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Chapter 33

The Once and Future Foreign Investment Regime

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I. Introduction

The McDougal-Lasswell-Reisman approach to international law, otherwise known as the "Yale" or "New Haven" School, is a powerful tool for dissecting how international legal regimes originate and evolve over time. As far back as 1959, Myres McDougal and Harold Lasswell argued for a new form of jurisprudence that was built upon, but went beyond, the insights of American legal realism. Their new "constructive jurisprudence of problem-solving" was situated in a larger context of world social events and processes, was attentive to the strategies of powerful actors (including groups and individuals and not merely the governments of states), paid heed to varied legal decision-making processes, and sought to clarify how international legal regimes fit within a system of public order that contributes to human dignity.[1] This "policy-oriented" approach stressed that international law could not be insulated from international politics and required an interdisciplinary approach capable of going beyond strict positivism to consider the goals, aspirations, and the conduct of all the diverse participants in the international legal process.[2] Although New Haven scholars acknowledged that nation states continued to be the predominant actors in the "global constitutive process of authoritative decision," they anticipated today's international relations scholars of the "liberal school"[3] in acknowledging the impact of numerous non-state actors both internal to and outside the state; they anticipated the "democratization" of international law.[4] McDougal, Lasswell, and Reisman also emphasized the normative values of the diverse participants in law-making processes and asked

1 *See* Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

2 *See, e.g.*, LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 1-14 (1989).

3 *See* Andrew Moravcsik, *Liberal International Relations Theory: A Scientific Assessment*, *in* PROGRESS IN INTERNATIONAL RELATIONS THEORY: APPRAISING THE FIELD 159 (Colin Elman & Miriam Fendius Elman eds., 2003).

4 *See, e.g.*, CHEN, *supra* note 2, at 23, 73-81; *see also id.* at 79 (criticizing the positivist notion that only states are the proper "subjects" of international law and noting the many ways

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whether emerging legal prescriptions would actually advance the eight values that they argued produced "security."[5]

As their broad concept of security suggests, the New Haven school did not examine only decisions bearing on so-called "high" politics, such as military security. Years before numerous global financial crises made the reality of economic interdependence obvious to all, McDougal and his colleagues noted that a "breakdown of any sector of [the] global economy is felt everywhere else."[6] Decades before globalization became a truism, they anticipated how the international flow of goods and services would make all nations dependent on the "resources, skill, labor, goods and markets" of others.[7]

This essay reexamines the rise and evolution of the contemporary international legal regime governing international investment in light of the insights of the New Haven school. In doing so, this essay critiques a leading game theoretic account of that regime, going beyond it to describe a regime that continues to evolve with the needs of its principal stakeholders.

II. An Outline of the International Investment Regime

The international investment regime,[8] unlike that governing trade, lacks a single definitive multilateral text or a single over-arching institution. There is no WTO to govern transnational capital flows intended to establish an enterprise in a host state. Instead, the investment regime is most closely identified with some 2600 bilateral investment agreements (BITs) and an additional 300 or so regional agreements to promote economic integration. These agreements include both trade and investment provisions (such as the NAFTA and a number of other Free Trade Agreements (FTAs)), and they involve, as of the end of 2006, at least 177 countries.[9] Rules governing investment

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that "state centered" international law was being transformed into an "international law of homocentricity").

5 *Id.* at 16 (respect, power, enlightenment, well-being, wealth, skill, affection, and rectitude).

6 Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT' L. 188, 191 (1968).

7 *Id.* at 190-91.

8 I am using the term "regime" here in the loose sense deployed by many political scientists, in lieu of more normatively laden alternatives such as "system" or "framework." *See, e.g.*, ROBERT O. KEOHANE, AFTER HEGEMONY 57 (1984) (defining "international regimes as 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations'" (quoting Stephen D. Krasner, *Structural Causes and Regime Consequences*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983))).

9 Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 3, 28 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) [hereinafter EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT] (citing UNCTAD's figures).

are also contained within other multilateral agreements (such as the Energy Charter Treaty) or exist within international organizations principally designed for other purposes (such as the WTO's TRIMs, GATS, and TRIPS Agreements, the World Bank's ICSID Convention, or the OECD's Code of Capital Movements).[10] BITs and the investment chapters of FTAs typically grant foreign investors from the respective state parties relative rights against discrimination (usually cast as requirements to accord national and most favored nation treatment) and some absolute minimum guarantees (usually cast as requirements to accord "fair and equitable treatment;" "full protection and security;" fair, prompt and adequate compensation upon expropriation; and the right to repatriate profits stemming from the operation of their enterprise).[11] Many of these treaties also rely on what is arguably the most effective set of remedies of any existing international legal regime: a guarantee than injured investors have direct recourse to binding international arbitration to affirm any of their treaty rights, without, in many cases, any need either to exhaust local remedies in the host state in which they are located or to seek the cooperation of their home state (as under traditional espousal).[12] Other participants in the global constitutive process also advance the most obvious goal of investment treaties—to protect foreign investors and thereby promote the free flow of capital across borders—and ought to be considered part of the regime. Such participants include international financial institutions, such as the World Bank's International Finance Corporation,[13] the International Monetary Fund,[14] regional organizations such as the OECD,[15] political risk insurers such as the United States's OPIC and MIGA,[16] market players who assess credit-worthiness or

10 *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 94-97, 102-07, 115-30, 456-61 (2002).

11 For descriptions of these rights, see R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1007-169 (2005).

12 *See, e.g., id.* at 1391-514.

13 See, for example, the annual "Doing Business" Reports issued by the International Finance Corporation.

14 *See, e.g.*, Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 SOC. & LEGAL STUD. 103 (2004).

15 Thus, for example, OECD studies on the role of incentives to promote investment and performance requirements have led to warnings to states to avoid such actions as subsidies to local industries. *See, e.g.*, OECD, Competition Policy in Subsidies and State Aid 2001, *available at* http://www.oecd.org/dataoecd/31/1/2731940.pdf. Not incidentally, most investment agreements fail to include investment promotion measures and some also discourage or prohibit certain performance requirements. *See, e.g.*, 2004 U.S. Model BIT, *available at* http://www.state.gov/documents/organization/38710.pdf (which contains no promotion measures and which prohibits certain performance requirements under Article 8).

16 For a description of the MIGA, see LOWENFELD, *supra* note 10, at 488-93. For a discussion of how the law on takings might be influenced by claims determinations made or by arbitrations under political risk insurers such as OPIC, see, for example, Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International*

political risk,[17] and, of course, foreign investors who may secure assurances from host states (through stabilization clauses contained in investment contracts or through local law).[18] As discussed below, NGOs are also increasingly becoming important players in the international investment regime.

How should we understand the contemporary international foreign investment regime, its past and its possible future, from the broad perspective of the New Haven school?

McDougal and his colleagues would be among the first to acknowledge that international rules addressing the treatment of investment emerged from the crucible of North/South tensions. Legal norms for the protection of international investment stem from customary rules of state responsibility towards aliens formulated during the colonial era, such as the "international minimum standard" said to reflect the rule of law among "civilized" nations.[19] Conflicts over the legitimacy and content of the standards that should govern the conduct of states in relation to foreign investors emerged at least by the late nineteenth and early twentieth centuries. "[B]etween 1829 and 1910, the United States [alone] entered into [some] 40 arbitrations with Latin American countries" resulting from diplomatic "espousal" efforts on behalf of U.S. investors.[20] These efforts generated predictable resistance from the periphery vis-à-vis the metropole, most famously in the form of the Calvo and Drago doctrines by Latin American jurists.[21] The claim by the United States that it was permissible to

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Law, 102 AM. J. INT'L L. 475 (2008). For consideration of how such rulings might have influenced compensation determinations, see MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 61 (2008).

17 For suggestions that market evaluators of political risk play a role in disseminating signals about the openness of a country with respect to its investment regime, see, for example, Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, *in* EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 9, at 171.

18 *See, e.g.*, Paul Kuruk, *Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience*, 13 MICH. J. INT'L L. 43 (1991) (case history of one government's rejection of, among other things, stabilization clauses negotiated in investment contracts by a prior regime); LOUIS T. WELLS & RAFIQ AHMED, MAKING FOREIGN INVESTMENT SAFE (2007) (case histories of investor/host-state tensions, particularly with respect to promises made in investment contracts).

19 *See generally* Vandevelde, *supra* note 9.

20 *Id.* at 6 n.24.

21 Under the Calvo Doctrine, first articulated by an Argentine jurist, foreign investors would be treated no differently than nationals and would only have access to the same avenues for redress as nationals (namely national courts). The Drago Doctrine, also articulated by an Argentine jurist, barred the use of armed force by states when intended to seek redress for debts owed to its foreign investors. *See generally id.* at 5-6. The Roosevelt Corollary, discussed below, was the United States's response to the Drago Doctrine.

use force to collect such debts in the Western Hemisphere suggests the vehemence of positions on both sides.[22]

North/South disputes over the applicable legal rules only grew in intensity as decolonization progressed after World War II, when many newly independent states reexamined the merits of investment contracts concluded under prior regimes, while others opted for socialist models for their economies that eschewed the market altogether, encouraged expropriations of the private sector, or sought to adhere to import substitution—choices that nearly always proved hostile to the interests of foreign investors.[23] This was the "larger context of world social events and processes" that culminated in the actions of the UN General Assembly in 1973, where over 100 nations proclaimed that all states have "full" and "permanent" sovereignty over their natural resources and economic activities, including the right to nationalize or transfer ownership of assets to their nationals, without mention of an international legal obligation to pay compensation;[24] and led to the adoption, with the support of 120 nations, in 1974, of a Charter of Economic Rights and Duties of States (CERDS).[25] The latter acknowledged only that "appropriate compensation," as provided under national law, should be paid in cases of expropriation.[26]

Given this history, it is scarcely surprising that many commentators continue to see bilateral and regional investment treaties through a North/South lens. Thus, some see the international investment regime as part and parcel of a broad ideological effort to impose a one-size-fits-all "Washington Consensus" model of "good governance" on the world.[27] Some go further and portray BITs as the direct heirs to the nineteenth-century capitulation agreements that Western empires once extracted from the periphery; they see BITs as neo-colonial one-sided agreements which only seek to protect the capital of the West in the Global South.[28] On this view BITs treat

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22 *Id.* at 6 (discussing the Roosevelt Corollary to the Monroe Doctrine).

23 *Id.* at 11. As Vandevelde indicates, key moments in this history were "the seizure of petroleum assets in Iran in 1951 and in Libya in 1955," Castro's expropriations starting in 1959, and a wave of expropriations in the 1970s. Vandevelde cites one study identifying "875 expropriations occurring in sixty-two countries between 1960 and 1974." *See id.* at 11 n.52.

24 Permanent Sovereignty over Natural Resources, G.A. Res. 3171 (XXVIII), U.N. Doc. A/9030 (Dec. 17, 1973).

25 Charter of the Economic Rights and Duties of States (CERDS), G.A. Res. 3281 (XXIX), U.N. Doc. A/9631 (Dec. 12, 1974) (adopted by a vote of 120-6 with ten abstentions).

