What and why are we "re-calibrating"? (forthcoming in *World Arbitration & Mediation Review* 2010)

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The United States has been re-calibrating its Model BIT since 2004.[2] Indeed, the NAFTA, concluded in 1994, had already contained changes as compared to earlier U.S. BITs, such as that concluded with Argentina (1991).[3] Other prominent BIT negotiators, such as Canada and China, are following the U.S. lead, while other governments, like Norway's, having recently attempted re-calibration, have for now given up trying to please both backers of BITs and their critics.[4]

As noted elsewhere, most of the changes in the U.S. BIT (as others') have been in the direction of narrowing investors' rights and expanding the host state's "policy space"— as with respect to the newly CIL defined FET, newly "balanced" clause on indirect takings, and the United States' now clearly self-judging essential security exception.[5] Canada has even turned to a broader list of exceptions reminiscent of those in the GATT's Article XX, as well as a new exception for "prudential" measures to protect

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[2] For a detailed description of the changes between the U.S. Model BITs of 1984 and 2004 see, José E. Alvarez, "The Evolving BIT, " in I. Laird and T. Weiler, ed., Investment Treaty Arbitration and International Law Vol. 3, 1 (2010). See also Kenneth J. Vandevelde, "A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests," in Karl P. Sauvant, ed., Yearbook on International Investment Law & Policy 283 (2008-09)

[3] For example, the NAFTA's Chapter Eleven on investment no longer contained an umbrella clause and severely restricted the rights of investors to bring claims based on denial of entry.

[4] Thus, the Norwegian government, having proudly announced a new version of its Model BIT, subsequently announced that it would terminate negotiating new BITs. See Damon Vis-Dunbar, "Norway shelves its draft model bilateral investment treaty," Investment Treaty News, June 8, 2008, available at http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx.

[5] See Alvarez, *supra* note 2.

their banking system.[6] If past is prologue, any new changes to the U.S. Model under the Obama Administration will not take us back to the "golden age" of U.S. BITs, that is the supremely investor-friendly U.S. Model BITs of 1984-87. This essay seeks to explain these developments in terms of broader trends or phenomena in international law.

So why has the United States, particularly under extremely business friendly Republican administrations, made its principal international instrument for the protection of business less likely to do just that? Here are five explanations.

(1) The chastened Washington Consensus, a k a the return of the state.

The most evident rationale for these changes is that the United States government itself – within both the Executive branch and in Congress -- has lost confidence in the so-called "Washington Consensus" mode of governance. The old consensus, which many believe was reflected in and advanced by the early U.S. BIT program – favoring deregulation, privatization, the un-abashed protection of property, and free trade and capital flows – has been chastened by perceptions that this formula has not really served to raise all boats and by some empirical studies casting doubt on whether enhanced capital flows, even when this occurs, really produce sustained economic development.[7] Columbia's Joseph Stiglitz, and others like Harvard's Dani Rodrik, have seeded doubts about neo-liberalist growth strategies and many in our government (and certainly many who run prominent human rights and environmental NGOs) now believe that even when treaty-based investment guarantees encourage FDI, this has been accompanied by

[6] See Article 10 of Canada's latest model BIT, available at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf.

[7] Thus, the scholarly literature has not uniformly supported the proposition that the negotiation of BITs necessarily increases the reciprocal flow of capital into those countries that conclude them or that even when such flows occur that the results are always positive. See the studies in Karl P. Sauvant and Lisa E. Sachs, The Effect of Treaties on Foreign Direct Investment (2009).

negative externalities, such as disparate income distribution, politically disruptive dislocations of persons, and adverse social/environmental impacts even in the midst of growing economies.[8] Of course, the global economic meltdown – and the perception that this time it started with us – has also helped batter the idea that Washington and its allies have the right answers and that BITs can be negotiated, as they once were, as one-sided dictats on how best to run a government.

