

**TITLE: State Consent, Investor Interests and the Future of
Investment Arbitration: Reanalyzing the Jurisdiction
of Investor-State Tribunals in Hard Cases**

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Introduction

1 The proliferation of Bilateral Investment Treaties (BITs) has been called both a blight and a blessing. Whether included as part of Free-Trade Agreements (FTAs) or as independent treaties, proponents of BITs argue that they promote investment, development and good governance.¹ Critics of BITs argue that investment protection regimes constitute an unjustifiable infringement on the sovereignty of states and place unreasonable constraints on their ability to act in the public interest.² Debate between the opposing schools of thought has accompanied investment treaties since their genesis.³ It has grown particularly vociferous since the now-continuous wave of modern investment disputes first began to crest in the years surrounding the millennium.⁴

2 The debate is set to intensify. Many prominent states, scholars, and non-governmental organizations are increasingly arguing that contemporary international investment agreements take insufficient steps to balance the rights and obligations of the parties involved.⁵ They argue that too much emphasis has been placed on granting foreign investors protective rights and that too little effort has been dedicated to preserving the rights of host states.⁶ They further argue that many decisions by Investor-State tribunals perpetuate and aggravate this imbalance between investor and sovereign interests. The controversy is far from academic. While the international investment regime has enjoyed an extended period of enthusiastic subscription, this euphoria has begun to recede in some quarters. For the first time since the BIT explosion began, countries are starting to denounce their obligations under the International Centre for Settlement of Investment Disputes Convention ("ICSID Convention") on the Settlement of Investment Disputes between States and Nationals of Other States and various BITs.⁷ If this continues, we may be on the eve of an even more fragmented regime of international investment law than exists today.⁸

3 Alarms have begun to ring in various corners of the international investment regime and numerous remedies have been suggested.⁹ One of the most persuasive of these -- though not necessarily the most common -- is that a paradigm shift in the manner arbitral tribunals understand investment disputes and investment agreements is needed.¹⁰ Too frequently, Investor-State tribunals interpret their duties as those owed first to foreign investors with standing under investment treaties. Too infrequently, Investor-State tribunals interpret their duties as those owed first to the state signatories to those treaties. In this regard, it is arguable that investment tribunals should approach investment agreements primarily as instruments concluded between sovereigns detailing the extent to which they intend to waive sovereign immunity in exchange for the promise of increased investment and, by extension, increased economic growth. It is arguable that investment tribunals should interpret investment treaties in a manner which prioritizes preserving sovereign prerogatives over advancing investor interests and protection.

4 This paper will explore the details and merits of this argument in relation to the jurisdiction of Investor-State tribunals. In particular, it will examine the degree to which the interpretive approach taken to state consent to arbitration can affect whether an investment tribunal will assert jurisdiction over an investment dispute. Investor-State tribunals often confront 'hard cases' where their authority to decide a dispute is vigorously contested by respondent host states. These include cases where an investor's claim is fundamentally dependent on Most Favoured Nation ("MFN") clauses, so called 'umbrella clauses', and the willingness of tribunals to ignore conflicting forum selection clauses. These are complex scenarios, and they raise divergent concerns. However, in each case the different weight given by investment tribunals to state interests and investor interests will likely be determinative of whether a claim proceeds. This paper will examine the degree to which investment tribunals have an obligation to adopt a cautious, state-centered approach to the interpretation of state consent to arbitration. It will then consider the different means available to states to further impose such an obligation on investment tribunals as a matter of international law.

5 Part I will survey the history of the proliferation of international investment agreements. It will examine the evolution of international investment dispute settlement from a State-to-State model to the currently popular Investor-State model. It will discuss the creation of the International Centre for the Settlement of Investment Disputes ("ICSID"), the incorporation of its jurisdiction into the majority of investment protection agreements, and its attempts to de-politicize investment dispute settlement. It then will discuss the difficulties encountered during the development of the international investment regime, including the differing opinions on, and motivations for, investment agreements by capital-importing and capital-exporting states. It will discuss the repeated attempts and failures to conclude a widely ratified Multilateral Agreement on Investment ("MAI") between capital-importing and capital-exporting states. Finally, it will discuss the relationship between the resulting uncoordinated global BIT regime and relevant principles of customary international law.

6 Part II will discuss the divergent reception that Investor-State arbitration has received. In particular, the differing reactions of capital-exporting and capital-importing states will be discussed.

It will highlight that, while capital-exporting states have been generally satisfied with the fruits of their BIT policies, capital-importing states have been less enthusiastic. The most common criticisms of contemporary investment arbitration practice and jurisprudence will be discussed. These include the aggressive use of Investor-State arbitration by investors, the occurrence of conflicting decisions, and the conflicts of interest affecting Investor-State arbitrators. Special attention will be paid to criticisms made of the broad interpretation of investment provisions often rendered by arbitral tribunals. Part II will then conclude with a survey of the recent backlash against the international investment regime that these concerns have sparked.

7 Part III will discuss options available to mitigate a widespread regression of Investor-State arbitration. It will examine two courses of action. First, it will argue that new investment treaties should expressly address those issues most important to aggrieved states, including the scope of MFN and 'umbrella' clauses and the ability of investors to contractually waive their rights under investment agreements. Secondly, it will argue that investment tribunals should reconsider the appropriate balance to be struck between investor interests and state interests in jurisdictional matters. It will argue that the limits of a state's waiver of immunity and consent to arbitration are the foundational starting point from which tribunals should interpret and apply investment treaties to settle disputes. Specifically, it will argue that the limits of a state's waiver of immunity and consent to arbitration must be concretely established with a high standard of certainty before a tribunal accepts jurisdiction over an investment dispute.

8 Part IV will discuss how an obligation for tribunals to adopt a cautious, state-centered approach to state consent to arbitration may remedy the grievances mentioned in Part II. It will also discuss the particularly significant impact this shift would have on the hard cases surveyed. It will then examine the ability of states to contest arbitral awards in which they believe a tribunal has illegitimately asserted jurisdiction over a dispute, including under Article 52 of the ICSID Convention and Article V of the New York Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention). Part IV will also examine the degree to which states may be able to further impose an obligation on investment tribunals to prioritize state interests over investor interests when interpreting a state's consent to arbitration. While BITs are incapable of significantly contributing to customary international law, the arguments of states -- both inside and outside of investment disputes -- are not necessarily deficient in this manner. Rather, they may represent state practice,¹¹ and as such may constitute part of the wider, customary international law to which tribunals must often resort in deciding disputes before them.¹² This section will consider the merits of this argument, and the degree to which consistent state practice could come to bear on the obligations of Investor-State tribunals.

9 Determining the appropriate approach to state consent to arbitration is an important question to address. If the backlash against BITs continues to burgeon unchecked, international investment law will eventually divide into a complex set of sub-systems -- if not dissolve altogether.¹³ This is not an attractive result as the stability of the international economic order will suffer alongside disintegrating trade and investment relationships. Nonetheless, this appears to be the road along

which we have begun, and for understandable reasons. Although sovereign consent to waive immunity is at the heart of Investor-State arbitration, many states feel that this consent has been taken for granted, illegitimately expanded, and exploited. Should their objections go unaddressed, or should states become convinced that the limits of their consent will not be honoured in good faith, it is only natural to assume that this consent will be withdrawn.¹⁴

Part I: The International Investment Regime the Origins of Investor-State Arbitration

10 The story of international investment law is a remarkable one. The first BIT was signed between Germany and Pakistan in 1959.¹⁵ By 1990, over 300 BITs had been concluded. By 2006 this figure had grown to over 2 500.¹⁶ This growth in investment treaties has sparked a corresponding mushrooming in the number of investment disputes. Less than fifty Investor-State arbitrations had been commenced before institutions such as the International Centre for the Settlement of Investment Disputes ("ICSID") by the millennium.¹⁷ Since that time, at least a further 250 claims have been lodged with this and other prominent international dispute settlement bodies.¹⁸ Where previously investment treaties and investment arbitration were the arcane business of a handful of bureaucrats, they have now attracted the attention of the world's most influential law firms, political activists, and governments.

11 Investment arbitration's newfound importance results from its radical transformation of the mechanics of foreign investment dispute resolution. Prior to the BIT regime, disaffected investors were largely dependent on State-to-State action assumed on their behalf by their home governments. However, in most cases home state representation was difficult to secure. Home states were generally unreceptive to any but the most politically symbolic or economically important of disputes.¹⁹ Furthermore, home states were not often interested in bringing claims on behalf of domestic actors against other states for fear of upsetting their relations with those states. Investor-State arbitration was technically possible where the host state had or was willing to agree to private dispute settlement, but this was rare.²⁰

12 Investor-State arbitration under investment treaties changed this. Where an investment falls under the protection of a BIT, state signatories are understood to have extended a unilateral offer to nationals of their co-signatories to institute arbitration proceedings where these investors allege their investments have been illegitimately treated.²¹ In other words, these investment treaties constitute an explicit waiver of the principles of 'sovereign immunity' and 'act of state' which would normally bar a private individual or entity from bringing suit against a host state.²² The result is an unprecedented body of law that "straddles the line between public and private law" as principles of public international law intersect with private commercial concerns.²³ No matter how unique this burgeoning jurisprudence is, however, it does not exist in a vacuum. The new international law of foreign investment was, and continues to be, a product of the wider forces of international investment, geopolitics, and theory in which it is set.

Multilateral and Bilateral Efforts

13 The Second World War left developed, capital-exporting states even more reluctant to intervene in potentially politically sensitive investment disputes than they had previously been.²⁴ Their priority was instead to rebuild and strengthen the international community in a manner that would safeguard against renewed global conflict. However, as it was widely acknowledged that international investment and trade were central to increasing economic and political interdependence, a workable alternative to state-supported investment dispute resolution was increasingly recognized as necessary. The ICSID Convention²⁵ was the first major manifestation of this determination.²⁶ It envisioned a self-contained, depoliticized forum²⁷ in which investors could pursue claims against host states completely independently of their home state.²⁸ The Convention was signed in 1965 and is now in force in 143 states. Dispute resolution before ICSID tribunals is a key component of the majority of BITs concluded to date.²⁹

14 The current popularity of the ICSID system does not mean that investment arbitration's rise to prominence was universally embraced. BITs have been the backbone of the development of the international investment law regime, but this was not always intended to be the case. Since the creation of ICSID, it has been the goal of many developed, capital-exporting states to secure a multilateral agreement on investment that would create a uniform body of foreign investment law.³⁰ However, this project has been consistently rejected by developing, capital-importing States and they have argued against both the formation of such an agreement as well as the principles on which it would be based. The first attempt at a multilateral agreement on investment issues was the 1948 Draft Charter for the International Trade Organization.³¹ The late 1960s saw the Organization for Economic Cooperation and Development's ("OECD") Draft Convention on the Protection of Foreign Property.³² The 1990s saw a renewed push for a Multilateral Agreement on Investment ("MAI") by the OECD but these negotiations again failed due to concerns by developing countries and non-governmental organizations that the agreement imposed unjustifiably strict conditions on host states.³³

15 The failure of the MAI was heralded as a major victory for 'south' over 'north', but the world's capital-exporting economies were not seriously deterred. What could not be achieved through a single framework was instead accomplished through a comprehensive network of BITs which functionally approximate the MAI's intended scope and application. In this regard, the heart of the BIT revolution lies in an uncoordinated 'divide and conquer' strategy employed by capital-exporting states. While developing states, buttressed by support from non-government organizations, were able to collectively resist the investment protection sought by the OECD, they were less capable of maintaining this resistance at the bilateral level due to their asymmetrical bargaining power.³⁴ Different arguments are offered to explain this starkly contrasting behaviour. Some posit that developing countries entered into BIT negotiations under the mistaken belief that their counterparty would take "affirmative measures to encourage its nationals to invest in their country."³⁵ Others argue that countries were partially induced by the promise of ancillary benefits, including "participation in the capital exporting country's foreign investment insurance program or obtaining increased political and economic support."³⁶ Andrew Guzman persuasively argues that, in general, LDCs experienced a prisoner's dilemma "in which it was optimal for them as a group to reject the

developed nations' views on investment protection but in which each was better off defecting from the group to gain advantages over other LDCs in competing to attract foreign investors."³⁷

16 Submission to the BIT regime by capital-importing states occurred in a piecemeal fashion. In this regard, it should not be implied that they were unaware of what they were getting themselves into. While traditionally capital-importing states have many criticisms of contemporary investment law and practice, the suggestion that they were 'duped' into participating in it is considered patronising. Among the earliest capital-importing parties to BITs were Indonesia,³⁸ Ecuador, Kuwait, and Togo.³⁹ Western European countries pioneered the BIT movement from the capital-exporting side, their negotiations facilitated by their former colonial ties to many of their treaty counterparties.⁴⁰ Germany was the most active individual country, doubtless interested in protecting its overseas investments having lost all such previous assets as a result of the Second World War.⁴¹ The European experience in concluding investment treaties encouraged the United States and the Reagan administration to launch its BIT program in the early 80s.⁴² China, after a period of resisting signing investment treaties, reversed its policy in the following decade.⁴³ In this regard, the defeat of the latest attempted MAI in the late 1990s was more a symbolic victory than anything else. The foundations of the BIT regime were by then firmly in place.⁴⁴

Economic, Political and Legal Justifications for BITs

17 Although BITs are bilateral treaties with reciprocal obligations, they cannot be properly understood purely from this perspective. The vast majority of early BITs were signed between capital-exporting and capital-importing states, and the interests of the signatories reflected this duality. Investors from capital-exporting states were anxious about conducting foreign investment for a number of reasons.⁴⁵ They were uncomfortable subjecting themselves to the unfamiliar laws of foreign jurisdictions. They were wary of facing discrimination before foreign courts. They were distrustful of foreign officials and regulators and feared that their investments might be subject to discriminatory treatment, expropriation, or harmful exchange controls. Customary international law did little to assuage their concerns. Less consensus on the law of foreign investment existed in the first decades following the Second World War than is the case today.⁴⁶ Neither did investors have access to a binding enforcement mechanism under which to pursue their claims under this vague law.⁴⁷ BITs directly accounted for all of these concerns. They established a series of substantive obligations for host states regarding the treatment of foreign investment. They established a clear mechanism through which a disaffected investor may institute proceedings where they feel their investments have been treated in breach of those obligations. Lastly, they established that this dispute resolution mechanism is available to all investors who satisfy a BIT's standing requirements without the need for any additional consent on the part of the host state.

18 The motivations of capital-importing states in signing BITs were also numerous. Economic advantages attributed to BITs include their facilitation of further relationship building between the signatories, their facilitation of economic liberalization policies, their ability to encourage domestic investment, and their ability to strengthen the rule of law and improve governance.⁴⁸ In this regard,

Kenneth Vandeveld posits that for many of these reasons, BITs have a strong symbolic value in addition to their economic value and they "signify a state's assumption of a particular philosophical stance toward foreign investment."⁴⁹ However, these reasons aside, it is little debated that the primary impetus behind the signing of BITs by capital-importing States was their promised ability to attract increased foreign capital by reducing the political and regulatory risk inherent to foreign investment.⁵⁰ Developing countries sought access to capital which did not involve the assumption of debt. Foreign investment also included the additional promise of externalities or spill-over in human and technological capital.

Investment Protection Provisions and Customary International Law

19 While the effectiveness of BITs in achieving the abovementioned objectives is not uniform,⁵¹ the manner in which they pursue their objectives generally is. Although thousands of BITs have been signed by a complex myriad of partners, the provisions contained in these different treaties are remarkably similar. The majority of BITs contain identical or slightly varied expressions of a handful of key substantive host-state obligations, including fair and equitable treatment, 'most-favoured-nation' treatment and fair compensation in the event of expropriation or actions tantamount to expropriation.⁵² The consistency of BIT provisions is primarily due to the popularity of standard form BITs developed by international organizations such as the OECD.⁵³ The protective provisions contained in these model treaties, in turn, originate primarily in disputed principles of international customary law on foreign investment.⁵⁴

20 The widespread 'treatification' of disputed principles of customary international law does not mean that they are no longer disputed, however. In other words, the 'treatification' of disputed principles of foreign investment law has not elevated them to newly minted principles of customary international law. Instead, what results is a two-tiered system in which foreign investment is protected by both disciplines. In the first instance, foreign investment is protected by undisputed principles of customary law such as the international minimum standard of treatment -- whatever the standard might be regarded to hold at any particular time.⁵⁵ This protection is primarily symbolic however, as no reliable mechanism of enforcement is available to the investor. In the second instance, foreign investment is protected under the robust provisions of relevant BITs, including their investor-friendly dispute resolution provisions. Thus, whereas little more than thirty to forty years ago foreign investment was almost exclusively protected by principles of customary international law, BITs have now overtaken this function. Customary international law has not been replaced, but for many practical purposes it has been usurped.⁵⁶

21 Not all commentators agree with this view. Rather, some maintain that the universal proliferation of BITs has done much to advance the substantive content of the international law on foreign investment. Proponents of this view argue that BITs "establish and accept and thus enlarge the force of traditional conceptions of the law of state responsibility for foreign investment."⁵⁷ Several investment tribunals have also adopted the position that BITs are doing much to define the customary international law of foreign investment.⁵⁸ In *Mondev v. United States*, for example, it

was held that:

On a remarkably wide basis, States have repeatedly obliged themselves to accord foreign investment [fair and equitable treatment and full protection and security]. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.⁵⁹

22 The more credible position, however, is that irrespective of their popularity, BITs are not "sufficiently uniform to establish custom accepted by the international community."⁶⁰ Rather, they are *lex specialis* and as such only have effect between the parties.⁶¹ In other words, "because BITs are signed by developing countries in pursuit of their economic self-interest rather than out of a sense of legal obligation, they do not support rules of customary international law."⁶² The continued failure of the international community to reach a multilateral agreement on foreign investment further supports this proposition.⁶³ It strongly indicates the continued desire by states to discretely control to whom, and in what circumstances, they consent to grant investment protection. Customary international law, such as the international minimum standard, often informs laws established under particular BITs. However, BITs do not cross-fertilize customary international law in the same manner.

Part II: State Complaints and a Nascent Backlash

Criticisms of Investor-State Arbitration

23 As discussed, numerous explanations are given for the popularity of BITs among both capital-importing and capital-exporting states. In this regard, little doubt exists that developed, capital-exporting states have been largely satisfied with the fruits of their BIT policies. Various important economic players, including the United States and Canada, have modified their Model BITs to be slightly more conservative than they previously were -- mostly due to debate sparked by a series of high profile NAFTA Chapter Eleven cases⁶⁴ -- but by and large they have both pressed forward in concluding new BITs with new partners.⁶⁵ Canada even proceeded to ratify the ICSID Convention on 13 March 2008, making arbitration before ICSID tribunals available to disputes under Chapter Eleven for the first time.⁶⁶ The reason capital-exporting states are satisfied with the investment arbitration regime is readily explainable. The fact is, outside the NAFTA context, the majority of BIT disputes involve claims made by investors of developed nations against the governments of developing, capital-importing states.⁶⁷ In other words, while BITs have been greatly successful in providing the investment protection originally intended by developed-world BIT negotiators, they have only infrequently been used as weapons against those same states.⁶⁸

24 Sentiment among developing, capital-importing states towards the BIT regime is less positive. As discussed, different explanations of why these states may have chosen to sign investment treaties have been made while no specific empirical research has explored the commonality of motivations of capital-importing states in this regard.⁶⁹ Nonetheless, available evidence increasingly suggests

that developing states do not feel that they have been enjoying their fair share of return on the 'grand bargain'⁷⁰ of the international investment protection regime. Numerous studies argue that BITs do not result in a marked increase in incoming FDI flows.⁷¹ Susan Rose-Ackerman and Jennifer Tobin paint a more nuanced picture. They find that, while BITs do have a positive impact on FDI flows to developing countries, this positive impact is greatly dependent "on the political and economic environment surrounding both FDI and BITs."⁷² In other words, they establish that BITs cannot be viewed in isolation, but must be understood within "the political, economic and institutional features of host countries and between host country BITs and the worldwide BITs regime" in which they occur, and that, as such, BITs are not a panacea for countries with weak political and economic conditions.⁷³

25 Perhaps most importantly, Rose-Ackerman and Tobin establish that the "marginal impact of a country's own BITs on its ability to attract FDI falls as the global coverage of BITs grows."⁷⁴ As the authors explain:

Although the growing world total of BITs may stimulate overall FDI to the developing world, the pool of funds remains limited. Hence, the marginal value of BITs as a signal of a strong investment environment in a particular country is dampened by the greater availability of BITs... as the worldwide coverage of BITs increases, the benefit from one's own BITs, although remaining positive, falls.⁷⁵

26 This reveals that, while BITs are a signal of a host state's desire to foster a safe investment climate in which the risks faced by investors is reduced, the relative strength of this signal is weakened as other signals multiply around it. In other words, the most valuable BITs were the first ones as they provided early signatories with a "first mover advantage." This advantage has subsequently diminished over time, and while a country's new BITs will allow it to remain competitive in the foreign investment marketplace, it is unlikely they will carry the same benefit they once would have.

