LGBT Rights are Human Rights: Conditioning Foreign Direct Investments on Domestic Policy Reform

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Foreign direct investment (FDI) encourages domestic production and market growth in developing countries.[1] In order to receive FDI, a nation is evaluated under international, national, or private investment standards to determine whether that nation has the capacity to effectively utilize the investment.[2] Many of these standards are voluntarily upheld by states and stem from institutional codes of conduct.[3] These codes of conduct have influenced investors to pay increased attention to countries' social policies when evaluating the impact of a long-term investment.[4] Contrary to investors' beliefs, evaluating countries' social policies can lay the foundations for investment success.[5] In assessing countries' social conditions and provisions, investors can avoid financial risks, sidestep reputational perils, and more effectively meet client expectations.[6]

Earlier this year, the Organisation for Economic Co-operation and Development (OECD) went so far as to regard environmental, social, and governance issues as "long-term investment value drivers" that an investor has a fiduciary duty to consider.[7] Despite investors' increased propensity to condition FDI on countries' progressive social policies, investors fail to evaluate a broad range of fundamental human rights provisions.[8] The narrow scope of investors' evaluations may stem from conduct codes'

1. FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT, THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 3 (Olivier De Schutter et al., eds. 2014).

2. *See* Muna Ndulo & Abigail Chase, *International Law and Foreign Direct Investment* (forthcoming 2018).

3. *See, e.g.*, HUMAN RIGHTS WATCH, *Submission to the OECD on the Draft Due Diligence Guidance for Responsible Business Conduct* (Feb. 9, 2017), https://www.hrw.org/news/2017/02/09/submission-oecd-draft-due-diligence-guidance-responsible-business-conduct [https://perma.cc/4LD5-UZRS].

4. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *Responsible Business Conduct for Institutional Investors* 24–25 (2017), https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf [https://perma.cc/4SCQ-M58J].

5. *See* Ibrahim AlHusseini, *10 Reasons Why You Should Consider Impact Investing*, FORBES (Apr. 13, 2017), https://www.forbes.com/sites/forbesfinancecouncil/2017/04/13/10-reasons-why-you-should-consider-impact-investing/#467ef8397a11 [https://perma.cc/D6WG-LSSM] (claiming that "impact investing can eradicate poverty, wipe out hunger and attain food security, expand access to quality healthcare and education, achieve gender equality, and ensure justice and promote peace").

6. Ndulo & Chase, *supra* note 2.

7. OECD, *supra* note 4, at 25.

8. *See, e.g.*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, *Guiding Principles on Business and Human Rights* 5 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/5K8D-MC4N]; *see also* Human Rights Watch, *supra* note 3.

failure to specify which specific human rights need protection.[9] Accordingly, an investor who grants FDI to a nation supporting progressive environmental laws, for example, may fail to consider that nation's lack of human rights protections for women, vulnerable children, or LGBT citizens.[10] To many government officials, investors, and scholars, conditioning FDI on a nation's LGBT rights provisions may seem contentious and radical.[11] The concept of evaluating a nation's treatment of citizenry before investing there, however, is both longstanding and impactful.[12]

This Note will examine the history and structure of LGBT rights provisions through the international human rights lens. In doing so, it will analyze different rights violations that have been triggered from the adverse treatment of LGBT individuals universally.[13] These rights include the right to non-discrimination, privacy, and marriage.[14] After illustrating how international laws have developed to protect LGBT individuals' inherent rights, this Note will evaluate how anti-LGBT treatment adversely affected North Carolina's economy from 2014 to 2016.[15] In doing so, this Note will illustrate the impact of conditioning investments on LGBT rights provisions in a state reluctant to amend their controversial transgender laws.[16]

This Note then turns to pre-apartheid South Africa to examine how conditioning FDI worked to end segregation in the country.[17] In South Africa, the Sullivan Principles called for desegregation and the elimination of laws and customs impeding social justice.[18] Because South Africa was reluctant to abide by the Sullivan Principles, companies began to withdraw

9. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), http://mneguidelines.oecd.org/guidelines/ [https://perma.cc/SYV4-T3L8]; HUMAN RIGHT WATCH, *supra* note 3.

10. ORGANISATION FOR ECON. CO-OPERATION & DEV., *supra* note 4 (categorizing investors' duties to consider long term investment drivers, including environmental and social issues with emphasis on climate risks); *see also* HUMAN RIGHTS WATCH, *supra* note 3 (noting that OECD Guidelines should recognize how business sector impacts children's rights).

11. See Foreign Direct Investment and Human Development, *supra* note 1, at 112; *see also* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 19–20 n. 68 (C.L. LIM ed. 2016).

12. HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 187 (Angela Hegarty et al. eds. 1999).

13. *See* INT'L JUST. RESOURCE CTR., *Sexual Orientation & Gender Identity*, http://www.ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/ [https://perma.cc/M4CA-VATC].

14. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg. (III), para. 71 U.N. Doc. A/810 (Dec. 12, 1948).

15. *See* Michael Gordon et. al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 30, 2017), http://www.charlotteobserver.com/news/politics-government/article68401147.html [https://perma.cc/K6FR-S8E2].

16. *See id.*

17. *See* Molly Roth, *Sullivan Principles*, ENCYCLOPEDIA OF GREATER PHILADELPHIA (2013), http://philadelphiaencyclopedia.org/archive/sullivan-principles [https://perma.cc/WLH4-HS6J].

18. *See id.*

FDI from the country and condition FDI on complete desegregation.[19] As the result of United States' banks and companies' widespread adherence to the Sullivan Principles, South Africa was motivated to desegregate.[20] After examining the application of the Sullivan Principles in South Africa, this Note will discuss how these principles have manifested in modern corporate guidelines, declarations, and compacts, known collectively as corporate codes of conduct.[21] This Note argues that corporate codes of conduct from the OECD, ILO and UN provide the best mechanisms for enforcing FDI human rights guidelines.[22] In particular, the OECD's Guidelines for Multinational Enterprises and Responsible Business Conduct has thirty-five member countries, thus many developed countries consider the OECD guidelines before investing in a developing country.[23] Current OECD guidelines encourage investors to evaluate a nation's social policy before investing there.[24] Without effective monitoring mechanisms, however, State Parties to the OECD may forgo this fiduciary duty at little to no cost.[25]

One additional consideration is whether conditioning FDI on countries' LGBT rights protections will be seen as a breach of state sovereignty or contrary to the ultimate goal of FDI—encouraging investments and economic growth.[26] If developing nations view both withdrawing and conditioning FDI as unreasonable threats to their sovereignty, looking into a state's LGBT rights protections may prove

19. *See id.*

20. *See The Sullivan Principles*, http://www.marshall.edu/revleonsullivan/principles.htm [https://perma.cc/V5LQ-WG9N].

21. *See e.g.*, NIKE CODE OF CONDUCT (2017), http://about.nike.com/pages/transform-manufacturing [https://perma.cc/JGW9-P2AD].

22. *See* ORGANISATION FOR ECON. CO-OPERATION & DEV., *supra* note 9, at 15 (noting that "governments are co-operating with each other and with other actors to strengthen the international legal and policy framework in which business is conducted. The start of this process can be dated to the work of the International Labour Organisation in the early twentieth century. The adoption by the United Nations in 1948 of the Universal Declaration of Human Rights was another landmark event . . . The OECD has contributed in important ways to this process through the development of standards covering such areas as the environment, the fight against corruption, consumer interests, corporate governance and taxation").

23. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *Members and Partners* (2016), http://www.oecd.org/about/membersandpartners/ [https://perma.cc/49PB-A7M9] (including Canada, France, Germany, Italy, Japan, Spain, Switzerland, United States, and United Kingdom); *see also* Justin Kuepper, *What is a Developing Country*, THE BALANCE (Nov. 8, 2016), https://www.thebalance.com/what-is-a-developing-country-1978982 [https://perma.cc/TMG3-BK87] (distinguishing developing from developed countries); The World Bank, *The World Bank Atlas Method - Detailed Methodology*, https://datahelpdesk.worldbank.org/knowledgebase/articles/378832-what-is-the-world-bank-atlas-method [https://perma.cc/XGS2-6CFG] (defining developing countries as "low income countries with a GNI per capita of $1,025 or less in 2015").

24. *See* ORGANISATION FOR ECON. CO-OPERATION & DEV., *supra* note 4.

25. *See* HUMAN RIGHTS WATCH, *supra* note 3.

26. *See Right cause, wrong battle*, THE ECONOMIST (Apr. 12, 2014), http://www.economist.com/news/leaders/21600684-why-world-banks-focus-gay-rights-misguided-right-cause-wrong-battle [https://perma.cc/VU3X-96S9].

unworkable in practice.[27] To solve these challenges, this Note maintains that domestic remedies are necessary for promoting sustainable solutions. Domestic officials, government organizations, and non-government organizations can not only gear LGBT policies to fit domestic conditions, but also ensure that LGBT laws are effectively implemented long after foreign involvement dissolves.[28]

I. The History and Evolution of International LGBT Rights

For years, interest groups have advocated for broader LGBT rights protections both domestically and internationally.[29] Despite their efforts, LGBT rights are continually viewed as too multifarious, dubious, or complex.[30] To be clear, LGBT as a category encompasses sexual orientation, sexual expression, gender orientation, and gender identity.[31] Few international instruments provide LGBT rights protections, but three instruments that do include: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (European Convention).[32] In addition to evaluating how these instruments have interpreted and enforced LGBT rights protections, this section will analyze rights often denied to LGBT individuals, including the rights to non-discrimination, privacy, and marriage.[33] In doing so, this section hopes to illustrate how LGBT right provisions are not complex, but are aligned with the racial, ethnic, and religious protections embraced by international human rights laws today.[34]

A. Universal Declaration of Human Rights

Shortly after World War II, the global community began to question how to properly define the rights violations perpetuated by Nazi Germany.[35] Believing that the United Nation's (UN) Charter lacked specificity as to the rights it declared, a committee of individuals from all regions of the world drafted a universal declaration to specify the rights of individu-

27. *See* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT, *supra* note 1, at 3.