The newly chastened U.S. BIT seems to be part of a trend: a more humble (slightly more transparent) IMF, no longer as confident about having the answer; academic and civil society challenges to the International Finance Corporation's advice (including with respect to its indices for "progress" produced in its annual "Doing Business" reports which confidently rank countries on how business-friendly is the national rule of law), emboldened resistance by a number of (principally Latin American) countries to the negotiation of new BITs or even the jurisdiction of ICSID; and some apparent back-tracking by countries around the world with respect to the adoption of business-friendly laws.[9] The new BITs' insistence on allowing greater sovereign policy space echoes comparable demands made by many at the WTO's DOHA Round, and by trade scholars anxious to re-calibrate the GATT-covered agreements, to permit, for example, regulatory

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[8] See, e.g., the case studies on Mexico, India, and China contained in Rudolf Dolzer, et. al, ed., Foreign Investment Its Significance in Relation to the Fight against Poverty, Economic Growth, and Legal Culture (2006); Joseph Stiglitz, Globalization and its Discontents (2002); Dani Rodrik, "Growth Strategies," available at http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B7P5F-4HP4N1P-N&_user=142623&_coverDate=12%2F31%2F2005&_rdoc=1&_fmt=high&_orig=search&_sort=d&_docanchor=&view=c&_searchStrId=1423493423&_rerunOrigin=scholar.google&_acct=C000000333&_version=1&_urlVersion=0&_userid=142623&md5=2d007b61fd3d0828e2774649c08243bc..

[9] For a general overview of these developments, see Karl P. Sauvant, "A backlash against foreign direct investment?," in Economist Intelligence Unit, *World Investment Prospects to 2010: Boom or Backlash?* (2006). For a skeptical look at the "Doing Business" reports, see Kevin Davis and Michael Kruse, "Taking the Measure of Law: The Case of the Doing Business Project," 32 *Law & Social Inquiry* 1095 (2007).

actions ostensibly demanded by the Covenant on Economic, Social and Cultural Rights (such as ostensible right to water or health).

Another way of interpreting this broader phenomenon is to describe it, as Hollywood might, as 'the revenge of the state.' The BIT changes parallel a revival of, or nostalgia for, old-fashioned (but certainly not Soviet-era) government regulation. They suggest a belated backlash to the Reagan years which memorably portrayed 'government as the problem.' In the United States some see this revival in new laws such as Sarbanes -0xley as well as recent legislation to rein in our banks in the wake of the global crisis. Some see it reflected as well in the newly energized CFIUS process intended to strengthen the ability of U.S. agencies to examine mergers and acquisitions that appear to threaten our essential security – a post- 9/11 form of investment screening that is now being emulated by others, from Germany to Canada.[10] Of course, the state is also making a comeback in other ways – in the return of state-owned enterprises and the renewed clout of some sovereign wealth funds – and new questions are emerging about whether we want our BITs to treat these entities as if these were no different than privately owned multinational enterprises.[11] And, of course, old-fashioned protectionist rhetoric about the risks of FDI – including the alleged risk that it poses for the "outsourcing" of jobs – are now being given a new sheen once the targets are the state-owned enterprises of China.

2. The realization that de-politicization is something of a myth.

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[10] See, e.g., Subrate Bhattacharjeee, "National Security with a Canadian Twist: the Investment Canada Act and the new National Security Review Test," available at http://www.vcc.columbia.edu/content/national-security-canadian-twist-investment-canada-act-and-new-national-security-review-test; Mark E. Plotkin and David N. Fagan, "The Revised National Security Process for FDI in the US," available at http://www.vcc.columbia.edu/content/national-security-canadian-twist-investment-canada-act-and-new-national-security-review-test.

[11] See, e.g., Charles Kovacs, "Sovereign wealth funds: much ado about some money," available at http://www.vcc.columbia.edu/content/sovereign-wealth-funds-much-ado-about-some-money; Veljko Fotak and William Megginson, "Are SWFs welcome now?," available at http://www.vcc.columbia.edu/content/are-swfs-welcome-now.

The United States government, now among the most frequently sued respondent states under investor-state arbitration, is enchanted with the contention that the move away from diplomatic espousal to investor-state arbitration "depoliticizes" these disputes. We are now learning that politics continues to play a role even when we resort to arbitration and get the U.S. State Department out of the claims espousal business. We are realizing that politics has merely moved to a different place and taken a different form. NGOs (and even Bill Moyers) have (more or less successfully) waged war against "secret" investor-state tribunals that "trade away" our democracy.[12] Some of the changes to the U.S. BIT, such as those encouraging greater transparency in arbitration, have been responsive to such complaints.