27 Other studies have arrived at equally troubling evaluations of the effects of BITs on economic liberalization⁷⁶ and the domestic promotion of good governance.⁷⁷ It is argued that the availability of international investment arbitration can undermine the development of impartial and transparent domestic judiciaries.⁷⁸ Furthermore, developing countries contend that, in general, they have been subject to a wide variety of arbitration claims that distort the original rationale of the investment protection regime. They argue that the BIT network "has gone from being a protective shield for defending investors against unfair and discriminatory treatment to a sword used by those investors to attack legitimate government regulation pursued in the public interest."⁷⁹ They claim the result is the imposition of a regulatory freeze in which host states are reticent of pursuing normal policy objectives, including issues related to public health and the environment, for fear of attracting liability under BITs.⁸⁰

28 This apprehension on the part of host states is aggravated by the inconsistent and often contradictory body of investment arbitration case law that has developed in recent years.⁸¹ Examples are bountiful, and lead to great uncertainty as to which situations, and which actions, may attract liability. Similar investment fact patterns have led to different decisions.⁸² Similar investment treaty provisions have been interpreted in conflicting ways.⁸³ Investment disputes have shown the propensity to result in multiple proceedings undertaken by different investors related to the same investment disputes.⁸⁴ Award claims have been so large at times as to impose severe burdens on the national reserves of respondent host states.⁸⁵ These problems are well-acknowledged.⁸⁶ Numerous calls have been made for the establishment of an international investment appeals tribunal to develop a consistent approach to these controversial issues.⁸⁷ However, to date no consensus can be reached as to whether such a forum is either desirable or feasible.⁸⁸

29 Perhaps the greatest source of distress for developing, capital-importing states has been what is referred to as the 'pro-investment bias' of international investment arbitration. In other words, not only have capital-importing states found that investment arbitration has been used by investors more aggressively than originally anticipated, but so too have they found investment tribunals overly eager to adopt broad interpretations of investment provisions that illegitimately expand their application in favour of investors and at the expense of host states. The list of grievances is long.⁸⁹ From a procedural standpoint, it is argued that many Tribunals have adopted an impermissibly broad interpretation of most-favoured-nation (MFN) clauses to extend a claimant's access to procedural rights as well as substantive rights contained in other investment treaties.⁹⁰ It is argued that 'umbrella clauses' have been improperly interpreted to elevate mere breaches of contract in investment disputes to breaches of international law.⁹¹ The routine dismissal by tribunals of forum selection clauses contained in investment contracts stipulating litigation in the host state's courts has also drawn fire.⁹² From a substantive standpoint, it is argued that the fair and equitable standard has been improperly extended beyond guarantees of procedural fairness and due diligence to provide excessive protection for foreign investments.⁹³ In a similar vein, it is argued that tribunals have been too liberal in their examinations of whether compensable expropriations have occurred without properly balancing the interests of investors with those of the host state.⁹⁴

30 These criticisms are exacerbated by allegations that investment tribunals have vested interests in taking this expansive approach to procedural and substantive issues. Critics are suspicious of the impartiality and independence of the arbitrators composing Investor-State tribunals.⁹⁵ They argue that the investment arbitration system has become monopolized "by a group of developed country lawyers, trained largely in business arbitration, prone to a purely contractual analysis of disputes, without having heed to the public and other interests that are at stake."⁹⁶ They argue that arbitrators have a conflict of interest that weighs in favour of interpreting investment protections provisions as widely as possible to promote future investment arbitrations and thus further employment and other business opportunities.⁹⁷ They argue that ad hoc tribunals are ill-suited and ill-posed to determine complicated claims related to public measures, issues of public policy and welfare and responsible governance.⁹⁸

31 In total, critics posit that "international law has seemingly lost its way," and that the traditionally sacrosanct notion of state sovereignty as the basis of international law has been the great victim of this development.⁹⁹ A.F.M. Maniruzzaman, for one, laments that "the Westphalian notion of sovereignty of states has given in to market forces crowning multinational corporations, at least in the field of business and international economic relations, as the dominant players in both public and private spheres of international life."¹⁰⁰ Eduardo Savarese provides another interpretation of the current state of international investment law.¹⁰¹ He highlights the tension between pro-investment and pro-sovereignty approaches as deriving from the difficulty in distinguishing between investment treaties as "traditional instruments aimed at regulating inter-State relationships so as to require full respect of the limits of the consent to arbitration negotiated by the state involved," and as "instruments aimed at fostering the investor's right to access to international arbitration."¹⁰² The former approach is primarily concerned with precisely drawing the scope of a sovereign's consent to arbitrate.¹⁰³ The latter approach is concerned exclusively with the benefits conferred by treaties to investors regardless of how those benefits may impair state interests.¹⁰⁴

The Beginning of a Backlash

32 Regardless of the exact nature of the complaints levied against the current state of international investment law and arbitration, the consequences are the same. If BITs are not considered to deliver on their promises, it is likely that developing, capital-importing nations will seriously reconsider their commitment to BIT regimes.¹⁰⁵ Such a backlash has been feared since the beginning of the BIT regime.¹⁰⁶ It is arguable that it has now begun.

33 In April 2007 Bolivia submitted a letter to ICSID under Article 71 announcing its decision to withdraw from the ICSID Convention.¹⁰⁷ It is the first of the 144 countries to ratify the ICSID Convention to exercise this right. Venezuela and Nicaragua have made similar representations but have yet to submit a notice. On 5 February 2008 Ecuador announced its intention to denounce at least nine of its BITs.¹⁰⁸ This followed Peru's submission to ICSID on 5 December 2007 of a notice under Article 25(4) of the ICSID Convention announcing the removal of its consent to investment arbitration for claims related to mining and energy.¹⁰⁹ Argentina has toyed extensively with the possibility of requiring all foreign investors to exhaust all local remedies before being able to institute a claim before an international tribunal.¹¹⁰ The constitutionality of Investor-State arbitration has been seriously challenged in Venezuela and its continued legality domestically is said to hinge greatly on the ideological inclinations of the country's Supreme Court.¹¹¹ Most recently, the renegotiation of NAFTA, including Chapter Eleven, had become a heated point of debate in the American presidential election campaign.

34 This revolt is at present concentrated in South America. This is not surprising. Historically, Latin America has been the strongest source of opposition to international investment protection. The Calvo Doctrine, which holds that international investors need only be afforded those rights and privileges enjoyed by nationals of a country, was championed by Carlos Calvo, a nineteenth-century Argentine diplomat.¹¹² The doctrine holds true regardless of the standard of rights and privileges

afforded to a country's nationals, and functions to prohibit access to any international dispute resolution forum geared toward the rights of aliens. Latin America was the last major geopolitical and cultural regime to acquiesce to participation in the international BIT regime.¹¹³ It has also recently become the first geopolitical region to show renewed interest in reviving the Calvo Doctrine, albeit in different forms.¹¹⁴ Furthermore, Argentina, the continent's second largest economy, has faced more Investor-State arbitrations than any other country.¹¹⁵

35 However, there is no reason to assume that this tangible dissatisfaction with the BIT regime will remain limited to Latin America. As acknowledged by Christoph Schreuer, "the future of investment arbitration is by no means certain," and the symbolic significance of Bolivia's denunciation of the ICSID Convention "should not be underestimated."¹¹⁶ Investment arbitration, as discussed above, has not fundamentally altered the state of customary international law. It remains a consent-based system of bilateral treaties. Some of these treaties will terminate after a stipulated period of time. Most others may be terminated unilaterally by either party after a mandatory period of time has expired, normally ten to twenty years.¹¹⁷ Either way, states ultimately remain in control of the degree to which, if at all, they undertake obligations toward foreign investors.¹¹⁸ At present Latin America is the exception, but it may prove to be the catalyst of a far broader regressive movement in the law of foreign investment. There is even reason to suspect that tears are beginning to surface within the fabric of the investment arbitration community itself. William Burke-White finds the ICSID Annulment Committee's critique of one tribunal's award "so blatant and at times even confrontational that the Committee may have been attempting to call into question the legitimacy of the CMS Tribunal and, more generally, a system that lacks appellate review to reverse gross and outcome determinative errors of law."¹¹⁹ He finds the decision "so remarkable that it seems difficult to interpret it as anything but an attack on the ICSID system from within" and wonders whether it may forewarn of a coming "crisis of confidence" in the Investor-State system.¹²⁰

Part III: State Consent and Investor Interests

The Asymmetrical Structure of Bits

36 If investment arbitration instituted under BITs has largely overlooked state interests in favour of investor interests, it is partly because host state interests often go unaddressed in BITs themselves.¹²¹ In other words, most BITs are overwhelmingly preoccupied with the obligations host states owe investors and pay scant attention to the preservation of sovereign prerogatives. This asymmetry can be largely explained by the fact that the first capital-exporting states to conclude BITs did not expect to be respondents in future Investor-State disputes.¹²² They understood BITs primarily as means to protect their nationals abroad, and as such sought to secure the widest protection possible without fear that the provisions might be used against their own interests.¹²³ The result was lopsided documents that resembled laundry lists of protective provisions rather than balanced accounts of investor and sovereign interests. These pioneering BITs became the models upon which later BITs were based, and their asymmetrical structure was thus perpetuated.¹²⁴

37 In this regard, the best way to address the uneven nature of BITs is for the next generation of investment treaties to expressly preserve those sovereign prerogatives disaffected states believe have been illegitimately infringed. Tribunals turn first to the text of investment treaties to decide disputes.¹²⁵ Where the treaty unequivocally expresses the intentions of the signatories, no room for discretion exists. The tribunal must give effect to the will of the parties. Therefore, more carefully crafted treaty provisions should remove much of the uncertainty that has plagued investment tribunals in the past. Problems associated with the interpretation and application of "most-favoured-nation" (MFN) clauses, so called 'umbrella clauses', and forum selection clauses contained in individual investment contracts exemplify the promise of this approach.

38 As discussed, the broad application of "most-favoured-nation" (MFN) clauses has caused great concern among numerous respondent states.¹²⁶ At issue has been the willingness of investment tribunals to apply MFN clauses to grant investors access to dispute resolution provisions contained in a host state's other investment treaties in addition to their substantive provisions. In *Maffezini v Spain*,¹²⁷ for example, an Argentine investor bringing suit against Spain relied on an MFN provision in the Argentina -- Spain BIT to access the more favourable dispute resolution provisions contained in Spain's BIT with Chile. Maffezini argued that he was entitled to the less restrictive waiting period contained in the Chile -- Spain BIT. Spain countered that as the MFN clause was intended to prevent discrimination arising in connection to "material economic treatment," it could not apply to "procedural matters such as dispute resolution procedures."¹²⁸ The tribunal decided to grant Maffezini access to the more favourable procedural provisions contained in the Chile -- Spain BIT. It did so for two main reasons.¹²⁹ First, it felt that the less restrictive procedural provisions contained in the Chile -- Spain BIT were clearly more 'favourable' in nature and that, as such, the MFN clause should extend to them. Secondly, it held that where a MFN clause is broadly worded, as it found the MFN clause in the Argentina -- Spain BIT to be, a presumption is raised that it was intended to extend to dispute settlement provisions. Similar applications of MFN clauses have been made in subsequent investment disputes, including in *Siemens v Argentina*¹³⁰ and *Gas Natural v Argentina*.¹³¹

39 States have been similarly aggrieved by the interpretations rendered of 'umbrella clauses'. These are investment protection provisions generally intended to provide additional protection to investors, but which arguably also purport to elevate ordinary breaches of contract to breaches of international law. They do this by requiring that host states honour or guarantee compliance with undertakings assumed.¹³² For example, Article II(2)(c) of the Romania -- United States BIT provides that "each party shall observe any obligation it may have entered into with regard to investments."¹³³ Tribunals applying 'umbrella clauses' must navigate two opposing arguments. On the one hand, investors argue that tribunals must give substance and effect to a specific term incorporated into treaties by their signatories.¹³⁴ On the other hand, states argue that umbrella clauses must not be allowed to operate to elevate mere breaches of contract to infractions of international law.¹³⁵ A common compromise between these positions adopted by investment tribunals differentiates between action taken by the host state which is of a purely commercial nature and action by the host state which is of a distinctly sovereign character.¹³⁶ Actions of the

former nature will generally not attract liability under the umbrella clause. Actions of the latter nature generally will. Some critics view this division as illusory, however,¹³⁷ and its application has not quelled state dissatisfaction.

40 Attempts to pre-emptively oust the jurisdiction of investment arbitration tribunals raise comparable issues. The vast majority of BITs, if not all of them, do not address the possibility of investors waiving the protections granted to them.¹³⁸ Nonetheless, various attempts have been made to exclude the application of BITs through reference to contractual clauses to that effect. Typically, such clauses are forum selection agreements that stipulate that investment disputes are subject to settlement before the host nation's domestic courts.¹³⁹ These are generally negotiated at the behest of the state party to an investment or concession contract.¹⁴⁰ In this regard, unlike MFN clauses and 'umbrella clauses', they are clauses which states argue should be given wide effect. That said, to the frustration of state parties, to this point forum selection clauses have been routinely denied effect by investment tribunals.¹⁴¹ Critics of these clauses argue that they are ineffective in removing the authority of a panel whose jurisdiction is based on an international treaty.¹⁴² Respondent host states have typically attempted to draw an analogy with international commercial arbitration whereby the relevant treaty establishes a third-party beneficiary system that is capable of waiver by the investor.¹⁴³ The general consensus is that, while a forum selection clause is effective in removing an investment tribunal's jurisdiction to decide contractual claims, it is ineffective in attempting to remove the tribunal's authority to hear claims based on substantive protections guaranteed by a treaty.¹⁴⁴ However, no consensus exists regarding whether an investor is capable of waiving all recourse to investment treaties via an explicit clause to that effect.¹⁴⁵

Addressing Jurisdictional Issues through Express Reference

41 Amendments to investment treaties can ameliorate each of the above ambiguities. Numerous tribunals have stated that MFN clauses can expressly address whether they are intended to extend to procedural provisions as well as substantive provisions.¹⁴⁶ Academics clearly support this position,¹⁴⁷ and there is no reason why the same treatment cannot be applied to both umbrella clauses and investor waivers. Umbrella clauses could elaborate the precise function they are intended to serve. For example, they could definitively establish whether they are meant to give Investor-State tribunals jurisdiction over claims based on mere contractual breaches and, if so, what law is to be applied to these disputes. Alternatively, they could specify that they are meant to apply solely to breaches of contract founded upon state action of a distinctly public nature, and provide criteria indicative of such action.¹⁴⁸ Investment treaties could also specifically acknowledge whether the signatories intend investor rights to arbitration to be subject to express waiver by individual investors.¹⁴⁹

42 This would be an overwhelmingly positive development. Greater clarity of drafting will result in improved transparency and predictability in the scope and application of investment treaties.¹⁵⁰ This will reduce risk and enhance the efficiency of foreign investment for both investors and host states.¹⁵¹ In the case of MFN clauses, the express exclusion of access to third party treaties can

provide host states with certainty as to which investment protection provisions will be applicable in a given dispute.¹⁵² It can also prohibit treaty shopping and other potentially abusive practices by investors.¹⁵³ Provisions addressing the scope and application of umbrella clauses and investor waivers will also clarify which claims have standing under investment treaties and which causes of action must be pursued before the courts of the host state. This will significantly clarify the rights and obligations of the parties and reduce the possibility of costly and inefficient parallel proceedings before multiple forums.¹⁵⁴

Rebalancing Investor and Host State Interests

Correcting the Interpretative Lens through which BITs are Viewed

43 Such renegotiation of BITs will do much to resolve currently contentious issues. However, this will be a drawn-out process that is likely to occur in a piecemeal fashion. Current BITs are set to expire at different times and different national BIT policies are generally not coordinated.¹⁵⁵ Therefore, it remains imperative to explore how investment tribunals may better resolve the controversies plaguing BITs currently in place. As mentioned, this can be best accomplished by reanalyzing the means by which investment agreements are commonly understood.

44 To date, BITs have too frequently been interpreted primarily as instruments intended to grant rights to third party investors. This approach involves an inaccurate assessment of the origins and intended function of BITs. It is also liable to lean towards tribunals deciding to assert jurisdiction over disputes which states may not have intended them to have. First and foremost, BITs must be appreciated as instruments intended to outline the circumstances in which sovereign states agree to waive immunity and submit disputes to binding arbitration. Furthermore, these instruments must be interpreted with an eye to definitively establishing state consent to arbitration in the circumstances before a tribunal will assert jurisdiction over a dispute. This correction does not involve setting an unusual course. On the one hand, it requires dismissing erroneous assessments of Investor-State arbitration. On the other hand, it requires revisiting the nature of the arbitration agreement fundamental to investment arbitration.

Dismissing Erroneous Assessments

45 International law has been experiencing a profound transformation in recent decades. Whereas international legal norms traditionally operated to regulate the exercise and limits of the sovereign acts of states, "a number of ill-defined and often vague relationships between classical subjects of international law, such as States or international organizations on the one side, and individuals, enterprises, non-governmental organizations and civil society on the other"¹⁵⁶ have been added to this dynamic. These developments have inspired much interesting analysis, and in the context of investment arbitration, many now question whether BITs vest individual rights in investors as subjects of international law.¹⁵⁷ The debate is a popular one. Investment rights guaranteed under investment treaties are routinely compared to human rights accorded under treaties such as the European Convention of Human Rights or the American Convention of Human Rights.¹⁵⁸ The

comparison flows from the tendency of investment agreements to entitle investors, like private individuals, to "a process for the resolution of their disputes which respects the basic elements of procedural fairness, including the recognition of the rights of all parties to be heard, to have due deliberation by a duly constituted tribunal, and to have a reasoned judgment free from fraud and corruption."¹⁵⁹

46 Other illustrations of the Investor-State model are offered. Van Harten & Loughlin, for example, argue that investment arbitration can best be understood as a novel species of global administrative law.¹⁶⁰ They distinguish Investor-State arbitration from both human rights proceedings and traditional international commercial arbitration by focusing on its authorization by the state of arbitration of disputes arising from the state's exercise of public authority as opposed to private acts of the state. In this regard, they argue that investment arbitration is most closely analogous to "domestic judicial review of state conduct."¹⁶¹ "Like the members of any administrative tribunal or court", the authors argue, "in reviewing executive acts, arbitrators rule on the legality of state conduct, evaluate the fairness of government decision-making, determine the appropriate scope and content of property rights, and allocate risks and costs between business and society."¹⁶² As the authors conclude, more so than human rights disputes or commercial arbitration, "this is the stuff of administrative law."¹⁶³

47 While these explanations are very informative, they are also potentially misleading. The unique associations created by investment arbitration allow for many interesting comparisons, but it cannot be forgotten that the Investor-State dynamic created by investment treaties is secondary to the inter-state dynamic at the heart of the investment treaty itself. In the words of S.J. Toope:

The 'capacity of a private individual or a corporation to proceed directly against a State' remains a limited exception to the first principles of international law. It is only because states agreed in a multilateral convention [referring to ICSID] to subrogate certain of their rights of action that non-state parties can 'proceed directly against a State.'¹⁶⁴

48 In other words, while investment treaties create investor rights, these will nonetheless always remain derivative rights. Investors are not party to investment treaties. They are merely third party beneficiaries of such treaties. Furthermore, states are not abdicating their sovereign rights by consenting to investment arbitration: they are exercising "their sovereign rights in an environment where the interests they seek to protect are many and diffuse."¹⁶⁵ As such, the novel dynamics created by investment arbitration should not be allowed to distract tribunals from the fundamental legal relationships at issue. They should not be allowed to persuade tribunals to consider investor interests before first respecting sovereign prerogatives.¹⁶⁶ To take any other approach skews the application of investment provisions and turns the treaties on their heads.

The Centrality of State Consent and the Agreement to Arbitrate

49 It is equally important to understand that the uniqueness of the Investor-State system does

nothing to diminish the centrality of state consent to arbitration within that system. As discussed, prior to the BIT regime, investment disputes were limited to State-to-State action. Aggrieved investors were required to exhaust all local remedies before petitioning their home state to assume a claim on their behalf. Whether or not to sponsor an investor's claim remained at the discretion of the host state. Afterwards, the International Court of Justice would only assume jurisdiction in an inter-state investment dispute where both parties had clearly indicated their consent to such proceedings. States had no obligation to give such consent.¹⁶⁷ Where they withheld this consent, no foreign forum would typically agree to assert jurisdiction over the acts of sovereign states within their own territory in the interests of international comity.¹⁶⁸

50 State consent to arbitration and the express waiver of sovereign immunity that accompanies it is equally important in the Investor-State system.¹⁶⁹ It merely takes a different form.¹⁷⁰ Whereas under traditional State-to-State dispute settlement a host state consents to the jurisdiction of a forum after a dispute has arisen, under BIT arbitration the requisite state consent generally begins prior to the dispute in the BIT itself. In other words, the BIT's arbitration provisions constitute a waiver of sovereign immunity and invitation to binding arbitration extended by the host state to all investors who satisfy the treaty's standing requirements. They represent a standing offer of arbitration by the host state to eligible foreign investors who can accept the offer by instituting arbitration in the prescribed manner. When this is done, an informal arbitration agreement between the foreign investor and host state is perfected.¹⁷¹

51 This 'de-coupled' approach to state consent to arbitration does much to disguise its importance. It does much to take state consent for granted and shift attention to the rights of investors. However, the unilateral nature of a state's consent to arbitration contained in a BIT does not diminish the fundamental importance of that consent. It remains the key to the legitimacy of all procedures that follow and is not made without limitations. Waiver of sovereign immunity is a "potentially costly political" act that is not undertaken lightly.¹⁷² It is a conscious and strategic decision made in the attempt to attract constructive assets flows intended to advance national economic interests. It is a "loss of liberty" and an "acceptance of constraints from which the State is otherwise free."¹⁷³ Furthermore, it is an inherently public act that can only be undertaken by a sovereign state rather than any ordinary private entity party to an arbitration agreement.¹⁷⁴ As such, waiver of immunity must be approached with the scrutiny normally accorded to state consent to binding dispute resolution.¹⁷⁵ Waiver of immunity and state consent to arbitration must be considered the foundational starting point from which tribunals interpret and apply investment treaties to settle disputes. Most importantly, as is customary in traditional arbitration proceedings, waiver of immunity and state consent to arbitration must be concretely established with a high standard of certainty before an Investor-State tribunal accepts jurisdiction over an investment dispute.¹⁷⁶

Comparing Investor-Centred and State-Centred Arbitral Decisions

52 A survey of investment arbitration awards suggests that these points are often overlooked, and that the primacy of state consent to arbitration is often underemphasized by tribunals.¹⁷⁷ As Eduardo

Savarese explains, two separate actions may be at work.¹⁷⁸ On the one hand, tribunals may interpret investor rights broadly to infringe upon sovereign prerogatives. On the other hand, a state's intention to retain sovereign immunity may be interpreted narrowly or otherwise overlooked by a tribunal. Where this is done, the intended neutrality of investment arbitration meant to balance the interests of investors and state parties in an objective and depoliticized manner is damaged.¹⁷⁹ The basis of investment arbitration is distorted by the decision of tribunals to interpret their duty as one owed to investors rather than to the treaty's state signatories.