28. HUMAN RIGHTS COUNCIL, *Role of Local Government in the Promotion and Protection of Human Rights*, Final Report of the Human Rights Council Advisory Comm., paras. 21–22, U.N. Doc. A/HRC/30/29 (Aug. 7, 2015).

29. Eric Heinze, *Sexual Orientation and International Law: A Study in Manufacture of Cross-Cultural "Sensitivity,"* 22 MICH. J. INT'L L. 283, 285–91 (2001).

30. *See id.* at 234, 309.

31. GLOBAL RIGHTS PARTNERS FOR JUSTICE, DEMANDING CREDIBILITY AND SUSTAINING ACTIVISM 12–13, 15 (2008).

32. *See* INT'L JUST. RESOURCE CENTER, *supra* note 13 (also note that these international instruments do not explicitly recognize LGBT individuals as protected class, but protect LGBT rights under various rights provisions).

33. *See id.*

34. *See* Heinze, *supra* note 29, at 309.

35. *See, e.g.*, *Introduction to the Declaration of Human Rights*, *Facing History and Ourselves*, FACING HIST. & OURSELVES, https://www.facinghistory.org/universal-declaration-human-rights/introduction-universal-declaration-human-rights [https://perma.cc/8JGP-6ZDH].

als.[36] Today, 192 UN member states have voluntarily signed this agreement, known as the Universal Declaration of Human Rights (UDHR).[37] In 1948, the United Nations General Assembly proclaimed the UDHR as the first universally protected doctrine of fundamental human rights.[38] Although the UDHR is not legally binding and states voluntarily assume the responsibility of protecting the UDHR's enumerated rights, international treaties, national constitutions, and corporate codes of conduct have replicated and expanded upon many of the UDHR's rights.[39] In particular, these treaties and national conventions have reiterated the importance of the UDHR's core principles, including the right to life and liberty, nondiscrimination, and equality.[40] Today, all UN member states have ratified one or more of the nine central international human rights treaties, and eighty percent have ratified four or more, unequivocally validating the universality of the UDHR and international human rights.[41]

1. UDHR LGBT Rights Provision

Article 2 of the UDHR states the following:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[42]

Article 2 sets out universally fundamental non-discrimination norms.[43] What differentiates Article 2 from other international human rights provisions is that it protects both enumerated and unenumerated categories of persons.[44] While Article 2 explicitly prohibits discrimination against racial, religious, or ethnic minorities, it also implicitly forbids discrimination against LGBT individuals.[45] In other words, Article 2's "other status" category can be construed to include LGBT individuals.[46] Consequently, LGBT individuals seeking UDHR protections have used this "other status" category to create a new category for sexual minorities.[47] In doing so, LGBT individuals have secured their fundamental rights to non-

36. *See Universal Declaration of Human Rights*, YOUTH FOR HUM. RTS., http://www.youthforhumanrights.org/what-are-human-rights/universal-declaration-of-human-rights/introduction.html [https://perma.cc/3DJB-M8AL]; *see also* UNITED NATIONS, *Universal Declaration of Human Rights*, http://www.un.org/en/universal-declaration-human-rights/ [https://perma.cc/X7LC-7XHU].

37. *See* YOUTH FOR HUM. RTS., *supra* note 36.

38. *See id.*

39. UNITED NATIONS, *The Foundation of International Human Rights,* http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html [https://perma.cc/V4AN-DHZQ].

40. *See id.*

41. *See id.*

42. *See* Universal Declaration of Human Rights, *supra* note 14.

43. *See* Heinze, *supra* note 29, at 285.

44. *See id.*

45. *See id*

46. *See id.*

47. *See id.*

discrimination.[48]

B. ICCPR

The International Covenant on Civil and Political Rights (ICCPR), the UDHR, and the International Covenant on Economic and Social Rights, (ICESR) constitute the International Bill of Human Rights.[49] The UDHR paved the way for the creation of the ICCPR, which, as of 2017, has been ratified by 169 State Parties.[50] The essential rights provisions of the ICCPR include the rights to life, human dignity, privacy, non-discrimination, and equality before the law, freedom from torture and slavery, and gender equality.[51] What differentiates the ICCPR from the UDHR is the ICCPR's legally binding nature.[52] Upon ratifying the ICCPR, states must comply with and implement the ICCPR's provisions just as they would implement domestic law.[53]

Additionally, the Human Rights Committee (HRC) was created to monitor and implement the ICCPR.[54] Every four years, the State Parties to the ICCPR must report to the HRC and may present the reports at one of the three annual HRC sessions.[55] Thereafter, the HRC examines each report and provides each country with "concluding observations" explicitly addressing its concerns and recommendations.[56] Additionally, the HRC publishes general comments including country-specific recommendations to "shame" states into implementing the recommendations.[57] One major critique of HRC recommendations, however, is their non-binding nature.[58] Despite the ICCPR's binding nature, the HRC lacks effective enforcement mechanisms for ensuring that State Parties regularly report and implement its recommendations.[59]

48. *See id.*

49. *FAQ: The Covenant on Civil and Political Rights (ICCPR)*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Apr. 2014), https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr [https://perma.cc/9JNK-WK22].

50. International Covenant on Civil and Political Rights, adopted Dec. 19, 1966 S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

51. ACLU, *supra* note 49.

52. *See id.*

53. *See id.* (noting exception of ratifications).

54. *See id.* (noting that HRC is composed of eighteen independent experts recognized in their distinct fields. These members are elected for term of four years from various countries that have ratified ICCPR).

55. See id.

56. *See id.*

57. *See* Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers,* 8 YALE J. HUM. RTS. & DEV. 1, 3–4 (2014) (claiming that human rights institutions and advocates largely rely on their power to "name and shame" as they monitor countries' compliance with treaties); *see also id.*

58. Elizabeth Willmott-Harrop, *Human Rights Mechanisms and International Law*, LIBERTY & HUMAN. (Jan. 2001), http://libertyandhumanity.com/themes/international-human-rights-law/human-rights-mechanisms-and-international-law/ [https://perma.cc/NXE8-S8JP].

59. ACLU, *supra* note 49.

1. ICCPR LGBT Rights Provisions

Article 2 of the ICCPR states the following:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[60]

Modeled after the UDHR, this non-discrimination norm prohibits discrimination against individuals of "other status(es)," which may include LGBT individuals.[61]

In *Toonen v. Australia*, however, the HRC found that a prohibition on consensual, adult homosexual conduct under Tasmanian law was a form of sexual orientation discrimination.[62] Moreover, the HRC claimed that this form of sexual orientation discrimination fit under the enumerated category of "sex" under Articles 2 and 26 of the ICCPR.[63] Classifying sexual orientation discrimination as a form of "sex" discrimination reveals the progressive nature of the ICCPR, and indicates a trend toward expanding enumerated categories to include sexual minorities.[64] Expanding enumerated categories would resolve accountability issues that may persist; where states cannot be held accountable for including LGBT individuals in "other status" classifications, thus depriving these individuals of fundamental rights.[65]

C. The European Convention of Human Rights

Two years after the UDHR, the European Convention on Human Rights ("European Convention") was drafted to enhance citizens' fundamental rights protections, while also recognizing gender equality and promoting international accord.[66] Of the seventeen rights and freedoms the European Convention explicitly protects, the most contentious are Article 10 (the right to freedom of expression) and Article 8 (the right to respect for private life and family).[67] Despite encountering hostility towards these rights provisions, the European Court has widely endorsed them, as later

60. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

61. *See* Heinze, *supra* note 29, at 292 (highlighting non-discrimination norm in Article 26 of ICCPR that expands LGBT rights protections beyond those recognized in ICCPR and instead provides equal protection of law within jurisdiction of state parties to ICCPR).

62. *See id.*; *see also* Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), (finding violation of Article 17(1), right to privacy, Article 2(1)).

63. *See* Toonen v. Australia, Communication No. 488/1992.

64. *See id.*

65. *See id.*

66. *See* Aisha Gani, *What is the European Convention on Human Rights?*, THE GUARDIAN (Oct. 3, 2014), https://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr [https://perma.cc/HT2J-45KK].

67. *See id.*

sections will illustrate.[68] The European Court is responsible for ensuring that the human rights of 800 million Europeans within the forty-seven member states are respected and safeguarded.[69] The European Court's immense case backlog undoubtedly hinders its ability to fully protect LGBT individuals' rights.[70] However, despite this obstacle, the European Court has the most detailed case law on point and is the most promising regional system for protecting LGBT rights.[71]

1. *The European Convention LGBT Rights Provisions*

Article 14 of the European Convention states the following:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[72]

The European Court has construed the "other status" provision so as to protect several new categories of individuals against discrimination.[73] Although there has been steady progress towards recognizing sexual orientation as a new category, the European Court has successfully safeguarded LGBT rights through other means.[74] For example, in *Goodwin v. United Kingdom*, the applicant, a post-operative male to female transsexual, claimed that the United Kingdom violated her right to "respect for her private life," under Article 8 of the European Convention.[75] The United Kingdom's failure to recognize the applicant's sexual identity led to many discriminatory and humiliating experiences in her everyday life, including various forms of abuse and disparate treatment at work.[76] Additionally, the United Kingdom's requirement of a birth certificate made it impossible for her to obtain certain entitlements, such as a retirement pension, life insurance, car insurance, or mortgage.[77] Based on these facts, the European Court found that the United Kingdom failed to fulfill its positive obligation to ensure the applicant's right to respect for her private life, particularly through the lack of legal recognition given to her gender reassignment.[78] The following section provides additional examples of how the European Convention safeguards LGBT rights.

