

FUNDAMENTALISM IN PUBLIC HEALTH AND SAFETY IN BILATERAL INVESTMENT TREATIES [Part I]^{*}

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ABSTRACT

The goal of this work is to explore, examine and analyze how much of an impact BITs can lawfully have on the choices available to governments to take necessary measures for the protection of health, safety, the environment and human rights. This calls for a return to first principles of sovereignty, constitutionalism and international law on the issues of sovereign authority with respect to domestic policy relating to security and other critical social policies. Any interpretation of the substantive content or the restraining effects of BITs must be framed against the backdrop of these first principles. Although the cases are still too few for any concrete statements to be made about the restraining impact of investment protection provisions on contracting States, there appears to be some suggestion of a serious policy chill on contracting States. In view of this, it appears useful to explore

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avenues of empowering States, particularly the weaker States, with regards to their obligations under current BITs. In conclusion, a State owes certain indelible duties to its citizens which it may not be surrendered or abandoned in a treaty for private profit. The State has the duty to protect its citizens not only from a hostile force but also from threats to their right to life, habitation, health and safety. Such responsibilities of the State may be said to be indelible, inherent and cannot be waived or surrendered in a treaty.

KEYWORDS: *bilateral investment treaties, constitutional rights,, fundamental rights, public health and safety, human rights, environment, prisoner's dilemma, bilateral unilateralism, jus cogens, arbitrability, indirect expropriation, state responsibility*

I. INTRODUCTION

In 1959, Germany started a program for investment protection that was credited with being the first organized scheme adopted by a country for that purpose.¹ In the same year, Germany signed the first bilateral investment treaty (BIT) with Pakistan. Two years later in 1961, Switzerland also concluded its first bilateral investment treaty with Tunisia for the protection of Swiss investors.² Since these early German and Swiss initiatives, there has been a proliferation of BITs worldwide involving many countries and regions. Starting rather slowly in the decade of the 1950s, BITs have steadily gained momentum with each subsequent decade. Almost five decades later, by the end of the 1990s, the number BITs concluded reached 1,857.³ This was a dramatic increase from the previous decade when the number of BITs stood at 385.⁴ It is reported that there are over 2,500 BITs currently in operation. The historical trends in the proliferation of BITs are captured in Figure 1 below which is self explanatory.

¹ See U.N. CTR. FOR TRANSNAT'L CORP. (UNCTC), BILATERAL INVESTMENT TREATIES at 8, U.N. Doc. ST/CTC/65, U.N. Sales No. E.88.II.A.1 (1988) [hereinafter UNCTC, BILATERAL INVESTMENT TREATIES].

² *Id.*

³ U.N. CONF. ON TRADE AND DEV. (UNCTAD), BILATERAL INVESTMENT TREATIES 1959-1999 at 1, U.N. Doc. UNCTAD/ITE/IIA/2 (2000) [hereinafter UNCTAD, BITS 1959-1999].

⁴ *Id.*