53 One issue before the tribunal in *AAP Ltd v Sri Lanka*, for example, was the effect of the MFN clause in the Sri-Lanka -- United Kingdom BIT.¹⁸⁰ As in *Maffezini*, AAP sought to use the clause to "borrow" dispute settlement provisions in the Sri-Lanka -- Switzerland treaty. Also as in *Maffezini*, the tribunal in *AAP Ltd v Sri Lanka* decided to consider this argument. However, rather than approach the question by examining whether it was likely that Sri Lanka and the UK had intended the MFN clause to apply to procedural provisions in addition to substantive provisions, the tribunal was instead solely concerned with identifying whether or not the Switzerland treaty did in fact provide for treatment that was more favourable. It found that it did not, and thus found that the MFN clause did not apply. However, this approach suggests that, had more favourable treatment been identified, no other issue, including the intentions of the state parties, need be addressed.¹⁸¹ This is an investor-centred perspective. It puts the interests of the investor at the centre of the investigation and disregards the primacy of state consent. It evidences a presumption that protective provisions should be interpreted broadly in favour of investor rights with the onus of rebutting that presumption lying with respondent host states.

54 The *Maffezini* tribunal followed the example set by the *AAP Ltd v Sri Lanka* tribunal. Interpreting MFN clauses broadly to catch all relevant procedural provisions, the tribunal opined, would improve the "harmonization and enlargement of the scope of such arrangements."¹⁸² This is also an investor-centred approach as it equates the vitality of the international investment regime with the increase in protection afforded to investors. It suggests that unifying all dispute resolution procedures available to foreign investors by eliminating the application of all but the most favourable terms would be a positive development. The tribunal in *Siemens A.G. v Argentina* concurred with and advanced this approach. "The purpose of the MFN clause," it held, "is to eliminate the effect of specially negotiated provisions unless they have been exempted."¹⁸³ It is, in other words, to create a novel treaty composed of the most favourable provisions included in the rest of a host state's investment treaties accessible through the application of the MFN clause. This argument totally disregards the primacy of state consent to arbitration. It grounds investor interests as the cornerstone from which sovereign rights and obligations must then be built rather than the opposite. It is a teleological approach to treaty interpretation that assumes that the sole purpose of BITs is the advancement of investor rights at the expense of sovereign rights rather than carefully negotiated waivers of immunity intended to improve governance, attract investment, and promote development.¹⁸⁴

55 Generally speaking, those decisions which have not expressly supported *AAP v Sri Lanka*,

Maffezini and Siemens A.G. have not attempted to discredit them.¹⁸⁵ The Tribunal's decision in *Plama Consortium Ltd v Republic of Bulgaria*¹⁸⁶ is an exception to this trend, however. It is a case where sovereign interests were placed before investor interests, and where this resulted in a narrow application of an MFN clause. Rather than focus on whether more preferential terms were available in other treaties, the tribunal in *Plama v Bulgaria* focused on the "requirement in arbitration law that an agreement to arbitrate must be clear; and that it is for the claimant to show that there is such agreement."¹⁸⁷ It found that the MFN clause in the Bulgaria -- Cyprus BIT was lacking in this regard and that it did not clearly indicate that Bulgaria had intended the provision to extend to dispute resolution procedures contained in other treaties.¹⁸⁸ The Tribunal found that:

[D]ispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context... It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as in the case of the Bulgaria -- Cyprus BIT (ad hoc arbitration), their agreement to most-favoured nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ISCID Arbitration). It is one thing to add to the treatment provided in one treaty more favourable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by the parties with an entirely different mechanism.¹⁸⁹

56 It is clear that the Tribunal in *Plama v Bulgaria* was disturbed by the implications of *Maffezini*.¹⁹⁰ On the one hand, the Tribunal seized on the point that, where MFN provisions are extended to procedural issues in other treaties, the effect is the nullification of a carefully determined set of rights and obligations negotiated between two state parties. On the other hand, the Tribunal realized that to give the broadest possible effect to MFN clauses is to undermine the essentially bilateral nature of investment treaties by extending their application to agreements negotiated with other states in potentially very different contexts.

57 Most importantly, the Tribunal neutralised these dangers simply by interpreting the MFN clause from the standpoint of ensuring that the limits of state consent were respected. It did this by concentrating on the requirement that a state's consent to arbitration and waiver of immunity must be unambiguous and unmistakable.¹⁹¹ In direct contrast to the ruling in *Siemens A.G. v Argentina*, it found that prudence must be taken in protecting sovereign interests at the expense of investor interests rather than vice-versa. In direct contrast to the ruling in *Siemens A.G. v Argentina*, it found that the appropriate presumption to be applied is one which favours the state rather than the investor. This evidences a guarded approach to treaty interpretation that recognizes that, "even though the traditional diplomatic protection mechanism by home states for their nationals investing abroad has been largely replaced by direct access by investors to arbitration against home states,"

this development "does not take away from the basic prerequisite for arbitration: an agreement of the parties to arbitrate."¹⁹² As such it is a more appropriate approach to the interpretation of the jurisdiction of Investor-State tribunals than is the approach adopted in *Maffezini and Siemens*. It is the approach which best respects the hierarchy inherent in investment treaties by acknowledging that investor rights are merely derivative rights that should only be considered once the limits of state consent have been delimited and respected. It is the approach that best acknowledges that states are the sole parties to investment treaties by emphasizing that an agreement to arbitrate must be clearly established and that the burden to do so lies with the investor.

Part IV: International Law and State Practice

58 Clearly identifying the dimension of state consent to arbitration will be easier in certain contexts than in others. Some treaties simply pay more attention to these concerns and take better care to accurately address the intentions of the state parties involved.¹⁹³ Furthermore, the possibility remains that a cautious, state-centred approach to consent to arbitration may lead to as broad a reading of investor rights as might a liberal, investor-centred approach.¹⁹⁴ However, such a result will be neither illegitimate nor otherwise undesirable where it derives from consideration of the state parties' consent to arbitration. It is not broad investor rights that are to be avoided: it is broad investor rights that are not derived from compliance with the will of the state parties. Where states have purposely negotiated asymmetrical investment agreements, only they can be faulted for having done so. Furthermore, according to the internationally recognized doctrine of *pacta sunt servanda*, they are bound to accept the consequences of their commitments.¹⁹⁵ However, this does not mean that ambiguities or gaps in investment agreements cannot be and should not be interpreted in a manner that prioritizes clearly establishing and respecting the limits of a state's consent to arbitration over extending protection to investors.

59 This begs the following two questions. First, to what degree are Investor-State tribunals under an obligation to adopt a state-centred approach when determining their jurisdiction to decide investment disputes? Secondly, to what degree are states capable of imposing, or further imposing, such an obligation on Investor-State tribunals moving forward? As mentioned, these questions are of more than academic interest. They are of great practical importance to the future of international investment arbitration. If states lose confidence that waivers of sovereign immunity contained in investment treaties will be strictly respected they will likely reconsider renegotiating such agreements or concluding new ones. This will represent a regression of generally positive developments in international investment law and could do much to destabilize international economic relations in the long term. However, if states' concerns are assuaged, international investment law could face a more stable and less controversial future.

Are Tribunals Bound to Adopt a State-Centred Approach to Consent?

60 Article 31 of the Vienna Convention on the Law of Treaties (VCLT) mandates that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms

of the treaty in their context and in light of its object and purpose."¹⁹⁶ This is a textual approach to treaty interpretation and, as the approach endorsed in the VCLT, it is the approach tribunals are required to adopt as a matter of international law.¹⁹⁷ Other interpretive approaches may be adopted, but only as long as those approaches remain subordinate to the textual approach. In other words, reference may be made to the "subjective intentions" of the parties to a treaty, but only so long as reference to those intentions is firmly confined by the relevant text.¹⁹⁸ Such caution is necessary to prevent 'judicial legislation' and the illegitimate extension or nullification of treaty provisions by the tribunals applying them.¹⁹⁹

61 In this regard, Investor-State tribunals are not, strictly speaking, obligated to adopt a state-centred approach to the interpretation of state consent to arbitration. Pursuant to the VCLT, they are merely obligated to adopt a textual approach. In many cases this will be sufficient to decide the issue and no other investigation will be required. The will of the state parties will necessarily be satisfied as it is the plain meaning of their agreement that is being honoured. However, in 'hard cases' where the textual approach is insufficient to resolve ambiguities or gaps in a treaty's text, reference may be had to further interpretive tools or principles to resolve those ambiguities or gaps. In fact, reference to further interpretive tools or principles will likely be necessary to resolve uncertainties in a treaty's application. Tribunals confronted by hard cases will not resort to arbitrary decision-making free from precedent. They will seek reliance on the most appropriate secondary sources of authority available to them with due regard to fostering a consistent, principled, and fair corpus of international investment law.²⁰⁰

62 In such circumstances, it is arguable that tribunals faced with difficult jurisdictional issues related to the application of MFN clauses, 'umbrella' clauses, and investor waivers of treaty protection have a duty to approach these issues cautiously in a manner which prioritizes preserving sovereign prerogatives over advancing investor interests. It is arguable that, for the reasons cited in Part III, the state-centered approach to the interpretation of a state's waiver of immunity and consent to arbitration is the appropriate approach to adopt because it best respects the fundamental requirement in arbitration law that the arbitration agreement be clearly established. Broad support can be found for this argument. In the words of Charles N. Brower II:

To compensate states for the uncertainty that accompanies the conferral of discretion on arbitrators, states should have the right to claim the benefit of all doubt in close cases. At first glance, this statement may seem incompatible with a fundamental tenet of procedural justice common to international law and international arbitration: equal treatment of the parties. Nevertheless, one may justify the proposed allocation of deference to states on procedural, substantive, and practical grounds.²⁰¹

63 Brower makes his argument in relation to investment disputes in general, including both procedural and substantive issues. However, he emphasizes that this argument can be most easily extended to placing the burden of proof on claimants in Investor-State disputes.²⁰² Like Toope, he

highlights that "private investors and host state's do not possess equivalent rights and obligations under international law."²⁰³ Like numerous other notable publicists,²⁰⁴ he highlights the relevance of a concept attracting increased attention in investment law: "caveat investor."²⁰⁵ With these justifications in mind, it is reasonable to suggest that where substantial doubt can be cast on the existence of an arbitration agreement, Investor-State tribunals should respond by refusing to assert jurisdiction over a claim.

64 Nonetheless, this proposition is likely to attract vigorous criticism. First, it will be accused of being a covert attempt to impose an obligation on tribunals to adopt a restrictive approach to treaty interpretation. Numerous previous host states have argued that tribunals must adhere to "a presumption against the limitation of a State's sovereignty" only to be firmly rebuked in each case.²⁰⁶ Tribunals have found that they should neither adopt a restrictive or liberal approach to state consent, but one that seeks to discover and respect the common will of the parties.²⁰⁷ They have found that "investment treaties must be interpreted in good faith,"²⁰⁸ taking into account "the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from their undertakings."²⁰⁹ In this regard, critics would argue that requiring claimants to establish the existence of the state's consent to arbitration with reasonable certainty has a practical effect akin to that of restrictive interpretation. They would argue that it would do much to frustrate the legitimate expectations of investors and the home states that specifically negotiated BITs with the desire to provide a stable and secure dispute settlement system for those investors.²¹⁰

65 Imposing a requirement on claimants to identify arbitration agreements with a reasonable degree of certainty would also be attacked for failing to acknowledge what has been called the VCLT's lingering preference for teleological interpretation. While it is well-accepted that the VCLT firmly enshrines a textual approach to treaty interpretation, it is also regularly argued that the VCLT maintains a preference for teleological or 'effective' interpretations through its Article 31 requirement that the "ordinary meaning to be given to the terms of a treaty shall be in the light of the treaty's object and purpose."²¹¹ In other words, it is suggested that the construction of Article 31 "is intended to ensure that all provisions of a given treaty and related agreements and instruments be given meaning and effect, and that none be left without effect."²¹² In the context of BITs, critics would argue that this emphasis on "effective interpretation" demands that treaty provisions be interpreted and applied to provide the investor protection BITs are intended to promote. They would argue that this emphasis on "effective interpretation" should, if anything, "lean towards a result that upholds jurisdiction and will create a presumption in favour of the validity or applicability of consent."²¹³

66 While both of these arguments are in part valid, they are also incomplete. Requiring that investment tribunals identify a clear intention to arbitrate on the part of a respondent host state before asserting jurisdiction is not equivalent to imposing a restrictive approach to treaty interpretation. Nor does it necessitate employing a restrictive approach to treaty interpretation. It merely asks that a certain standard of probability be met in relation to a fundamental jurisdictional question. Furthermore, the imposition of this standard involves an application of an impartial,

textual approach to treaty interpretation and not a rejection of it. This is because, while the standard sets a mark to be met, it is an impartial, textual approach to the treaty and any other available evidence that will decide whether the mark has in fact been met. This subtle distinction between means and ends was recognized by the tribunal in *Southern Pacific Properties(SPP) v Egypt* when it found that, while "jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith," jurisdiction will only be found to exist if the "force of the arguments militating in favour of it is preponderant."²¹⁴ Neither does this logic violate any lingering inclination on the part of the VCLT for effective interpretation. Rather, it simply requires acknowledging that any such bent in favour of effective interpretation is incapable of diminishing the standard of certainty to be met regarding the state's consent to arbitration.

The Standard in Practice

67 A return to specific hard cases will demonstrate how a requirement to identify a state's consent to arbitration with a reasonable degree of certainty would function in practice. Before doing so, however, it is important to note that these cases need not necessarily arise frequently. Nor would the requirement function to make investment arbitration inaccessible to a majority of investors. While the requirement to identify a state's consent to arbitration with a reasonable degree of certainty would function to exclude certain investors who might have enjoyed standing under a BIT in its absence, it must be remembered that most BITs have otherwise broad and inclusive standing provisions. In other words, while a stricter approach to state consent would curtail the number of a BIT's beneficiaries, most BITs already make investment arbitration very accessible. On the one hand, they often define "investment" so broadly as to include almost any conceivable economic enterprise.²¹⁵ On the other hand, they often take an equally broad approach to the definition of eligible investors.²¹⁶ These provisions are not cryptic. Their application is straightforward and predictable when approached reasonably, and particularly if approached conservatively. Therefore, relatively speaking, the number of investors excluded by a heightened standard of state consent would not be high. Rather, it would consist only of those investors who chose to embrace ambitious interpretations of a treaty's standing prerequisites.

MFN Clauses

68 Requiring investors to identify state consent to arbitration with a reasonable degree of certainty would make it more difficult for them to establish the jurisdiction of a tribunal by relying on an MFN clause. As per *Plama Consortium v Bulgaria*, it would generally prohibit investors without access to investment arbitration under a BIT from gaining access to investment arbitration provided for in a second BIT via an MFN clause in the immediately applicable BIT. This is because a simple MFN clause is unlikely to constitute an implied waiver of sovereign immunity and consent to binding arbitration,²¹⁷ particularly when a state had the opportunity to explicitly agree to such binding arbitration in the same instrument. The state would argue, quite persuasively, that had it intended to offer investors access to arbitration under the BIT, it would have done so directly. It would argue that, as it chose not to do so, its desire to expressly withhold an offer of arbitration

from the particular class of investors is clearly evident.

69 In contrast to *Maffezini* and *Siemens*, the need for investors to identify a clear and unambiguous arbitration agreement would also likely preclude investors from relying on an MFN clause to access more favourable arbitration provisions in a second BIT than those immediately available to them. Each of the tribunals in these cases interpreted an MFN clause's silence or ambiguity on the issue of dispute settlement as an opportunity to include dispute settlement within the scope of the clause.²¹⁸ They "interpreted the absence of an explicit reference to dispute settlement in the MFN clause as a legitimate basis for concluding that dispute settlement procedures do fall within the concept of MFN 'treatment.'"²¹⁹ This is analogous to giving the benefit of the doubt to investors and imposing a presumption that MFN clauses do encompass dispute resolution provisions on the state to rebut.²²⁰ However, giving the benefit of the doubt to the respondent host state and placing the burden on the claimant inverts this logic. It prohibits the incorporation of dispute settlement provisions into an MFN clause until clear evidence is found that the state parties intended to do so.²²¹

70 In each case the investigation must begin with the specific wording of a treaty's MFN clause and any other provisions that give context to that clause.²²² This investigation should include consideration of any subsequent practice by the state parties pursuant to Article 31(3) of the VCLT. Furthermore, this investigation should adopt neither a restrictive nor expansive approach to the terms and actions under investigation. However, in most cases the requirement that an agreement to arbitrate be clearly established will prevent a general MFN clause from overruling specifically negotiated dispute resolution procedures in the same treaty.²²³

Umbrella Clauses

71 Thomas Walde explains that "the discussion in the 1950s and 1960s giving birth to the umbrella clause envisaged not a commercial law breach, but rather governmental action abrogating a long-term -- mostly concession-like -- agreement."²²⁴ It was recognized that "contracts entered into between States and foreign investors are entitled to special protection, especially in light of the host State's municipal law-making competence, which can subsequently affect the parties' contractual bargain."²²⁵ In this regard, the type of action the umbrella clause was intended to protect investors from was not that which could be undertaken by any ordinary private party, but rather that which involved the exercise of a state's sovereign authority or 'puissance public,' including, but not limited to, expropriation.²²⁶ This understanding played out in practice under the State-to-State dispute settlement system which preceded Investor-State arbitration where home states would categorically refuse to sponsor investor disputes with foreign sovereigns that were purely commercial in nature.²²⁷ For these reasons, nobody expected that the umbrella clause, when coupled with investment arbitration and freed from the supervision of the host state, would suddenly make private commercial contract claims arguably actionable under international law.²²⁸

72 Requiring that investors establish a host state's consent to arbitrate purely contractual claims under an umbrella clause with reasonable certainty would do much to restore the clause's function to

the scope originally intended by its framers. It would reinforce the contemporary consensus that purely contractual disputes between states and foreign investors are not elevated to matters of international law by umbrella clauses and place the burden of refuting this presumption with the investor. Common sense supports this approach. When a state makes a commitment in a BIT to honour commitments it enters into with investors, it makes this commitment as a state and not as a private party. Therefore, it is logical to assume that it is referring to breaches of contract which are sovereign in nature rather than purely commercial in nature. This inference is not absolute, however, and could be vulnerable in the context of the wider treaty housing the umbrella clause. As discussed by Gaffney & Loftis, the investor may be able to clearly establish that "the State intended to extend an offer of something more than would otherwise be available to the investor as a matter of international law... as an inducement to invest in its territory."²²⁹ Making this determination will not be a simple exercise. Due to the overlapping nature of jurisdictional and substantive issues in 'umbrella clause' claims, it may be necessary for the tribunal to consider the two simultaneously in a mixed jurisdiction and awards hearing.²³⁰ This may require consideration first of whether the investor's claim is purely commercial in nature and secondly, if so, whether the umbrella clause was intended to extend to such claims. Difficult questions of attribution may also arise, including whether the conduct of a sub-state entity or state enterprise may be attributable to the state.²³¹

Investor Waiver

73 No investment arbitration case to date has had to wrestle directly with the question of whether international law permits investors to waive their rights under a BIT.²³² The tribunal in *Aguas del Tunari S.A. v The Republic of Bolivia*²³³ considered this possibility, as did the tribunal in *SGS v Philippines*.²³⁴ The former found that, in principle, no rule operated to bar such a waiver so long as it was explicit and did not contravene any other related provisions included in the BIT.²³⁵ The latter disagreed, finding that "it is doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law."²³⁶ However, in both the discussion was obiter dictum as no such attempt to expressly waive all recourse to a treaty was found to have been made. As discussed, at issue in these cases was whether mere forum selection clauses included in the relevant investment contracts were sufficient to remove the jurisdiction of an Investor-State tribunal over contractual claims. Other interesting arguments have been made in either direction.