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68. *See* Heinze, *supra* note 29, at 286–87.

69. *See id.*

70. *See id.* (noting that, as overall backlog of pending cases has decreased, rate of new cases has increased each year).

71. *See id.* at 285.

72. *See id.* at 286.

73. *See id.* (noting that Convention prohibits discrimination against unmarried mothers and children born out of wedlock).

74. *See id.*

75. Goodwin v. United Kingdom, App. No. 28957/95, Eur. Ct. H.R. (July 11, 2002).

76. *See id.*

77. *See id.*

78. *See id.*

D. LGBT Rights Violations in Need of Protection

1. Non-Discrimination

As previous sections have discussed, the right to non-discrimination has been fashioned to account for unenumerated categories of minorities.[79] The "other status" provision allows international courts and committees to recognize LGBT rights in the form of sexual orientation, sexual expression, gender identity, or gender expression.[80] Nevertheless, when international courts interpret non-discrimination clauses, they have unfettered discretion to construe the "other status" category as broadly or narrowly as they please.[81] Thus, international courts have two options: (1) they can either view the "other status" clause as encouraging countless "new" categories, or (2) read the clause as allowing "new" categories in rare circumstances.[82] The European Court, for example, could have established a precedent to limit the scope of new categories so that State Parties were obligated to introduce them through amendments or protocols.[83] The European Court, however, did not take this route, and instead embraced new categories of protected classes under Article 14.[84] In essence, non-discrimination provisions provide valuable protections of LGBT rights. Where courts, however, must create a new category of rights to ensure LGBT individuals protection, non-discrimination norms become more difficult to enforce in practice.[85] If courts can safeguard LGBT rights within existing categories of protected rights, such as sex, privacy, and marriage, they can avoid the potentially tedious process of creating new categories of protected LGBT classes.[86]

2. Privacy

Article 8 of the European Convention, guarantees everyone the "right to respect for his private and family life, his home and his correspondence."[87] Article 8 safeguards this right from interference by a public authority, "except such as is in accordance with the law and is necessary in a democratic society . . . for the protection of health or morals."[88]

In *Dudgeon v. United Kingdom,* the European Court held that a prohibition of "consensual, adult homosexual conduct" violated the right to privacy under Article 8 of the European Convention.[89] In this monumental

79. *See* Heinze, *supra* note 29, at 285–91.
80. *See id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.*
85. *See id.*
86. *See id.*
87. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, http://www.echr.coe.int/Documents/Convention_ENG.pdf [https://perma.cc/B6NF-V8ZH].
88. *Id.*
89. *See* Dudgeon v. United Kingdom, App. No. 7525/76, Eur. Ct. H.R. (Oct. 22, 1981).

case, the Court deemed it unnecessary to evaluate whether the claimant's right to non-discrimination had been violated, relieving the Court from having to determine whether sexual orientation should be considered a new category under Article 2.[90] Finding that the privacy right adequately resolved the dispute, the European Court highlighted the necessity of protecting LGBT rights and the ease in which other legal bodies could do so without explicitly recognizing LGBT individuals as a protected class.[91] Additionally, the Court admonished the idea that protecting LGBT rights undermines the morals of European society.[92] Sidestepping this Article 8 exception, the European Court reinforced LGBT citizens' rights to privacy against any perverse cultural or moral norms disfavoring them.[93]

Just a decade later, the European Court held in *B v. France* that State Parties must take specific minimum steps towards recognizing the sex-reassignment of post-operative transsexuals.[94] Along the lines of *Dudgeon*, the European court maintained that Article 8 of the European Convention protects one's right to sexual identity.[95] Through *Dudgeon* and *B v. France*, the European Court circumvented the contentious question as to whether sexual orientation, sexual expression, or gender identity should be recognized as new categories within the European Convention's non-discrimination purview.[96] In doing so, the European Court paved the way for international courts to recognize the rights of sexual and gender minorities through rights currently embedded in their legal doctrines.[97]

3. *Marriage*

Article 12 of the European Convention provides that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[98] In *Goodwin v. United Kingdom*, the European Court considered whether a transsexual woman's right to marriage was violated when she was prohibited from marrying her male partner because the law treated her as a man.[99] In cases leading up to *Goodwin*, the European Court held that a transsexual individuals' inability to marry someone of the sex opposite to

90. *See id*; *see also*, Heinze, *supra* note 29.

91. *See* Dudgeon v. United Kingdom, App. No. 7525/76; *see also*, Heinze, *supra* note 29.

92. *See* Heinze, *supra* note 29, at 289 n. 29.

93. *See European Convention for the Protection of Human Rights and Fundamental Freedoms, supra* note 87 (Article 8 explaining protection of health or morals exceptions to right to privacy).

94. *See* Heinze, *supra* note 29, at 287; *see also* B v. France, App. No. 3343/87, Eur. Ct. H.R. (Mar. 25, 1992).

95. *See* Heinze, *supra* note 29, at 287; *see also* B v. France, App. No. 3343/87.

96. *See* Heinze, *supra* note 29, at 287.

97. *See id.*

98. *See European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 87.

99. *See* Goodwin v. United Kingdom, App. No. 28957/95, Eur. Ct. H.R. (July 11, 2002).

their re-assigned gender did not breach Article 12.[100] In *Goodwin*, however, the Court identified major social changes and developments in the institution of marriage and field of transsexuality as supporting a new interpretation of Article 12 that went beyond protecting one's biological sex.[101] This new interpretation construed "men" and "women" to include transsexual men and women.[102]

Additionally, the European Court claimed that Article 12 not only protected one's right to marriage but also secured transsexuals' enjoyment of the right to marriage under any circumstance.[103] The Court noted that, although more countries were eager to recognize gender changes than transsexual marriages, the margin of appreciation did not extend so far as to bar transsexuals from the fundamental right to marriage.[104] The European Court established a new precedent for LGBT rights in Europe and within the international community.[105] It also illustrated the importance of interpreting law and policy in light of social change and development.[106] These tactics should be mimicked by investors when establishing FDI guidelines and evaluating a state's soundness for investments today.[107]

II. Evaluating the Effectiveness of Conditioning Domestic Investments: United States and HB2

This section turns to the effectiveness of conditioning domestic investments on states' LGBT rights protections, whereas, states that have shown a commitment to protecting LGBT individuals' rights to non-discrimination, life, health, privacy, or marriage may be considered more sound places for investing.[108] This notion of conditioning investments on a state's human rights policies may, on its face, seem radical. The conditioning of investments, however, is exactly what motivated North Carolina—a

100. *See id.*
101. *See id.*
102. *See id.*
103. *See id.*
104. *See id; see also* Eleni Frantziou, *The Margin of Appreciation Doctrine in European Human Rights Law*, UCL POLICY BRIEFING, https://www.ucl.ac.uk/public-policy/for-policy-professionals/research-insights/European_human_rights_law.pdf [https://perma.cc/QZ9P-FYRF] (defining margin of appreciation as "an analytical tool utilized by the [European Court] in its assessment of those provisions of the Convention and its Protocols that require balancing with other rights, or need to be weighed up against other aspects of the public interest").
105. *See* Goodwin v. United Kingdom, App. No. 28957/95.
106. *See id.*
107. The limitations on individuals' rights to due process and health should also be considered when evaluating LGBT rights provisions. *See* Ryan Bailey, *The LGBT Community, Health Policy, and the Law*, 12 AMA J. ETHICS 658, 658–62 (2010), http://journalofethics.ama-assn.org/2010/08/hlaw1-1008.html [https://perma.cc/VU7D-6BS9] (noting that "in *Lawrence* [*v. Texas*], Kennedy boldly extended the right to privacy to 'homosexual persons' through substantive due process," and also claiming that "[t]he field of health care is at the forefront of the LGBT battlegrounds").
108. INVESTOR STATEMENT ON NORTH CAROLINA HOUSE BILL 2 (2016), http://www.ott.ct.gov/PolicyAndEducation/092616InvestorStatementonNorthCarolinaHB2.pdf [https://perma.cc/7L79-8F7F].

developed state in the United States' southern region—to reconsider its enforcement of a discriminatory LGBT law.[109] If North Carolina, a state whose economic superiority and rapid population growth could have easily shielded it from outside pressures, was influenced to change its stance on LGBT rights, then what is stopping investors from using similar tactics abroad?[110] By examining the background of North Carolina's controversial law, the immediate impact of the law's passage, and the resulting change in law, this section hopes to illustrate how states' protections of LGBT rights can increase economic development and encourage states to change their attitudes towards LGBT rights.