26 *Id.* art. 2.2(c).

27 For popular accounts both in favor and against, see, for example, THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (2000) (praising LDC's turn to the "Golden Straightjacket"); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (criticizing the promulgation of the "Washington Consensus").

28 Under those imperial products, colonial powers expanded their extraterritorial jurisdiction by exempting Western merchants and investors from the local laws of the countries in which they operated. Capitulation agreements imposed the "standard of civilization" on the "uncivilized" by granting jurisdiction over Western nationals and their property to consular officials of Western states in lieu of local courts. Imperial powers justified these treaties on the premise that some states were incapable of satisfying the standard of justice granted

developing countries that are the recipients of Western capital as less than civilized; the investment regime is essentially law imposed by "Anglo-American" empire.[29] Others suggest that BITs are more analogous to "contracts of adhesion" imposed on the unwilling poor by the rich.[30]

Fears that investor-state dispute resolution has not truly leveled the playing field between Northern capital exporters and Southern capital importers underlie many other critiques of investment treaties. Some contend that investor-state arbitrators are no more sensitive to local context than the majority of the Commissioners who decided the *Chattin* case before the U.S.-Mexico Claims Commission in 1927—a controversial decision, that concluded that Mexican courts had engaged in a denial of justice, which some have criticized as based on a misunderstanding of the civil law approach to adjudication.[31] The harshest critics suggest that "gunboat arbitration" has merely displaced the gunboat diplomacy of Calvo's day or that today's "biased" investor-state arbitrators continue to apply "privilege law for foreigners."[32]

III. Guzman's Account of the Origins of the Investment Regime

The view that the contemporary investment regime is a game played by the West on the rest was most famously made by Andrew Guzman in a 1998 article.[33] To this day,

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by civilized nations. Today's BITs, like the old capitulation agreements, generally exempt foreign investors from having to go to local courts; they merely substitute international arbitral mechanisms for the former recourse to consular officials. *See, e.g.*, David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 TEX. INT'L L.J. 387 (2000).

29 *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 207-08, 259 (2d ed. 2004). For more general articulations of the "imperial" thesis for contemporary international law, see, for example, Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003); B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004); WALTER RUSSELL MEAD, GOD AND GOLD: BRITAIN, AMERICA, AND THE MAKING OF THE MODERN WORLD (2007). *But see* José E. Alvarez, *Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?*, 60 ALA. L. REV. 943 (2009) (criticizing "imperial" perspectives of the contemporary international investment regime).

30 For a critique of this contention, see José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 379, 473-77 (Karl P. Sauvant ed., 2009) [hereinafter INTERNATIONAL INVESTMENT YEARBOOK].

31 *See* B.E. Chattin (United States) v. United Mexican States, 4 R. Int'l Arb. Awards 282 (Gen'l Claims Comm. 1927) (MacGregor, Comm'r, dissenting).

32 Santiago Montt, *What International Investment Law and Latin America Can and Should Demand from Each other, Updating the Bello/Calvo Doctrine in the BIT Generation*, 3 REVISTA ARGENTINA DEL RÉGIMEN DE LA ADMINISTRACION PÚBLICA 75, 80 (2007).

33 Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

Guzman's article, which its author has updated for publication in 2009,[34] is the most frequently cited account of the rise and spread of the investment regime. Although told in the dry jargon of law and economics, Guzman portrays the investment regime as essentially a tool of empire—a prime example of Western capital exporters turning to hegemonic bilateral treaties to exert unfair leverage over individual developing countries, when, as a group, those countries had successfully managed to change the rules of the game.

Guzman seeks an answer to an apparent paradox: why did developing states oppose the Hull Rule, which required "prompt, adequate, and effective" compensation, and embrace the New International Economic Order (NIEO) at the UN while simultaneously flocking to bilateral treaties that contradicted these collective efforts? To Guzman the answer lies in a simple prisoner's dilemma. As a group, developing states had a common interest in toppling the Hull Rule and other relevant rules of customary international law protecting alien investors. They successfully did so through their General Assembly efforts, but they were unable to sustain a united front; instead, as individual prisoners they defected from the NIEO by adhering to bilateral investment agreements with capital exporting states.

BITs address what Gúzman calls a "dynamic inconsistency problem," a situation "when a preferred course of action, once undertaken, cannot be adhered to without the establishment of some commitment mechanism."[35] "The central problem," Guzman explains, "is that a sovereign country is not able, absent a BIT, to credibly bind itself to a particular set of legal rules when it negotiates with a potential investor."[36] Guzman explains that individual developing countries conclude BITs out of economic self-interest, intent on striking particular tit-for-tat remedies for the dynamic inconsistency problem with particular capital exporting nations but without any intention of restoring the former (pre-NIEO) general rules protecting the interests of alien investors. His thesis is that individual least developed countries (LDCs) conclude BITs in an ultimately fruitless and self-defeating competitive effort to secure an advantage vis-à-vis other developing countries. The results are predictably suboptimal: their acts as BIT signatories generate a race to the bottom whereby all LDCs are ultimately worse off than if they had stuck together and adhered to the NIEO.[37]

Guzman's recourse to game theory also offers an ostensible legal payoff. Guzman contends that since LDCs adhered to BITs for economic reasons, their actions did not have the *opinio juris* to affect or change the underlying customary international legal protections that had been destroyed by the NIEO.[38] Accordingly he argues that today's network of investment agreements constitute *lex specialis* between their par-

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34 Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, *in* Effect of Treaties on Foreign Direct Investment, *supra* note 9, at 73.

35 *Id.* at 78.

36 *Id.*

37 *Id.* at 85-88, 90-91.

38 *Id.* at 93-96.

ticular parties and should not be considered to codify, to affect, or to provide evidence of customary international law.[39]

IV. Questioning Guzman

A careful student of the New Haven school would question the existence of the alleged "paradox" that begins Guzman's inquiry. The circumstances surrounding the origins of BITs and the evolution of this regime cast doubt on Guzman's contentions that LDCs were "simultaneously" engaged in contradictory actions, had successfully toppled the Hull Rule or other relevant customary legal norms prior to entering into BITs, had no other option except to enter into BITs to surmount a dynamic inconsistency problem, entered into BITs solely to surmount the dynamic inconsistency problem, and have not affected customary international law through their participation in investment agreements. In this part, I argue that the investment regime was probably not, as Guzman would have it, built on the failure of collective action. In the next part, I contend that even if Guzman were correct about the regime's origins, it is certainly not accurate to describe the *existing* investment regime as a ruse devised by game theorists to pull the wool over the eyes of unwilling LDCs.

To begin, Guzman's timeline is wrong or at best misleading. In 1973-74 the vast majority of LDCs were not doing one thing at the UN General Assembly while simultaneously engaged in undermining those efforts through the individual negotiation of BITs. As Guzman acknowledges, the highpoint of the NIEO effort, never to be duplicated, came in 1974. Yet, even when the Cold War ended many years later, in 1989, only 386 investment agreements were in place (as opposed to nearly 3000 today).[40] Guzman is correct to point out that at least some LDCs had concluded some bilateral investment treaties by 1974, but he is wrong to suggest that such BITs responded to either the alleged "toppling" of the customary international laws or to his crucial "dynamic inconsistency" problem. Guzman ignores that in the early 1970s nearly all BITs were extremely weak devices for the protection of investment rights and most lacked the perfected investor-state arbitration clause that Guzman argues makes BITs credible commitment devices (at least over investment contracts that are enforceable only through recourse to host state courts).[41] As is clearly shown by Jason Webb Yackee's impressive empirical efforts to trace the growth of what he calls "strong" BITs (so called because they contained investor-state dispute settlement clauses in which the

39 Indeed, Guzman contends that BITs are more plausibly described as "permissible derogations from the existing rules of customary law." *Id.* at 95.

40 Vandevelde, *supra* note 9, at 16.

41 Thus Tillmann Rudolf Braun notes that the "first generation" of BITs included only state-to-state arbitration clauses. The erstwhile leader of BITs, Germany, concluded its first BIT with an investor-state arbitration clause only in 1979, and that clause (in the German-Rumanian BIT) extended arbitral jurisdiction only with respect to the amount of compensation. The first German BIT with a comprehensive investor-state arbitration clause was signed only in 1986. TILLMANN RUDOLF BRAUN, GLOBALIZATION: THE DRIVING FORCE IN INTERNATIONAL INVESTMENT LAW (forthcoming 2009).

state gave its advance consent to arbitration), of the BITs concluded by 1974, only a miniscule number contained effective investor-state dispute settlement clauses.[42]

Thus, when LDCs were, as a group, resisting the traditional international legal protections for investors and the recourse to international arbitration at the General Assembly, they had not yet agreed individually, in the few BITs concluded at that time, that foreign investors could unilaterally initiate binding arbitration to enforce their rights. LDCs' consistent position on this point should not come as a surprise. Although the first BIT was concluded in 1959, it was not until 1965, with the conclusion of the ICSID Convention, that states could possibly give their advance consent to investor-state arbitration through a BIT. Moreover, as those most familiar with the drafting of the ICSID Convention have stated, it was unclear even when that convention was concluded and a trickle of states began ratifying it after 1965 that ICSID would become a general vehicle for *treaty-based* arbitration "without privity" (as opposed to a device to complement distinct arbitral commitments contained in investment contracts between investors and states).[43] The first BIT with unqualified state consent to arbitration (between Italy and Chad) "did not enter into force until 1969 ... and the majority of BITs" did not contain the state parties' pre-commitment to international arbitration for investor-state disputes "until well into the 1990s."[44] Indeed, the *AAPL v. Sri Lanka* award, which came in 1990, was the first to affirm that consent to arbitration could be provided through a state's advance consent as provided in a treaty.[45] While the aggregate data does not permit the reader to identify how many BITs between developed and developing states contained effective investor-state dispute settlement clauses as of 1974, it would appear from the data that the vast majority of BITs did not contain such clauses but were comparable to the Canada-Poland BIT of 1990—a typical treaty for its time that combined relatively weak investment protections with an ineffectual investor-state dispute settlement clause.[46] Investment treaties of this kind do not provide investors with the assurances that their rights will be credibly protected. They do little to correct the conditions of "dynamic inconsistency" which Guzman claims motivated LDCs to defect from the NIEO.

42 Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 815 (2008).

43 Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

44 Yackee, *supra* note 42, at 815.

45 Thomas Wälde, *Introduction: International Investment Law Emerging From the Dynamics of Direct Investor-State Arbitration*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 43, 58 (Philippe Kahn & Thomas W. Wälde eds., 2007); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 46 (2009). The first award to uphold "arbitration without privity" based on a state's giving its advance consent to arbitration in its domestic law was *SPP v. Egypt* (1985). *See* NEWCOMBE & PARADELL, *supra*, at 45.