74 Critics of the suggestion that investors can waive their rights under a BIT argue that investment protection provisions represent an irrevocable offer by the state.²³⁷ They argue that to allow access to such offers to be terminated via individual contracts would be to ignore "the practical realities of bargaining with a state" and the asymmetrical power inherent in such a dynamic.²³⁸ Critics also argue that allowing such exclusion of access to investment treaties would be to do considerable "harm to the goals of universal investment protection envisaged by such treaties" -- based as they are not so much on the conferral of private individual rights on investors but on the imposition of general obligations on host countries in a manner intended to create favourable investment conditions.²³⁹ Therefore, they argue, governments which attempted to evade investment arbitration

through such clauses would be acting "contra factum proprium and in bad faith by attempting to reap the general benefits of signing investment treaties (in terms of reciprocity and reputation) without having to face up to the regulation and potential scrutiny that such treaties entail."²⁴⁰

75 Advocates of the notion that investors can waive their rights under a BIT, on the other hand, draw an analogy with international commercial arbitration whereby the relevant treaty establishes a third party beneficiary system that is capable of waiver by the investor. They argue that, where an investor concludes an agreement to waive its rights under a treaty, they are estopped from acting contrary to this representation in the future by seeking to initiate an investment claim by accepting the unilateral offer.²⁴¹ According to this view the investor rights created by BITs, although creatures of international law, are not sacrosanct and are capable of being surrendered by individual investors through private contractual agreements.²⁴² The principle of party autonomy takes precedence over any suggestion that BITs, absent an express clause to that effect contained therein, are intended to overrule conflicting clauses in otherwise lawful contracts. Therefore, as discussed by the Tribunal in *Agua del Tunari*, complete investor waiver is possible so long as it relates to the same parties as the dispute, the same matters as the dispute, and makes explicitly clear the investor's intention to waive all rights to arbitration under the treaty.²⁴³

76 Where the investor is required to establish an arbitration agreement with a reasonable degree of certainty, however, many of these issues are circumvented. This is because, while the above-described investigations concentrate primarily on whether the investor is capable of waiving their right to consent to arbitration in the event of a future dispute, they ignore the fact that such a waiver simultaneously represents the state's removal of its consent to the same proceedings. In other words, the operative question is not necessarily whether an investor is capable of waiving their rights under a BIT, but whether, with an investor's consent, a state is capable of revoking its offer of arbitration.²⁴⁴ From this perspective the state's offer of arbitration advanced in a BIT is not an irrevocable one, but merely a unilateral one, and as such is capable of retraction via an explicit waiver clause without a resulting breach of the BIT by the host state.²⁴⁵ Furthermore, where this is done an investor will be unable to meet any requirement to positively establish a clear and unambiguous arbitration agreement between the parties. The investor may, however contrary to the waiver clause, express a renewed desire for binding investment arbitration.²⁴⁶ However, the investor will be incapable of establishing such a renewed desire on the part of the state.

Annulment and Judicial Review

ICSID Convention Article 52

77 Imposing an obligation on claimants to establish a state's consent to arbitration with a reasonable degree of certainty will do much to decide jurisdictional issues where the application of MFN clauses, umbrella clauses, and purported investor waivers of access to BITs is involved. However, regardless of the particular approach to state consent adopted by an investment tribunal, recourse remains available to states who believe the limits of that consent have been illegitimately

extended. Article 52(1)(b) of the ICSID Convention provides that an ad hoc committee established by the ICSID secretariat can annul an award where the tribunal in question has "manifestly exceeded its powers." The provision was specifically included in the ICSID Convention to provide redress where tribunals have exceeded their authority in deciding a dispute. In this regard, "the most important form of excess of powers occurs when a tribunal exceeds the limits of its jurisdiction."²⁴⁷

78 Disagreements exist concerning the standard that has to be met by such an application. Some argue that the tribunal's abuse of its authority must be so manifest as to be "discernable with little effort and without deeper analysis."²⁴⁸ This position is grounded in the fact that the ICSID Convention was designed to favour predictability and the finality of awards over other concerns²⁴⁹ and that, as a result, any lower standard would risk the widespread "frustration of awards."²⁵⁰ Others argue that "to limit excess of powers... to manifest cases does not make sense where the tribunal's jurisdiction is at issue."²⁵¹ This position is grounded in the argument that "jurisdiction is such a fundamental element that it cannot be decided in degrees," and that a tribunal either has jurisdiction or it does not.²⁵² In other words, the standard applied in an Article 52(1)(b) annulment hearing is irrelevant where the tribunal's jurisdiction is at issue because any excess of powers will necessarily have been manifest as the tribunal did not have any powers at all.²⁵³

79 Therefore, where a state believes that an ICSID tribunal erred by finding jurisdiction where no such jurisdiction was intended to exist, it may apply to have an award made by that tribunal rendered null and void.²⁵⁴ In each case the host state could argue that the scope of review applied need not be limited as any improper assertion of jurisdiction is necessarily a manifest excess of power. In each case the host state could argue that the tribunal in question had an obligation to refuse jurisdiction where a clear and unambiguous agreement to arbitrate the type of dispute at hand could not be located with a reasonable degree of certainty. Furthermore, in each case the annulment committee would be required to make an original decision on the matter without deferring to the contested decision of the tribunal, as is allowed in other investigations made under Article 52.²⁵⁵ While Article 52 balances the competing interests of correctness and finality with precedence given to the latter,²⁵⁶ there occurs no corresponding presumption in favour of an award's correctness in the interests of finality.²⁵⁷ This is particularly the case when jurisdiction is at issue and where any error of legal reasoning, no matter how 'tenable', is necessarily absolute.²⁵⁸

New York Convention Article V

80 The situation would be similar where arbitration is conducted under the UNCITRAL Model Arbitration Law, under the ICSID Additional Facility Rules, or under any other comparable set of institutional rules.²⁵⁹ In such circumstances the ICSID Convention would not apply and the arbitral award would be vulnerable to judicial review both in the jurisdiction in which enforcement was sought as well as at the seat of arbitration.²⁶⁰ At the place of enforcement, it is likely that the New York Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention) would apply.²⁶¹ At the seat of arbitration, the award would be subject to judicial review in accordance with the law of the jurisdiction.²⁶² However, it is common for such national laws to

closely mirror the provisions of the New York Convention or the UNCITRAL Model Law,²⁶³ particularly in those jurisdictions typically chosen by disputing parties to serve as the seat.²⁶⁴ In this regard, both the New York Convention and the Model Law provide that local courts may refuse enforcement or vacate an award where it "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."²⁶⁵

81 These provisions serve the same purpose as Article 52(1)(b) of the ICSID Convention in functioning to provide redress where the terms of any purported agreement to arbitrate have been exceeded. However, their application may vary significantly from that of ICSID Article 52, and not always in ways that favour respondent states. The current trend is, and has been for some time, for national courts to show significant deference to foreign arbitral awards and to enforce them without re-examination or alteration.²⁶⁶ The same can generally be said of national courts asked to review awards at the seat. Unfortunately for disaffected respondent host states, this reduces the possibility that national courts will be sympathetic to their objections, even in matters where the jurisdiction of the original tribunal is contested. In *S.D. Myers v Canada*, for example, the Canadian government argued that NAFTA awards "do not attract extensive judicial deference where the issue is whether the award under review falls within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration."²⁶⁷ The Federal Court of Canada disagreed, and decided not to impose "its own interpretation of the relevant provisions on which the tribunal had relied to affirm its jurisdiction *ratione personae*."²⁶⁸ This is an even stricter standard of review than that mandated by Article 52(1)(b) of the ICSID Convention.²⁶⁹ However, such uncontested deference to arbitral awards has not always been popular and a return to a lower standard of review of investment awards by national courts remains possible. Furthermore, such a reversal of judicial discretion could only be hastened by a widespread regression of state support for Investor-State arbitration of the type now being witnessed in Latin America.

Are States Capable of Imposing Interpretive Obligations on Tribunals?

82 The preceding discussion reveals that the question of whether tribunals have a duty to take a state-centred approach to the interpretation of consent to arbitration is debatable. This paper has argued that, due to the requirement that an agreement to arbitrate be clear and unambiguous, Investor-State tribunals do have such an obligation. However, as evidenced by many of the cases surveyed, many tribunals have not subscribed to this view. Therefore, it is reasonable to investigate whether states are capable of clearly imposing such an obligation on investment tribunals moving forward. If this could be done, any debate to the point would be rendered moot. States themselves would be in the position to ensure that their consent to investment arbitration was interpreted in a consistent and principled manner. This could do much to quell many of the most common criticisms of the investment arbitration regime. It could also do much to ensure the continued stability and prosperity of foreign investment law.

83 The question is a difficult one to answer. Generally speaking, no such attempt by states to

influence the greater investment arbitration regime has been made. Nor has such an attempt been widely considered in the relevant literature. However, different mechanisms are available to states interested in pursuing such a course of action, and thus merit consideration. States may consider negotiating additional agreements which supplement investment treaties and specifically prescribe the interpretive techniques to be adopted by their tribunals. States may consider establishing interpretive committees empowered to resolve disputes concerning the interpretation and application of investment treaties. Finally, states may consider resorting to arguments based on wider principles of international law, including customary international law and state practice. Each presents different challenges, while none provides a comprehensive solution.

Subsequent Agreements and Interpretive Committees

84 Articles 31(2)(a) and (2)(b) of the VCLT state that, "for the purpose of the interpretation of a treaty," its context shall comprise agreements relating to the treaty made between or accepted by all the parties to the treaty. Articles 31(3)(a) and 31(3)(b) add to this "subsequent agreements between the parties regarding the treaty's interpretation or application" and "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Therefore, should parties to a bilateral or multilateral investment treaty seek to impose an obligation on tribunals to adopt a state-centered approach to the interpretation of the consent to arbitration contained therein, the simplest way to do so would be to conclude a new agreement to that effect. For example, following the annulment decision in *CMS v Argentina*, the Argentine government has "indicated a desire to reach an agreement with the U.S. publically clarifying" the hotly contested provisions leading to divergent interpretations and three awards against the country.²⁷⁰

85 This may not be a realistic proposition, however. First, it would require all contracting state parties to come to an agreement on this point. On the one hand, states which believe that their interests, as well as those of their investors, are well served by the status quo may be reluctant to conclude such agreements. These may be capital-exporting states that prefer to view investment treaties primarily as instruments geared toward advancing the interests of their overseas investors at the expense of the sovereign prerogatives of those capital-importing states who host them. On the other hand, states may not have resources available to dedicate to the renegotiation of investment treaties. They may decide that it is more important to concentrate on negotiating new treaties with new trading partners than returning to previously concluded treaties. They may also be hesitant to endorse a relatively unproven and novel approach to managing investment relations and disputes. Investment treaties are complicated and politically sensitive agreements and take significant human resources and political capital to negotiate. Although one party to an investment treaty may be interested in rewriting treaties already in force, there is no guarantee that their co-signatories will have either the time or inclination to return the favour.

86 Some investment treaties will not require that a novel agreement between the parties be negotiated. These are those agreements that include provisions empowering special committees comprised of representatives of the parties to oversee the operation of Investor-State tribunals. This

may include supervising the implementation of an investment treaty or "resolving any disputes that may arise regarding its interpretation and application."²⁷¹ The NAFTA Free Trade Commission (FTC), established under NAFTA Article 2001, is one example of such a commission, and one which has been given much work. In July 2001, the FTC issued a statement curtailing the parties' substantive obligation to provide 'fair and equitable treatment' under Article 1105.²⁷² The interpretive note mandated that Chapter Eleven tribunals interpret the provision, contrary to a literal reading of the text,²⁷³ to require no treatment beyond that demanded by the customary international law minimum standard.²⁷⁴ This was followed by the FTC's release of guidelines allowing non-disputing parties to make submissions to Chapter Eleven tribunals. Also known as amicus submissions, this innovation allows NGOs and other interested non-parties to submit arguments in relation to disputes dealing with matters of significant public concern.²⁷⁵

87 Implementation commissions such as the FCT would greatly facilitate any endeavour by the parties to an investment treaty to closely prescribe the fashion in which tribunals interpret and apply the treaty. They institute the mechanism by which interpretive notes are devised and the procedures by which they are implemented. As such, the process is streamlined and requires the dedication of fewer resources than does the negotiation of a novel agreement. However, as with the negotiation of a novel agreement, any decision by an implementation commission would still be dependent on the concurrence of the representatives of the state parties. As described above, this may be difficult to secure where one or more parties feels their investors benefit from the status quo. The FTC's interpretive note curtailing the meaning of fair and equitable treatment under NAFTA Article 1105 is an interesting event in that it represents an instance in which capital-exporting states have curbed investor rights. However, it is important to note that the decision to do so was largely the result of concern on the part of Canada and the United States regarding the expansive treatment given to Article 1105 by a number of Chapter Eleven tribunals in claims made against them.²⁷⁶ As alluded to, it was not originally foreseen that Canada (or the United States) would find themselves as respondent host states in Investor-State arbitrations.²⁷⁷ Chapter Eleven was principally intended to safeguard the interests of Canadian and American enterprises expanding their operations in Mexico. As such, when Canadian and American investors began aiming Chapter Eleven's arsenal of protective provisions across either side of the 49th parallel, the NAFTA parties sought different means to limit the firepower available to them. Of chief concern was Article 1105's incorporation of the vague and indeterminate standard of fair and equitable treatment under international law.²⁷⁸

88 Not all co-signatories to investment treaties are likely to be as galvanized as were the NAFTA parties following the first wave of Chapter Eleven claims.²⁷⁹ This is particularly the case where an investment treaty has been signed between a capital-exporting state and a capital-importing state, as the majority still are.²⁸⁰ While principally capital-importing states may well be interested in devising an interpretive note which instructs tribunals to read state consent to arbitration cautiously by prioritising state interests over investors' interests, principally capital-exporting states are unlikely to share their enthusiasm. NAFTA Chapter Eleven's short but rich history provides many interesting examples, but it cannot be forgotten that, as multilateral investment agreements involving two major capital-exporting states as well as a prominent capital-importing state, it

remains the exception rather than the rule. All states would do well to learn from the NAFTA experience and negotiate the frameworks for incorporating interpretive commissions into their investment treaties. However, they should not do so under the assumption that such a commission will be capable of solving all controversies that may arise. Providing a mechanism to guide the implementation of an investment treaty does not guarantee the deployment of that mechanism.

89 It is ironic that, had a Multilateral Agreement on Investment been successfully negotiated in the 1990s, the complexity of these endeavours would be greatly reduced. In other words, addressing the jurisdiction of investment tribunals through treaty amendment or the work of an interpretive commission would be greatly facilitated in the context of a widely ratified multilateral treaty. First, rather than the many multitudes of bilateral treaties that compose the current BIT regime, there would be a single multilateral treaty of wide-ranging application that could be addressed in one fell swoop. Secondly, and most importantly, capital-importing states would enjoy a far stronger bargaining position. Amid a diffuse set of bilateral treaties, each capital-importing state enters into renegotiation discussions facing the same power imbalance present at the treaty's conclusion. They may demand that the treaty be amended, but if their counterparty refuses, they are left without further recourse. In the context of a multilateral treaty, on the other hand, capital-importing states would have the ability to work in concert. They would be in a position to form a united front that could outnumber disagreeable capital-exporting states. They would be in a position to pool their resources in renegotiation efforts. Due to the magnitude and importance of the treaty at stake, they would also be in a far better position to command the attention of capital-exporting states. Capital-exporting states could continue to refuse to capital-importing states' calls to renegotiate, but it would come at a greater political cost.

State Arguments and State Practice

90 A last option for states to consider involves wider principles of international law, including customary international law and state practice. In particular, states may consider seeking to impose an obligation on tribunals under international law to interpret state consent to arbitration in a fashion which prioritizes sovereign prerogatives over promoting investor interests. They may do this by releasing clear statements to this effect to the rest of the international community. They may also do this by arguing to this effect in those instances in which they are the respondents in Investor-State arbitrations. This is an uncertain process which would not necessarily produce concrete results. Nor could it produce immediate results. The success of this enterprise would depend not on the actions of any one state but on the collective actions of many states. It would depend on a communal response by states over time to issues relating to state consent to arbitration and the means by which that consent is to be interpreted by investment tribunals.

91 Article 42 of the ICSID Convention states that, "in the absence of an agreement on the rules to be applied, the arbitral tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."²⁸¹ NAFTA Article 1131(1) makes a similar direction, reading: "a Tribunal established

under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." These articles have been the subject of some academic discussion, and slightly different assessments of their effect have been made.²⁸² However, the end result of these applicable law provisions is relatively uncontroversial: where states have not expressly outlined all law applicable to a dispute, tribunals are free -- in fact required -- to consult wider sources of law, including wider principles of international law. This is a fact of fundamental importance to investment disputes. Most BITs do not specify which law should be consulted where the treaty proves deficient in addressing all issues in dispute.²⁸³ In this regard, customary international law can affect the operation of international investment treaties in a number of ways.²⁸⁴ It informs those treaties that refer to its principles. It may complete treaties by filling lacunae in their coverage. Lastly, though rarely, treaty provisions may be modified by subsequent inconsistent customary international norms.

92 The examples of investment tribunals that have referred to law beyond the immediate BIT to resolve the issues before them are numerous. In *ADF v United States* the tribunal had to consider the scope of the obligations owed by states to aliens under customary international law.²⁸⁵ In *Methanex Corp v United States* the Tribunal investigated customary rules relating to the ability of states to lawfully differentiate their treatment of aliens and nationals.²⁸⁶ In *Santa Elena v Costa Rica* the tribunal needed to consider international norms relating to the use of compound interest in the calculation of award damages.²⁸⁷ At the heart of the tribunal's decision to deny remedies to an aggrieved investor in *Loewen v United States* were international norms regarding continuous nationality requirements.²⁸⁸ In *Noble Ventures Inc. v Romania*, recourse to international law was necessary to decide whether the actions of a state enterprise were attributable to the host state.²⁸⁹ In *Enron v Argentina* the tribunal referred to international law to decide whether Argentina could legitimately invoke the principle of necessity to avoid liability under the treaty.²⁹⁰

93 Customary international law also plays an important part in the interpretation of investment treaties. This flows from Article 31(3)(c) of the VCLT and its requirement that interpretation of a treaty take into account "any relevant rules of international law applicable in the relations between the parties."²⁹¹ This rule of interpretation has been affirmed in *North Sea Continental Shelf*,²⁹² *Amoco v Iran*,²⁹³ *Case Concerning Oil Platforms*,²⁹⁴ and, most recently, in *Saluka Investments v Czech Republic*.²⁹⁵ Importantly, it "reflects a 'principle of integration' [and] emphasizes both the 'unity of international law' and the sense in which rules should not be considered in isolation of general international law."²⁹⁶ It requires that customary international law be used not only to fill in possible lacunae in a treaty, but also to "aid in the interpretation and implementation of its provisions."²⁹⁷ It has also largely been overlooked by both investment tribunals and respondent host states.²⁹⁸ Therefore, while at present there is no principle of customary international law mandating that investment tribunals approach state consent to arbitration cautiously rather than liberally, this does not preclude the possibility of such a principle developing over time. Furthermore, were such a principle to develop, tribunals would be obligated to respect it pursuant to Article 31(3)(c) of the VCLT.