As was the case when the United States government adopted the Foreign Sovereign Immunities Act in order to get the State Department out of the business of issuing Tate Letters, political issues have now been judicialized but not totally eradicated. We have learned that investor-state arbitration is not the same thing as commercial arbitration. That is, that when investor-claimants challenge everything from environmental legislation involving the rights of indigenous peoples to national emergency legislation responding to a severe economic crisis, these public disputes need to be visible to the public – and require moves towards transparency and the admission of amicus groups from civil society. As is clear from the number of diverse groups interested in commenting on U.S. BIT policy, investor-state arbitration is now public litigation. It promotes no less a political reaction than do WTO rulings or indictments issued by the International Criminal Court.

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[12] See, e.g., Bill Moyers, Transcript of PPS Show, "Trading Democracy," available at http://www.pbs.org/now/transcript/transcript_tdfull.html.

In this, the second half century of the age of BITs, we are also realizing that our international adjudicators can operate a bit like politicians – as is suggested by the last line in the *Loewen* award suggesting a tribunal with one eye on the claimant and another on the United States' threats to leave the NAFTA if things do not go its way.[13]

And even when investor-state arbitrators are not being overtly political, what they do is perceived to have political consequences. Ask anyone in Argentina in the shadow of over 40 investor-state claims against that country whose face value reportedly exceeds that country's GDP. Given these developments, we should not be surprised if some changes to the U.S. BIT – such as the attempt to shrink the domain of FET to the standard pronounced in the 1926 *Neer* case – seek to rein in the discretion of our arbitrators.[14] Other changes in our BITs seem similarly directed, such as the U.S. executive's promise to its Congress to consider establishing an appellate process.[15]

Much of this is reminiscent of concerns being expressed with respect to other international legal regimes. As our international adjudicative fora proliferate, we are now facing questions across the board about whether the turn to international courts or tribunals really does "level the playing field" as advertised or whether such leveling requires directed, targeted efforts to this end, including through the provision of

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[13] *The Loewen Group, Inc. and Raymond Loewen v. United States*, Award, ICSID Case No. ARB(AF)/98/3 (June 26, 2003), ¶ 242 ("The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.").

[14] See *Glamis Gold, Ltd. v. United States*, UNCITRAL Award, June 8, 2009 (agreeing with United States' contentions that FET remains subject to the standard articulated in the *Neer* v. *Mexico* (4 R. Int'l Arb. Awards (Oct. 15, 1926)) case but suggesting that that standard, requiring a demonstration of "egregious" conduct by the state, has evolved over time).

[15] For a thorough description of the 2004 U.S. Model's changes to investor-state dispute settlement and the attempt to respond to Congressional demands imposed under the Bipartisan Trade Promotion Authority (passed as part of the Trade Act of 2002), see Vandevelde, *supra* note 2, at 308-12. This includes a demand by Congress the United States "improve" the dispute resolution process by providing for the expeditious dismissal of claims, including mechanisms to deter and eliminate frivolous claims, and establishing an appellate mechanism. *Id.*

technical, advisory, or other services directed at the less advantaged, from LDCs to victims of war crimes atrocities. The perceived myth of depoliticization is drawing renewed scrutiny to our adjudicators. There is growing scrutiny over who our international judges are (whether at the International Court of Justice (ICJ), other permanent international courts, or in investor-state arbitrations), how they are selected and by whom, what exactly is their expertise and whether it is too narrow to take full account of the full range of interests and stakeholders involved.[16] Do investor-state arbitrators from the global south tend to rule in favor of host states or tend to issue awards of differing amounts from others? Does the result turn on whether they are specialists in public vs. private international law? Within the investment regime, these concerns drive the empirical work of scholars like Susan Franck, who attempts to gauge whether our arbitral results are really stacked in favor of investors or rich respondent states.[17] Similar questions have arisen or are emerging not only in connection with investor-state arbitration but in connection with international criminal courts and the WTO. Greater exposure to the realities of arbitration – and the small cadre of individuals that are currently involved in it -- is also drawing renewed attention to the conflict or other ethical rules under which our international adjudicators operate and whether there are any "checks" (political or other) over their decisions.[18]

3. The risks of internal and external fragmentation.

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[16] For a recent revealing (and dispiriting) examination of how judges are selected at the ICJ and the International Criminal Court, see Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, Selecting International Judges (2010).