46 *See, e.g.*, Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Pol., art. IX, Apr. 6, 1990 (failing to provide the states' advance consent to arbitration within the treaty).

Guzman's thesis ignores the fact that, as most investment scholars have recognized, the modern BIT era began not with the first weak BITs concluded by Germany in the late 1950s or with the tiny trickle of investment treaties concluded by 1974, but with the later development of much more investor-protective agreements, coinciding with the decision by the United States to abandon its old Friendship, Commerce, and Navigation (FCN) program and develop its own Model BIT.[47] The U.S. BIT program formally began in the early 1980s but did not really take off until about 1989, long after the NIEO efforts in the General Assembly had come to an end.[48] The first U.S. Model BIT successfully used in negotiations, the U.S. Model BIT of 1984, revolutionized the investment regime and was instrumental in enabling the wave of investor-state arbitral disputes many years later.[49] As the excerpts from that treaty in the accompanying table indicate, the U.S. Model of 1984 had a simple, straightforward purpose: to protect foreign investors.[50] It had an expansive, some would say "circular," definition of investment that embraced all forms of economic interests, from those conferred by informal contract to those bestowed according to local laws or licenses.[51] Its "relative" guarantees of national and most favored nation (MFN) treatment extended to the entry of investment and not merely to post-entry treatment.[52] It contained an "umbrella" clause elevating violations of any "obligation" between host state and investor to the level of a treaty breach, and providing a guarantee, above and beyond national treatment, to protect investors from "arbitrary and discriminatory" measures.[53] It affirmed the need to provide investors prompt, adequate and effective compensation for any direct or indirect expropriation or other acts that were "tantamount to expropriation or nationalization."[54] Crucially, it also enabled the third party beneficiaries of the treaty, namely foreign investors from either party, to enforce, directly and without intervention from their home state, all the treaty's guarantees through international arbitration, to which the state parties gave their advance consent in the treaty itself.[55]

Moreover, even though the U.S. Model BIT of 1984 was regarded as the most investor-protective agreement then in existence and came to be emulated by others, the United States continued to "improve" its model over time. It was not until 1987, for example, that the United States sought to correct another potential source of "dy-

47 *See, e.g.*, NEWCOMBE & PARADELL, *supra* note 45, at 45 (contending that the modern BIT era did not begin until 1969 with the signing of the Chad-Italy BIT).

48 For a history of the U.S. BIT Program, see KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES 29-43 (1992).

49 For texts of the 1982, 1983, and 1984 U.S. Model BITs, as well as the texts of the first BITs concluded by the United States, see *id.* apps. A and B (the 1984 U.S. Model appears as Appendix A-3).

50 *Id.* app. A-3, at 20 (preamble to the 1984 U.S. Model BIT).

51 *See id.* (art. I).

52 *Id.* at 21 (art. II(1)).

53 *Id.* (art. II(2)).

54 *Id.* at 22 (art. III).

55 *Id.* at 23 (art. VI).

namic inconsistency"—the possibility that host states may have successfully induced an investor to waive its right to international arbitration through an investment contract. The new U.S. model treaty of 1987 clarified that its guarantee of investor-state dispute settlement would, at the option of the investor, prevail over any clause in an investment contract stipulating other forms of dispute settlement (including local courts).[56]

Contrary to what Guzman suggests, the wave of BITs capable of addressing his "dynamic inconsistency" problem did not begin until after LDCs had abandoned their attempts to establish the NIEO. Indeed, as Yackee's data indicate, BIT ratifications generally, and particularly ratifications of "strong" BITs, began to accumulate in significant numbers only after the fall of the Berlin Wall. LDCs turned to "strong" BITs, in short, roughly at the same time (and for the same reasons) as they turned towards liberalized capital flows and towards market approaches to running their economies. The 1990s, not the 1980s and certainly not the 1970s, were the era when the modern investment regime was born.

Given these facts, Guzman's conclusions about the disconnect between BITs and customary law are extremely dubious. Guzman contends that if LDCs had intended to resurrect customary international law investment protections apart from their entry into BITs, they would have undertaken collective efforts to undo the effects of their earlier NIEO efforts within the General Assembly. This contention ignores some troublesome facts, apart from the timing issues noted above.

Contrary to what Guzman argues, there is little concrete evidence that the NIEO efforts in the Assembly had successfully toppled—as opposed to merely threatened—the Hull Rule or other relevant customary norms encompassed by the doctrine of state responsibility to aliens. As those involved in the establishment of the U.S. BIT program have repeatedly pointed out, the U.S. turned to BITs and the inclusion of various provisions therein that explicitly relied on customary international law in order to buttress customary law.[57] U.S. BIT negotiators would hardly have sought to conclude treaties explicitly relying on customary law and indicating that U.S. investors needed to be treated in accord with customary law had they thought that those traditional norms no longer existed. And these negotiators had good reason to continue to put their trust in such norms since, whenever the viability of such rules had been questioned before reasonably neutral bodies, the relevant arbitral tribunals continued to conclude even after 1974 that neither the Assembly resolution on Permanent Sovereignty nor its Charter of Economic Rights and Duties of States had changed the underlying customary norms.[58] Guzman makes no mention of these fa-

56 For the 1987 U.S. Model BIT, see *id.* app. A-4. Its provision on investor-state dispute settlement, at article VI, expressly qualifies resort to previously agreed applicable dispute settlement (including provisions in the investor's contract) to paragraph 3, enabling the investor to choose to go to treaty based investor-state arbitration even in such cases.

57 *See, e.g., id.* at 7-22.

58 *See, e.g.,* SEDCO, Inc. v. Nat'l Iranian Oil Co., 10 Iran-U.S. Cl. Trib. Rep. 180 (1986); Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 I.L.M. 1 (Int'l Arbitral Trib. 1978); *see also* LOWENFELD, *supra* note 10, at 16-31.

mous decisions or of their underlying contentions that, since both of these Assembly resolutions had drawn the opposition of "specially affected" states, the resolutions could not displace the traditional law affirmed in earlier Assembly resolutions adopted by consensus. Guzman's facile conclusion that the Assembly's actions had, by 1974, successfully destroyed the Hull Rule ignores lively scholarly debates on whether those Assembly resolutions had any legal effects on customary law, whether Assembly resolutions in general can be seen as a form of "state practice" or "*opinio juris*," and whether it is easier for the Assembly to *displace* existing custom than to replace it.[59] Given arbitral decisions on point and the absence of a scholarly consensus otherwise, it is strange to suggest, as Guzman does, that had LDCs truly wished to restore the traditional international rules protecting alien investors, they could have done so through General Assembly resolutions "revoking" the previous NIEO resolutions. It would have been extraordinary for the Assembly to attempt to "revoke" a prior Assembly resolution even if the vast majority of states no longer agreed with their prior proclamations.[60] When an Assembly effort is no longer viable, it is far more common for the relevant Assembly resolution simply to disappear from the Assembly's agenda. This is, of course, what eventually occurred with the NIEO. It is equally plausible to assume that as former supporters of the NIEO changed their minds about the wisdom of those efforts—which had never convinced arbitrators in any case—they merely failed to re-introduce affirmations of the Charter of Economic Rights in subsequent sessions of the Assembly. Subsequent inaction by the Assembly on the NIEO, coupled with other Assembly actions, such as its passage of a resolution in praise of "entrepreneurship" in 1993, could be taken as evidence that LDCs as a group *and* as BIT parties no longer supported the NIEO.[61]

Of course, as traditional positivist international lawyers would be quick to point out, the content of customary norms is determined by actual state practice and *opinio juris* (or, as New Haven scholars would put it, by the actions and reactions of the relevant participants and by the appraisal of those actions and reactions by other relevant actors). It is wrong to single-mindedly focus on the impact of either a network of investment treaties or a series of Assembly resolutions. To determine the state of relevant customary law at a particular moment in time, one must look at what states were doing and not merely what they were saying. BITs do not exist in a vacuum.

As veteran U.S. BIT negotiator Kenneth Vandevelde has noted, U.S. BIT negotiators tend to seriously negotiate only with countries whose laws or reform plans would

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59 *See, e.g.*, LOWENFELD, *supra* note 10, at 16-31.

60 The closest example, which suggests its exceptional nature, is the Assembly's effort to renounce its prior Assembly equating Zionism with racism.

61 *See* G.A. Res. 48/180, U.N. Doc. A/RES/48/180 (Dec. 21, 1993) (entitled "Entrepreneurship and Privatization for Economic Growth and Sustainable Development"). Knowledgeable Assembly watchers know that when a majority of states continue to support action in the Assembly, this is inevitably accompanied by Assembly resolutions in seriatim. The sheer absence of subsequent Assembly affirmations of the Charter of Economic Rights and Duties of States in the 1980s and beyond suggests how the NIEO effort effectively died from lack of affirmative support.

enable them to live up to the BIT's terms.[62] To do otherwise would only lead to disappointed foreign investors and to a tide of unsettling investor-state arbitral claims. Thus, prospective BIT signatories usually reform their local laws and practices as necessary in order not to generate at least predictable investor disputes under the BIT. This may help explain why the wave of BIT ratifications has generally been accompanied or preceded by a wave of reforms to relevant national laws and practices. Therefore, according to UNCTAD, of 2533 changes in national foreign direct investment (FDI) laws from 1991 to 2006, ninety-one percent moved towards making the investment climate more welcoming to FDI.[63] These changes in law, which coincided with the steep increase in BITs, and not merely the practice of concluding BITs, are surely part of the "state practice" that needs to be examined with respect to the relevant customary law.[64]

Guzman's mono-causal view of why countries enter into BITs would not persuade scholars of the New Haven School. It is wrong to assume that BITs constitute the *only* mechanism LDCs have to overcome the dynamic inconsistency problem, that individual LDCs could not defect from the NIEO in the absence of BITs, or that only reputational constraints affected the behavior of LDCs prior to the advent of BITs. Even without BITs, LDCs have long had at least two other methods to overcome the dynamic inconsistency problem: political risk insurance and undertaking express commitments to particular investors via contract.[65] Depending on the circumstances, neither of these imposes only "reputational" constraints on host states' subsequent

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62 VANDEVELDE, *supra* note 48, at 31-32.

63 Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, *in* EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra* note 9, at xlix-l.

64 The fact that states are entering into such commitments under the law (both national and international) would certainly support using these developments as evidence of *opinio juris*. Indeed, the relevant changes to national law in the direction of a liberal investment regime could also support an argument on the basis of general principles of law.

Nor is there evidence, as would be implied by Guzman's "economic" rationale for LDCs' conclusion of BITs, that market-oriented changes to national laws were intended to benefit only select investors from specific BIT partners. The evidence that we have suggests that most of these national laws sought to benefit investors generally. This makes sense as particularized benefits to only certain foreign investors, even if they had been attempted, would likely have been short-lived given the MFN protections accorded under most BITs, while domestic legal reforms suggesting that foreign investors would receive greater rights than local investors could prove politically controversial. For a specific example of the use of BITs as a device to improve conditions for all investors, national or foreign, see Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 92-93 (2007) (discussing Chinese efforts to use its BITs to redress local rule of law shortcomings).