How Customary International Law Develops

94 It cannot be said whether the development of a rule mandating a state-centered approach to the interpretation of state consent is a realistic possibility. Its fate lies entirely in the hands of the international community. It can be said, however, that much would have to transpire before one could credibly argue that such a principle of interpretation exists. Customary international law sets a high standard for induction. First, a sufficient number of states must behave in a way sufficient to delineate the contours of a novel principle of law.²⁹⁹ Secondly, these states must act in this manner with the subjective belief that such state activity is obligatory.³⁰⁰ The first limb requires consideration of the duration, consistency, uniformity, repetition, and generality of the particular state practice.³⁰¹ The second limb requires identification of *opinion juris*: that the relevant states have chosen to act in the specified manner because they believe they have a duty to act in that fashion rather than for some other reason.³⁰² The ultimate threshold required before the new custom is created cannot be accurately predicted. It would depend in part on the strength of any prior rule which it purports to replace as well as the strength of any opposition it may arouse.³⁰³

95 State practice as required to fashion principles of customary international law can derive from a wide array of governmental behaviour.³⁰⁴ It may include "executive acts, legislation and regulations, judicial decisions, international treaties, as well as verbal acts, such as official declarations or protests, public and diplomatic statements, especially when taken during multilateral conferences or before the organs of international organisations."³⁰⁵ It must be extensive, uniform and representative, but it need not necessarily be unanimous.³⁰⁶ Neither must it be a positive act, as omissions by states are equally capable of contributing to the formation of customary law.³⁰⁷ In the context of a purported obligation for Investor-State tribunals to interpret investment treaties in a manner which prioritizes strictly respecting the limits of state consent to arbitration over promoting investor protection, it may include clear statements made by the international community. As contemplated by the International Law Commission, it may also include arguments made by respondent host states in their arguments to Investor-State tribunals.³⁰⁸

96 The least complicated of these avenues is the first: clear statements made by states to the rest of the international community. If states believe that it is appropriate for Investor-State tribunals to interpret state consent to arbitration cautiously, they can voice this belief in a number of forums. They can make unilateral statements to the rest of the international community. They can instruct their representatives at international law conferences and related events to make this case and seek support for it. Perhaps most importantly, they can also make *amicus* submission in disputes before ICSID to which they are not a party.³⁰⁹ On the other hand, states will only have the opportunity to argue this point before Investor-State tribunals in those instances where an investment arbitration claim has been made against them. Depending on the circumstances, this is not a situation likely to arise frequently for many countries.³¹⁰ It is not a situation they would welcome. Nor is it one that would allow them to broadcast their position as widely as would public statements.³¹¹ However, arguments made by states to Investor-State tribunals may ultimately be more meaningful than public statements to the same effect. As explained by Malcolm Shaw, statements are not necessarily

accurate predictions of what a state will really do when distinct interests are actually at stake.³¹² Nor do statements carry the same force as concrete actions taken when distinct interests are actually at stake.³¹³

Opinio Juris and the Requirement that States Argue Responsibly

97 The project would not be impossible, but the challenge is great. First, State Practice under customary international law does not normally encompass rules relating to the interpretation of treaties. This is a procedural matter given extensive treatment by the VCLT, one of the most successful and widely ratified international agreements of modern times. Therefore, states are unaccustomed to raising points on this issue, particularly outside of dispute resolution proceedings. Furthermore, Investor-State tribunals may be hesitant to accept that they may be bound by a rule of interpretation imposed from outside the institutional rules under which they are established. State practice under customary international law normally functions to impose substantial or procedural obligations on states themselves, not tribunals established under the authority of international treaties. Investor-State tribunals may feel they are obliged solely to respect the procedural rules under which they have been formed, whether this is the ICSID Arbitration Rules or UNCITRAL Arbitration rules, and not procedural guidelines advocated by large groups of states. However, Article 31(3)(c) of the VCLT and its mandate that treaties be interpreted with regard to "any relevant rules of international law applicable in the relations between the parties" appears to invalidate this position. So, too, does the mandate of ICSID Article 42(1) that disputes be decided with regard to "such rules of international law as may be applicable." Secondly, as stated by the ICJ in the North Sea Continental Shelf Cases, the state practice would have to be "both extensive and virtually uniform in the sense of the provision invoked."³¹⁴ Stated differently, it would require that states consistently argue that investment tribunals strictly respect the limits of state consent to arbitration whenever they are in a reasonable position to do so, both inside and outside of Investor-State proceedings.

98 Such consensus would be difficult to build and express. It would have to occur collectively. States would first have to seize on the fact that state consent to arbitration is often interpreted over-generously. They would then have to reject this practice and conclude that the only appropriate approach to state consent is a cautious one that requires clear identification of the agreement to arbitrate, and argue this point convincingly. This may not always be likely. Not all states will agree with this proposal in all circumstances. For the reasons discussed above, in the context of treaty negotiation and interpretive committees, this is particularly likely to be the case with principally capital-exporting states. The example of *SGS v Pakistan* is illustrative. There the tribunal held that the umbrella clause included in the Switzerland -- Pakistan BIT did not reflect an intention on the part of the contracting parties to internationalize contractual breaches.³¹⁵ Similar to the decision in *Plama v Bulgaria*, this interpretation prioritised establishing the limits of state consent over protecting investor interests. It held that where the provisions of a treaty term were ambiguous, it was appropriate to read that term conservatively so as not to grant jurisdiction to a tribunal where it was unclear that the state parties had intended to create such jurisdiction.³¹⁶ However, following this

interpretation Switzerland sent a letter to the ICSID Secretariat strongly protesting the decision and advocating its investor's case.³¹⁷

99 Such state consensus would also require that nations express their support for a cautious approach to state consent in a responsible and consistent manner. This is a multifaceted endeavour. Depending on the circumstances, it may not be necessary or convenient for a state to maintain such an argument, even if the state is a dedicated advocate of this position. However, the principle of *opinion juris* would require that the state argue for such an interpretive approach regardless of its convenience and out of a perceived duty to do so. In this regard, states would have to understand that they are more than normal litigants in a dispute resolution proceeding. In the words of Thomas:

As the principal subjects of international law, states must seek to promote it in good faith, paying particular attention to the merits of the claims that they advance. They must be concerned about the implications of the arguments that may be advanced in one case for future cases.³¹⁸

100 In other words, it would be of the utmost importance that states maintain a firm line and never contradict themselves in the interest of defending particular claims. They must, in the words of Price, "guard against letting the exigencies of defending a particular case cause the sacrifice of important principles."³¹⁹ They must not think of themselves as private individual parties whose sole concern is securing the best possible results in the immediate circumstances of the dispute.³²⁰ This has not always been the case, and in different instances states have advanced less than credible arguments in pursuit of defending arbitration claims. For example, when making a thirdparty submission in *GAMI v Mexico*, the United States denied that Article 1116 of NAFTA "departs from the existing customary rules according to which shareholders could not assert claims for loss or damage suffered by a company."³²¹ This, in spite of the fact that this is partly what Article 1116 was drafted to do.³²²

Conclusion

101 Although it has been said that both capital-exporting and capital-importing states were well aware of the implications of bilateral investment treaties, it might still be fair to say that international investment law did not develop as they might have expected.³²³ Many hundreds of BITs were concluded before the current surge in investment arbitration claims began in the late 1990s. This extensive first generation of treaties did not have the benefit of learning from anything more than a handful of early disputes. They multiplied rather blindly, and rather quickly. The result is a large body of treaties with wide ranging investor protection provisions with often vague terms. These, in turn, have been interpreted in divergent fashions, and in ways often unfair to host states. It is a remarkable development potentially unparalleled in the history of international law. Foreign investment law looks very different today than it did even as few as ten years ago. Since the rise of the modern nation-state it has been a rarity to see a sovereign entity as a respondent to a commercial claim, whether before the ICJ or otherwise. It is now, perhaps distressingly, commonplace. It is also

commonplace to see states on the losing end of tribunal awards.³²⁴ The law codified in much of the first generation of BITs is much more investor-friendly than that enshrined in customary international law.

102 This is less the case with the second generation of BITs. This is the wave of BITs that had the benefit of learning from the explosion of investment arbitrations claims and the lessons they provided into how various popular treaty terms could be applied and interpreted in practice. As a result, several trends are identifiable. First, recent investment treaties tend to be much longer and more detailed than their predecessors. Canada's 2007 Foreign Investment Protection Agreement (FIPA) with Peru, for example, is 61 pages long. This is 43 pages longer than its 1998 FIPA with Thailand and 49 pages longer than its 1990 FIPA with Poland. A good part of the added text is extensive annexes specifically detailing the character of investor rights and host state obligations. The goal of these additions is to avoid the surprises born from the unexpected interpretations rendered of NAFTA Chapter Eleven.³²⁵ Secondly, some recent investment treaties tend to be more conservative in the protection they extend to investors. Canada's practice is again illustrative.³²⁶ Article 5 of its 2004 Model FIPA replicates the FTC's interpretive note limiting the fair and equitable treatment standard to that required by customary international law. Annex B.13(1)(c) of the Model FIPA applies a similar treatment to the obligation of host states to compensate investors in the event of actions tantamount to expropriation by stipulating that, "except in rare circumstances... non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."³²⁷

103 These are positive developments. States are right to learn from the mistakes of unsophisticated treaty-drafting and to improve on their efforts in the new treaties they conclude. They are right to more clearly outline the nature and extent of the protective provisions granted to foreign investors. But these improvements should not concentrate solely on tailoring the different substantive provisions included in BITs. They should also be concerned with the different procedural and jurisdictional components of BITs. States should take greater care to clearly outline the circumstances in which they intend investment tribunals to have jurisdiction and the circumstances in which they do not intend that jurisdiction to arise. They must clarify the effect and application of MFN clauses, the effect and application of "umbrella clauses", and whether investors may waive the guarantees extended to them through forum selection clauses.³²⁸ They must also be careful to specify how they intend investment treaties to be interpreted by the tribunals empowered under them. They must specify whether they intend investment treaties to be viewed first and foremost as documents concluded to grant wide protection to third-party investors or as limited waivers of sovereign immunity. They must do more to specify the intended purpose of BITs, whether the promotion of development, bilateral relations, or otherwise.³²⁹

104 States must also take greater account of the role they play in the continued development of investment law in the bigger picture. The frequency with which investment treaties have brought nations to arbitration has done much to tarnish the special status of sovereign states as the principal

subjects of international law. It has done much to make them appear as typical private parties engaged in private commercial disputes. It may even have done much to convince government officials of these things. However, any such assertions are untrue. Regardless of their selective waiver of sovereign immunity to arbitration proceedings, states remain the primary subjects of international law. As such, they must always be conscious of the fact that they remain the primary source of international investment law as well as the primary defenders of that law. They must remember this when discussing developments in foreign investment law in international forums. They must also remember this when defending themselves before investment tribunals and when making amicus submissions. Unlike investors, who do not have any long-term interest in particular BITs, states cannot "aggressively advance claims uninhabited by any discipline."³³⁰ To counteract this imbalance, they should make full use of the privileges afforded to them. If sufficient states act in concert, they are capable of affecting the manner in which most investment tribunals are obligated to perform their duties. While at times new principles of customary international law may be slow to develop, they can also develop 'near instantly' and without a long period of gestation.³³¹ All that is required is a sufficient number of influential states with a significant relationship with the relevant subject matter to consistently argue a point with the conviction that it is their duty to do so.³³² Bad decisions by tribunals will always be an unfortunate fact of life. What is of prime importance is how states decide to respond to those decisions.³³³

105 In the meantime, the safekeeping of international investment law lies in the hand of investment tribunals. Second generation BITs may be improving on their predecessors, but first generation BITs will still be with us for some time. Furthermore, fresh sets of controversies regarding the jurisdiction of tribunals are still likely to arise regardless of a BIT's age. The international BIT regime is likely only to grow more fragmented and heterogeneous than it presently is and no agreement is ever perfectly drafted: each will inevitably be incomplete. For example, a critically important controversy has recently erupted surrounding the ability of states to withdraw from the ICSID Convention. The disagreement centres on the effect of Article 25 of the Convention and its instruction that once parties have consented to arbitration, that consent cannot be unilaterally withdrawn. On the one hand it is argued that this makes any renunciation of the ICSID Convention ineffective vis-à-vis specific investment treaties until those treaties themselves have become terminated.³³⁴ On the other hand it is argued that investment treaties only constitute "offers" to arbitrate and that, as such, denunciations of the ICSID Convention are effective vis-à-vis all BITs immediately.³³⁵ This controversy is a further manifestation of the ability of analysts to take widely divergent approaches to state consent to arbitration contained in BITs. The former approach illegitimately disregards the primacy of state consent in finding that a state's commitment to ICSID proceedings in a BIT can overrule its subsequent express denunciation of the ICSID Convention. The former takes the far fairer approach by recognizing that once state consent is withdrawn, it cannot be subsequently reconstructed by reference to other agreements.

106 In this regard, investment arbitrators are not to be envied. Although well-remunerated, they have a tremendous responsibility to bear. Investment arbitrators are both "developing a new branch of law impacting on cross-border transactions" and "clarifying principles of international law

relating to foreign investment."³³⁶ They must walk a fine line between competing interests, philosophies and ideologies, and they know their decisions will be subject to intense scrutiny. On the one hand, their decisions must be convincing enough "to overcome the suspicion that investment arbitration is nothing but a plot to derail the political will of legitimate governments."³³⁷ On the other hand, their decisions must not be "too timid to redress the wrongs suffered by an investor for fear of confronting a powerful host country."³³⁸ Either way, they know that their decisions can create "powerful political ripples" capable of affecting more than the investment relations between the state parties to a treaty.³³⁹ For this reason it is not uncommon to find arbitrators adopting an apprehensive, cautious approach and "reserving their most innovative suggestions for dicta for fear of the consequences" and controversies they may inspire.³⁴⁰ Investment arbitration may have been partially intended to depoliticize investment disputes, but this has hardly been the case.

107 There is evidence that "international arbitration institutions are realizing the wisdom of taking a more balanced approach" to weighing investor and host state interests.³⁴¹ This is partly attributable to increasing criticism of the current paradigm by host states, academics, and activists. It is also attributable to the increasing number of arbitrators appointed from developing countries.³⁴² However, much more remains to be done. Investment tribunals must take care to disregard the erroneous and misleading descriptions made of investor rights and investment arbitration. They must take care to dismiss frivolous arguments brought by overaggressive claimants. They must take care not to forget by whose authority they are empowered. It cannot be forgotten that investor rights under BITs remain no more than derivative rights and that it is only from the consent of the state parties to a treaty that tribunals derive their authority. As such, it must be remembered that, strictly speaking, tribunals do not owe a duty directly to investors. Rather, their duty is first and foremost to the state parties to a treaty and that, as such, their first concern must be strictly respecting the consent to arbitration contained in those treaties.

* * *

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Notes

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¹ See, for example, Thomas Walde, "Investment Arbitration as a Tool of Good Governance", in Todd Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsey, NY: Transnational Publishers, 2004) 475.

2 See, for example, M. Sornarajah, "A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment" (2006) 6 *International Environmental Agreements* 329 [Sornarajah, "Lost Law"].

3 See generally Carlos Calvo, *Le Droit international Theorique et Pratique* (1868), Kurt Lipstein, "The Place of the Calvo Clause in International Law" (1945) 22 *The British Yearbook of International Law* 130; M. Sornarajah, *The International Law on Foreign Investment*, 2nd Edition, (Cambridge: Cambridge University Press, 2004) [Sornarajah, "International Law on Foreign Investment"].

4 For an analysis of the early backlash against NAFTA's investment chapter, see Charles Brower II, "Investor States Disputes Under NAFTA: The Empire Strikes Back" (2001) 40 *Colum. J. Transnat'l L.* 43.

5 For a collection of criticisms of the investment arbitration regime, see Lyuba Zarsky, ed., *Balancing Rights and Rewards: International Investment for Sustainable Development* (San Francisco: Nautilus Institute for Security and Sustainability, 2005).

6 For a model investment Treaty drafted with the express intention of equally balancing the interests of investors and home states, see Konrad von Moltke, "A Model international Investment Agreement for the Promotion of Sustainable Development" (2004) *International Institute for Sustainable Development and the Swiss Agency for Development and Cooperation*, online: *International Institute for Sustainable Development* <www.iisd.org/pdf/2004/trade_model_inv.pdf>.

7 See *Washington Convention on the settlement of investment disputes between States and nationals of other States*, 18 March 1965, 575 U.N.T.S. 159 (No. 8359); I.L.M. (1965) 532; U.K.T.S. (1967) 25 378 (entry into force 14 October 1966) [ICSID Convention].

8 See generally Bernardo M. Cremades & David J.A. Cairns, "The Brave New World of Global Arbitration" (2002) 3 *Journal of World Trade & Investment* 173 [Cremades & Cairns].

9 The most common and reoccurring appeals are for the establishment of international investment appeals court to harmonize conflicting law and practice. However, serious impediments to such a forum have consistently impeded any serious action in this direction. See Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) *Fordham L. Rev.* 1521 [Franck, "Legitimacy Crisis"]; Charles N. Brower et al., "The Coming Crisis in the Global Adjudicative System" (2003) 19 *Arb. Int'l* 415; Jacques Werner, "Making Investment Arbitration More Certain: A Modest Proposal" (2003) 4 *The Journal of World Investment and Trade* 767.

10 For different treatments of this general proposition, see Celine Levesque, "Investor-State

Arbitration Under NAFTA Chapter 11: What Lies Beneath Jurisdictional Challenges" (2002) 17 ICSID Review -- FILJ 320 [Levesque]; Andrea K. Bjorklund, "Contract Without Privity: Sovereign Offer and Investor Acceptance" (2001) 2 Chicago J. Int'l L. 183 [Bjorklund]. Variations of this argument have also been advanced by several respondent host states in Investor-State proceedings, including *Amco v Indonesia*, *infra* note 195 and *Holiday Inns v Morocco*, *infra* note 206. For an impartial account of the different possible approaches to the interpretation of investment treaties, see Eduardo Savarese, "Investment Treaties and the Investor's Right to Arbitration -- Between Broadening and Limiting ICSID Jurisdiction" (2006) 7:3 Journal of World Investment & Trade 407 [Savarese].

11 Tarcisio Gazzini, "The Role of Customary International Law in the Field of Foreign Investment" (2007) 8 Journal of World Investment & Trade 691 [Gazzini] at 693, referring to the point made by M.A. Villiger in International Law Association, "Committee on the Formation of Customary (General) International Law, Final Report" (London, 2000), online: International Law Association <www.ila-hq.org/html/layout_committee.htm>.

12 See Annie Leeks, "The Relationship Between Bilateral Investment Treaty Arbitration and the Wider Corpus of International Law: The ICSID Approach" (2007) 65 U.T. Fac. L. Rev. 1 [Leeks].

13 See Cremades & Cairns, *supra* note 8 at 188.

14 In the words of Charles N. Brower II, "practically, to the extent that their long-term survival depends on the consent of states, systems for the adjudication of private claims against foreign states must, within the limits of principled decision-making, find ways to accommodate the rights, duties, and long-term interests of those states." See Charles H. Brower II, "Mitsubishi, Investor-State Arbitration, and the Law of State Immunity" (2004-2005) Am. U. Int'l L. Rev. 907 [Brower II, "Mitsubishi"] at 920.

15 Treaty for the Protection of Investment, West Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 23.

16 United Nations Conference on Trade and Development, "Recent Developments in International Investment Arbitration (2006 -- June 2007)" International Investment Agreements Monitor No.3 (2007), online: United Nations Conference on Trade and Development <www.unctad.org/en/docs/webiteiia20076_en.pdf> [IIA Monitor No.3 (2007)].

17 United Nations Conference on Trade and Development, "Latest Developments in Investor-State Dispute Settlement" International Investment Agreements Monitor No.1 (2008), online: United Nations Conference on Trade and Development <www.unctad.org/en/docs/iteiia20083_en.pdf> [IIA Monitor No.1 (2008)].

18 Besides taking place under the auspices of the ICSID, investment arbitration may also take

place under ICSID's Additional Facility Rules, or before such bodies as the Stockholm Chamber of Commerce, the International Chamber of Commerce, or before an ad hoc tribunal constituted under the arbitration rules of the United Nations Commission on International Trade Law.

19 The absence of this filtration process, by which home states "screened" which disputes they would choose to sponsor, has become noticeably absent within contemporary Investor-State arbitration. See Walde, "Umbrella Clauses", *infra* note 91 at 16. It has not, however, been completely abandoned. Article 11.16 of the Free Trade Agreement concluded by Australia and the United States requires that aggrieved investors secure the approval of their home governments before they acquire standing to bring an arbitration claim. See Susan D. Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law" (2007) 19 *Pacific McGeorge Global Business & Development Law Journal* 337 [Franck, "Rule of Law"] at 359-361.

20 For a detailed analysis of the trials and tribulations faced by an English company that attempted to enforce an arbitration clause concluded within the terms of a concession contract signed with the Soviet Union in the early part of the twentieth century, see V.V. Veeder, "The Lena Goldfields Arbitration: The Historical Roots of Three Ideas" (1998) 47 *I.C.L.Q.* 747.

21 Jan Paulsson, "Arbitration Without Privity" (1995) 10 *ICSID Review - FILJ* 232 [Paulsson, "Privity"].

22 The principle of sovereign immunity serves as a jurisdictional bar against private parties seeking to bring claims against sovereign states in municipal courts. The 'act of state doctrine' serves as a substantive bar against municipal courts ruling on the legality of actions taken by sovereign states even where jurisdiction is taken. See Paul B. Stephen et al., *International Business and Economics: Law and Policy* (3rd ed.) (New York: Matthew Bender & Co., 2004) at 187-213. See also Malcolm N. Shaw, *International Law* (5th e.) (Cambridge: Cambridge University Press, 2003) [Shaw] at 621-624.

23 Leeks, *supra* note 12 at 2.

24 Much of this was due to the Cold War which left western, capitalist states anxious of pursuing the cases of their nationals for fear of driving neutral or uncommitted states towards the Soviet Bloc, see Louis T. Wells & Rafiq Ahmed, *Making Foreign Investment Safe: Property Rights and National Sovereignty* (Oxford: Oxford University Press, 2007).

25 See ICSID Convention, *supra* note 7.

26 Cremades & Cairns, *supra* note 8 at 175.

27 The depoliticization of investment disputes is often hailed as the greatest achievement of

the ICSID system. See Ibrahim F.I. Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986) 1 ICSID Review -- Foreign Investment Law Journal 1.

28 Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* (The Hague: Kluwer Law International, 2004) at 8 [Reed].

29 ICSID arbitration is only available where both the host state and the home state of the investor have ratified the ICSID Convention and where arbitration before ICSID is made available by the relevant investment treaty. Where the treaty does not provide for ICSID arbitration, or where either the home state or host state has not yet ratified the ICSID Convention, arbitration using the ICSID Additional Facility Rules may be available. Alternatively, the investment treaty may provide for ad hoc arbitration under UNCITRAL's arbitrations rules or before an institution as the ICC. To date, ICSID arbitration has proved to be the most popular forum for the resolution of investment disputes. Through 2007, of the approximately 290 investment arbitration claims lodged by investors, 190 have taken place either before the ICSID or using the ICSID's Additional Facility Rules. See IIA Monitor No.1 (2008), *supra* note 17.