[17] See, e.g., Susan D. Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration," 86 *N.C. L. Rev.* 1 (2007).

[18] See, e.g., Catherine Rogers, "The Ethics of International Arbitrators," in The Leading Arbitrators' Guide to International Arbitration (2d ed. 2008); Catherine Rogers, "Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct," 41 *Stan. J. Int'l L. J.* 53 (2005).

Investor-state arbitration has also raised concerns over the risks of internal and external fragmentation. There is serious question about whether the arbitral caselaw, both original awards and annulment decisions, is really producing internally consistent, stable, and predictable international investment law – any more than is the case with respect to other international courts and tribunals dealing with other specialized bodies of the law, such as human rights or international criminal law. Concern that international investment law is internally inconsistent lead some to propose establishing a single international investment court or at least appellate bodies within discrete arbitral forums, such as ICSID.

There is even graver concern, particularly among NGOs and scholars, over the prospects of external fragmentation – that is, that our diverse international adjudicators are not engaging enough in the transjudicial communications that some seem as needed but are too often talking past one another. Many fear a world where investor-state arbitrators, ICJ judges, and WTO adjudicators render decisions that fail to draw systematic connections between the interstate obligations required by BITs, the GATT covered agreements, or human rights, labor, or environmental conventions.

Some of the changes in the U.S. BIT – especially but not exclusively to its preamble – are beginning to address the risk that international investment law will become fragmented from the rest of public international law but it is important to realize that these efforts are part of a much bigger challenge – as is clear from the International Law Commission's report on the risks of fragmentation.[19] As the ILC's report suggests, there are a number of familiar recipes to respond to the fragmentation risk. These include

[19] International Law Commission, Report, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.702 (18 July 2006).

politically unlikely proposals for a hierarchically organized international courts, capped by appeal to the ICJ, but they also include interpretative reforms that would pay greater attention to canons of treaty interpretation that, for example, would disfavor determinations of *lex specialis* and would urge resort to fundamental principles of customary law unless a treaty expressly states otherwise.[20]

4. Treatification: the second generation.

Second generation questions arising from our increased resort to treaties in a number of regimes, including international investment, abound. We once assumed that the turn to treaties constitutes progress, a maturation of international lawyers' rudimentary reliance on the vague process for establishing and determining custom or our equally troublesome reliance on equally vague, ill-defined general principles of law. We assumed that treatification entailed, as one scholar put it, "the twilight of custom."[21] Within the investment regime, treatification was supposed to put an end to terminally vague rules such as the "international minimum standard" or "denial of justice" or "I know when I see it" tests like the *Neer* "shocking" or "egregious" government conduct test. (Obviously, such hopes were cast into doubt by the recent NAFTA decision in *Glamis Gold*.[22])

Once scholars told us that treaties would come to displace the vagaries of custom; that treaty-based obligations would be more precise, more legitimate, and even more democratic, than reliance on custom or general principles. Now that we have some

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[20] See id. For distinct views of the particular applications of such rules, compare José E. Alvarez and Kathryn Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime," chapter 10 in K. P. Sauvant, *Yearbook on International Investment Law & Polic,y* 379 (2008-2009) to Campbell McLachlan, "Investment Treaties and General International Law," 57 *Int'l & Comp. L. Q.* 361 (2008).
[21] J. Patrick Kelly, "The Twilight of Customary International Law", 40 *Va. J. Int'l L.* 449 (2000).
[22] See *Glamis Gold*, supra note 14.