65 Of course, all countries have at least one other option: establish credible and independent national courts that foreign investors can trust to affirm host states' commitments to them.

actions towards investors. Both also offer plausible alternative courses of action for those seeking to "defect" from Guzman's alleged prisoners' dilemma.[66]

Accordingly, it is unlikely that states ratify BITs only in order to resolve the dynamic inconsistency problem, and it is unlikely that these actions therefore have no relevance to the continued viability of traditional rules of custom. BITs were a *marginal* improvement over political risk insurance and investment contracts as credible commitment devices, but, as recent efforts to attempt to enforce arbitral decisions against Argentina demonstrate,[67] it is a mistake to assume that BITs provide a foolproof method of forcing compliance on a reluctant state.[68] It is reasonable to inquire why states take the trouble to negotiate BITs when these treaties only contribute to,

66 Guzman has claimed that "no consensus" exists that investment contracts are binding under international law. *See* Guzman, *supra* note 34, at 79. For a forceful rebuttal of this argument, see Jason Webb Yackee, Pacta Sunt Servanda *and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550 (2009) (surveying the arbitral case law affirming the enforceability of investor contracts with host states under a number of international legal doctrines, including expropriation). Note that arbitrators have disagreed about why states need to respect the vested interests of investors. *See, e.g.*, Ole Spiermann, *Applicable Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 89, 94-99 (Peter Muchlinski et al. eds., 2008) [hereinafter HANDBOOK OF INTERNATIONAL INVESTMENT LAW]. Arbitrators have also suggested, however, that ordinary commercial breaches of contract by a government do not violate international law absent other government conduct that violates international law, such as a denial of justice. *See, e.g.*, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 87, U.N. Doc. A/56/10 (2001).

67 For reports on the battle between CMS and Argentina over payment of the ICSID Award in favor of CMS, see Luke Eric Peterson, *Round-Up: Where Things Stand with Argentina and Its Many Investment Treaty Arbitrations*, 1 INV. ARB. REP. 9 (2008), *available at* http://www.iareporter.com/Archive/IAR-12-17-08.pdf. For an attempt by an ICSID tribunal to deal with the enforcement "gap" in investor-state arbitration, see *Sempra v. Argentine Republic* (ICSID 2009), http://ita.law.uvic.ca/documents/Sempra-Stay.pdf (directing Argentina to put $75 million into an escrow account if it wishes to stay an award against it, pending pursuit of annulment).

68 BITs are more reliable "commitment devices" than investment contracts at least insofar as the latter do not include enforceable arbitration clauses; in addition, BITs provide investors protection in the myriad instances in which they have no contracts with a host state or where their injuries result from harms that are not cognizable in contractual terms. In addition, BITs extend protection to risks that exceed the political risks covered by most forms of political risk insurance (even when this is available) and enable the investor to bring a claim against the host state. Investor-state dispute settlement under a BIT also enables investors to control the kinds of issues that would be presented to arbitrators for their decision; investor-state arbitration assists in depoliticizing disputes in a way that is not possible under the subrogation schemes of political risk insurance mechanisms where the home state of the investor (and issuer of the insurance) assumes the investor's claim. It needs to be stressed, however, that all of these are only relative improvements on alternative commitment devices. Given the difficulty of enforcing damages awards against entities with sovereign immunity, none of these—BITs, investment contracts, or

but do not wholly resolve, the dynamic inconsistency problem. It is probable that LDCs turn to BITs for other reasons as well. As scholars of the New Haven School have repeatedly pointed out, states usually have multiple reasons—and often face competing pressures from domestic constituencies—for entering into international commitments. It would be strange indeed if BITs, alone among treaties, were an exception to this general rule.

As observers of both BITs and earlier FCNs have suggested, while it is always difficult to speculate about the motivations of governments, distinct government elites are, in all likelihood, motivated to enter into investment treaties for political as well as economic reasons. Given the evident fact that in some cases a country that enters into an investment agreement with the United States cannot realistically expect increases in U.S. capital flows as a result,[69] an LDC with a checkered history of investor-state relations might adhere to the exceptionally investor-protective U.S. Model BIT, circa 1984-87, in order to send a forceful signal that it is ready to protect all foreign investors or that it has now reformed its practices to be more market friendly.[70] The intent to send this general message is especially likely if, as in most cases, it would be politically untenable to extend treaty guarantees only to U.S. investors and to no one else.[71] Some developing countries may also have entered into such treaties to entice more aid from the U.S. Congress or from other U.S. allies or to show the IMF that it was serious about complying with that organization's structural adjustment demands. Others may have concluded BITs with the United States to express solidarity with the United States vis-à-vis other issues—or even to signal that it would now vote with the United States should NIEO-type resolutions be proposed in the General Assembly.

As New Haven School scholars would point out, it is also important to seek to understand the domestic constituencies within an LDC that may be pressing for or against BIT ratification. Even some internal elites within an LDC may favor conclud-

political risk insurance—*ensure* that states' commitments to private parties will be fully respected.

69 Indeed, as veteran U.S. BIT negotiators have repeatedly pointed out, U.S. negotiators routinely alerted prospective BIT partners not to expect that BITs would necessarily increase such flows from U.S. investors, and U.S. investors frequently resisted attempts by prospective BIT partners to include investment promotion devices within such treaties. *See, e.g.*, VANDEVELDE, *supra* note 48, at 32; Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 524 (1998).

70 *See, e.g.*, Akira Kotera, *Regulatory Transparency*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 66, at 617, 624 (describing the motivations behind BITs with Eastern European countries, including the U.S.-Poland BIT).

71 For consideration of the evidence that BITs may increase a party's general appeal to all foreign investors and not merely to investors from the particular signatory country, see, for example, Büthe & Milner, *supra* note 17, at 171.

ing a strong investor-protective BIT with the United States if they believe that such a treaty could make the national rule of law more stable or predictable.[72]

These are all credible rationales for adhering to BITs. Unlike the single (inadequate) rationale offered by Guzman, none of these is inconsistent with the text of many of these treaties—which affirm the continued validity of relevant customary norms, from the Hull Rule to "full protection and security."[73]

Even assuming Guzman is correct that the LDCs' turn to BITs was principally driven by "economic" concerns, it is hard to see why this undercuts the potential for BITs to re-affirm customary international law. Even if LDCs enter into such agreements only for economic reasons, this rationale is not necessarily inconsistent with support for customary norms. As New Haven School scholars would be among the first to point out, economic self-interest is one reason states may express support for a rule of custom. The need to secure scarce capital is not inconsistent with expressing continued *opinio juris* in support of customary law and may well be a reason to do so. Indeed, as both realists and New Haven scholars would contend, most rules of custom (or in treaties) exist because relevant states believe the rules are in their political, economic, or other interests. These rationales do not undercut the existence of *opinio juris*.

Guzman ignores the salient facts that strongly suggest why, particularly after the end of the Cold War, developing countries (as well as those emerging from socialism) were likely to support the traditional customary protections for investors. The explosion in the number of investment agreements—what Vandevelde calls the "global era" of such agreements—is rooted in a global (if perhaps short-lived) victory for market ideology.[74] As noted, the proliferation of BITs has been accompanied by pervasive changes in how both foreign and national investors are treated under national laws. This turn to liberal capital flows and to respect for property rights has, of course, also been encouraged by the "good governance" efforts of the World Bank, the IMF, and other market participants. The vast bulk of BITs came at the same time that multilateral organizations—from the World Bank to the IMF to UNCTAD—were also changing their perspective on free capital flows and their impact on development. Guzman ignores these multilateral dimensions of the investment regime as well as

72 As Thomas Wälde has suggested, this would follow from application of Putnam's analysis of the two-level games often undertaken through the conclusion of international legal commitments. *See, e.g.*, Wälde, *supra* note 45, at 91; *see also* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000) (explaining how fragile government elites in Europe turned to human rights treaties after WWII to buttress their states' commitment to democracy).

73 In addition to the language affirming the Hull Rule and customary international law "minimum" standards of treatment (such as "fair and equitable treatment" and "full protection and security"), the typical U.S. BIT also re-affirms that investors have a right, under the treaty, to treatment no less than that provided under international law. *See* tbl. *But cf.* Guzman, *supra* note 34, at 95 (stating that BITs do not contain language affirming customary international law).

74 Vandevelde, *supra* note 9, at 21.

the impact of other significant global events, such as the establishment of the WTO in 1994, along with its complementary rules for reducing states' reliance on trade-related investment measures (TRIMs), for protecting trade in services (GATS), and for protecting intellectual property rights (TRIPS). The TRIMs Agreement has helped to encourage the inclusion of comparable restrictions on trade-distorting performance requirements within investment agreements, and there is significant overlap with the goals sought to be achieved through the TRIPS and GATS agreements as well.[75]

Guzman's alleged prisoner's dilemma exists in a rarified vacuum unconnected to how the financial constraints faced by LDCs in all likelihood affected the motivations of their government officials as well as other powerful internal actors. Quite apart from the odd premise that capital flows constitute a zero sum game,[76] his prisoner's dilemma ignores the consequences brought on by the disintegration of the Soviet bloc or by the debt crisis of 1980s. It ignores the wider ripples of decline in private lending during this period, which, as Vandelvelde points out, had by 1980 "accounted for half of all capital flows to developing countries."[77] It ignores the massive federal deficits of the Reagan era, which prompted extensive borrowing by the United States and which put further pressure on private markets for credit. It also ignores reductions in development assistance at the behest of that same Administration—and the severe impact on LDCs of all of these events. Guzman ignores, in short, the possibility that LDCs had, *as a group and as individual states*, as well as influential elites within those states, more than sufficient reasons to abandon any lingering hostilities to traditional customary protections for foreign investment and more than enough reasons to adopt (or to resume) policies, such as concluding investment agreements with investors and investment treaties with states, intended to create a generally favorable environment for capital flows (and not merely for investors from specific BIT parties). Indeed, it would be extraordinary if, given all of these developments, rational developing state governments would have continued to adhere to the NIEO.[78]

75 For a discussion of the impact of these developments, see, for example, *id.* at 19-28.

76 For one critique of such "mercantilistic" zero-sum thinking as applied to the investment regime, see, for example, Wälde, *supra* note 72, at 72-73.