30 See Franziska Tschofen, "Multilateral Approaches to the Treatment of Foreign Investment" (1992) 7 ICSID Review -- FILJ 384 [Tschofen]; S.A. Aaronson, "International Investment Carousel" (2004) 18 *The International Economy* 56.

31 See Tschofen, *ibid.* For a discussion of multilateral approaches to investment in the context of international trade, see Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 3rd ed. (New York: Routledge, 2005).

32 Tschofen, *ibid.*

33 See Cremades & Cairns, *supra* note 8 at 180. See also Glen Kelly, "Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations" (2001) 39 *Colum. J. Transnat'l L.* 483.

34 Graham Mayeda, "Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral investment Treaties" (2007) 41 *J. World Trade* 273 at 291 [Mayeda, "Playing Fair"] argues that asymmetries in bargaining power "raise serious concerns about legitimacy and fairness." A similar asymmetry of will and influence has been identified in the negotiations leading to the inclusion of the Trade Related Investment Measures (TRIMs) in the WTO. See Amit M. Sachdeva, "International Investment: A Developing Country Perspective" (2007) 8 *Journal of World Investment & Trade* 533 at 537-538.

35 Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries" (1990) 24 *Int'l Law.* 655 at 661

[Salacuse, "BIT by BIT"].

36 Ibid.

37 Andrew Guzman, "Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Va. J. Int'l L. 639 at 666-667 [Guzman, "Why LDCs Sign"]. See also Z. Elkins, A. Guzman et al., "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" (2006) 60 International Organization 811. Different explanations of the proliferation of BITs over the last several decades have been given. The practice of 'institutional copying', whereby "governments repeat the actions of others in an effort to appear enlightened or receptive to modern international law trends," has been cited by some authors. See Franck, "Rule of Law", supra note 19 at 348 fn 61, referring to Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" (2005) 25 Int'l Rev. L. & Econ. 107 at 117. On the other hand, "learning theory" suggests that governments only follow their peers in signing BITs after observing positive results from earlier endeavours. See Zachary Elkins & Beth Simmons, "On Waves, Clusters and Diffusion: A Conceptual Framework (2005) 598 Annals American Academy of Political and Social Science 33 at 42-43.

38 Agreement Between the Government of Denmark and the Government of the Republic of Indonesia Concerning the Encouragement and the Reciprocal Protection of Investments, 30 January 1968, 720 U.N.T.S. 223 (No. 10352), online: United Nations Conference on Trade and Development <www.unctad.org/sections/dite/ia/docs/bits/denmark_indonesia.pdf> [Denmark -- Indonesia Bilateral Investment Treaty] .

39 Rudolf Dolzer & Margaret Stevens, *Bilateral Investment Treaties* (The Hague: Kluwer Law International, 1995) at 267-268 [Dolzer & Stevens]; Agreement Between the Federal Republic of Germany and the Republic of Togo Concerning the Encouragement of Capital Investments, 16 May 1961, online: United Nations Conference on Trade and Development <www.unctad.org/sections/dite/ia/docs/bits/germany_togo_gr_fr.pdf> [Germany -- Togo Bilateral Investment Treaty].

40 Salacuse, "BIT by BIT", supra note 35 at 657.

41 Ibid.

42 See Kenneth Vandeveld, "The Bilateral Investment Treaty Program of the United States" (1988) 21 Cornell Int'l L. J. 201; Pamela B. Gann, "The U.S. Bilateral Treaty Program" (1985) 21 Stan. J. Int'l L. 373.

43 See Chan An, "Should the Four Great Safeguards in Sino-Foreign BITs Be Hastily Dismantled? -- Comments on Provisions Concerning Dispute Settlement in Model U.S. and Canadian BITs" (2006) 7 Journal of World Investment & Trade 899. For a discussion of

Chinese domestic legislation dealing with foreign investment, see Shan Wenhua, "Towards a Level Playing field of Investment in China" (2002) 3 *Journal of World Investment & Trade* 327.

44 See generally Jeswald W. Salacuse, "From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World" (1999) 33 *The International Lawyer* 875 [Salacuse, "Changing Role"].

45 Salacuse, "BIT by BIT", supra note 35 at 659.

46 See *Banco de Cuba v Sabbatino*, 376 U.S. 398 (1964) [Sabbatino] for a thorough discussion by the United States Supreme Court on the diverging opinions on the customary law of expropriation, if any, held by different states in the late 1960s. See also *Barcelona Traction Company (Belgium v Spain)*, [1970] I.C.J. Rep. 3 at 46-47 for a discussion of the lack of consensus on whether shareholders in a corporation have standing to sue on their own behalf during roughly the same period.

47 Salacuse, "BIT by BIT", supra note 35 at 659.

48 Jeswald W. Salacuse, "The Treatification of International Investment Law: A Victory of Form over Life? A Crossroads Crossed?", online: (2006) 3:3 *Transnational Dispute Management* at 6-11 <www.transnational-dispute-management.com> [Salacuse, "Treatification"].

49 Kenneth J. Vandeveld, "The Economics of Bilateral Investment Treaties" (2000) 41 *Harv. Int'l L. J.* 469 at 470 [Vandeveld, "Economics"], referring to Kenneth J. Vandeveld, "Sustainable Liberalisation and the International Investment Regime" (1998) 19 *Michigan International Law Journal* 373 [Vandeveld, "Sustainable Liberalisation"]. See also J.A. Soloway, "NAFTA's Chapter 11: The Challenge of Private Party Participation" (1999) 16 *J. Int'l Arb.* 1 at 13 [Soloway], discussing how, for Mexico, Chapter 11 of the NAFTA provided a much needed market signal to foreign investors that the country was "open for business."

50 Vandeveld, "Economics", supra note 49 at 488.

51 See below for an analysis of the different empirical studies into the effectiveness of BITs in attracting FDI.

52 Dolzer & Stevens, supra note 39 at 58.

53 See Dolzer & Stevens, *ibid.*; Salacuse, "BIT by BIT", supra note 35.

54 Daniel M. Price, "Chapter 11 -- Private Party vs. Government, Investor-State dispute Settlement: Frankenstein or Safety Valve?" (2000) 26 *Can. -- U.S.L.J.* 107 at 108 [Price].

55 It is now well established that the international minimum standard is dynamic over time. See, for example, Mayeda, "Playing Fair", supra note 34; Ian A. Laird, "Betrayal, Shock and Outrage -- Recent Developments in NAFTA Article 1105" in Todd Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational Publishers, 2004) at 49 [Laird, "1105"].

56 See Salacuse, "Treatification", supra note 48 at 5, Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46 *Harv. Int'l L.J.* 67 at 70 [Salacuse & Sullivan]; Patrick Juillard, "L'Evolution des Sources du Droit des Investissements" (1994) 250 *Recueil des Cours de L'Academie de Droit International* 74; UNCTAD, "World Investment Report 2003: FDI Policies for Development: National and International Perspectives" U.N. Doc. UNCTAD/WIR/2003 (4 September 2003).

57 Salacuse & Sullivan, *ibid.* at 112, referring to F.A. Mann, "British Treaties for the Promotion and Protection of Investments" (1981) 52 *Brit. Y.B. Int'l L.* 241 at 249. See also Asoko de Z. Gunawardana, "The Inception and Growth of Bilateral Investment Promotion and Protection Treaties" (1992) 86 *American Society of International Law Proceedings* 544; David L. Robinson, "Expropriation in the Restatement (Revised)" (1984) 78 *A.J.I.L.* 176.

58 *Mondev International Limited v. United States* (11 October 2002), ARB(AF)/99/2 (NAFTA Chapter 11 Arbitration Tribunal), 42 *I.L.M.* 85 (2003) [Mondev]; *Pope & Talbot, Inc. v. Canada* (10 April 2001), Award on the Merits, Phase Two (NAFTA Chapter 11 Arbitration Tribunal), 7 *ICSID Reports* 102; *CMS Gas Transmission Company v. Argentina* (17 July 2003), Decision on Objections to Jurisdiction, ICSID Case No. ARB/01/8 (International Centre for Settlement of Investment Disputes) 7 *ICSID Reports* 494 at para. 48 [CMS Gas]. See also Salacuse & Sullivan, supra note 56 at 113-115.

59 *Mondev*, *ibid.* at para. 117.

60 Salacuse, "Treatification", supra note 48 at 16.

61 See Bernard Kishoiyian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law" (1994) 14 *Nw. J. Int'l L. & Bus.* 327.

62 Guzman, "Why LDCs Sign", supra note 37 at 639 at 643-644 and 684-687.

63 This point was specifically recognized by the tribunal in *United Parcel Service v. Canada*, UNCITRAL (NAFTA), Award on Jurisdiction, 22 November 2002 at para. 97, online: NAFTA Claims <naftaclaims.com/Disputes/Canada/UPS/UPSAwardOnJurisdiction.pdf>.

64 Critics in developed countries have become uncomfortable with the idea that BITs grant generous rights to foreign investors that are not available to their own nationals. Ironically,

this sentiment has not been widely acknowledged as indirect support for the 'Calvo Doctrine', a theory furiously opposed by many developed countries. See O.M. Garibaldi, "Carlos Calvos Redivivus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties", online: (2006) 3:5 *Transnational Dispute Management* <www.transnational-dispute-management.com> [Garibaldi], for an explanation of this phenomenon in the United States.

65 See Barton Legum, "Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions" (2004) 19 *ICSID Review -- FILJ* 344; James McIlroy, "Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back" (2004) 5 *Journal of World Investment & Trade* 621 [McIlroy, "Two Steps"]. See also Stephen Schwebel, "The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law" in Gerald Aksen and Robert Georg Briner, ed., *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (Paris: ICC Publishing, 2005) 815; Noah Rubins, "The Arbitral Innovations of Recent U.S. Free Trade Agreements: Two Steps Forward, One Step Back" (2003) 8 *I.B.L.J.* 865 [Rubins, "Two Steps"].

66 The US ratified the ICSID Convention in 1966. As such, once Canada deposits its instrument of ratification with the Centre, arbitration before ICSID tribunals will be available, but not mandatory, in disputes between Canadian investors and the United States, and vice-versa. As Mexico has yet to either sign or ratify the Washington Convention, arbitration before ICSID tribunals will remain unavailable in disputes involving a Mexican party.

67 Susan D. Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration" (2007) 86 *N.C.L. Rev.* 1 at 29 [Franck, "Empirically Evaluating"], stating that "investors making claims predominantly hail from developed states" and drawing particular attention to the large number of investors from the United States, Canada, Spain, France, the Netherlands and the United Kingdom making use of investment arbitration.

68 *Ibid.* at 33-35, where the author finds that available data "appears to support Professor Dodge's attributive hypothesis that [investment treaties] are 'reciprocal in theory but not in fact'." The author is referring to an earlier article in which Dodge argued that investment treaties are "reciprocal in theory but not in fact, for it is generally only the less developed country that bears the risk of being sued." See William S. Dodge, "Investor-State Dispute Settlement Between Developed Countries: Reflection on the Australia-United States Free Trade Agreement" (2006) 39 *Vand. J. Transnat'l L.* 1 at 3.

69 Salacuse, "Treatification", *supra* note 35 at 11. See also note 37, above.

70 Salacuse & Sullivan, *supra* note 56 at 111.

71 See Kevin P. Gallagher & Melissa B.L. Birch, "Do Investment Agreements Attract Investment? -- Evidence from Latin America" (2006) 7 *Journal of World Trade & Investment* 961; Eric Neumayer & Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" (2005) 33 *World Development* 1567; Mary Hallward-Driemeier, "Do Bilateral Investment Treaties Attract FDI? Only a Bit... and They Could Bite" (World Bank, Working Paper No. 3121, June 2003); Jason Webb Jackee, "Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm" (2005) 12 *U.C. Davis Journal of International Law & Policy* 195. But see also Salacuse & Sullivan, *supra* note 38, where the authors discovered a positive correlation between the ratification of U.S. BITs and increased FDI flows into the relevant counterparties. Franck cites investment arbitration is one factor among many considered by investors when deciding where to invest overseas. See Franck, "Rule of Law", *supra* note 19 at 340, 353-354.

72 Jennifer Tobin & Susan Rose-Ackerman, "When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties" (25 April 2007) (Working paper on file with the author) at 4 [Tobin & Rose-Ackerman].

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 Kenneth J. Vandeveld, "Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties" (1998) 36 *Colum. J. Transnat'l L.* 501.

77 Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance" (2005) 25 *Int'l Rev. L. & Econ.* 107. See also Salacuse & Sullivan, *supra* note 56 at 92 where they find that the economies of many developing countries that entered into BITs have experienced economic liberalization, but that "it is difficult to determine the precise role BITs have played in this liberalization process." But see also Franck, "Rule of Law", *supra* note 19 at 366 where the author argues that "investment treaty arbitration may actually benefit the rule of law, or at a minimum, does not affect a country's adherence to the rule of law."

78 Ronald J. Daniels, "Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in Developing Countries" (Draft 23 March 2004), online: Università degli Studi di Siena <www.unisi.it/lawandeconomics/stile2004/daniels.pdf>. See generally Thomas W. Waelde & James L. Gunderson, "Legislative Reform in Transition Economies: Western Transplants -- A Shortcut to Social Market Economy Status" (1994) 43 *I.C.L.Q.* 347.

79 Aaron Cosbey, "The Road to Hell? Investor Protections in NAFTA's Chapter 11" in Lyuba

Zarsky, ed., *International Investment for Sustainable Development* (Sterling, VA: Earthscan Publishers, 2005) at 151.

80 See generally Gus Van Harten, "Private Authority and Transnational Governance: The Contours of the International System of Investor State Protection" (2005) 12 *Review of International Political Economy* 600; Lyuba Zarsky, "From Regulatory Chill to Deepfreeze?" (2006) 6 *International Environmental Agreements* 395.

81 Charles H. Brower II is not surprised by this. "Despite their sterling qualifications," he explains, "which remain above question, and their professional disposition of individual cases, ad hoc tribunals share the institutional tendency of juries to produce clusters of decisions with a deficit of consistency and a surplus of arbitrary distinctions ... When combined with the discretion granted to tribunals, the growing volume of disputes, and their importance to ever broader consistencies, the use of ad hoc tribunals without coordinating mechanisms seems likely to provoke crisis." See C. Brower II, "Mitsubishi", *supra* note 14 at 921 and 923.

82 Two cases instituted against the Czech Republic in relation to the same investment dispute, one conducted before an ICSID Tribunal and the other before the Stockholm Chamber of Commerce, came to opposite conclusions in 2004. See Franck, "Legitimacy Crisis", *supra* note 9.

83 The tribunals in *SGS v Pakistan* and *SGS v Philippines* came to conflicting interpretations of the nature and effect of umbrella clauses. See Bjorn Kunoy, "Singing in the Rain: Developments in the Interpretation of Umbrella Clauses" (2006) 7 *Journal of World Investment and Trade* 275 [Kunoy].

84 The Lauder claims against the Czech Republic, mentioned in footnote 82 above, are again the most poignant example of this possibility under BITs.

85 No less than forty-three claims have been levied against Argentina in relation to the country's response to its financial crisis in 2001-2002, and its potential liability from these cases alone surpasses \$8 billion. This sum exceeds the Argentine government's entire 2002 financial reserves. The country also faces other investment claims not directly related to measures taken in response to the financial crisis. As a result, it has been speculated that "the total value of potential claims against Argentina could reach U.S. \$80 billion". See William W. Burke-White, "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System" (January 2008) Research Paper No.08-01, University of Pennsylvania Law School -- Institute for Law and Economics at 5 [Burke-White].

86 See Brower et al., *supra* note 9.

87 See Franck, "Legitimacy Crisis", *supra* note 9; C.N. Brower et al., *ibid.*

88 See Franck, *ibid.*

89 Additional complaints exist that are not listed here. For example, the acceptance of treaty shopping, whereby foreign companies incorporate their investments in a state purely to attract standing under its BITs with other host nations, is criticised as undermining the bilateral nature of BITs; see M. Sornarajah, "Lost Law", *supra* note 2 at 349, referring to *Tokio Tokeles v Ukraine* (2005), ICSID Case No. ARB/02/18, 20 ICSID Review -- FILJ 205, Decision on Jurisdiction, 29 April 2004 (International Centre for Settlement of Investment Disputes).

90 See *Emilio Agustin Maffezini v The Kingdom of Spain* (25 January 2000), Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/7 (International Centre for Settlement of Investment Disputes) 5 ICSID Reports 396 [Maffezini]; *Siemens A.G. v The Argentine Republic* (3 August 2004), Award on Jurisdiction, ICSID Case No ARB/02/8 (International Centre for Settlement of Investment Disputes) 44 I.L.M. 138 [Siemens]; *Gas Natural v The Argentine Republic* (17 June 2005), Decision on Jurisdiction, ICSID Case No. ARB/03/10 (International Centre for Settlement of Investment Disputes) [Gas Natural]. For commentary on these cases see Locknie Hsu, "MFN and Dispute Settlement: When the Twain Meet" (2006) 7 *Journal of World Investment and Trade* 25 [Hsu]; Okezie Chukwumerije, "Interpreting Most-Favoured Nation Clauses in Investment Treaty Arbitration" (2007) 8 *Journal of World Investment & Trade* 509; Dana H. Freyer & David Herlihy, "Most-Favoured-Nation Treatment and Dispute Resolution in Investment Arbitration: Just How 'Favoured' is 'Most-Favoured'?" (2005) 20 ICSID Review -- FILJ 58 [Freyer & Herlihy].

91 Thomas W. Walde, "The 'Umbrella' (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases", online: (2004) 1:4 *Transnational Dispute Management* <www.transnational-dispute-management.com> [Walde, "Umbrella Clauses"]. For a contrary opinion see John P. Gaffney & James L. Loftis, "The Effective and Ordinary Meaning of BITS and the Jurisdiction of Treaty-Based Tribunals to Contract Disputes" (2007) 8 *Journal of World Investment & Trade* 5 [Gaffney & Loftis]. Closely linked to the controversy surrounding umbrella clauses is that surrounding broadly drafted Disputes Resolution Clauses (DRCs) in investment treaties. While both 'umbrella clauses' and DRC clauses are capable of bringing ordinary contractual disputes before investment tribunals, they raise distinct issues and only the former will be dealt with in this thesis. For a discussion of DRCs and their attendant controversies, see Gaffney & Loftis.

92 For a number of investment arbitrations in which the respondent host state has sought to rely on forum selection clauses as *de facto* waivers by investors of their right to pursue arbitration, see Ole Spiermann, "Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties" (2004) 20 *Arb. Int'l* 179 [Spiermann].

See also Christoph Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration" (2005) *The Law and Practice of International Courts and Tribunals* 1 [Schreuer, "Calvo's Grandchildren"].

93 Mayeda, "Playing Fair", *supra* note 34 at 275 and 288. See also Thomas J. Wesscott, "Recent Practice on Fair and Equitable Treatment" (2007) 8 *Journal of World Investment & Trade* 409.

94 See Ursula Kreibbaum, "Regulatory Takings: Balancing the Interests of the Investor and the State" (2007) 8 *Journal of World Investment & Trade* 717.

95 See Jan Paulsson, *The Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) at 228-262; G. Van Harten & M. Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 *E.J.I.L.* 121 at 147-148 [Van Harten & Loughlin]; M. Sornarajah, "Power and Justice in Foreign Investment Arbitration" (1997) 14 *J. Int'l Arb.* 103 at 117. See also Alan S. Rau, "Integrity in Private Judging" (1997) 38 *S. Tex. L. Rev.* 455 at 488 and 521. See generally Hong-Lin Yu & Lawrence Shore, "Independence, Impartiality, and Immunity of Arbitrators -- U.S. and English Perspectives" (2003) 52 *I.C.L.Q.* 935.

96 Sornarajah, "Lost Law", *supra* note 2 at 341.

97 *Ibid.* at 348; Howard Mann, "From a Law of Greed to a Law for Need: the underlying importance of professor Sornarajah's paper" (2006) 6 *International Environmental Agreements* 359 at 360; Jacques Werner, "The Global Arbitrators" (2007) 8 *Journal of World Investment and Trade* 745 at 748-750 [Werner]; Thomas Walde, "Investment Arbitration and Sustainable Development: Good Intentions or Effective Results?" (2006) 6 *International Environmental Agreements* 459 at 462.

98 Brower II, "Mitsubishi", *supra* note 14 at 907-910, referring to number of prominent critics of arbitration, including the dissent of Supreme Court Justice John Paul Stevens in *Mitsubishi Motors Corp. v Soler Chrysler-Plymoth, Inc.*, 473 U.S. 614.

99 A.F.M. Maniruzzaman, "The International Law of Foreign Investment in the Age of Globalization: from Panic to Panacea" (2006) 6 *International Environmental Agreements* 365 at 365 [Maniruzzaman]. See also Philippe Sands, *Lawless World: Making and Breaking Global Rules* (New York, NY: Viking, 2005).

100 Maniruzzaman, *ibid.* at 365.

101 Savarese, *supra* note 10.

102 *Ibid.* at 420-421.

103 Ibid.

104 Ibid.

105 For a thorough cost/benefit analysis of the adoption of bilateral investment treaties over other methods of regulating foreign investment, see Vandeveld, "Economics", supra note 49.