A. History of the HB2 Law

On March 23, 2016, North Carolina's legislature convened for a special session to pass House Bill 2 (HB2).[111] This law, formally called the Public Facilities Privacy and Security Act, was aimed at preventing transgender individuals from using bathrooms consistent with their gender identities.[112] For instance, individuals born as males, who years later identified as females, would be forced to use male bathrooms under HB2.[113] Cities and counties, moreover, lacked the power to maintain or adopt anti-discrimination ordinances to protect their visitors and residents.[114] Prior to HB2, cities and counties maintained broad discretion to create laws prohibiting workplace discrimination, setting minimum wage standards, and regulating the use of public facilities.[115] HB2, however, reaffirmed a statewide definition of protected classes that excluded both sexual orientation and identity.[116]

In practice, HB2 had a adverse day-to-day impact on many individuals.[117] In schools, LGBT students were required to use restrooms and locker rooms inconsistent with their gender identities; in the workplace, LGBT employees could be disparately treated, harassed, or fired without adequate remedies.[118] Because North Carolina precluded sexual orientation as a protected class, the law did not safeguard the right to non-discrimination in school, the workplace, or public facilities.[119] Equally worrisome, however, was HB2's ability to compromise LGBT individuals'

109. *See* Michael Gordon et. al., *supra* note 15.
110. *See e.g.* Richard Stradling, *NC Population Growth Continues to Outpace the Nation*, THE NEWS AND OBSERVER (Dec. 20, 2016), http://www.newsobserver.com/news/local/article121954063.html [https://perma.cc/TC5N-EYXH]; *see also* Will Doran, *North Carolina Has Had the Country's Fastest-Growing Economy Since 2013*, POLITIFACT (Apr. 29, 2016), http://www.politifact.com/north-carolina/statements/2016/apr/29/pat-mccrory/mccrory-north-carolina-has-had-countrys-fastest-gr/ [https://perma.cc/SR8X-2SP3].
111. *See* Michael Gordon et. al., *supra* note 15.
112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*
119. *See id.*

rights to life, health, and privacy by prohibiting equal access to public facilities.[120] Recognizing these injustices, public and private actors built coalitions, raised their voices, withdrew their events, and revoked investment assurances in North Carolina.[121] In doing so, these actors established a precedent that LGBT rights are human rights deserving of equal protection.[122]

B. Impact of the Law's Passage

Less than four months after the passage of HB2, the National Basketball Association (NBA) made an unprecedented announcement.[123] In opposition to HB2, the NBA decided to move its All-Star Game from Charlotte, North Carolina, a move that would cost the city an estimated 100 million dollars.[124] The NBA's announcement turned international attention to HB2, and communicated the message that HB2 was not conducive to the NBA's promotion of LGBT rights.[125] As at least one source has reported, however, much of the NBA's decision to remove the game may have been market based.[126] HB2 caused an uproar both within and outside of the LGBT community.[127] Thus, the NBA, seeking to maximum returns, worried about how the social climate HB2 created would inhibit the game's success.[128] In effect, the NBA's decision to move the All Star Game was in part supported by human rights concerns but was also motivated by a fear that the climate HB2 created may reduce monetary returns.[129] In fact, this theme of mixed motives for eliminating HB2 was pervasive throughout the corporate community, and inevitably fostered a change in law.[130]

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120. *See id.*

121. *See e.g.* Scott Cacciola & Alan Blinder, *N.B.A. to Move All-State Game From North Carolina*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/sports/basketball/nba-all-star-game-moves-charlotte-transgender-bathroom-law.html?_r=0 [https://perma.cc/YRL2-4MGJ].

122. *Id.*

123. *See* Cacciola & Blinder, *supra* note 121.

124. *See id.*

125. *See id.* (showing that state's failure to prevent discriminatory treatment towards LGBT individuals would come at cost).

126. *See* Ben Marquis, *Media Said NBA Bathroom Bill Boycott Would Hurt NC, But It's NBA's All-Star Game Sales That Are Down*, CONSERVATIVE TRIB. (Feb. 22, 2017), https://conservativetribune.com/media-nba-boycott-hurt-nc-really/ [https://perma.cc/R6RV-P82B].

127. *See id.*

128. *See id.*

129. *See id.*

130. *See* HRC Staff, *More Companies Call for Repeal of HB2 Despite Gov. McCroy's Executive Order on Anti-LGBT Law*, HUMAN RIGHTS CAMPAIGN (Apr. 15, 2016), http://www.hrc.org/blog/more-companies-call-for-repeal-of-hb2-despite-nc-gov-mccrorys-executive-ord [https://perma.cc/RL4P-WUMR] (citing companies claiming that they "believe that HB2 will make it far more challenging for businesses across the state to recruit and retain the nation's best and brightest workers and attract the most talented students from across the nation. It will also diminish the state's draw as a destination for tourism, new businesses, and economic activity.").

The opposition to HB2 was prevalent, powerful, and fierce. Mayors and governors across the United States banned travel to North Carolina in support of LGBT residents and visitors, famous musicians cancelled concerts to stand in solidarity with the LGBT community, and news outlets vilified North Carolina as the "pioneer of bigotry."[131] Along similar lines, major banks and corporations halted all investments in the state.[132] Most notably, 160 Chief Executive Officers (CEOs) from companies including American Express Company, Capital One, Ernst & Young LLP, PayPal Inc., RBC Capital Markets, and Visa Inc., signed an open letter urging North Carolina's former governor, Pat McCrory, to repeal HB2.[133] The letter started off with the impactful assertion that HB2 did not reflect the values of the companies, the United States, or the overwhelming majority of North Carolinians.[134] After asserting their stance on HB2, the companies classified the law as discriminatory, and, thus, harmful for both employees and businesses.[135] Furthermore, the companies claimed that passing HB2 was an imprudent move for states "seeking to provide successful, thriving hubs for business and economic development."[136]

Similarly, a group of more than fifty investment managers, representing over two trillion dollars in collective assets, formed a coalition against HB2.[137] They claimed that the bill not only "invalidate[d] the human rights of individuals across the state," but also that it had troubling financial implications for the investment climate in North Carolina"[138] The investment managers acknowledged the specific investment risks posed by HB2:

> In terms of private investment in North Carolina, venture capital and private equity deals —which provide the foundation for much of the state's innovation economy rooted in science, technology, knowledge industries, financial services, and advanced manufacturing—are already being placed at risk. Prominent private equity investors have begun to boycott the state. In public finance, major credit rating agencies such as Moody's and Standard & Poor's have both issued guidance related to the law based on the potential negative economic impacts the law may have on the state and key municipalities that issue municipal bonds. Fixed-income investors now receive regular inquiries from clients who no longer want exposure to NC municipal bonds because of HB2. The law has suddenly placed the state's long-standing AAA credit rating at serious risk for downgrade, which would lead to a much

131. *See id.*
132. *See id.*
133. *See id.*
134. *See id.*
135. *See id.*
136. *See id.*
137. *Investors Worth $2.1 Trillion Call for Full Repeal of North Carolina's House Bill 2*, TRILLIUM INV. MGMT. (Sept. 26, 2016), http://www.trilliuminvest.com/investors-worth-2-1-trillion-call-full-repeal-north-carolinas-house-bill-2/ [https://perma.cc/MXE2-WW3J]; *see also* INVESTOR STATEMENT ON NORTH CAROLINA HOUSE BILL 2, *supra* note 108.
138. Jena McGregor, *Add big investors to the list of those taking aim at North Carolina's 'bathroom bill*,' WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/09/26/add-big-investors-to-the-list-of-those-taking-aim-at-north-carolinas-bathroom-bill-2/?utm_term=.Dea5a96bd03d [https://perma.cc/U23U-5CYE].

> higher cost of capital for cities, local authorities, and the state as a whole, at a time when interest rates are beginning to rise.[139]

The investment manager group's statement called for a full repeal of HB2 before North Carolina's investment climate deteriorated further. The statement recognized that corporate policies celebrating and strengthening inclusivity are good for business.[140] The group believed that "equality is fundamental to a successful workplace."[141] For the last twenty-five years, one signatory, New York City's pensions funds, has gone so far as to pressure over one hundred companies to enact non-discrimination polices that protect LGBT individuals.[142] The group notes that these "policies are essential if we want companies—and our economy—to succeed."[143]

Underlying both the major corporations and investment managers' letters is a correlation between rights provisions and investment security, where investment security is conditioned upon the assurance of LGBT rights protections.[144] In both letters, the business community came together and, like the NBA, acknowledged the social and fiscal harms of HB2.[145] Within the first six months of HB2's enactment, more than 40 million dollars in business investments were withdrawn from the state while the scope of lost investment opportunities remains unknown.[146] While supporting discriminatory LGBT practices is identified as uncharacteristic of successful companies' values, it may also have negative

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139. *See* TRILLIUM INV. MGMT., *supra* note 137.

140. *See id.* (claiming that "[n]early 93% of the Fortune 500 have adopted inclusive non-discrimination policies protecting their employees on the basis of sexual orientation and 75% of the Fortune 500 also include gender identity/expression in order to better position themselves to attract and retain the best talent"; further "[r]esearch has also shown that LGBT-supportive policies lead to positive business outcomes, lower staff turnover, and increased job satisfaction") (citing the Human Rights Campaign, Corporate Equality Index 2018, http://www.hrc.org/campaigns/corporate-equality-index [https://perma.cc/M2V5-BVAV]); *see also* M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, WILLIAMS INST. (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf [https://perma.cc/Y2PH-AEQ5]).

141. *See* TRILLIUM INV. MGMT., *supra* note 137.

142. *See* INVESTOR STATEMENT ON NORTH CAROLINA HOUSE BILL 2, *supra*, note 108.

143. *Id.*

144. *See id.* (noting that "[q]uite simply, HB2 is bad for business and investors do not support legislation that limits discrimination protections and hampers the ability of our companies to offer open and productive workplaces and communities"; *see also* Human Rights Campaign, *supra* note 130 (claiming that "[t]he business community, by and large, has consistently communicated to lawmakers at every level that such laws are bad for our employees and bad for business. This is not a direction in which states move when they are seeking to provide successful, thriving hubs for business and economic development.")

145. *See id.*

146. *See* INVESTOR STATEMENT ON NORTH CAROLINA HOUSE BILL 2, *supra*, note 108 (citing *HB2 Could Cost North Carolina Almost $5 Billion a Year*, WILLIAMS INST. (May 11, 2016), http://williamsinstitute.law.ucla.edu/press/hb2-could-cost-north-carolina-almost-5-billion-a-year/ [https://perma.cc/RQJ3-BPF2]); *see also* Cacciola & Blinder, *supra* note 121 (noting 100 million dollars lost from the NBA).

financial impacts on them.[147] Thus, companies may condition investments in North Carolina for financial reasons, without regard for how HB2 impacts LGBT rights.