77 Vandevelde, *supra* note 9, at 21.

78 Guzman argues that if LDCs were intending to affirm customary norms they would have signed multilateral treaties rather than bilateral ones. *See* Guzman, *supra* note 34, at 84. This is a non sequitur. BITs vary in their terms—although they do not generally undermine by their content anything in customary international law. The fact that states may opt to preserve different standards of treatment having nothing to do with customary law, and, subject to MFN, extend only certain of these preferences to some treaty partners may drive them to bilateral and regional agreements. The absence of a multilateral agreement among LDCs or between LDCs and developed states with respect to investment says no more about investment agreements' impact on customary norms than does the failure of OECD members to conclude the Multilateral Agreement on Investment (MAI). There is no question that OECD members share among themselves relatively compatible views about the applicable customary norms. As Vandevelde suggests, the failure of the MAI "may have been in part the result of that very consensus: that is, because these countries already provide a favorable environment for investment as a matter

V. Beyond Guzman: The Future of the Investment Regime

Getting past Guzman's oversimplified account of the "coerced" origins of BITs is essential to understanding the complex reality of the contemporary investment regime and its likely future. Whatever else it may be, today's investment regime is not the product of a zero sum hegemonic or imperial game played at the expense of capital importers. As we are more acutely aware than ever in the United States, today's flows of investment are not merely one way. For some time the United States has not only been the world's leading exporter of capital flows but also the world's leading *recipient* of foreign investment capital. We share this duality with others, such as Brazil, Russia, India and China—that is, the BRICs, which are all leading recipients and exporters of capital. Indeed, of the net stock of outward foreign direct investment capital, one fifth (or about $300 billion in 2007) comes from multinational corporations (MNCs) from emerging markets.[79] Emerging market MNCs are now important players in the world market. Of course, among the most dynamic MNCs are those from the Chinese mainland.[80]

Stephan W. Schill has explored what China's status as both capital exporter and capital importer has meant for the Chinese BIT program, which is second only to Germany's in the number of BITs concluded.[81] Schill traces the evolution of Chinese BITs and finds a significant change occurring in the late 1990s when that country broke with its long-standing reservations concerning national treatment and comprehensive investor-state dispute settlement. Schill points out that while, until 1979, the PRC government associated itself with other LDCs in support of the NIEO, it radically changed its mind in order to attract foreign investment. He shows that, particularly as the PRC evolved into both a capital importer and capital exporter, that country's reservations to the international legal guarantees contained in Western BITs crumbled. Consistent with the history suggested in Part IV, Schill describes how Chinese BITs evolved from the relatively weak treaty concluded with Sweden in 1982 (which did not contain investor-state dispute settlement at all), through treaties predating the PRC's (1990) signature to the ICSID convention (which offered investors an arbitral remedy only with respect to the narrow question of the amount of compensation due in case of expropriation), to a "new generation" of BITs in the late 1990s and early 2000s (which finally combined broad guarantees of national treat-

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of national policy, most of the participants had little to gain from the agreement and thus, once negotiations were underway, the focus shifted to that which they would be conceding." Vandevelde, *supra* note 9, at 33. Of course, there are some multilateral agreements that extend rights to foreign investors; the Energy Charter Treaty is the most prominent.

79 Sachs & Sauvant, *supra* note 63, at xxxii-xxxiii.

80 For one account of the massive increases in Chinese outflows of foreign investment from 1992 to the present, see, for example, Press Release, Vale Columbia Center on Sustainable International Investment, Chinese Multinationals Make Steady Progress (Oct. 22, 2008) [hereinafter Vale Columbia Press Release].

81 Schill, *supra* note 64, at 75. As of 2008, Germany had signed 139 BITs with 125 in effect, while China had over 120 signed BITs. *See* BRAUN, *supra* note 41.

ment, clearer compensation standards, an umbrella clause, and capital transfer provisions with a comprehensive and effective investor-state arbitration clause).[82] Schill notes that the new generation of Chinese BITs is not limited to treaties concluded with LDCs (where Chinese investors would be expected to be the principal beneficiaries) but also includes recent treaties with capital exporting European states, such as its BIT with the Netherlands (2001) and with Germany (2003).[83]

Schill explains changing Chinese attitudes toward the international investment regime in terms that are strikingly different from Guzman's prisoner's dilemma. For Schill the PRC's new generation of BITs was "brought about by the continuous exposure to the needs and requirements of the global economy and China's increasing engagement with the international community."[84] While the PRC once sought to uphold the structures of its socialist economy by resisting commitments on national treatment that would put its state-owned enterprises on the same plane as foreign investors, Schill contends that "China's interest in protecting its own investment ventures abroad" led to its acceptance of an ever stronger BIT, as would be expected of any state that needs to balance its dual position as both capital exporter and capital importer.[85]

As the new generation of PRC BITs suggests, those treaties are no longer about protecting capital from the West. Today's investment regime is increasingly universal in scope. By the end of 2008, more countries had entered into at least one investment protection agreement (179 countries) than had joined the WTO.[86] Even countries that once adhered to the Calvo doctrine have now agreed to permit investor-state disputes to be heard outside their own courts, by international arbitration. Today, when twenty-seven percent of BITs are between developing countries[87] and a considerable portion of capital flows going to the West as well as coming from the East, investment agreements cannot be explained simply as variations of the one-sided capitulation agreements once concluded between colonial powers and the periphery.

While model investment agreements from Europe and the United States have served as the template for the world's network of some 3000 investment agreements, those entering such agreements today are a cosmopolitan lot. Apart from China, today's evolving investment regime includes, as prominent players, countries such as Cuba. Cuba—whose revolution was characterized by opposition to the rights of foreign investors[88]—now has concluded about as many investment protection agree-

82 Schill, *supra* note 64, at 89-113. China introduced an investor-state arbitral clause in its BITs for the first time in 1998, in a treaty with Barbados; its first use of such a clause with an industrialized nation was with Germany in 2003. *See* BRAUN, *supra* note 41.

83 Schill, *supra* note 64, at 93.

84 *Id.* at 82.

85 *Id.* at 99.

86 U.N. Conference on Trade & Dev. [UNCTAD], *The Development Dimension of International Investment Agreements*, 2, U.N. Doc. TD/B/C.II/MEM.3/2 (Dec. 2, 2008).

87 *See, e.g.*, Sachs & Sauvant, *supra* note 63, at xxxiv.

88 *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

ments as the United States(62).[89] And Cuba's BITs are not very different from the highly investor-protective U.S. Model BIT of 1984. The Cambodia-Cuba BIT of 2001, for example, includes a very expansive definition of protected investment (including all forms of property, stocks, any claims to money or performance under contract, and intellectual property rights).[90] It protects investors as well as their returns; accords fair and equitable treatment and full protection and security; and promises most favored nation status as well as "fair and equitable treatment."[91] Students of the infamous *Sabbatino* decision[92] of 1964, where the U.S. Supreme Court refused to find the Cuban nationalizations of U.S. properties illegal under international law, will be amused to discover that the Cuba-Cambodia BIT even includes a provision on expropriation that affirms, as does the U.S. BIT of 1984, the need to extend prompt, adequate, and effective compensation.[93]

As the Cuba-Cambodia BIT suggests, the United States' affection for free capital flows is now widely shared—and even includes governments that do not identify their economies as capitalist. It is difficult to see such countries—or other leading BIT signatories such as Egypt—as tools of hegemonic empire. Most countries now worship at the shrine of David Ricardo's theory of comparative advantage. Virtually all nations now regard the mutual flows of transnational capital as indispensable for economic growth. Whatever they once were, investment agreements are not *now* one-sided tools for the imposition of Western power. Nor are leading players who are signing such agreements to protect their foreign investors—countries such as Cuba, China or Egypt—easily characterized as dupes of Western capital.

But the best evidence of the changing dynamics and players of the contemporary investment regime may be the changes in U.S. investment policies over time. In recent years, the United States, along with many Western countries, has devel-

89 La Industria Cubana, http://www.cubaindustria.cu/webs/acuerdos_protec_inver.htm.

90 Agreement Concerning the Promotion and Protection of Investments, Cambodia-Cuba, art. I(1), May 28, 2001 [hereinafter Cambodia-Cuba BIT] (definition of "investment").

91 *Id.* arts. II, III, and VI.

92 Sabbatino, 376 U.S. at 398.

93 The Cambodia-Cuba BIT, *supra* note 90, art. IV, provides:

> Each Contracting Party shall not take measures of expropriation, nationalization, or otherwise subjected to any other measures having legal nature similar to nationalization or expropriation (hereinafter referred to as "expropriation") against the investments of an investor of the other Contracting Party except under the following conditions: a. the measures are taken for a lawful purpose, for public interest and under due process of law; b. the measures are non discriminatory basis [sic]; c. the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the investments affected immediately before the measures of expropriation became a [sic] public knowledge. Such market value shall be determined in accordance with internationally acknowledged practices and methods or, where such fair market value cannot be determined, it shall be such reasonable amount as may be mutually agreed between the Contracting Parties hereto, and it shall be freely transferable in the freely convertible currency in which the investment was made or in any other currency agreed upon by both Contracting Parties.

oped a more cautious attitude toward foreign investment. It is wrong to portray the United States of today or its current BIT program as driven by a single-minded quest to protect the interests of U.S. investors overseas. The United States, the ostensible leader of the investment regime and the author of what was once the most investor-protective treaty on earth, now shares with many countries, including many LDCs, fears about whether granting reciprocal rights to all investors will interfere with its sovereign prerogatives or result in challenges to its federal or state laws. For some time foreign takeovers of U.S. companies, including former public utilities, have led to debates over the power of U.S. federal and state governments to influence employment; patrol national security; preserve local jobs and prevent outsourcing; encourage technological innovation; and protect intellectual property or national security. In addition, as the United States, along with its European allies, has faced a greater number of investments from the BRICs, new concerns have emerged in some quarters about such investments. Whether these concerns stem from racism, economic nationalism, or other reasons, emerging market MNCs' attempts to take over Western companies have sometimes proven as sensitive for the United States as incoming Western capital has sometimes been for LDCs.[94]

In the wake of the highly controversial Dubai Ports deal, the United States has strengthened its ability to engage in the screening of incoming foreign investment under the Foreign Investment and National Security Act of 2007, which among other things elevates the level of scrutiny that the U.S. government will now accord to foreign investments owned or controlled by foreign governments, including state owned enterprises and sovereign wealth funds.[95] The country which has done the most to undermine the need for investment screening around the world now engages in a form of such screening. The number of cases examined by the U.S. government entity charged with national security screening of investments, the Committee on Foreign Investment in the United States (CFIUS), tells the story of the rising level of U.S. concerns. In 2005, the CFIUS reviewed 65 cases of planned mergers or acquisitions; in 2006 the number went to 113; in 2007 it looked at 147, and in 2008 it is estimated it reviewed some 170 cases, even though the amount of foreign investment coming into the United States was substantially less than in prior years.[96] The CFIUS screening process has had, in all probability, a certain chilling effect on incoming acquisitions; it exerts a shadow over foreign mergers and acquisitions that exceeds the small handful of prospective investments that are formally blocked through that government process. Moreover, the United States's decision to turn towards enhanced

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94 Presentations at Five Diamond International Investment Conference, Global Players from Emerging Markets. Indeed, the program on foreign investment at Columbia Law School is now completing a project on whether the United States is actually ready for FDI and especially mergers and acquisitions from China. *See* Vale Columbia Press Release, *supra* note 80.