106 See generally Paulsson, "Privity", supra note 21 at 257; Cremades & Cairns, supra note 8 at 188.

107 See <www.worldbank.org/icsid/>. In justifying its denunciation of the ICSID Convention, Bolivia cited "ICSID's alleged bias towards corporations, the lack of substantive appeals mechanism for arbitration rulings, and the confidentiality of arbitration hearings charged with resolving matters of public interest." See Fernando Cabrera Diaz, "Bolivia Expounds on Reasons for Withdrawing from ICSID Arbitration System", Investment Treaty News (27 May 2007), online: International Institute for Sustainable Development <www.iisd.org/pdf/2007/itn_may27_2007.pdf>.

108 See Investment Treaty News, a regular publication of the International Institute for Sustainable development (IISD), available at <www.iisd.org/investment/itn/>. Neither does Ecuador intend to renew certain BITs once they have expired. See "Ecuador Says Won't Extend U.S. Investment Treaty" Reuters (6 May 2007), online: Reuters <www.reuters.com/article/politicsNews/idUSN0626423520070507>.

109 See <www.worldbank.org/icsid/>.

110 Bernardo M. Cremades, "Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues" (2004) 59 Disp. Resol. J. 78 at 81 [Cremades, "Calvo"]. Note, however, that such requirements could only be prospective in nature and would only be available in future treaties. They could not affect obligations assumed by Argentina in treaties already ratified by the country.

111 Cremades, "Calvo", *ibid.* at 81 and 83.

112 See Garibaldi, supra note 64; Schreuer, "Calvo's Grandchildren", supra note 92; Cremades, "Calvo", *ibid.*

113 See Carlos G. Garcia, "All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration" (2004) Fla. J. Int'l L. 338.

114 See Schreuer, "Calvo's Grandchildren", supra note 92. See also B.M. Cremades, "Calvo", supra note 110.

115 The majority of the investment arbitrations instituted against Argentina arose as a result

of drastic regulatory measures adopted by the country in response to its 2001 financial crisis. See Burke-White, *supra* note 85.

116 Christoph Schreuer, "Introduction -- International Investment Law in Context" in August Reinisch & Christina Knahr (eds.) *International Investment Law in Context* (Utrecht, The Netherlands: Eleven International Publishing, 2007) 3 at 5.

117 Once a State exercises its right to terminate a BIT, termination most often goes in affect one year later. See, for example, Article XVII(2) of the Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, 1 July 1996, online: UNCTAD <www.unctad.org/sections/dite/ia/docs/bits/canada_venezuela.pdf> ["Canada -- Venezuela bilateral investment treaty"].

118 As described by Hazel Fox, "There is not today and never has been any general method of compulsory adjudication at the international level. A state which makes the undertaking to enter into arbitration knows that nothing but good faith and the general principle, *pacta sunt servanda*, holds it to the arbitration. There is generally no external authority which can make an order compelling the State to submit to the arbitration." See Hazel Fox, "States and Undertakings to Arbitrate" (1988) 37 *I.C.L.Q.* 1 at 4.

119 Burke-White -- Legitimacy, *supra* note 85 at 29, referring to *CMS Gas Transmission Co. v Argentine Republic* (25 September 2007) Decision of the ad hoc committee on the Application for Annulment, ICSID Case No. ARB/01/08 (International Centre for Settlement of Investment Disputes), online: International Centre for Settlement of Investment Disputes <icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>.

120 Burke-White, *ibid.* at 26 and 30.

121 Sornarajah, "Lost Law", *supra* note 2 at 342.

122 Levesque, *supra* note 10 at 322; Price, *supra* note 54 at 112; C.N. Brower & L.A. Steven, "Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11" (2001) 2 *Chicago J. Int'l L.* 193 [Brower & Steven]; Soloway, *supra* note 49 at 4. See also Jose Luis Siqueiros, "Bilateral Investment Treaties on the Reciprocal Protection of Foreign investment" (1994) 24 *Cal. W. Int'l L.J.* 255; Rubins, "Two Steps", *supra* note 65.

123 Soloway, *ibid.* at 4, referring to E.M. Graham, "Regulatory Takings, Supernational Treatment and the Multilateral Agreement on Investment: Issues Raised by Non-Governmental Organizations" (1998) 31 *Cornell Int'l L.J.* 599.

124 Soloway, *ibid.*

125 The primacy of the text in deciding investment disputes is enshrined in Article 31 of the Vienna Convention on the Law of Treaties. Article 31 provides that tribunals must first seek to interpret investment provisions by their ordinary meaning in light of the object and purpose of the agreements.

126 See footnote 90, *supra*.

127 Maffezini, *supra* note 90.

128 Hsu, *supra* note 90 at 27.

129 *Ibid.* at 28.

130 Siemens, *supra* note 90.

131 CMS Gas, *supra* note 58.

132 See, for example, *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan* (29 November 2004) Decision on Jurisdiction, ICSID Case No. ARB/02/13 (International Centre for Settlement of Investment Disputes) 44 I.L.M. 569 at para. 126.

133 Treaty Between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, 28 May 1992 (entered into force 15 January 1994), online: SICE Foreign Trade Information System <www.sice.oas.org/Investment/BITSbyCountry/BITS/US_Romania.pdf> at Article II(2)(c) [US-Romania Bilateral Investment Treaty].

134 See, for example, *Noble Ventures Inc. v Romania* (12 October 2005) Award, ICSID Case No. ARB/01/11 (International Centre for Settlement of Investment Disputes), online: Investment Treaty Arbitration, University of Victoria <ita.law.uvic.ca/documents/Noble.pdf> at para. 52 [Noble].

135 See *SGS Societe General de Surveillance SA v Pakistan*, (6 August 2003) Decision on Jurisdiction, ICSID Case No. ARB/01/13 (International Centre for Settlement of Investment Disputes) 18 ICSID Review -- FILJ 307 at paras. 97 and 166 [SGS v Pakistan].

136 See Kunoy, *supra* note 83 at 288-293.

137 *Ibid.* at 291-293.

138 Spiermann, *supra* note 92 at 186. See generally Andrea Schulz, "Exclusive Choice of Court Agreements and Arbitration" (Paper prepared for the Hague Conference on Private International Law, June 2005), online: Hague Conference on Private International Law

<www.hcch.net/upload/wop/jdgm_pd32e.pdf>.

139 See, for example, Venezuela's 2001 Hydrocarbons Law which calls for the following clause to be incorporated in future public-private energy contracts: "Any doubts and controversies of any nature that may arise from the agreement and that may not be amicably settled between the parties, including arbitration in cases permitted by the law on the matter, shall be settled by competent courts of the Republic of Venezuela pursuant to its laws, and may not give rise to any foreign claims for any reasons whatsoever." For a discussion of the history and origins of such clauses, referred to generally as 'Calvo Clauses' after the 19th Century Argentine diplomat, see Garibaldi, *supra* note 64.

140 Because a specific investment contract with the host state or state-entity is required, this issue cannot arise where no specific agreement concerning the investment in question has been reached between an investor and a host state.

141 See CAA and Vivendi Universal (CGE) v The Argentine Republic, Annulment Decision of 3 July 2002, (2002) 41 I.L.M. 1135; Salini Construction and Italstrade v Morocco, Decision of 23 July 2001, (2003) 42 I.L.M. 609; SGS v Pakistan, *supra* note 135.

142 See Spiermann, *supra* note 92.

143 *Ibid.*

144 See Campbell McLachlan et. al., *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 4.110-4.112 [McLachlan, *Substantive Principles*]. See also SGS v Philippines (Jurisdiction) 8 ICSID Reports 515 [SGS v Philippines]; Gaffney & Loftis, *supra* note 91 at 28-30.

145 Spiermann argues that such waiver is possible, *supra* note 92 at 207-210.

146 See, for example, Plama Consortium Ltd v Republic of Bulgaria, ICSID Case No. ARB/03/24 (8 February 2005), 20 ICSID Review -- FILJ 262 (International Centre for Settlement of Investment Disputes) at para. 223 [Plama]; Maffezini, *supra* note 90 at 52.

147 Hsu, *supra* note 90 at 35-36. Hsu mentions the use of the floating footnote which expressly explains whether a MFN clause is intended to include or exclude dispute resolution procedures before "disappearing from the final treaty text and receding into the travaux préparatoires of the treaty for future reference."

148 For example, Article 10(1) of the Energy Charter Treaty specifically excludes normal contractual claims from the jurisdiction of ECT investment tribunals. See Energy Charter Treaty, (17 December 1994), 34 I.L.M. 360.

149 See Spiermann, *supra* note 92.

150 Brower II makes the argument that more detailed drafting of substantive provisions in investment treaties may not necessarily be in the best interests of respondent states. Rather, he argues that the optimal solution may be to grant wider discretion to tribunals with an accompanying obligation to give the benefit of the doubt to states in close cases. See Brower II, "Mitsubishi", supra note 14 at 917-918.

151 See McIlroy, "Two Steps", supra note 65 at 644.

152 Hsu -- MFN, supra note 90 at 29.

153 Ibid.

154 See Gilles Cuniberti, "Parallel Litigation and Foreign Investment Dispute Settlement" (2006) 21 ICSID Review -- FILJ 381. See also C. McLachlan, *Substantive Principles*, supra note 144 at Chapter 4.

155 As mentioned, most BITs were signed for durations of ten to fifteen to twenty years, after which they would either cease or extend indefinitely until terminated by a party. However, standard terms of termination provide that termination only becomes effective a year from the date the declaration of termination takes place. Furthermore, most BITs provide that investments made previous to termination will still enjoy protection throughout their lifetime. This could make older BITs applicable for years if not decades after they have ceased to apply to new transactions.

156 Savarese, supra note 10 at 418.

157 Spiermann, supra note 92 at 185; Rainer H. von Hoffman, ed., *Non-State Actors as New Subjects of International Law: Proceedings of an International Symposium of the Kiel Walther-Schücking-Institute of International Law* (Berlin: Duncker & Humblot, 1999); Asher Alkoby, "Non-State Actors and the Legitimacy of International Environmental Law" (2003) 3 *Non-State Actors and International Law* 23; Georges R. Delaume, "Le CIRDI et l'immunité des Etats" (1983) *Rev. arb.* 143 and Georges R. Delaume, "ICSID Arbitration and the Courts" (1983) 77 *A.J.I.L.* 784.

158 See Jose E. Alvarez, "The Ripples of NAFTA" in Todd Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational Publishers, 2004) at xxvii; Elihu Lauterpacht, "International Law and Private Foreign Investment" (1997) 4 *Ind. J. Global Legal Stud.* 259. For a criticism of the comparison of investor rights under BITs and human rights, see Stephen J. Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge: Cambridge University Press, 1990) at 251.

159 Alvarez, *ibid.* at xxx. Some commentators argue that certain investment guarantees,

"such as the right not to be discriminated against on the basis of nationality and the right to compensation when personal property is seized by the state," have human rights antecedents.

160 Van Harten & Loughlin, *supra* note 95. See also Kingsbury, Kirsch & Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law & Contemp. Probs.* 15.

161 Van Harten & Loughlin, *ibid.* at 144-148, referring to Cremades & Cairns, *supra* note 8.

162 Van Harten & Loughlin, *ibid.* at 147.

163 *Ibid.*

164 Toope -- Mixed Arbitration, *supra* note 158 at 251.

165 Levesque, *supra* note 10 at 358-359. To paraphrase Pierre Lalive, State submission to investment arbitration is an "exercise" of sovereignty, not an "alienation" of it; Pierre Lalive, "The First 'World Bank' Arbitration (Holiday Inns v Morocco) -- Some Legal Problems" (1980) 51 *Brit. Y.B. Int'l L.* 123 at 158. See also W. Michael Tupman, "Case Studies in the Jurisdiction of the International Centre for the Settlement of Investment Disputes" (1986) 35 *I.C.L.Q.* 813; Price, *supra* note 54 at 113.

166 Others are less quick to decree state sovereignty as sacrosanct. See, for example, Louis Henkin, "The Mythology of Sovereignty" (March 1993) *American Society of International Law Newsletter* 1, online: *American Society of International Law* <www.asil.org/asilnewsletter.cfm> (available only to subscribers).

167 As described by Hazel Fox, "there is not today and never has been any general method of compulsory adjudication at the international level. A state which makes the undertaking to enter into arbitration knows that nothing but good faith and the general principle, *pacta sunt servanda*, holds it to the arbitration. There is generally no external authority which can make an order compelling the State to submit to the arbitration." See Fox, *supra* note 118 at 7.

168 See Ibrahim F.I Shihata, *The Power of the International Court to Determine its Own Jurisdiction: Competence de la Competence* (The Hague: Martinus Nijhoff Publishers, 1965) at 204, discussing the jurisdiction of the International Court of Justice. See Sabbatino, *supra* note 46. See also Shabtai Rosenne, *The World Court: What Is It and How It Works*, 5th ed. (London: Martin Nijhoff Publishers, 1995).

169 As described by J.C. Thomas, "Investor-State Arbitration under NAFTA Chapter 11" (1999) 37 *Can. Y.B. Int'l L.* 99 at 112 [Thomas], "a cornerstone of the law of arbitration is the requirement that the parties consent to the arbitration of their differences" and this is no less the case in regards to the jurisdiction of ICSID. Consent by state parties is expressly required by ICSID Convention Article 25, and has been described as the "cornerstone of the

jurisdiction of the centre"; see Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (1965) 1 ICSID Reports 23.

170 Paulsson, "Privity", supra note 21 at 232. See also Levesque, supra note 10 at 322.

171 Paulsson, "Privity", ibid. at 232.

172 Rubins, "Two Steps", supra note 65 at 873.

173 States, supra note 118 at 4. Because private parties choose arbitration as an escape from litigation while states are rarely bound to any effective third party adjudication, Fox explains that consent to arbitration is more of a sacrifice for a state than it is for a private party.

174 See Gus van Harten, "Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?" (2005) 21 Arb. Int'l 493 at 500.

175 Bjorklund suggests that the interpretation of state consent to arbitration should involve consideration of "the historic reluctance of states to waive sovereign immunity." See Bjorklund, supra note 10 at 184.

176 See Paulsson, "Privity", supra note 21.

177 For an example of this occurring in the context of NAFTA Chapter 11, see Ethyl Corporation v The Government of Canada, Decision on Jurisdiction, 24 June 1998, (1998) 38 I.L.M. 708; Pope & Talbot, Inc. v Canada, Award in Relation to Preliminary Motion by Government of Canada to strike paragraph 34 and 103 of the Statement of Claim from the Record (the Harmac Motion), 24 February 2000, at para 16. See Levesque, supra note 10; David R. Haigh, Q.C., "Chapter 11 -- Private Party vs. Governments, Investor-State Dispute Settlement: Frankenstein or Safety Valve?" (2000) 26 Can. -- U.S.L.J. 115 at 120-125 [Haigh].

178 Savarese, supra note 10 at 408.

179 Paulsson, "Privity", supra note 21 at 256. See Shihata, supra note 27.

180 Asian Agricultural Products Limited v Republic of Sri Lanka, Case No. Arb/87/3, Award of 27 June 1990, 4 ICSID Reports 246 (International Centre for Settlement of Investment Disputes).

181 Hsu, supra note 90 at 27.

182 Maffezini, supra note 90 at para. 62.

183 Siemans, *supra* note 90 at para. 106.

184 See generally Omar E. Garcia-Bolivar, "The Teleology of International Investment Agreements -- The role of Purpose in the Interpretation of International Investment Agreements" (2005) 6 *Journal of World Investment & Trade* 751 [Garcia-Bolivar]; Sir G.G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 *Brit. Y.B. Int'l L.* 1 [Fitzmaurice].

185 Hsu, *supra* note 90 at 29. See, for example, *Gas Natural*, *supra* note 90.

186 *Plama*, *supra* note 146.

187 Hsu, *supra* note 90 at 32, referring to *Plama*, *supra* note 146 at para. 198.

188 Note that, while many commentators agree with the result reached in *Plama v Bulgaria*, the reasoning of the tribunal has been criticized as being slightly heavy-handed. See Hsu, *supra* note 90 at 34.

189 *Plama*, *supra* note 146 at paras. 207 and 209.

190 See Hsu, *supra* note 90 at 32.

191 *Plama*, *supra* note 146 at para. 198.

192 *Ibid.*

193 For example, Celine Levesque argues that NAFTA Chapter Eleven does more than most bilateral investment treaties to balance investor and state interests. See Levesque, *supra* note 10 at 360-362.

194 Note that a state-centered approach must consider the interests of the home state as well as the host state.

195 See the decision of the tribunal in *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 *ICSID Reports* 393 at 395 (International Centre for Settlement of Investment Disputes) [*Amco v Indonesia*]. Note that the principle of *pacta sunt servanda* is also enshrined in Article 26 of the ICSID Convention.

196 The Vienna Convention on the Law of Treaties (Signed at Vienna 23 May 1969), 1155 *U.N.T.S.* 331, 8 *I.L.M.* 679 (entry into force 27 January 1980) at Article 31 [VCLT].

197 The VCLT applies to treaties ratified by participating states after its entry into force. However, even when these conditions are not met, the scriptures of the VCLT must nonetheless be closely followed as it is considered a codification of the relevant customary

international law on the interpretation of treaties.

198 Note other possible interpretive approaches, including the teleological approach. See Fitzmaurice, *supra* note 184; Garcia-Bolivar, *supra* note 184.

199 See Levesque, *supra* note 10 at 338-339.

200 See C. McLachlan, "The Principle of Systemic Integration and Article 31(c) of the Vienna Convention" (2005) 54 I.C.L.Q. 279 [McLachlan, "Systemic Integration"].

201 Brower II, "Mitsubishi", *supra* note 14 at 918.

202 "Procedurally," Brower II explains, "equal treatment of the parties does not -- and cannot -- apply to the burden of proof." See Brower II, *ibid.* See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1987) at 305-306 and 327; J.L. Simpson & Hazel Fox, *International Arbitration* (London: Stevens & Sons., 1959) at 194-195, 197; Jackson H. Ralston, *International Arbitration from Athens to Locarno* (Palo Alto, CA: Stanford University Press, 1929) at 80; Toope, *supra* note 158 at 262 and 390-391.

203 Brower II, "Mitsubishi", *supra* note 14 at 919, referring to Toope, *ibid.* at 262.

204 See Peter T. Muchlinski, "'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard" (2006) 55 I.C.L.Q. 527; L. Yves Fortier & Stephen L. Drymer, "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor" (2005) 13 Asia Pac. L. Rev. 79.

205 Brower II, "Mitsubishi", *supra* note 14 at 919, referring to L. Yves Fortier, *Caveat Investor: The Meaning of 'Expropriation' and the Protection Afforded Investors Under NAFTA* News From ICSID, Summer 2003 at 1 and 13.

206 Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) at Article 25 at para. 378 [Schreuer, ICSID], referring to Pierre Lalive, "The First 'World Bank' Arbitration (Holiday Inns v Morocco) -- Some Legal Problems" (1980) 51 Brit. Y.B. Int'l L. 123; *Holiday Inns v Morocco*, ICSID Case No. ARB/72/1 (Settlement agreed by the parties and proceeding discontinued at their request) [*Holiday Inns v Morocco*]; *Amco v Indonesia*, *supra* note 195 at 398-400.

207 See *Amco v Indonesia*, *ibid.* at 394.

208 *Ibid.*

209 *SOABI v Senegal*, Award, 25 February 1988, 2 ICSID Reports 205 at 205-206.

210 See Hersch Lauterpact, "Restrictive Interpretation and the Principle of the Effectiveness in the Interpretation of Treaties" (1949) 26 Brit. Y.B. Int'l L. 48 at 52, where the author states: "The view which is gaining increasing acceptance seems to be that some of the current rules of construction of treaties... instead of aiding what has been regarded as the principle aim of interpretation, namely, the discovery of the intention of the parties, may end up by impeding that purpose." See also the opinion of the International Court of Justice in its 1950 Advisory Opinion in Competence of the General Assembly For The Admission Of A State To The United Nations, [1950] I.C.J. Rep. 4 at 8 where it declares "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter."

211 Gaffney & Loftis, *supra* note 91 at 8.

212 *Ibid.*

213 Schreuer, ICSID, *supra* note 206 at Article 25 at para. 381.

214 Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 131 at 143.

215 See Barton Legum, "Defining Investment and Investor: Who is Entitled to Claim?" (2006) 22 Arb. Int'l 521.

216 See McLachlan, Substantive Principles, *supra* note 144 at Chapter 5.

217 See Plama, *supra* note 146 at 184.

218 Freyer & Herlihy, *supra* note 90 at 77, referring to Plama, *ibid.* at para. 203.

219 Freyer & Herlihy, *ibid.* at 83, referring to Plama, *supra* note 146 at para. 223.

220 See Siemens, *supra* note 90 at para. 105.

221 As discussed by Locknie Hsu, this will not necessarily require that the MFN provision in the immediate treaty explicitly state that it incorporates dispute resolution contained in other treaties as was put forth in Plama, *supra* note 146 at para. 223. See Hsu, *supra* note 90 at 33-34. See also Freyer & Herlihy, *supra* note 90 at 77 and 83.

222 Freyer & Herlihy, *ibid.* at 82.

223 This exercise should also include consideration of the doctrine of *lex specialis derogat legi generali*, which holds that where two applicable laws conflict, the more specific of the

two takes precedence over the more general of the two. Generally speaking, this doctrine supports the notion that a general MFN clause should not override specific dispute resolution clauses contained in the same treaty.