One view is that this business approach is self-interested to a fault, and companies should prioritize human rights concerns over fiscal stability. A more persuasive view, with respect to the relationship between business interests and protection of LGBT rights, is that companies might feel obligated to protect LGBT rights in order to protect themselves from financial and reputational hardships—a goal that is in their own self-interest. That could encourage all companies to protect LGBT rights, even those reluctant to do so.[148] Furthermore, companies that provide FDI to states that are intolerant of LGBT rights provisions will pay a cost. While this cost may start off small, if LGBT rights protections are continually encouraged by political, media, non-profit, and corporate entities, evaluating these rights provisions could become a routine part of investors' FDI assessment tests.

III. Evaluating the Effectiveness of Conditioning FDI in a Developing State: South Africa and the Sullivan Principles

Having discussed the effectiveness of conditioning domestic investment in a developed state, this section examines whether FDI can be used to effectuate social change in developing nations. In particular, this section defines FDI and discusses its importance to global development. Thereafter, this section examines the conditions that United States' companies and banks placed on South Africa during the apartheid era. In a racially divided nation, conditioning and withdrawing FDI promoted unity and equality. Various schemes in the last decade have replicated the human rights principles that United States companies required South Africa to respect. Exploring these schemes will illustrate how investors can effectively condition FDI on states' LGBT rights protections.

A. What is Foreign Direct Investment (FDI)?

FDI involves "the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets"[149] There are four essential characteristics of FDI: (1) the actual investment generating wealth in the country concerned; (2) the transfer of assets into the country concerned; (3) relative difficulties withdrawing the investment from the country concerned; and (4) a significant element of control

147. *See* INVESTOR STATEMENT ON NORTH CAROLINA HOUSE BILL 2, *supra*, note 108 (citing investors claiming that "[a]s long-term investors in North Carolina, we seek a predictable, stable business climate where our portfolio companies can thrive. HB2 is undermining that basic condition for sound investment.").

148. *See id.*

149. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (3d ed., Cambridge University Press 2010) 11; *see also* Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries*, 36 FIN. & DEV. (1999), http://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm [https://perma.cc/ZHU4-33TF].

retained by the owner of the assets.[150] What differentiates FDI from domestic investment are the concepts of movement, control, and wealth production.[151] For example, one purpose of FDI is to stimulate growth in developing countries.[152] In effort to do so, foreign investors mobilize to increase developing countries' capacities through the provisions of funding, construction, and intellectual property.[153] Thereafter, investors work to effectively control and protect assets.[154] In a perfect FDI scheme, the asset will generate wealth in the developing country, and simultaneously, the investor will accrue profits.[155] Today, foreign direct investment is critical for developing countries.[156] These countries rely on investors' funding and expertise to improve their international sales.[157] In 2014, developing countries received more than half of the total global FDI.[158] Thus, while FDI projects are not always flawless, many countries depend on them for economic development.[159]

B. The History and Impact of the Sullivan Principles

In 1977, Rev. Leon Sullivan devised a unique method for combating South African apartheid.[160] As a Board member at General Motors, Rev. Leon Sullivan used his corporate influence to place economic pressure on South Africa's race war.[161] In doing so, Rev. Leon Sullivan created a corpo-

150. *See* Muna Ndulo & Abigail Chase, *International Law and Foreign Direct Investment* (forthcoming 2018) (noting that this is the general definition of FDI, but this can be modified via Bilateral Investment Treaties (BITs), which are specific and expansive in including things to which the countries agree upon. BITs can broadly define investments to include IP, etc.); *see also* INTERNATIONAL MONETARY FUND, *Balance of Payment Manual* 86 (defining "direct investment" as "the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy.").

151. *See id.*

152. *See* Kimberly Amadeo, *Foreign Direct Investment: Pros, Cons and Importance*, THE BALANCE (June 24, 2017), https://www.thebalance.com/foreign-direct-investment-fdi-pros-cons-and-importance-3306283 [https://perma.cc/4BSW-LG3T].

153. *See id.* (noting that FDI allows developing countries to incorporate the latest technology, operational practices, and financial tools); *see also* Ndulo & Chase, *supra* note 150.

154. *See id.*

155. *See* THE BALANCE, *supra* note 152.

156. *See id.*

157. *See id.; see also* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT [UNCTAD], *World Investment Report* 10 (2016), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf [https://perma.cc/3MSR-VZB2] (noting that in 2015, developing economies saw their FDI inflows reach a new high of $765 billion, nine percent higher than in 2014).

158. *See id.* (noting that developed countries received forty-one percent of FDI in 2014 and fifty-five percent in 2015 while FDI growth was unprecedented in developing countries, reaching a new high in 2015.)

159. *See* THE BALANCE, *supra* note 152.

160. *See Global Sullivan Principles*, CSRIDENTITY.COM, http://csridentity.com/global-sullivanprinciples/index.asp [https://perma.cc/TQ6D-ADKT] (noting that "[t]he Sullivan principles are the names of two corporate codes of conduct, developed by the African-American preacher Rev. Leon Sullivan, promoting corporate social responsibility.") [hereinafter Global Sullivan Principles].

161. *See* Roth, *supra* note 17.

rate code of conduct entitled the "Sullivan Principles."[162] Despite the non-binding nature of these principles, acceptance of them resulted in more than one hundred banks and companies withdrawing from South Africa, and many others withholding their investments from the country.[163] These corporations supported the Sullivan Principles' call for (a) equal and fair employment practices; (b) non-segregation of races in eating, comfort, and work facilities; (c) improvement of the quality of life for blacks and other nonwhites outside of the work environment; and (d) work to eliminate laws and custom that impede social, economic, and political justice.[164] United States public sentiment pressured American government officials to enact economic penalties against South Africa. American government officials realized that the same FDI that helped to develop South Africa economically, supported the oppressive apartheid regime.[165] Thus, by providing the framework for conditioning United States investments on desegregation in South Africa, the Sullivan Principles established a precedent for using economic pressure to advance international human rights.[166]

The Sullivan Principles signified the beginning of corporate involvement in the global issues of ethical conflict and social responsibility.[167] This is most evident in the subsequent formation of another code of conduct by Rev. Leon Sullivan. The new code, developed at the request of world and industry leaders, is entitled, the Global Sullivan Principles (GSP).[168] The GSP set out to support economic, social, and political justice by companies where they do business, including respect for human rights and equal work opportunities for all peoples.[169] Major companies' have replicated the human rights protections embodied in both the Sullivan Principles and GSP in their codes of conduct over time.[170]

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162. *See* Global Sullivan Principles, *supra* note 160.

163. LAWRENCE A. BEER, A STRATEGIC AND TACTICAL APPROACH TO GLOBAL BUSINESS ETHICS, (2d ed, 2015); *see* Global Sullivan Principles, *supra* note 160 (including Exxon, Kodak, IBM, and Xeron).

164. *See* Roth, *supra* note 17.

165. *See* Beer, *supra* note 163.

166. *See id.*

167. *See id.*

168. DANIEL E. LEE & ELIZABETH J. LEE, HUMAN RIGHTS AND THE ETHICS OF GLOBALIZATION 105 (Cambridge University Press, 2010).

169. *See The Global Sullivan Principles–Preamble*, U. MINN. HUM. RTS. LIBR., http://hrlibrary.umn.edu/links/sullivanprinciples.html [https://perma.cc/6PFG-F7NC] (noting "[t]he objectives of the Global Sullivan Principles are to support economic, social and political justice by companies where they do business; to support human rights and to encourage equal opportunity at all levels of employment, including racial and gender diversity on decision making committees and boards; to train and advance disadvantaged workers for technical, supervisory and management opportunities; and to assist with greater tolerance and understanding among peoples; thereby, helping to improve the quality of life for communities, workers and children with dignity and equality.").

170. *See* Beer, *supra* note 163; *see also,* Ken Silverstein, *Sullivan Principles: Corporations Must Contribute to the Culture of Peace and Help End Gun Violence*, FORBES (Dec. 25, 2012), https://www.forbes.com/sites/kensilverstein/2012/12/25/sullivan-principles-corporations-must-contribute-to-the-culture-of-peace-and-help-end-gun-violence/#14e1af4a3fa6 [https://perma.cc/P57L-WUJA].