greater experience with our nearly 3000 BITs and FTAs, we see how naïve all of this was. It turns out that claimants, respondent states, and arbitrators very much need to concern themselves with non-treaty sources of law. Indeed, as in other pockets of international law that have been treatified (such as international criminal law and international humanitarian law), custom appears to be making a comeback, at least as gap-filler and aider to treaty interpretation. This is no less true for investor-state arbitrators wrestling with the meaning of "fair and equitable treatment" than it is for U.S. Supreme Court judges, who have needed to determine the content of common article 3 to the Geneva Conventions.[23]

The international investment regime is teaching us that Wolfgang Friedman was right when he wrote, over 40 years ago, that treaties do not *displace* custom as much as *overlay* it, and that there is a constant interplay between all of the international sources of law.[24] It is also hard to BITs as more "democratic" than rules of custom on the premise that at least the former were subject to the consent of our Senate. The "democratic" pedigree of our BITs and FTAs do not seem to give them much greater legitimacy to the skeptics -- not when our BITs last for a minimum of 21 years for existing investors, are difficult to terminate in any case due to powerful market forces, and when much of investment law is being developed by "undemocratic" arbitrators.

Another recent realization is that reliance on bilateral treaties does not preclude multilateralization. As Stephan Schill's new book on The Multilateralization of International Investment Law argues, even regimes built on bilateral arrangements may come to establish what are, in effect, multilateral rules. The is certainly true to the extent

[23] See *Hamdan v. Rumsfeld*, 548 US 557 (2006).
[24] Wolfgang Friedman, *General Course in Public International Law*, 1969, at 131-36. See also P. C. Jessup, Transnational Law (1956)

MFN guarantees achieve such effects or investor-state arbitrations rely on and in turn affect general rules of custom.[25] Given this, it should scarcely surprise if some of the changes to the U.S. BIT – such as its newly constrained interpretation of FET – seeks to equate a treaty guarantee with a rule of custom, while also restricting the meaning of both. The multilateralization of investment law also occurs to the extent investor-state dispute settlers attempt to adhere generally to precedent (or if one prefers the continental term, to *jurisprudence constante*). Despite the many examples we now have of inconsistent arbitral decisions, there is plenty of evidence to support the conclusion that investment awards or annulment rulings sometimes tweak the rules of treaty interpretation for the sake of adhering to or establishing coherent investment law. More often than not investor-state arbitrators ignore the textual differences among BITs – including different formulations of FET or different phrasing of MFN or NT guarantees - - for the sake of fidelity to prior arbitral rulings. In doing so, they are acting on the premise that stability and consistency were precisely what the stakeholders of the regime most desire. This suggests that the investment regime may be discovering "community" norms even without relying on a multilateral regime purporting to establish such a community.

The multilateralization of international investment law has positive and negative aspects. To the extent it occurs, it may enhance the stability of expectations for all stakeholders in accordance with the preambles of many BITs. At the same time, multilateralization elevates the visibility and significance of particular arbitral rulings and particular investment agreements. It makes it less likely that the U.S. executive branch can, for example, dismiss either – or the model text from which it is currently negotiating

[25] See, e.g., José E. Alvarez, "A BIT on Custom," 42 *N.Y. Univ. J. Int'l L. & Pol.* 17 (2009).

– as reflecting mere "one-off" deals having no general normative impact. The prospect that BITs – ours and others – shapes the law for all investors, whether covered under BITs or under customary law, and may even influence what happens to U.S. investors through the power of example may explain why the Obama Administration believes that the future direction of its BIT program requires such close scrutiny, amidst consultation with all stakeholders. Of course, some of the specific changes to the U.S. BIT – such as our insistence on making our "essential security" exception explicitly self-judging – seem particular responses to an emerging "community" consensus that appears to disfavor such an outcome.[26]

5. The challenge of non-state actors.

As is the case with respect to other international legal regimes, the investment regime is also groping with a dilemma: the more it empowers non-state actors, the more it appears to threaten the power of the state to protect the entire polity. The realization that investment law is now being driven by the *jurisprudence constante* produced by investor-state arbitrators – and not merely by the state-centric process of concluding BITs and FTAs—is also drawing attention to another phenomenon with ripples across international regimes: the rise and significance of the non-state actor.