95 *See, e.g.*, Mark E. Plotkin & David N. Fagan, *The Revised National Security Review Process for FDI in the US*, 2 COLUM. FDI PERSPS. (2009), *available at* http://www.vcc.columbia.edu/pubs/documents/Perspective2-PlotkinandFagan.pdf.

96 Presentation, Five Diamond International Investment Conference, *supra* note 96.

national security screening is inspiring others—such as Canada, Russia, China, Japan and Korea—to do the same.[97] Although most of these countries formally limit investment screening to cases that threaten "national security" interests, it is not clear how many of those efforts will slide into familiar investment screening intended to protect more general economic concerns—as has long been the case in Canada. The prospect of this occurring is high, particularly at a time of declining levels of employment and frequent bankruptcies by national industries and particularly since the new legislation or regulations authorizing investment screening will not likely include a comprehensive or transparent definition of "national security."[98]

The increased sensitivity within the United States posed by the fact that it is at the receiving end of foreign investment flows is clearly indicated by the changes over the past twenty years to the U.S. BIT program. While, as discussed, the Chinese BIT program appears to be evolving towards greater acceptance of what Schill considers prevailing "international standards" toward the treatment of foreign investors,[99] the U.S. BIT program has been going in the opposite direction. The accompanying table compares certain provisions from the 1984 Model BIT with the 2004 Model Treaty, which the United States now uses in its negotiations. Comparing the two texts suggests the extent to which the United States's experience, particularly as a defendant under the NAFTA's investment chapter over the past ten years, has made it considerably more cautious about extending treaty-based protections to foreigners. The United States, which since 1994 has faced a number of cases brought by Canadian investors challenging U.S. federal and state laws under the investment chapter of the NAFTA, is no longer as sanguine about proposing open-ended relative or absolute guarantees to foreign investors or about its ability to comply with these.[100]

As a comparison of the language of the 1984 and 2004 Model BITs demonstrates, the United States has now sought to "balance" the rights accorded investors with its rights to regulate to protect health, safety, and the environment.[101] It has also narrowed the tautological definition of "investment" by, for example, indicating that some forms of debt (such as claims for payment for the sale of goods or services, or

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97 *See, e.g.*, Budget Implementation Act, 2009, § 453 (Can.) (amending the Investment Canada Act to permit government screening of incoming foreign investment if there are reasonable grounds to believe that it could be "injurious to national security").

98 Neither the U.S.'s Foreign Investment and National Security Act of 2007 nor its underlying regulations clearly define the crucial concept of "national security." 50 U.S.C. App. § 2170 (2009); 31 C.F.R. pt. 800 (Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons).

99 Schill, *supra* note 64, at 113-15.

100 For a more thorough comparison of the 2004 and earlier U.S. Models, see Kenneth J. Vandevelde, *A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests*, *in* INTERNATIONAL INVESTMENT YEARBOOK, *supra* note 30, at 283.

101 See in particular the new language added to the preamble and new provisions such as articles 12 and 13. *See* 2004 U.S. Model BIT, *supra* note 15.

licenses that do not provide rights under local law) should probably not be considered to be covered by the treaty.[102]

The United States has narrowed the scope of the national and MFN treatment obligations by imposing fewer constraints on the sectors that a party can declare exempt from those obligations,[103] exempting from these obligations local government measures,[104] actions taken in compliance with the TRIPs Agreement,[105] government procurement,[106] and subsidies or grants provided by state parties.[107] In addition, investors can no longer claim that, even where they have not been the subject of a violation of national or MFN treatment, they have still suffered from "arbitrary and discriminatory" action, because that clause no longer appears in the 2004 Model.[108]

The 2004 U.S. Model adheres to examples set by the NAFTA's Chapter Eleven and has eliminated the 'umbrella' clause in the 1984 Model.[109] Although under the 2004 Model investors can still bring investor-state claims based on their written investment contracts,[110] apparently this only enables them to make such claims in instances involving host states' violations of other guarantees provided in the treaty, such as violations of fair and equitable treatment or violations of national treatment. Accordingly, a breach of even a written investment contract no longer suffices to prompt an investor-state treaty claim.

The scope of the "minimum standard of treatment" has been dramatically limited in scope, in accord with the NAFTA Commission Interpretation, issued on July 31, 2001, of a comparable provision in that treaty.[111] Investors are now accorded only that treatment which they would have been accorded in any case under "customary international law minimum standard of treatment of aliens," which is expressly stated not to create additional substantive rights and does not include breach of another provision of the treaty or of any separate international agreement.[112] Further, the guarantee of "fair and equitable treatment" is essentially limited to what once were designated

102 *See id.* art. 1, nn.1, 2 (these notes are new additions).

103 *Compare* VANDEVELDE, *supra* note 48, app. A-3, 21 (1984 Model BIT article II), *with* 2004 U.S. Model BIT, *supra* note 15, arts. 3(1), 4(1).

104 2004 Model BIT, *supra* note 15, art. 14(1).

105 *Id.*

106 *Id.* art. 14(5).

107 *Id.*

108 *Compare* VANDEVELDE, *supra* note 48, app. A-3, 21 (1984 Model BIT article II(2)), *with* 2004 U.S. Model BIT, *supra* note 15, art. 5(1).

109 *See* VANDEVELDE, *supra* note 48, app. A-3, 21 (1984 Model BIT article II(2)).

110 *See* 2004 U.S. Model BIT, *supra* note 15, art. 24(1). Compare the definition of "investment contracts" in the 2004 Model with the broad definition of "investment" in the 1984 Model. *See id.* art. 1; VANDEVELDE, *supra* note 48, app. A-3, art. I(b) (the 1984 U.S. Model BIT).

111 NAFTA Free Trade Comm'n, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001).

112 *See* 2004 U.S. Model BIT, *supra* note 15, arts. 5(2), 5(3).

as "denials of justice,"[113] while "full protection and security" is limited to failure to accord "police protection."[114] Yet a further limitation on the investors' rights may be suggested by Annex A's narrow definition of the meaning of "customary" law (limited to the "economic" rights of aliens).[115] Host states' obligations to make public all investment-related laws, regulations, or administrative practices and procedures are now limited to those acts having "general application."[116] An express provision assuring investors' rights to pursue claims in national courts is now omitted, replaced by a "transparency" provision that excludes from investor-state arbitral enforcement an investor's right to participate in national administrative proceedings.[117]

Investors' absolute rights in cases of expropriation have now been limited by making that clause inapplicable to the revocation, limitation or creation of intellectual property rights when these are in accord with the TRIPs Agreement[118] and by requiring that claims of taxation-based expropriation need to be submitted first to both state parties' tax authorities (such claims may be submitted to arbitration only if the tax authorities disagree).[119] More importantly, the expropriation guarantee now eliminates the "tantamount to expropriation" language,[120] states that the expropriation treaty right is no different than that contained in customary international law,[121] and subjects claims of "indirect" expropriation to a "case-by-case" inquiry that requires consideration of at least three balancing factors.[122] Finally, the new U.S. Model states that, "[e]xcept in rare circumstances," non-discriminatory regulatory actions taken to protect legitimate public welfare objections do not constitute "indirect" takings.[123]

Apart from restricting the scope of what once were far more open-ended investor protections, the new 2004 Model further restricts investor-state arbitrators' discretion in a number of ways. The new investor-state dispute settlement provision imposes a number of constraints on investors, such as a requirement of ninety days

113 *See id.* art. 5(2)(a).

114 *See id.* art. 5(2)(b).

115 *See id.* annex A.

116 *See id.* art. 10. Note that, while the 2004 Model expands on the traditional transparency obligations to include opportunities to participate in the adopting and application of investment-related policies, these provisions are not subject to investor-state arbitration. *See id.* arts. 11, 24(1)(a)(i).

117 *Compare* VANDEVELDE, *supra* note 48, app. A-3, 22 (1984 Model BIT article II(6)), *with* 2004 U.S. Model BIT, *supra* note 15, arts. 11, 24(1).

118 2004 U.S. Model BIT, *supra* note 15, art. 6(5).

119 *Id.* art. 21(2).

120 *Compare* VANDEVELDE, *supra* note 48, app. A-3, 22 (1984 Model BIT article III), *with* 2004 U.S. Model BIT, *supra* note 15, art. 6(1).

121 2004 U.S. Model BIT, *supra* note 15, annex B(1).

122 *See id.* annex B(4). The three factors are drawn from a leading takings case decided by the U.S. Supreme Court. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-25 (1978).

123 2004 U.S. Model BIT, *supra* note 15, annex B(4)(b).

notice indicating the legal and factual basis of each one of its claims[124] and effectively a three year statute of limitations.[125] In addition, the new requirement of transparency in investor-state claims and the requirement of amicus curiae briefs from non-disputing parties[126] might be seen by some investors (and their lawyers) as imposing additional burdens and costs on bringing such claims. More significantly, host states may now avoid arbitral rulings against them by invoking a more expansive and arguably self-judging "essential security" clause[127] or by invoking a wholly new exception permitting states to adopt or maintain "measures relating to financial services for prudential reasons"[128] or non-discriminatory measures of general application "in pursuit of monetary and related credit policies or exchange rate policies."[129] In addition, as under the NAFTA's Chapter Eleven, the new 2004 Model BIT includes a provision permitting the state parties to issue interpretations of their treaty from time to time that are binding on investor-state arbitrators.[130]

It should also be noted that while, in principle, investors subject to the new generation of U.S. BITs could attempt to secure the greater rights accorded to investors under prior U.S. BITs through the MFN clause, this possibility is seemingly precluded by a nonconforming measures clause that, while it does not appear in the text of the 2004 Model, has so far appeared in all U.S. BITs and Free Trade Agreements (FTAs) concluded since 2004. Under that clause, the United States reserves the right to adopt or maintain any measure that accords differential treatment to countries under any international agreement signed or in force prior to the date of entry into force of the BIT or the FTA. This means that covered investors or investments may not demand treatment as favorable as that guaranteed by any prior U.S. BIT or FTA, notwithstanding the MFN provision.[131]

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124 *Id.* art. 24(2).

125 *See id.* art. 26(1).

126 *Id.* arts. 28, 29.

127 *See id.* art. 18. The "which it considers" language in this provision suggests an attempt to make that clause essentially self-judging so that international arbitrators cannot second-guess a state's determination that a measure that harms a foreign investor is needed to protect a state's own determination of its own "essential security." While some might suggest that this language still enables arbitrators to examine whether a state's invocation of "essential security" was in good faith, at least one recent US BIT (the 2006 Peru-US Free Trade Agreement) makes that doubtful. In that treaty, the parties added a sentence indicating that "if a party invokes [the measures not precluded clause] in an arbitral proceeding ... the tribunal or panel hearing the matter shall find that the exception applies." If this is the case, today's U.S. BIT protections can be rendered illusionary at the discretion of any host state willing to say that "essential security" made me do it.