C. Application of the Sullivan Principles Today

Rev. Leon Sullivan's notion that governments cannot do it all, but corporations must contribute to the culture of peace, has manifested in diverse corporate settings.[171] After the Sandy Hook Elementary School tragedy in Newtown, Connecticut, for example, several columnists suggested that corporations adopt Rev. Leon Sullivan's ideals and condition their investments so as to "bring the National Rifle Association to its knees."[172] More commonly, however, the Sullivan Principles have been reproduced in major companies' codes of conducts.[173] One of the most prominent being Nike's code of conduct.[174]

Less than two decades ago, reports of ongoing child labor exploitation, sexual harassment, and physical abuse in Nike's Asia factories shocked the world.[175] Indonesian employees, nearly all women under the age of twenty-three, earned as little as fourteen cents per hour while being bullied and forced to work overtime.[176] Protests spurred from college campuses to the Olympic Games, provoking waves of media attention to Nike's human rights violations.[177]

As a result of these riots, Nike created the "Fair Labor Association" (FLA), a non-profit group that combined companies and human rights representatives to create an independent monitoring system and workplace code of conduct.[178] FLA's code of conduct defines labor standards that aim to assure humane working conditions internationally.[179] Akin to the Sullivan Principles and other international human rights instruments, the code of conduct contains a nondiscrimination provision that reads: "no person shall be subject to any discrimination in employment, including hiring, compensation, advancement, discipline, termination or retirement, on the basis of . . . sexual orientation."[180] Over one hundred major companies, organizations, and universities have agreed to uphold the FLA code of

171. *See* Silverstein, *supra* note 170.
172. *Id.*
173. *See* NIKE CODE OF CONDUCT, *supra* note 21.
174. *See id.*
175. John Aglionby, *Abuse Rife in Indonesian Nike Plants*, THE GUARDIAN (Feb. 22, 2001), https://www.theguardian.com/world/2001/feb/23/indonesia.johnaglionby1 [https://perma.cc/LA5U-BSHJ].
176. Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUS. INSIDER (May 9, 2017), http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5 [http://perma.cc/35FB-UC7R]; *see also Nike Admits Abuse at Indonesian Plants*, BBC NEWS (Feb. 22, 2001), http://news.bbc.co.uk/2/hi/asia-pacific/1184103.stm [https://perma.cc/MH34-GJNJ].
177. Simon Birch, *How Activism Forced Nike to Change its Ethical Game*, THE GUARDIAN (July 6, 2012), https://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike [https://perma.cc/2QJR-5PYF] (noting that [i]t's worth remembering that in the 1990s the global boycott campaign of Nike was so successful that it has now become an object lesson in how giant corporations can be brought to account by ordinary consumers); *see also* Nisen, *supra* note 176.
178. *See* Nisen, *supra* note 176; *see also* FLA WORKPLACE CODE OF CONDUCT, http://www.fairlabor.org/our-work/labor-standards [https://perma.cc/P57E-NWRA].
179. FLA WORKPLACE CODE OF CONDUCT, *supra* note 178.
180. *Id.*

conduct since its promulgation in 1999.[181] Nike promised that unless they saw improvements in their contract factories' working conditions, they would be forced to relocate them.[182] Nike's commitment to its code was unfaltering in 2016 when a notorious Filipino athlete made international headlines for homophonic comments.[183] Nike promptly responded by dropping the athlete's contracts.[184] In its subsequent interviews, Nike emphasized its commitment to diversity, inclusion, and human rights and referenced its code of conduct.[185] Around the same time, in 2016, a reporter from the Nation Institute investigated current working conditions at Nike's Vietnam contract factories.[186] Through her interviews with workers, she discovered that Nike's contract factories breached the Sullivan Principle's essential tenants of freedom from harassment, discrimination, and exploitation.[187] The reporter verified instances of arbitrary punishments, financial penalties, threats, and humiliation that contradicted Nike's very own code of conduct.[188] Today, Google, Walmart, Amazon, and Apple are just a few of the companies whose codes of conduct protect against discrimination and human rights violations.[189] While these corporate codes of conduct may protect individuals' human rights within the workplace they fail to extend proper protections outside of the workplace.[190] In an effort to broaden the range of corporate human rights protections, a greater focus must be placed on human rights conditions outside of the workplace and within the affected community.

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181. *See* FAIR LABOR ASSOCIATION, *Affiliates*, http://www.fairlabor.org/affiliates?page=9 [https://perma.cc/MKR2-ZBR9]

182. *See* Aglionby, *supra*, note 175.

183. *See* Christopher Langner, *Nike Dropping Pacquiao after he called gays 'worse than animals' puts focus on LGBT rights in clothing industry*, FIN. POST (Feb. 19, 2017), http://business.financialpost.com/news/nike-dropping-pacquiao-after-he-called-gays-worse-than-animals-puts-focus-on-lgbt-rights-in-clothing-industry [https://perma.cc/CH2V-4Q36].

184. *See id.*

185. *See id.*

186. Maria Hengeveld, *Nike Boasts of Empowering Women Around the World*, SLATE (Aug. 26, 2016) http://www.slate.com/articles/business/the_grind/2016/08/nike_s_supply_chain_doesn_t_live_up_to_the_ideals_of_its_girl_effect_campaign.html [https://perma.cc/UNW7-X25W].

187. *See id.*

188. *See id.*

189. *See* APPLE'S CODE OF CONDUCT (2017), https://images.apple.com/supplier-responsibility/pdf/Apple-Supplier-Code-of-Conduct-January.pdf [https://perma.cc/YH5A-VGS7]; *see also* WALMART'S STATEMENT OF ETHICS, https://www.walmartethics.com/uploadedFiles/Content/U.S.%20-%20English.pdf [https://perma.cc/73R8-LK4F]; *see also* AMAZON'S CODE OF BUS. CONDUCT, & ETHICS (2017), http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-govconduct [https://perma.cc/9PHU-PRNA].

190. *See* APPLE'S CODE OF CONDUCT, *supra* note 189 (claiming that a "supplier shall not discriminate against any worker based on . . . sexual orientation, gender identity . . . in hiring and other employment practices," but not mentioning discrimination against individuals outside of the workplace).

D. LGBT Inclusion and Economic Development Intersect

Why should developing countries concern themselves with the implications of their anti-LGBT human rights standards? A study conducted by USAID found a positive correlation between countries' gross domestic production and legal rights for LGBT individuals.[191] USAID examined several examples of countries' exclusionary treatment towards LGBT individuals, including unjust police arrests, workplace discrimination, and psychological violence.[192] Through their analysis, USAID revealed a correlation between countries' negative treatment towards LGBT citizens and slow economic growth.[193] According to their findings, discriminatory treatment in education and the workplace, for example, may lead to lost labor time, decreased productivity, underinvestment in human capital, and the insufficient allocation of human resources.[194]

Additionally, Open for Business, a conglomeration of companies including Google, IBM, and American Express, evaluated the business opportunities and risks of investing in countries that disregard LGBT citizens' right.[195] While business opportunities include greater employee productivity, increased innovation, and profitability, business risks include decreased employee safety, reputational hazards, and conflicts between global and local laws.[196] Open for Business claims that transparent, inclusive, and diverse communities are better for business and economic growth.[197]

Using India as a case study, the World Bank examined the economic costs of the country's negative attitude towards LGBT people.[198] In 2006, India's public opinion data revealed that sixty-four percent of its citizens could never justify homosexuality.[199] While these negative attitudes have weakened over time, the effects of this cultural sigma significantly impact India's labor productivity and output.[200] The spread of educational, employment, and health discrimination throughout the country has stifled

191. M.V. Lee Badgett, *The Relationship Between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies*, WILLIAMS INST. & USAID (Nov. 2014), https://www.usaid.gov/documents/15396/relationship-between-lgbt-inclusion-and-economic-development-analysis-emerging [https://perma.cc/3G4J-WG9N] (claiming that countries with more rights for LGBT people have higher per capita income and higher levels of well-being).

192. *See id.*

193. *See id.*

194. *See id.*

195. Jon Miller & Lucy Parker, *Open For Business* (2015), https://www.slideshare.net/Brunswick/open-for-business-the-economic-business-case-for-global-lgbt-inclusion [https://perma.cc/MA3V-HQ8T].

196. *See id.* at 3–4.

197. *See id.*

198. M.V. Lee Badgett, *The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study of India*, THE WORLD BANK (Oct. 2014), http://documents.worldbank.org/curated/en/527261468035379692/pdf/940400WP0Box380usion0of0LGBT0People.pdf [https://perma.cc/3Y2B-9NWU].

199. *See id.* at 8.

200. *See id.* at 5.

its economic development.[201]

IV. Codes of Conduct-Organization for Economic Co-Operation and Development

A. Institutional Codes of Conduct—The OECD

In 1961, the Organisation for Economic Co-operation and Development (OECD) was established to promote global economic and social development.[202] To achieve their goal, the OECD provides a forum for governments to collaborate, share experiences, and seek solutions to common problems.[203] Fifteen years after the OECD's founding, the organization promulgated the Declaration on International Investment and Multinational Enterprises (the "Declaration").[204] The Declaration represents a policy commitment by adhering countries to "provide an open and transparent environment for international investment, and to encourage the positive contribution multinational enterprises can make to economic and social progress."[205] Today, thirty-five developed countries have ratified the Declaration, making them morally bound by it.[206]

Like the OECD Declaration, other international instruments, including the International Labor Organization (ILO) Tripartite Declaration and UN Global Compact, provide non-binding mechanisms to foster global economic and social development.[207] The OECD Declaration, however, most effectively echoes the Sullivan's Principle's blueprint for conditioning FDI on a states' human rights provisions.[208] Additionally, while the ILO, for example, recently revised its Multinational Enterprise Declaration to address work issues related to human rights abuses, recent OECD guidelines show a more progressive trend of addressing human rights issues outside of the workplace.[209]

The OECD Declaration is constantly growing and changing through its implementation of guidelines.[210] Guidelines such as the OECD Guidelines for Multinational Enterprises (the "Guidelines"), are not legally bind-

201. *See id.* at 38.
202. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *About the OECD,* http://www.oecd.org/about/ [https://perma.cc/4VWY-V5VL].
203. *Id.*
204. *See id.*
205. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *OECD Declaration and Decisions on International Investment and Multinational Enterprises,* http://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm [https://perma.cc/RNR7-FVLU].
206. *See id.*
207. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *OECD Due Diligence Guidance for Responsible Business Conduct* (Draft 2.1) (2017), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Responsible-Business-Conduct.pdf [https://perma.cc/443V-TCR7].
208. *See id.*
209. *See id.* at 8.
210. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *OECD Guidelines for Multinational Enterprises* (2011), http://www.oecd.org/corporate/mne/1922428.pdf [https://perma.cc/C6SU-FJ67].

ing on countries, but ratifying countries are strongly encouraged to adopt them.[211] In May 2011, the OECD amended its Guidelines to include a chapter entitled, "Guiding Principles on Business and Human Right."[212] The chapter obligates states to protect human rights regardless of their size, ownership, and structure, and to respect human rights wherever they operate.[213]

Importantly, the chapter emphasizes the significance of respecting human rights using the global standard of what is expected from states, independent of a state's ability or willingness to fulfill its human rights obligations.[214] Moreover, the Guidance recognizes a minimum standard of treatment and obligates states to refer to the Universal Declaration of Human Rights.[215]

In addition to the Declaration and Guidelines, the OECD reports annually on its ratifying states' progress in achieving guideline objectives.[216] One of the most vital objectives is for states to protect international human rights through responsible business conduct.[217] Each ratifying state is obliged to establish a National Contact Point (NCP) to enhance the effectiveness of the OECD Guidelines.[218] The NCP system serves as a grievance mechanism for issues relating to human rights, taxation, bribery, industrial relations, and technology, but the OECD's 2015 annual report identified that eighty percent of NCP complaints were human rights related.[219] Notably, between 2001 and 2010, there were very few reports of human rights violations, but after the ratification of the OECD guidelines in 2011, the number of human rights cases skyrocketed.[220] For example, in 2011, a Bangladeshi company reported to the

211. *See* OECD, *supra* note 9, at 3.