In the investment regime, we may be in the process of turning our investor/third party beneficiaries of BITs into de facto subjects of international law.[27] Investor-claimants are

[26] Compare United States-Peru Trade Promotion Agreement, n. Art. 22, Apr. 12, 2006 (indicating that when one of the parties invokes the self-judging measures not precluded clause, "the tribunal or panel hearing the matter shall find that the exception applies") to a number of investor-state cases against Argentina that reject that state's claim that the "measures not precluded" clause in the U.S.-Argentina BIT is self-judging. See Alvarez and Khamsi, *supra* note 20 (describing the uniform rejection of the self-judging contention in that context).

[27] But see José E. Alvarez, "Are Corporations "Subjects" of International Law?," (forthcoming in *Santa Clara Journal of International Law* 2010)(urging international lawyers to resist this conclusion), available as a work in progress at http://law.scu.edu/corplaw/abstracts.cfm.

now fully capable of bringing claims like other international persons, as do individuals before regional human rights courts. This means that such claimants channel the law that gets made through the jurisgenerative process of dispute settlement. Our investors are not merely claimants; they are de facto law-makers, along with investor-state arbitrators. States, normally international law's principal law-makers, retain, to be sure, their primary role through the making or unmaking of BITs and FTAs, but their control over the future trajectory of investment law has been reduced. In the course of investor-state arbitration states are more passive reactors to the actions of non-state actors, including investor-claimants, "independent" arbitrators and members of annulment committees, and NGOs as amicus.

U.S. changes to its BIT do not directly address this challenge but, as noted, many of the changes made to investor-state dispute settlement have the effect of restricting the potential for claimants to drive the production of arbitral caselaw in some respects.[28] The new BIT includes an expedited process for the dismissal of frivolous claims, requires initial pleadings to provide respondent states with more notice of the nature of the claims they are facing, gives the disputing parties (including states) an opportunity to comment on a proposed arbitral decision before it is final, and anticipates the participation of non-claimant voices as amicus. Most significantly, it authorizes the state parties to the treaty to regain the upper hand by issuing interpretations of their treaty that are binding on arbitrators.

Sooner or later the investment regime, or at least particular BITs, will also need to address more explicitly whether investor-state dispute settlement is really only a variation

[28] At the same time, some of the changes – such as permitting arbitrators to issue interim orders of protection and orders consolidating claims – might be seen to enhance their powers, as well as the jurisgenerative potential of investment arbitration.

on old fashioned espousal – where the states remain in full control of the process, including the waiver of claims – or whether investors are really full scale "subjects" of international law and only they, not their home states, control whether to waive or assert their claims, for example.[29] The need to settle this and other questions of corporate "subjecthood" is already apparent, as some arbitral awards and national courts wrestle with the related question of whether the residual inter-state rules of international law (such as the customary defense of necessity or the rules governing attribution) continue to apply to the "new" investor-claimant subject.[30] Of course, those who insist that investors need to be treated like other subjects of international law may find that others think these "new subjects" should also be accountable with respect to other obligations, including human rights, imposed on other subjects of international law.

Comparable battles over the rights and obligations of non-state actors are now being waged elsewhere. They are playing out in the United States Second Circuit Alien Tort Claims Act decisions--where human rights advocates are suggesting, for example, that Articles of State Responsibility rules on aiding and assisting should apply to corporations, for example.[31] As these cases suggest, it is not only the investment regime which is addressing whether other non-state actors, from NGOs to corporations, should have greater access rights with respect to the adjudication of international law and what the legal consequences are when this occurs.

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[29] See Alvarez, *supra* note 27.

[30] For examples consider *BG Group v. Argentina,* UNCITRAL Award, Dec. 24, 2007, at ¶ 408 (suggesting, without deciding, that Argentina may not be able to rely on the customary defense of necessity if that rule applies only in the inter-state context); Bundesverfassungsgericht [BverfG], Decision of May 8, 2007, summarized in Stephan W. Schill, German Constitutional Court rules on Necessity in Argentine Bondholder Case, ASIL Insight, July 31, 2007, available at http://www.asil.org/insights070731.cfm (German court ruling that necessity was not available as a defense to Argentina because no such defense was applicable as between a state and a private individual). See also Zachary Douglas, "The Hybrid Foundation of Investment Treaty Arbitration," 74 *BYIL* 151 (2003).