128 2004 U.S. Model BIT, *supra* note 15, art. 20(1).

129 *Id.* art. 20(2).

130 *See id.* art. 30.

131 For a discussion of the impact of these MFN provisions, see Vandevelde, *supra* note 100, at 301.

The new U.S. BITs, like the new Canadian investment agreements which they closely resemble,[132] are more than twice as long as the treaties based on the 1984 Model. In this instance, however, a longer treaty generally means far more hedged investment guarantees. Unlike the new Chinese BITs described by Schill, the new U.S. BITs have become longer in order to protect the rights of the United States as sovereign. While the new U.S. Model does not protect host states as much as did the NIEO, it is not farfetched to suggest that its new text evinces a newfound respect for many of the "sovereign rights" that the United States ridiculed at the General Assembly during the 1970s. The 2004 U.S. Model, like the current Canadian model investment agreement, reflects a government that has faced the brunt of claims under the NAFTA, such as those that challenged California's right to protect its ground water as a violation of the overly broad guarantees of fair and equitable treatment or asserted that a Mississippi jury award of punitive damages against a Canadian investor constituted an illegal taking of property.[133] The newly hedged essential security clause also reflects awareness of ICSID decisions that have found Argentina liable for harms inflicted on foreign investors as a result of general measures that that nation took in response to a serious economic and political crisis.[134] The changes to Canada's and the United States' model treaties also reflect a decade of pressure by numerous NGOs in both countries, some of which were involved in the successful effort to unravel the negotiations for the OECD's Multilateral Agreement on Investment (MAI) and who remain convinced, rightly or wrongly, that the network of BITs and other investment agreements threaten the rights of federal, state or provincial governments within both countries to regulate in the public interest.[135]

It is possible to justify some of the changes to the 2004 U.S. Model as merely "clarifying" matters to better reflect what U.S. negotiators always intended.[136] And some changes are obviously designed to bring post-2004 U.S. BITs more in line with the changes introduced in the NAFTA's Chapter Eleven.[137] Nonetheless, the extent of the changes between the 1984 Model and the 2004 version is striking, and it is hard to believe that arbitrators required to interpret a treaty concluded on the basis of these different models would come to the same conclusions, at least if they remain faithful to interpreting a treaty in conformity with its plain meaning in accordance with the Vienna Convention on the Law of Treaties.

While it is possible to justify many of these changes as merely rectifying what would otherwise be an "imbalance" between the rights accorded investors and a na-

132 For the text of Canada's latest model treaty for investment promotion and protection, see http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf.

133 *See, e.g.*, Methanex Corp. v. United States, 44 I.L.M. 1345 (2005); Loewen Group, Inc. v. United States, 42 I.L.M. 811 (ICSID 2003).

134 For a discussion of some of these cases, see Alvarez & Khamsi, *supra* note 30.

135 *See generally* Peter Muchlinski, *Corporate Social Responsibility*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 66, at 637, 637-87.

136 *See, e.g.*, Vandevelde, *supra* note 100, at 287-89, 291.

137 *Id.* at 291.

tion's right to regulate in the public interest, this is not how business interests have seen it. From their perspective, the original 1984 U.S. Model intentionally emphasized the rights of the foreign investor and the new U.S. model constitutes a regressive retrenchment.[138] U.S. businesses are more likely to agree with Thomas Wälde who has argued that the perceived "asymmetries" of traditional BITs (such as the 1984 U.S. Model) respond to the "pre-existing and inherent structural asymmetry in which foreign investors find themselves;" that is, BITs protect only foreign investors and provide an international forum only to them because host states would otherwise hold most of the cards as contractual party, regulator, sovereign, and judge.[139]

At least some of the changes to substantive investor protections in the U.S. Model BIT reflect concerns of members of the U.S. Congress who indicated, in connection with passage of trade promotion authority (TPA) in 2002, that henceforth the United States should not grant foreign investors "greater" rights than those enjoyed by U.S. nationals.[140] The United States' attempt to reduce the absolute expropriation guarantee to existing U.S. law appears to be a bow to such Calvo-like concerns. If this is the intent or the effect, what this means is that, ironically, the expropriation provisions contained in the Cuba-Cambodia BIT or in some Chinese BITs, for example, now provide investors with greater protections than do contemporary U.S. investment agreements.[141]

The evolving U.S. BIT is yet another reason why it is a caricature to describe the evolving investment regime as a neo-colonialist scheme to protect the capital interests of the metropole. Understanding how today's BITs bite the metropole back is crucial to understanding the investment regime's future. As the changes to the U.S. Model suggest, even when the metropole wins the cases filed against it (as the United States has to date), it finds itself chafing under the investment regime's reciprocal constraints.[142]

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138 *See, e.g.*, Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, 3 TRANSNAT'L DISP. MGMT. 1 (2006).

139 Wälde, *supra* note 72, at 55; *see also* Ian A. Laird, *NAFTA Chapter 11: Canada's Weakening of the International Rule of Law in the NAFTA Zone*, *in* INVESTOR PROTECTION IN THE NAFTA AND BEYOND 141 (Alan S. Alexandroff ed., 2006).

140 *See* Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, div. b (codified at 19 U.S.C. §§ 3801-3813 (2006)). The TPA's objectives stated in relevant part:

> Recognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law, the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States. ...

19 U.S.C. § 3802(b)(3); *see also* Vandevelde, *supra* note 100, at 286 n.6.

141 *Compare* Cambodia-Cuba BIT, *supra* note 90, art. IV, *with* 2004 U.S. Model BIT, *supra* note 15, art. 6.

142 Of course, even during the colonial era, the metropole did not remain unaffected by developments, including legal developments, resulting from their engagements with

More countries than ever before are, like the PRC and the United States, capital exporters as well as capital importers. The position of such countries in the investment regime might be said to approximate that of the individual in John Rawls' "original position," that is, someone who is placed behind a veil of ignorance and does not know what social or economic position she occupies within society and is therefore incentivized to articulate principles of justice that are fair to all.[143] If this is indeed the case, the Chinese and United States' respective BIT programs provide hints of the possible evolution of other countries' investment agreements as those countries become capital exporters as well as capital importers, or as they react to investor claims filed against them. There is some evidence, based on the texts of the investment agreements that China and the United States are now negotiating, that both of these countries' respective BIT programs, despite their different histories, are, over the past couple of years, evolving towards common positions on a number of crucial provisions.

While the "new generation" of Chinese BITs described by Schill look more like the 1984 U.S. Model than the 2004 U.S. Model, a few of the PRC's most recent investment agreements appear to have been influenced by the latest U.S. Model. While no single PRC BIT yet incorporates all the innovative provisions evident in the 2004 U.S. Model, it is striking that the China-Mexico BIT of 2008 adopts a hedged definition of the minimum standard of treatment that approximates the United States's post-2004 articulation of "fair and equitable treatment;"[144] that the China-India BIT of 2006 largely reproduces the United States's new limits on "indirect takings;"[145] and that the China-New Zealand FTA of 2008 includes a number of innovations to investor-state dispute settlement clearly inspired by the 2004 U.S. Model, such as requirements of transparency and advance notice for claims, along with provisions permitting the consolidation of claims and authorizing binding joint interpretations by the state parties.[146] It is also notable that the Chinese-New Zealand FTA, like the 2004 U.S. Model, evinces comparable concerns with respect to labor and the environment.[147]

Given these developments, it is possible that the decisions of the PRC and the United States to launch renewed BIT negotiations in June 2008 will prove successful. Of course, the mere fact that the U.S. and Chinese BIT models are approaching common positions will not resolve the likely political battles over the prospect of enhanced U.S.-Chinese FDI flows. If high profile concerns in the United States over Chinese investments (evident in recent actions by CFIUS, for example) are overcome

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the periphery. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005).

143 *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

144 *See* Bilateral Investment Treaty, P.R.C.-Mex., art. 5, July 11, 2008.

145 *See* Bilateral Investment Treaty, P.R.C.-India, Nov. 21, 2006, (in the Protocol, qualifying the meaning of "takings" for purposes of article 5).

146 *See* Free Trade Agreement, P.R.C.-N.Z., arts. 153-54, 156-57, Oct. 1, 2008.

147 *See* Memorandum of Understanding on Labour Cooperation and Environment Cooperation Agreement, both of which are integral parts of the China-New Zealand Free Trade Agreement.

and a PRC-U.S. BIT emerges, such a treaty could have considerable impact on future investment agreements around the world—and not only because of the obviously huge capital flows which such a treaty would encompass. Such a treaty—between the erstwhile capitalist defender of the Hull Rule and its once most earnest critic—would concretize just how far international norms governing investment have come. The compromises forged in such a treaty between the rights of investors and the rights of states to regulate could inspire changes in other countries' model BITs and might even inspire a new generation of leaders around the globe to attempt the arduous negotiations that would be required to replace the current "spaghetti bowl" of investment agreements with a single multilateral agreementAbsent such developments, however, the differences among the nearly 3000 investment agreements that now exist should not be underestimated. Despite the hints of common provisions emerging as between the BIT programs of the PRC and the United States, it is important to remember that we now have a world in which both the U.S.-Argentina BIT of 1991 (based on the United States's most investor protective model of 1987) exists alongside agreements like U.S.-Uruguay BIT of 2004 (based on the 2004 U.S. Model). Further, these different U.S. investment agreements exist alongside PRC investment treaties that reflect that country's various BIT models over the years. As is clear from UNCTAD's latest attempt to survey developments in international investment agreements, there is enormous diversity among countries' existing BITs—and there is no clear effort by leading BIT signatories to displace older treaties with a single harmonious text.[148] When the diversity of these agreements is considered, alongside the evolving (and not always consistent) arbitral case law interpreting the agreements, it is clear that the investment regime is becoming, at least for now, more, not less, complex. Given that BITs differ, sometimes substantially, and that significant changes are sometimes made even to a single country's preferred negotiating text over relatively short periods of time, investment law is not (yet) coalescing into coherent definitions of the substantive investment guarantees, residual exceptions for governmental regulatory power, or agreed procedures for initiating or conducting investor-state disputes. As the evolution of PRC and U.S. BITs over time makes clear, it is no longer accurate to state unequivocally that the "object and purpose" of all such treaties is to benefit foreign investors—not when some of their texts or preambles suggest that their purposes are at least as much to protect certain sovereign prerogatives.[149] Further, as UNCTAD's survey points out, Preferential Trade and Investment Agreements (PTIAS) in particular vary tremendously in their attention to investor rights;

148 *See* U.N. Conference on Trade & Dev. [UNCTAD], *IIA Monitor No. 2, Recent Developments in International Investment Agreements*, 1, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/1 (Aug. 30, 2005) (noting the "increasingly complicated framework of multi-layered and multi-faceted investment rules").