212. *See id.*

213. *See id.* at 31.

214. *See id.* at 31–32 (noting that respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfill their human rights obligations and does not diminish those obligations).

215. *See id.* at 32 (claiming that "[i]n all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognized human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.").

216. *See id.*

217. *See id.* (claiming that "The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting," and noting that in "order to engage with non-adhering countries on matters covered by the Guidelines, the Committee may invite interested non-adhering countries to its meetings, annual Roundtables on Corporate Responsibility, and meetings relating to specific projects on responsible business conduct.").

218. *See id.*

219. *See* HUMAN RIGHTS WATCH, *supra* note 3.

220. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *Annual Report on the OECD Guidelines for Multinational Enterprises* 34 (2016) (noting that "the large number of spe-

United Kingdom's NCP that investing in a Bangladeshi mine would displace tens of thousands of citizens who lacked access to appropriate legal protections.[221] Furthermore, in 2014, a Chinese company reported discriminatory hiring practices to Canada's NCP, and in 2013, a Danish company reported instances of employee discrimination to Denmark's NCP.[222] The OECD's annual update findings increased international organizations' focus on investors' fiduciary duties and responsible business conduct.[223] A 2015 study by the UN analyzed fiduciary duty in Australia, Brazil, Canada, Germany, Japan, South Africa, and the United Kingdom.[224] Remarkably, the study concluded that upon investing, failing to consider long-term investment value drivers (including environmental, social, and governance issues) is a failure of fiduciary duty.[225] In 2017, the OECD announced its commitment towards acknowledging that each investor meets expectations under the OECD Guidelines and makes a positive contribution to sustainable development.[226]

In response to the proliferation of human rights offenses, the OECD developed the "Due Diligence Guidance for Responsible Business Conduct."[227] The Due Diligence Guidance seeks to align with ILO and UN instruments and provide investors with a comprehensive set of recommendations for mitigating human rights violations.[228] The OECD defines due diligence as the "process through which enterprises can identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts."[229] The OECD claims that the guidance provides a new approach to the concept of due diligence that gears investors towards

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cific instances referencing the human rights chapter is consistent with trends since the 2011 update of the Guidelines and the inclusion of the human rights chapter.").

221. *See id.* at 37.

222. *See id.* at 85.

223. *See id.* at 95, 100.

224. UNITED NATIONS GLOBAL COMPACT ET. AL, *Fiduciary Duty in the 21st Century* 3 (2015), www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf [https://perma.cc/5FTT-D2CB].

225. *See id.*

226. *See* VIGEO EIRIS, *Decent Work and Due Diligence: ILO and OECD Update Their Guiding Principles for Multinational Companies* (Apr. 10, 2017), http://www.vigeo-eiris.com/en/2017/04/10/decent-work-and-due-diligence-ilo-and-oecd-update-their-guiding-principles-for-multinational-companies/ [https://perma.cc/29CC-SGJL] (noting amendments to the ILO landmark Declaration on multinational enterprises (MNE Declaration) on March 17, 2017, that "enriched the MNE Declaration by adding principles addressing specific decent work issues related to social security, forced labour, transition from the informal to the formal economy, wages, access to remedy and compensation of victims.").

227. *See* OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (Draft 2.1), *supra* note 207 (noting that "[i]n relation to human rights impacts, including impacts on the human rights of workers, it seeks to align with the UN Guiding Principles on Business and Human Rights (UNGPs), the ILO Declaration on Fundamental Principles and Rights at Work, relevant ILO Conventions and Recommendations, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy").

228. *See id.*

229. *Id.*

responsible business conduct.[230] This new approach expands investors' current due diligence process to focus not only on risks associated with the investment itself, but also risks surrounding the investment community and their human rights.[231]

The supplementary companion to OECD's Due Diligence Guidance recommends good investment practices for companies to follow, including the assessment of human rights risks in countries pre-investment.[232] Additionally, in a 2017 publication by the OECD entitled "Responsible Business Conduct for Institutional Investors," the OECD compels investors to create grievance mechanisms should they create or contribute to adverse human rights impacts within investing countries.[233] The last five years have highlighted the importance of investors refraining from promulgating human rights violations in investing countries.[234] The OECD has reacted to the growing trend of recognizing investors' roles in combating human rights violations.[235] Through the creation of various guides, the OECD has sought to encourage investors to recognize both the obvious and salient impact that their FDI may have on international human rights.[236]

B. OECD Guideline Recommendations

Despite the OECD's efforts to include human rights assessments in FDI schemes, some organizations argue that their guidelines do not go far enough to protect human rights.[237] Recommendations for strengthening OECD guidelines include: (1) enumerating specific human rights provi-

230. *See id.*

231. *See id.*

232. *See* ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *Due Diligence Companion* (Draft) 9 (2017).

233. *See* OECD, *supra* note 4, at 46.

234. *See, e.g.*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *Annual Report on the OECD Guidelines for Multinational Enterprises* 34 (2016) (noting that "[t]he chapter on human rights was the most frequently cited chapter in this reporting period, referenced in 19 specific instances, representing 59% of all specific instances submitted. This is an increase from the last reporting period where human rights was also the leading theme referenced but accounted for 35% of the specific instances. The large number of specific instances referencing the human rights chapter is consistent with trends since the 2011 update of the Guidelines at which time the human rights chapter was added.").

235. *See id.*

236. *See id.* at 28. For example, in Bahrain, the OECD's NCP found that "due diligence measures in place in a bid to identify, prevent and mitigate the risks associated with its products, but that [the country] did not yet have a human rights policy, which is particularly important given its area of activity. An agreement was reached that the company will take additional steps to protect against the re-export of its products to countries with poor human rights records e.g. through including punitive fines for countries that re-export Etienne-Lacroix products, as well as the termination of all business relations where a country re-exports such products multiple times."

237. *See* HUMAN RIGHTS WATCH, *supra* note 3; *see also* DANISH INST. HUM. RTS., *Comments on Due Diligence Guidance and Companion for Responsible Business* (June 6, 2017), https://www.humanrights.dk/news/comments-due-diligence-guidance-companion-responsible-business [https://perma.cc/X6BQ-DTL7] (stressing the importance of highlighting "[t]he way in which enterprises cause, contribute or are linked to human rights adverse impacts, stressing that irrespective of such categorisations companies have a responsibility to act.").

sions, including the right to non-discrimination based on sexual orientation; (2) increasing investor accountability; and (3) enhancing monitoring mechanisms or the binding nature of guidelines.[238] After the OECD submitted its draft Due Diligence Guidance for Responsible Business Conduct (the "Guidance"), the Human Rights Watch (HRW) responded with several recommendations and comments.[239] The HRW is a well-known international non-governmental organization that conducts interviews, compiles reports, and collects data in an effort to combat human rights abuses globally.[240] The HRW recommended that the OECD recognize and explicitly enumerate names of international human rights instruments, including treaties, within its Guidance.[241]

As previous sections of this paper have highlighted, the UDHR, ICCPR, and European Convention, currently outline human rights standards, such as the right to non-discrimination.[242] Because the OECD recognizes the UDHR as establishing minimum standards of treatment, they should take this sentiment further and explicitly name human rights standards that investors should evaluate and uphold, along with additional instruments that they should use for guidance.[243] In doing so, the OECD can protect the right to non-discrimination and enhance the rights of LGBT individuals globally. In terms of accountability, the HRW proposes that the OECD encourage enterprises directly linked to human rights abuses, but not causing or contributing to the harm, to ensure that effective remedial processes are in place.[244] Thus, even when a company is neither contributing to nor causing LGBT rights obligations, they have a duty to mitigate against human rights violations and provide a just remedy when the harms are incidental to FDI.[245]

Lastly, the HRW recommended that the OECD adopt legally binding international due diligence standards, as they have done in other areas, such as anti-bribery.[246] Without legally enforceable standards or effective monitoring mechanisms, the HRW fears that millions of workers will continue to face ongoing human rights abuses.[247] Without a legally-binding instrument, OECD country investors who pledge to uphold the Guidance's non-discrimination standards will face minor repercussions for granting FDI to states who, in turn, discriminate against LGBT individuals. In promulgating its final Due Diligence Guidelines, the OECD could most effectively recognize and protect LGBT citizens' rights by ensuring that