[31] See generally, Alvarez, *supra* note 27.

Moreover, to the extent the investor is increasingly seen as a co-equal subject of international law – no less than are persons in human rights regimes – this may encourage other forms of inter-regime borrowing, as where international notions of due process applied in human rights regimes come to influence the meaning of FET in investor-state arbitration and vice versa. Such borrowing, a form of transjudicial communication, although routinely assumed to lead to more human rights friendly investor-state decisions,[32] could also produce more investor-friendly decisions. The latter could occur, for example, if the right to "ensure" (and not merely "respect" rights) that is routinely applied with respect to human rights treaties, gets imported back into investor-state arbitration and comes to influence, for instance, the interpretation of what it means to accord an investor "full protection and security."[33]

At the same time, if we start seeing corporate investors as no different from individual human rights claimants, more people may find the differences between the remedial schemes worrisome.[34] Once we start drawing comparisons between the rights accorded investors and those accorded other persons under human rights, more people are bound to notice the evident fact that while the United States has not adhered to a single binding supranational mechanism to scrutinize its laws when it comes to human rights, it has entered multiple investment treaties or that the typical investor/claimant under a BIT is usually in a better position than is the typical human rights claimant. The latter, after all, does not get a binding award under any of the complaints mechanisms available

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[32] See, e.g., Ruti Teitel and Robert Howse, "Cross-Judging: Tribunalization In a Fragmented But Interconnected Global Order," 41 *NYU J. Int'l L. & Pol.* 959 (2009).

[33] Cf. *Velásquez-Rodriquez*, Inter-American Court of Human Rights, Judgment July 29, 1988, 28 ILM 291 (1989)(affirming that governments are under a direct obligation to act to prevent private action that violate the enumerated rights in the American Convention of Human Rights).

[34] For a critique of the investment regime along these lines, see Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law," 17 *EJIL* 121 (2006).

under global human rights conventions (even with respect to torture). Moreover, even when the human rights claimant can resort to a regional human rights court, she first needs to exhaust local remedies, does not get to appoint her own judge, and at the end of the day is not likely to a multimillion dollar award for past harm.[35] The claimant/investor, of course, typically faces no such limitations. If investors are increasingly equated to other non-state actors such as individuals, we can expect further challenges to the exceptional remedial scheme provided uniquely to investors under BITs and FTAs. What this means is that those who successfully argue, by way of defending the investment regime or for purposes of asserting an expansive claim under BITs or FTAs, that corporate investors "are people too" may come to regret it.

Conclusion

The five challenges that the international investment regime now faces discussed above serve as reminders of the broader context of debates over whether to re-calibrate this regime or our Model BITs. Although it is obvious that positions taken with respect to re-calibration relate most directly to distinct views of economic globalization or the best ways to encourage economic growth, these also connect with greater challenges facing all public international lawyers.

The cumulative aspect of these – and how other regimes respond to them -- make it difficult to predict the future path of the U.S. BIT program. On the one hand, there are those, including some who served on the State Department's Advisory Subcommittee on International Economic Policy charged with advising the Obama Administration on future BIT policy, who urge a further shrinking of the U.S. Model BIT, as by eliminating altogether investor-state dispute settlement or according investors protection only against

[35] See *id.*.

discrimination but leaving their rights otherwise subject to local law.[36] Others, such as the Canadian based International Institute for Sustainable Development (IISD), encourage adoption of a vastly more expansive "Model Agreement for Investment for Sustainable Development" that would encompass in various ways the labor and environmental duties of foreign investors and possibly even of their home governments.[37]

Neither of these radical alternatives deserves endorsement. States turned to investment protection agreements precisely because local courts have historically proven themselves to be, time and again, inadequate when it comes to the fair treatment of foreign investors. Investor claims filed against states like the United States or Canada, though not always meritorious, suggest, at least to me, that even developed nations with strong rule of law traditions need a bit of supranational scrutiny from time to time – and that this true with respect to economic issues no less than with respect to human rights. Even otherwise fine national courts and legislatures sometimes have difficulty avoiding disparate treatment of "the other," whether that other is a foreign investor, an immigrant, or an enemy combatant.