224 Walde, "Umbrella Clause", supra note 91 at 16.

225 McLachlan, "Substantive Principles", supra note 144 at 4.41, referring to Walde, "Umbrella Clause", supra note 91.

226 *Impregilo SpA v. Islamic Republic of Pakistan (Jurisdiction)* ICSID Case No ARB/03/3, 12 ICSID Reports 242 (2005) at para. 260 (International Centre for Settlement of Investment Disputes). See also *Joy Mining Machinery Ltd v Arab Republic of Egypt (Jurisdiction)* (2004) 19 ICSID Review -- FILJ 486 (International Centre for Settlement of Investment Disputes). As Thomas Walde further explains, evidence suggests that "the framers of the original 'pacta sunt servanda' clause assumed as evident that the state conduct targeted by the clause had to be qualified as governmental. The idea that any commercial contract concluded by state entities in their 'fisc', i.e. private-law role, did not occur to them -- and was therefore not debated. There is no evidence that the fathers of this clause ever intended to create a treaty-based forum for adjudicating all contractual disputes between state entities and foreigners." See Walde, "Umbrella Clause", supra note 91 at 36.

227 Walde, "Umbrella Clause", *ibid.* at 16-17.

228 *Ibid.* at 18 and 21.

229 Gaffney & Loftis, supra note 91 at 12.

230 For a discussion of the overlap between jurisdictional and substantive issues in the context of deciding whether an "investment" has been made, see Yves G.L. Wolters, "The Meaning of "Investment" in Treaty Disputes: Substantive or Jurisdictional? -- Lessons from *Nagel v Czech Republic* and *S.D. Myers v Canada*" (2007) 8 *Journal of World Investment & Trade* 175.

231 See Srilal M. Perera, "State Responsibility -- Ascertainning the Liability of States in Foreign Investment Disputes" (2005) 6 *Journal of World Investment & Trade* 499; Nick Gallus, "State Enterprises as Organs of the State and BIT Claims" (2006) 7 *Journal of World Investment & Trade* 761; Priscilla M.F. Leung & Guigio Wang, "State Contracts in a Globalized World" (2006) 7 *Journal of World Investment & Trade* 829.

232 To the knowledge of the author.

233 *Aguas del Tunari S.A. v. The Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on the Respondent's Objection to Jurisdiction, 21 October 2005, 20 ICSID Review -- FILJ

450 (International Centre for Settlement of Investment Disputes) [Aguas del Tunari].

234 SGS v Philippines, supra note 144.

235 Aguas del Tunari, supra note 233 at paras. 111-119. See Spiermann, supra note 92 at 208-210 for a discussion of the specific elements such a clause would have to include.

236 SGS v Philippines, supra note 144 at para. 154. Interestingly, the tribunal also argued that, if a party is looking to claim under a contract, that party must comply with the contract in doing so. This argument would seem to support the notion that, if an investor has contractually waived its right of access to a BIT, it must honour that waiver when seeking to claim on the contract.

237 Todd Weiler & Thomas Walde, "Investment Arbitration Under the Energy Charter Treaty in Light of the New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation", online: (2004) 1:1 Transnational Dispute Management <www.transnational-dispute-management.com> [Weiler & Walde]. See also Spiermann, supra note 92 at 180.

238 Weiler & Walde, *ibid.* See also Spiermann, supra note 92 at 208.

239 Weiler & Walde, *ibid.*

240 *Ibid.*

241 *Ibid.*

242 Spiermann, supra note 92 at 208.

243 Aguas del Tunari, supra note 233 at 111-119. Note that the requirement that the parties to the waiver be the same as the parties to the dispute will raise significant barriers in certain situations. This is because concession contracts are often signed between investors and either sub-state entities or state enterprises rather than with the state itself. However, the state must be a party to the waiver if it is to be effective as it will be the state, rather than the sub-state entity or state enterprise, which will be the respondent in any subsequent investment arbitration. See also Gaffney & Loftis, supra note 91 at 28-30; Spiermann, supra note 92 at 207-210.

244 Spiermann, *ibid.* at 208 where the author decides that "relying on a forum or arbitration clause is not normally a breach of the bilateral investment treaty on the part of the host state."

245 Critics of this proposition would argue that where a state retracted any offer of arbitration advanced under a BIT it would in fact be in breach of its treaty obligations. However, this is likely to depend on the wording and terms of the specific BIT in question. Furthermore, any

breach by a state of its treaty obligations would not necessarily render the retraction of its consent ineffective. Rather, it may instead give rise to a cause of action in favour of the investor's home state under international law.

246 Whether or not a tribunal would accept such a reversal in the investor's position would depend on the arguments canvassed above.

247 Schreuer, ICSID, *supra* note 206 at Article 52 at paras. 135-136 and 147. Stated differently, it is acknowledged that "a decision on the merits by a tribunal that lacks competence is the most obvious example of an excess of powers." As described by Schreuer, "an arbitral tribunal derives its power from the parties' agreement. The agreement to arbitrate constitutes both the basis and the outer limit of the tribunal's power." See *Klockner v Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports 95 at 98 (International Centre for Settlement of Investment Disputes). [Klockner].

248 Schreuer, *ibid.* Article 52 at para. 138. See the reasoning of the tribunal in *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID Reports 85 at 85-87 [MINE].

249 Schreuer, *ibid.* at Article 52 at para. 3, stating that "[a]rticle 52 constitutes a limited exception to the principle of the finality of awards as embodied in Article 53." See also Ross P. Buckley, "Now we have come to the ICSID Party: Are its Awards Final and Enforceable?" (1992) 14 *Sydney Law Review* 358 at 362.

250 Schreuer, *ibid.* at Article 52 at para. 137. See, for example, the reasoning of the Annulment Committee in *Klockner*, *supra* note 247 at 171.

251 Schreuer, *ibid.* at Article 52 at para. 143.

252 Schreuer, *ibid.* at Article 52 at para. 143. See also D. Thompson, "The *Klockner v Cameroon Appeal*" (1986) 3 *J. Int'l Arb.* 27. See also A. Broches, "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction" (1966) 5 *Colum. J. Transnat'l L.* 263; David D. Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal" (1992) 7 *ICSID Review -- FILJ* 21. See Pinsolle, *infra* note 253 at 616.

253 Philippe Pinsolle, "Jurisdictional Review of ICSID Awards" (2004) 5 *Journal of World Investment & Trade* 613 at 620 [Pinsolle], referring to Christoph Schreuer who states that, in the context of jurisdiction, the proper wording of Article 52 might include "absence of powers."

254 Note that positive decisions on jurisdiction made by a tribunal can only be challenged under Article 52 once the tribunal has rendered an award rather than immediately after a tribunal has decided to accept jurisdiction. This is in contrast with a decision to refuse

jurisdiction, which can be challenged immediately. This is a peculiarity of the ICSID system, and one that has been strongly criticised; see Pinsolle, *ibid.* at 614-616. Note also that there is some debate on the adequacy of Article 52 for challenging jurisdictional review; see Pinsolle *ibid.* at 618. Note also that annulled awards may be resubmitted to arbitration pursuant to Article 52(6).

255 Pinsolle, *ibid.* at 617.

256 Schreuer, ICSID, *supra* note 206 at Article 52 para. 3. See also Caron, *supra* note 252 at 49; Mark B. Feldman, "The Annulment Proceedings and the Finality of ICSID Arbitral Awards" (1987) 2 ICSID Review -- FILJ 85; Jan Paulsson, "ICSID's Achievements and Prospects" (1991) 6 ICSID Review -- FILJ 380 at 386; W. Michael Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" (1989) Duke L.J. 739 at 740; G.R. Delaume, "The Finality of Arbitration Involving States: Recent Developments" (1989) 5 Arb. Int'l 21.

257 MINE, *supra* note 248 at 4.11-4.12.

258 Pinsolle, *supra* note 253 at 617.

259 As discussed, BITs frequently provide a range of choices to investors in terms of arbitral forums. Where both signatories have ratified the ICSID Convention this choice is normally listed first. The investor is usually also given the choice to institute *ad hoc* proceedings under the UNCITRAL Model Law or before a well know arbitral institution such as the International Chamber of Commerce in Paris or the Stockholm Chamber of Commerce. See Giorgio Sacerdoti, "Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards" (2004) 19 ICSID Review -- FILJ 1 [Sacerdoti]. See also Noah Rubins, "Judicial Review of Investment Arbitration Awards" in Todd Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsey, NY: Transnational Publishers, 2004) 359 at 359-362 [Rubins, "Judicial Review"].

260 Under the ICSID Convention, awards are immune from such proceedings. This results from the ICSID Convention's 'self-contained' enforcement mechanism under which the local courts of contracting states are obliged to enforce ICSID awards as a matter of international law. See Reed, *supra* note 28 at 8.

261 New York Convention on the Recognition and Enforcement of Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38, No. 4739 (entry into force 7 June 1959) [New York Convention]. The New York Convention has been ratified by over 140 countries and is considered one of the most successful international agreements in history. Note that there is no duty under customary international law which compels states to enforce foreign arbitral awards. See Toope, *supra* note 158 at 102.

262 Note that, while vacation at the seat precludes enforcement in that jurisdiction, the discretionary language employed by the New York Convention does not mean that vacation at the seat precludes enforcement in other jurisdictions. See Article V(1)(e), which states that "recognition and enforcement of the award may be refused" where the "award has... been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" (emphasis added).

263 The UNCITRAL Model Law closely follows the New York Convention; Schreuer, ICSID, *supra* note 206 at Article 52 at para. 6.

264 It is common for national law regarding the judicial review of arbitral awards to incorporate by reference the UNCITRAL Model Law. This, in turn, closely resembles the content of the New York Convention.

265 New York Convention, *supra* note 261 at Article V(1)(c); UNCITRAL Model Law on International Commercial Arbitration, 24 ILM 1312 (1985) at Article 34(2)(a)(iii).

266 See Rubins, "Judicial Review", *supra* note 259; Toope, *supra* note 158 at 107. See generally Thomas H. Webster, "Review of Substantive Reasoning of International Arbitral Awards by National Courts: Ensuing One-Stop Adjudication" (2006) 22 Arb. Int'l 431.

267 Attorney General of Canada v S.D. Myers, Inc., Court File No. T-80-03 (Memorandum of Fact and Law of the Applicant Attorney General of Canada) at paras. 137-138.

268 Sacerdoti, *supra* note 259 at 41.

269 Note that this decision is not binding on similar cases brought in foreign jurisdictions.

270 Burke-White, *supra* note 85 at 5, referring to the Statement of Osvaldo Guglielmino, Procurador del Tesoro de la Nación Argentina, American University, Washington College of Law, 24 October 2007. As Burke-White notes, Argentina may be aided in this cause by the fact that the ad hoc Committee in the CMS annulment decision strongly criticized much of the legal analysis that composed the foundation for the tribunal's divergent findings.

271 See Article 51 of Canada's Model Foreign Investment Protection Agreement 2004, online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf>.

272 See Laird, "1105", *supra* note 55.

273 It has been argued that, because of its direct contradiction of the plain meaning of the text of Article 1105, the interpretive note in fact constitutes an amendment of the provision and thus an ultra vires act by the FTC Commission. See Charles H. Brower, "Why the FTC

Notes of Interpretation Constitutes a Partial Amendment of NAFTA Article 1105" (2006) 46 Va. J. Int'l L. 347.

274 This standard can be traced to the 1926 Neer Claims Case, see *United States (L.F. Neer) v United Mexican States* (1926) 4 R.I.A.A. 60 (Mexico-U.S. General Claims Commission). The standard is dynamic rather than static and is said to have experienced an expansion in scope since the Neer Claims Case.

275 See generally Ross P. Buckley & Paul Blyschak, "Guarding the Open Door: Non-Party Participation before the International Centre for the Settlement of Investment Disputes" (2007) 22 B.F.L.R. 353 [Buckley & Blyschak].

276 See Laird, "1105", supra note 55.

277 Brower & Steven, supra note 122 at 195; Ian A. Laird, "NAFTA Chapter 11 Meets Chicken Little" (2001) 2 Chicago J. Int'l L. 223 at 224-225. See generally Ray C. Jones, "NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to be Embraced or a Sword to be Feared?" (2002) B.Y.U.L. Rev. 527.

278 Article 1105 was not the NAFTA parties' sole concern. So too were they concerned with different readings given to Article 1110's guarantee of compensation in the event of government actions "tantamount to expropriation." Canada, for its part, has sought to limit the effect of this guarantee in Annex B.13(1)(c) of its Model Foreign Investment Protection Agreement in stating that "except in rare circumstances... non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation." See Model FIPA, supra note 271.

279 Some of the political reactions sparked by the first NAFTA Chapter 11 disputes were quite extreme. For instance, Pierre Pettigrew, Canadian Trade Minister in 2001, repeatedly affirmed his intention to remove investment protection provisions from all the country's future free trade agreements. See, for example, Terence Corcoran, "Ottawa's Campaign to Sabotage NAFTA" *National Post* (23 February 2001) C14.

280 See IIA Monitor No. 3 (2007), supra note 16.

281 ICSID Convention, supra note 7 at Article 42 (emphasis added).

282 See Leeks, supra note 12; Emmanuel Gaillard & Yas Banifatemi, "The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process" (2003) 18:2 ICSID Review -- FILJ 375; W. Michael Reisman, "The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of its Threshold" (2000) 15 ICSID Review - FILJ 362. See also McLachlan,

"Systemic Integration", *supra* note 200.

283 Leeks, *ibid.* at 19.

284 Gazzini, *supra* note 11 at 714-715.

285 ADF Group Inc. v United States, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 179 (International Centre for Settlement of Investment Disputes). Numerous NAFTA Chapter Eleven Tribunals have had to make similar inquiries under claims invoking NAFTA Article 1105 guaranteeing the minimum standard of treatment required by customary international law.

286 Methanex Corp. v United States, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, Chapter C, para. 25.

287 Compania del Desarrollo de Santa Elena S.A. v Costa Rica, ICSID Case No. ARB/96/1, Final Award, 17 February 2000 (International Centre for Settlement of Investment Disputes).

288 Loewen Group Inc. and R.L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3, Award 26 June 2003 at para. 223 (International Centre for Settlement of Investment Disputes).

289 Noble, *supra* note 134 at para. 69.

290 Enron Corp. Ponderosa Assets L.P. v Argentine Republic, ICSID Case No. ARB/01/3, Award 22 May 2007, para 334.

291 Saluka Investments BV (the Netherlands) v Czech Republic, Partial Award, UNCITRAL, 17 March 2006 at para. 254.

292 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, [1969] I.C.J. Rep. 3 at para. 75.

293 Amoco International Finance Corporation v Islamic Republic of Iran et al., Iran -- United States Claims Tribunal, 14 July 1987, 83 ILR 500 (1990), at para. 112 [Amoco v Iran].

294 Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, [2003] I.C.J. Rep. 161 at paras. 23 and 41.

295 Saluka Investments BV (The Netherlands) v Czech Republic, Partial Award, UNCITRAL, 17 March 2006 at para. 254.

296 Philippe Sands, "Treaty, Custom and the Cross Fertilization of International Law" (1998)

88 Yale Human Rts. & Dev. L. J. 85 at 95. See also McLachlan, "Systemic Integration", supra note 200.

297 Amoco v Iran, supra note 293 at para. 112.

298 Gazzini, supra note 11 at 710.

299 Shaw, supra note 22 at 70.

300 Ibid.

301 Ibid. at 72. See, for example, the Asylum Case (Columbia v. Peru), [1950] I.C.J. Rep. 266, 17 I.L.R. 280; The Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. Rep. 116, 18 I.L.R. 86.

302 Shaw, *ibid.* at 80. See, for example, the Lotus Case, PCIJ, Series A, No. 10, 1927, at 28; the North Sea, supra note 292 at 3.

303 Shaw, *ibid.* at 74.

304 Ibid. at 78.

305 Gazzini, supra note 11 at 692, referring to the ILA, Final Report, supra note 11.

306 Gazzini, *ibid.*

307 Shaw, supra note 22 at 76.

308 ILA, Final Report, supra note 11 at 19 fn 42.

309 See Buckley & Blyschak, supra note 275; Aurelia Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules" (2006) 21:2 ICSID Review -- FILJ 427.

310 As discussed, outside the NAFTA context, the majority of respondent host states have to date been primarily capital-importing, less developed or "southern" countries. See Franck, "Empirically Evaluating", supra note 67.

311 Not all submissions to and decisions by arbitration tribunals are made available to the general public. Whether or not this happens depends on the investment treaty in question as well as the forum in which the dispute is heard. For example, ICSID will not publish arbitral awards unless consent is given by both parties to the dispute. Where this does not occur, ICSID will publish select excerpts of the legal reasoning employed by tribunals in the interest of further developing international investment law.

312 Shaw, *supra* note 22 at 79.

313 *Ibid.*

314 North Sea, *supra* note 292 at 43.

315 Kunoy, *supra* note 83 at 283.

316 Note, however, that decision by the Tribunal in *SGS v Pakistan* has been criticized for taking an illegitimately conservative approach to umbrella clauses by interpreting the relevant provision in the Switzerland -- Pakistan BIT in a manner that effectively removes it of all practical effect. See, for example, Emmanuel Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contract Claims -- The SGS Cases Considered" in Todd Weiler (ed.) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) at 336.

317 Kunoy, *supra* note 83 at 283.

318 Thomas, *supra* note 169 at 115.

319 Price, *supra* note 54 at 113.

320 Thomas, *supra* note 169 at 115.

321 Gazzini, *supra* note 11 at 709, referring to *GAMI v Mexico*, UNCITRAL(NAFTA), Submission of the United States, 30 June 2003 at para. 9.

322 See Staminir A. Alexandrov, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals -- Shareholders as 'Investors' under investment Treaties" (2005) 6 *Journal of World Investment & Trade* 387

323 It is argued that investment protection treaties were intended by states "to provide an extraordinary means of redress against governmental action that is truly in breach of the conventional international law protection set out" in them. As this article has described, they have turned out to be far more potent. See Thomas, *supra* note 169 at 136.

324 Franck, "Empirically Evaluating", *supra* note 67 at 48-55.

325 See McIlroy, "Two Steps", *supra* note 65; James McIlroy, *NAFTA's Investment Chapter: An Isolated Experience or a Precedent for a Multilateral Investment Treaty?* (2002) 3 *Journal of World Investment & Trade* 127.

326 For a discussion of similar adjustments made in the foreign investment policy of the United States, see Rubins, "Two Steps", *supra* note 65; Laura J. Loppacher & William A.

Kerr, "Investment Rules: The U.S. Agenda in Bilateral Trade Agreements" (2006) 7 *Journal of World Investment & Trade* 39.

327 As discussed, Article 1110 of the NAFTA guarantees foreign investors of compensation where their investment has been "indirectly expropriated" by the actions, cumulative or otherwise, of a host state. This guarantee, and those similar to it in other BITs, has proved one of the most controversial in investment arbitration law.

328 For example, BITs concluded by the United Kingdom are particularly careful to address the scope and application of MFN clauses contained therein. See Article 3(3) of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania for the Promotion and Protection of Investments, 30 March 1994, 1919 U.N.T.S. 15 at 18 (entered into force 30 August 1995) [United Kingdom -- Albania Investment Treaty].

329 BITs are designed to attract foreign investment and the externalities that investment brings. Perhaps surprisingly, this policy objective goes unmentioned in the majority of investment treaties. See Garcia-Bolivar, *supra* note 184 at 759.

330 Thomas, *supra* note 169 at 102-103.

331 Shaw, *supra* note 22 at 70.

332 *Ibid.* at 75, referring to Charles De Visscher, *Theory and Reality in Public International Law*, 3d ed. (Princeton, NJ: Princeton University Press, 1960) 149.

333 Thomas, *supra* note 169 at 136.

334 This argument sees arbitration provisions in BITs as composing the "consent to arbitration" referred to in Article 25. Therefore, so long as an investor has standing under a treaty that grants jurisdiction to ICSID tribunals, then the ICSID Convention is applicable to the dispute even if the host country has previously denounced the ICSID Convention. See Emmanuel Gaillard, "The Denunciation of the ICSID Convention" *N.Y.L.J.* (26 June 2007) at 3; Christian Tietje, Karsten Nowrot & Clemens Wackernagel, "Once and Forever?: The Legal Effects of a Denunciation of ICSID", online: (2009) 6:1 *Transnational Dispute Management* <www.transnational-dispute-management.com>.

335 This argument is based on the contention that the consent to arbitration referred to by Article 25 is only perfected once an investor accepts the "offer" contained in investment treaties. See Juien Fouret, "Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: 'Manufacturing Consent' to ICSID Arbitration" (2008) 25:1 *J. Int'l Arb.* 71; Roberto Castro de Figueiredo, "Euro Telecom v Bolivia: The Denunciation of the ICSID Convention and ICSID Arbitration under BITs", online: (2009) 6:1 *Transnational*

Dispute Management <www.transnational-dispute-management.com>.

336 Maniruzzaman, *supra* note 99 at 367. See also A.F.M. Maniruzzaman, "The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?" (1999) 14 *Am. U. Int'l L. Rev.* 657.

337 Werner, *supra* note 97 at 746.

338 *Ibid.* at 746.

339 Alvarez, *supra* note 158 at xxv.

340 *Ibid.*

341 Maniruzzaman, *supra* note 99 at 367.

342 *Ibid.*