238. *See* HUMAN RIGHTS WATCH, *supra* note 3.
239. *See id.*
240. *See id.*
241. *See id.*
242. *See* Heinze, *supra* note 29, at 291.
243. *See* HUMAN RIGHTS WATCH, *supra* note 3.
244. *See id.* (noting that "[t]he OECD Due Diligence Guidance for Responsible Business Conduct should include remediation planning and disclosure as part of its due diligence process. Remediation should be strongly encouraged throughout a supply chain, even when an enterprise is only directly linked to harm.").
245. *See id.*
246. *See id.*
247. *See id.*

these rights are enumerated, reflective of international standards, and effectively supported by legally binding provisions.[248]

V. The Politics of Aid-Obstacles Investors May Encounter When Conditioning FDI on Rights Provisions

A. The Effects of Conditioning and Withdrawing Aid and Investments

Will developing countries be receptive to a legally-binding instrument that conditions their receipt of FDI on LGBT rights provisions? In February 2014, former United States Secretary of State, John Kerry analogized Uganda's Anti-Homosexuality Act (hereinafter "Act") to South Africa's apartheid.[249] Uganda's original Act would sentence individuals to death should they commit a homosexual act.[250] Additionally, the Act prescribed punishments for anyone found helping, counselling, or encouraging another person to participate in a homosexual act.[251] These provisions outraged the international community, which faced public pressure to withdraw their contributions from Uganda in retaliation to the Act's passage.[252] The United States withdrew plans to establish a three million dollar National Public Health Institute in Uganda, along with over two million dollars earmarked for community policing.[253] Initially, government leaders, who were previously vocal about Uganda's need to ban homosexuality, turned quiet amidst the international response.[254] In Ghana and Nigeria, however, threats from the United States and other developing countries were felt immediately.[255] The Nigerian Senate promptly passed a bill criminalizing same-sex marriage, while the Ghanaian president declared that he would never legalize homosexuality in the country.[256] Simultaneously, African organizations who work with LGBT individuals quickly responded to developing countries' threats.[257]

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248. *See* HUMAN RIGHTS WATCH, *supra* note 3.

249. *Kerry Likens Uganda Anti-Gay Law to Anti-Semitism and Apartheid*, REUTERS (Feb. 26, 2014), http://www.reuters.com/article/us-usa-uganda-kerry-idUSBREA1Q03U20140227 [https://perma.cc/RVG3-PWUP].

250. *See* Joshua Mmali, *Uganda Fear Over Gay Death-Penalty*, BBC NEWS (Dec. 22, 2009), http://news.bbc.co.uk/2/hi/africa/8412962.stm [https://perma.cc/7J4G-YDZG] (noting that the death penalty was given where "criminals" were HIV positive).

251. *See id.*

252. *See id.* (noting that "among those most strongly opposing the bill is Sweden, which has said it would withdraw the $50m (£31m) of aid it gives to Uganda each year if the measures become law.").

253. Tabu Butagira, *US Punishes Uganda for Anti-Gay Law: Withdraws Support to Police,* UPDF & HEALTH (June 2014), http://www.monitor.co.ug/News/National/-US-cancels-exercise-with-UPDF—withdraws-support-to-police/688334-2355208-k8qa0t/index.html [https://perma.cc/4KAF-PE6C].

254. *See id.*

255. Luis Abolafia Anguita, *Aid Conditionality and Respect for LGBT People Rights*, SEXUALITY POLICY WATCH (Mar. 9, 2012), http://sxpolitics.org/we-recommend-134/7369 [https://perma.cc/4EL2-5QAQ].

256. *See id.*

257. *See id.*

Having witnessed how the withdrawal of aid in developing countries could negatively affect LGBT individuals, increasing their vulnerabilities and making them targets of physical violence and threats, domestic organizations urged Western governments to find "more respectful" ways of collaborating with Africa to safeguard LGBT rights.[258] Much of this backlash stems from the fundamental right to sovereignty that countries have over their laws and citizenry.[259] The coercive nature of Western society's conditioning and withdraw of aid was seen as a direct attack on states' autonomy and freedom—something they valued more than their fiscal status.[260]

B. Current Investment Trends Moving Away from FDI

Even where FDI schemes may effectively condition investments on states' LGBT rights provisions while enabling them to maintain their sense of autonomy, current FDI trends may render these schemes unworkable. Despite the phenomenal growth of FDI since the early 1980s, FDI flows dropped thirteen percent in 2016.[261] While developing countries as a whole experienced economic growth, this growth was rather isolated.[262] For example, developing Asian countries remained the largest recipient of FDI in the world, with FDI inflows surpassing 500 billion dollars. FDI grants to Africa, Latin America, and the Caribbean, however, faltered.[263] Much of this trend is attributable to foreign governments' increased protectionism, restraining FDI flows.[264] This fear likely comes from Western society's conditioning and withdrawing of aid in the last decade.[265]

258. Anguita, *supra* note 255.

259. *See id.* (also noting that "[t]he experience in Malawi, as the prime example of international pressure and aid conditionality to ensure the respect for the rights of LGBT persons, is, at best, a bittersweet episode. From a short-term perspective, the action was successful: the Malawian president granted a pardon for the couple. However, the medium-term effects have been negative: increased persecution of LGBT people; reduction of government funding, which probably will increase poverty levels; the weakening of local LGBT organizations; executive power overriding the judiciary system to grant a pardon, a procedure that sets a bad precedent."). *See also* Foreign Direct Investment and Human Development, *supra* note 1.

260. *See* Foreign Direct Investment and Human Development, *supra* note 1.

261. *See* United Nations Conference on Trade and Development [UNCTAD], *Global Foreign Direct Investment Fell 13% in 2016, but Modest Recovery Expected in 2017* (Feb. 2017) http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1437 [https://perma.cc/MC9U-NLJP] (reporting that global flows of foreign direct investment (FDI) fell thirteen percent in 2016 to an estimated $1.52 trillion as global economic growth remained weak and world trade volumes posted anemic gains, according to the latest UNCTAD Global Investment Trends Monitor).

262. *See id.* (noting that "slowing economic growth and falling commodities prices weighed on FDI flows to developing economies . . . [n]evertheless, developing economies continue to comprise half of the top 10 host economies.").

263. *See* United Nations Conference on Trade and Development [UNCTAD], *World Investment Report* 2016 4–8 (2017), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf [https://perma.cc/K439-KESQ].

264. Stephen Thomsen & Fernando Mistura, *Is Investment Protectionism on the Rise*, OECD Global Forum on International Investment, http://www.oecd.org/investment/globalforum/2017-GFII-Background-Note-Is-investment-protectionism-on-the-rise.pdf [https://perma.cc/V2EW-AY9K].

265. *See* Foreign Direct Investment and Human Development, *supra* note 1.

Despite growing trends of openness to foreign investors, many countries today have increased their use of rules and tactics to enhance national interests and security at the cost of limiting FDI.[266] Where foreign governments are increasingly tightening terms for investing in their infrastructure, their openness to increased investor requests in terms of human rights provisions seems limited.[267] Nevertheless, developing countries remain dependent on and attracted to FDI.[268] While developed countries may have more leeway to make their own investment terms, many developing countries lack that luxury.[269]

Separate obstacles that may make conditioning FDI unworkable in developing countries, also include increased foreign corruption, lack of transparency, and mismanagement of assets.[270] While global executives have ranked South Africa as an essential investment destination in Sub-Saharan Africa, for example, scholars claim that the country must demonstrate a concerted effort to "mitigate systemic issues such as corruption, transparency, and a troubled economy in order to maintain foreign direct investment (FDI) inflows."[271] Because of these challenges, conditioning FDI to enhance global LGBT rights may prove difficult. These presumptions of adversity and risks, however, must not overshadow evidence of the successful conditioning of FDI in developing countries to date.[272] While conditioning FDI is workable in practice to an extent, the most effective methods for changing LGBT rights provisions may develop on the national level to mitigate risks attributable to FDI.

VI. Long Term Solutions

In an effort to enhance LGBT rights protections globally, FDI must become more attractive and less coercive.[273] States must feel that they have an autonomous choice to participate in FDI negotiations or abstain from them. Furthermore, by increasing FDI incentives, states will be more inclined to weigh the benefits of FDI against the costs of forgoing anti-LGBT rights provisions. In addition to making FDI more attractive to states, investors can enhance domestic mechanisms to ensure that host states uphold their human rights commitments.[274] Investing in cross-sec-

266. *See* Stephen Thomsen & Fernando Mistura, *supra* note 264, (claiming that for most countries, sector-specific limits on foreign equity ownership have been the most common form of discrimination faced by foreign investors).

267. *See id.*

268. *See* UNCTAD, *supra* note 263.

269. *See id.* (noting that in Figure 5 the number of developed countries using discriminatory restrictions or measures against foreign investors, largely outweighs the number of developing countries).

270. *See* Ray Mahlaka, *Glass Half Full on SA's Foreign Direct Investment Flows*, MONEYWEB (Apr. 28, 2017) http://today.moneyweb.co.za/article?id=691347#.WRp4iBPytE4 [https://perma.cc/P9HX-LBRH].

271. *Id.*

272. *See* WILLIAMS INST. & USAID, *supra* note 191.

273. *See* Mahlaka, *supra* note 270.

274. *See* Anguita, *supra* note 255.

tor training between local lawyers, judges, NGOs, and relevant stakeholders on issues pertaining to LGBT rights, may not only combat anti-LGBT rights norms, but also facilitate healthier investment environments.[275] Despite states' increased propensity to opt-out of FDI schemes, and their commitment to preserving state sovereignty, FDI is essential to the economies of many states averse to LGBT rights.[276] Thus, enhancing domestic resources, strengthening international codes of conduct, and increasing FDI incentives can play a substantial part in encouraging states to strengthen their LGBT rights protections.

275. *See* WILLIAMS INST. & USAID, *supra* note 191, at 47 (highlighting local barriers to LGBT individuals receiving adequate treatment and legal rights, that in turn harm the economy).

276. *See id.* at 2.