Investor-state dispute settlement, along with absolute (if minimum) guarantees not dependent on the vagaries of local legislators, are essential components of why investment protection treaties are needed and remain necessary. Giving up on either of these features could doom the United States to the fate of Norway, whose efforts to re-caliberate its BIT Model ended when no constituency emerged to back that Model's awkward compromises.

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[36] For background on the Subcommittee and the options being urged on it, see Kevin P. Gallagher, "U.S. BITs and financial stability," available at http://www.vcc.columbia.edu/content/us-bits-and-financial-stability. For the report issued by that Subcommittee, including the divergent statements of many of its members, see http://www.state.gov/e/eeb/rls/othr/2009/131118.htm.

[37] For the text of this Model Agreement, see http://www.state.gov/e/eeb/rls/othr/2009/131118.htm.

On the other hand, I am skeptical of the 'penance envy' that appears to drive an effort like the IISD's Model BIT for sustainable development. That attempt turns to BITs to enforce human rights or environmental standards on multinational enterprises precisely because of the perceived appeal of these treaties' enforcement scheme – and its relative efficacy as compared to remedies contained in environmental conventions or the ILO. But the IISD's effort ignores the fact that those alternative schemes for enforcement remain weak for a reason: states have not agreed to enforce these standards (many of which remain contested) on their investors abroad through multimillion dollar judgments. The proposal to overload investor-state dispute settlement and BITs with the rights and duties of multinationals is likely to remain a step too far for most governments, particularly the United States, whose skepticism of even the weak ILO enforcement mechanisms (not to mention the ICJ, human rights courts, or the ICC) is legendary. There may not be many supporters, even among OECD members, for turning investor-state arbitrations into general globalization courts of review. And quite apart from doubts over whether such a project would draw political support, this may not be a good idea. Labor, human rights, and environmental advocates should examine more closely whether they really want these rights to be adjudicated by the commercial arbitrators who tend to sit on investor-state disputes. Absent far more radical changes to investor-state dispute settlement, its arbitrators may not be suited to serve as all-purpose judges for the world.

None of this intends to suggest that the investment regime cannot change. This panel, as well as my remarks, is a testament to the regime's continual evolution – both through changes in the underlying treaties over time and through the evolving interpretations issued by its dispute settlers. We are seeing fundamental re-alignments in terms of the

positions of governments and even investor-state adjudicators with respect to particular issues and perhaps the regime as a whole. The regime is in motion. Its dynamism has exceeded the expectations of both its proponents and its detractors.

Few would have predicted, back in the 1980s when the United States started its BIT program, that the United States would be in the position of defending a recent investment treaty (with Australia) that foregoes the use of investor-state enforcement in favor of local courts. Or that one of the critics of U.S.-Australia agreement would be Communist China, which has noted that given the likelihood of anti-foreigner bias in local court, every state needs to make investor-state arbitration available. Few also would have predicted that a few years after the United States appeared to win the battle against the Calvo Clause and had negotiated a strongly protective BIT even with the home state of Calvo himself (Argentina) – it would be reacting adversely to its own nationals' claims against that country. Today, the United States (and its Congress) seems to be reviving the Calvo Clause by attempting to limit the parameters of BIT guarantees to those already secured by national law.[38] And, of course, those of us who negotiated BITs in the 1980s would never have predicted that the United States would find itself – as repeated NAFTA respondent -- at the receiving end of our insistence that the world adhere to our "civilized" standards of treatment.

[38] See, for example, Annex B (4)(a) of the U.S. Model BIT of 2004 which attempts to equate the right to compensation for indirect takings to that assured by the Takings Clause of the U.S. Constitution as interpreted by the U.S. Supreme Court or Annex B(4)(b) which states that states that regulatory actions to protect "legitimate public welfare objectives" cannot normally constitute indirect expropriations. These provisions appear to respond to Congressional demands, as expressed in 2002, that U.S. treaties do not accord foreign investors in the United States "greater substantive rights" than those given U.S. investors. See Alvarez, *supra* note 2 .