149 See, in particular, the preamble of Norway's 2007 Model BIT, *available at* http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc.

many of these may seek to achieve general economic integration more than investment protection.[150]

Given the substantive and procedural differences among existing investment agreements, we are entitled to expect, over the near term, greater disparities in the results of investor-state decisions than we have today, not because the arbitrators are less than competent or are unaware of prior precedent, but precisely because they may be conscientiously attempting to decide each case in accordance with the precise terms of the treaty before them. While none of this necessarily alters the continued potential for investment treaties and customary law to continue to influence one another,[151] determining the applicable customary international law relating to investments may become more complex as states' practices (and not merely their BITs) change. Absent renewed efforts to craft more harmonious investment treaties, there may not be much hope for establishing common global principles of investment rules through either a "Statement of International Investment Law" issued by an impartial group of academics or through decisions by a single arbitral Appellate Body.[152]

Nonetheless, it is important to remember that the investment regime is not merely evolving rapidly; it is young. Some seventy-three percent of the publicly available investor-state arbitral decisions have been rendered only in the past five years.[153] As Brigitte Stern has suggested, the regime is in its adolescence and is still suffering growing pains.[154] It is too early to predict with confidence what it will look like as an adult. What we can conclude is that, for all the reasons surveyed here, the regime is becoming more "democratic" than it once was and that investor-state arbitrations are not likely to be one-sided courts for capital.[155] In the midst of today's worldwide economic crisis, the investment regime will continue to evolve, but it is difficult to predict in which direction the regime will go.

The most likely scenario is that, as occurred during prior economic crises, the investment regime will increasingly face growing protectionist threats.[156] There is a

150 RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS, *supra* note 148, at 10-13.

151 For a description of the interaction between investment treaties and customary law, see José E. Alvarez, *A BIT on Custom*, N.Y.U. J. INT'L L. & POL. (forthcoming 2010).

152 For proposals along these lines, see, for example, KARL SAUVANT, JOSÉ E. ALVAREZ & KAMIL GERARD AHMED, THE EVOLVING INTERNATIONAL INVESTMENT REGIME (forthcoming 2010).

153 Sachs & Sauvant, *supra* note 63, at xxxix.

154 Brigitte Stern, *The Future of Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate*, *in* SAUVANT, ALVAREZ & GERARD, *supra* note 152.

155 *But see* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007) (contending that investor-state dispute settlement is biased in favor of the investor).

156 *See, e.g.*, John W. Miller, *Nations Rush to Establish New Barriers to Trade*, WALL ST. J., Feb. 6, 2009, at A1 (reporting on, for example, "buy America" provisions in planned stimulus measures); Presentations at Five Diamond International Investment Conference,

serious risk that today's dismal economic conditions will be seen as a verdict not only on the lack of effective government regulation over the financial sector but on the investment regime as well. Many will find it difficult to distinguish investment agreements or the complimentary actions of international financial institutions—both of which encourage the free movement of capital—with the "unregulated free market economics" that are seen as partly to blame for the housing and banking crises in the United States. If the investment regime becomes synonymous in the public mind with *unregulated* capital flows, it may not long survive—even in the modified form suggested by the 2004 U.S. Model. Such perceptions, if allied with a sense that the regime only serves the interest of Western capital exporters, will intensify the political backlash against the investment regime that is increasingly evident outside the United States, particularly in Latin America, where BITs and FTAs tend to be seen in Guzman's North/South terms, and where opposition to them is seen as part and parcel of opposition to U.S. power and influence.[157]

If the investment regime continues to be seen as the embodiment of empire or as a cause of the current economic crisis, retrenchment could be the order of the day not only in the United States but around the world. We could be in for a freeze on the negotiation of all trade agreements (including investment agreements); resistance to ratifying investment agreements in the pipeline; attempts by many countries to withdraw from their existing investment agreements and/or investment arbitration; greater attempts to screen incoming foreign investment, to impose conditions (such as performance requirements) upon entry, or to impose other restrictive measures under national laws; and/or increased limitations on investment and arbitration rights in the next wave of investment agreements (and not only those originating in the United States or Canada). Future BITs may go far beyond the changes suggested by the 2004 U.S. Model to provide, for example, counter-claims against investors who fail to respect labor or environmental laws or who fail to satisfy a corporate code of conduct.[158]

At the same time, it is not at all clear that such sweeping changes in the scope and reach of investment treaties are in the offing. Few states may want to conclude all-purpose treaties that embrace (or seek to balance) everything from investment pro-

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Global Players from Emerging Markets (noting the recent rise in investment protectionism in OECD countries, with respect to South-South FDI, and the corresponding rise in demand for political risk insurance).

157 This is certainly how it is portrayed in states like Bolivia—which in May 2007 announced its withdrawal from ICSID—or Venezuela, whose policies have raised the ire of many foreign investors and which has announced its own intent to limit ICSID's jurisdiction, or Ecuador—which has denounced nine of its BITs and indicated that it would not recognize ICSID jurisdiction over oil, gas, and mining investment disputes. *See generally* Karl P. Sauvant, *Regulatory Risk and the Growth of FDI*, *in* World Investment Prospects to 2011 67 (2007), *available at* http://www.vcc.columbia.edu/pubs/documents/WorldInvestmentProspectsto2011.pdf.

158 *See, e.g.*, Howard Mann et al., IISD Model International Agreement on Investment for Sustainable Development (2005), *available at* http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.

tection to corporate social responsibility and the right to regulate. States (and their citizens) may resist creating general courts of supranational jurisdiction capable of rendering decisions on the human rights and environmental responsibilities of both host states and multinational enterprises (MNEs) through investor-state claims. And given the fact that mutual capital flows increasingly affect and benefit everyone, the backlash against the investment regime may go only so far. After all, even Venezuela's denunciation of the investment regime is (quietly) selective. At the same time that that government has been portraying ICSID as a tool of the West, it has been strengthening its ties and investment flows with other nations, such as Russia and Cuba.[159]

Less likely, but possible, is that the current worldwide economic crisis, and its adverse impact on capital flows,[160] will produce a renewed sense of urgency about the need to protect and promote transnational investment flows. In this scenario, countries will increasingly turn not to economic protectionism but to re-invigorated international and national legal efforts to increase liberal capital flows. Countries could become more cautious about taking actions—from withdrawal from ICSID to efforts to resist enforcing investor-state arbitral awards—that might threaten, or might be perceived as threatening, such flows. Under this scenario, both China and the United States may come to a renewed recognition that neither they nor others would benefit from a full-fledged return to the Calvo doctrine.

While a return to the unadorned pro-investor 1984 U.S. BIT model is not likely for the United States, we might see changes at the margins of U.S. investment policies—and the investment policies of other nations that emulate the United States. The United States (and others) could become less choosy, for example, about whether the foreign capital that it so desperately needs comes from state-owned enterprises or sovereign wealth funds or from emerging market MNEs, and the CFIUS (and others' equivalent screening mechanisms) may grow more cautious about scaring off such investors. To the extent the U.S. government itself becomes the effective holder of formerly private enterprises, including financial institutions, it may become more difficult for it to complain about investments controlled by other sovereigns. If the United States becomes, in effect, the home of some of the largest state-owned enterprises, it can hardly afford to antagonize other sovereigns who do the same. This may yet become another instance where the changing places of the investment regime's leading players may prompt unanticipated evolutionary changes in the investment regime.

It is also possible that in the wake of the current economic crisis, the investment regime itself may become a battleground over the legality of some governments' responses to that crisis. This could occur if challenges to some governments' actions are filed under the WTO, in investor-state dispute settlement, or even under existing

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159 *See, e.g.*, Emily Morris, Cuba and Venezuela (Feb. 6, 2008), *available at* http://www.londonmet.ac.uk/londonmet/library/q11223_4.ppt.

160 *See, e.g.*, Karl P. Sauvant, *The FDI Recession Has Begun*, 1 COLUM. FDI PERSPS. (2008), *available at* http://www.vcc.columbia.edu/pubs/documents/KPSPerspective-FDIrecessionhasbegun_001.pdf.

FCNs. Such challenges could be brought where, for example, government bailouts to national enterprises, such as national banks or national automakers, or conditions imposed under such bailouts, elicit complaints of violation of national treatment or violations of some BITs' bans on certain performance requirements.[161]

VI. Conclusions

When we situate investment agreements within the "larger context of world social events and processes," as we are directed to do by the New Haven School, it becomes increasingly dubious to explain the once and future investment regime exclusively in North/South terms. Whatever it once was, it is untenable to claim that the investment regime remains a tool of Western capital interests. While the original goal of states in the North may have been to use BITs to respond to the needs of their MNEs and to impose their will on capital importing states, they did not succeed in doing so until the developing world itself became convinced of the need for liberal capital flows. Neither the demise of the NIEO nor the rise of BITs can be insulated from the dynamics of international politics. Both of these developments, along with complementary changes to national laws and the good governance efforts of international organizations, reaffirmed customary international legal protections for foreign investors.

As the New Haven School would also have predicted, subsequent changes in the positivist rules of the regime—namely the content of investment agreements—have responded to the goals, aspirations, and conduct of the diverse participants involved in their evolving construction. Whether or not we approve of the changes to BITs and FTAs surveyed here, the international investment regime has become progressively "democratized" over time—at least to the extent that it now responds to the pressures of numerous non-state actors, including its principal attorney-general enforcers (foreign investors), arbitrators, legislators, and NGOs—for good or ill. Such pressures help to explain evolutionary changes such as those within the respective Chinese and U.S. BIT programs. The regime's diverse participants have influenced

161 *See, e.g.*, Anne Van Aaken & Jürgen Kurtz, *The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Disputes?*, 3 COLUM. FDI PERSPS. (2009), *available at* http://www.vcc.columbia.edu/documents/Perspectives3-vanAakenandKurtz-FINAL.pdf. Treaty claims resulting from emergency measures taken in the wake of the current economic crisis are not entirely farfetched even with respect to the United States, which except for claims under the NAFTA, is generally not exposed to BIT claims from major capital exporters into the United States. Some foreign car makers located in the United States might want to challenge some of the actions being taken by the United States that are principally intended to benefit U.S. automakers. While the United States does not have BITs with Japan and Germany, it does have FCNs with those states. Under relevant U.S. Supreme Court precedent, such FCNs are considered "self-executing" and could ground a cause of action in U.S. courts based on violation of national treatment. *See, e.g.*, Asakura v. City of Seattle, 265 U.S. 332 (1924) (successful challenge to discriminatory provision in municipal law by Japanese pawnbroker based on U.S.-Japan FCN).

the ever-changing rules of the game, and at least some of those participants believe that they are changing the rules in order to advance one or more of the eight New Haven values encompassed by the notion of "security." At the same time, it is possible to read the rise and subsequent evolutions of investment treaties within the larger historical framework provided by Karl Polanyi in his highly influential work, *The Great Transformation*.[162] It is easy to see the U.S. Model BIT of 1984 as the embodiment of Polanyi's concept of utopian market liberalism, that is, an effort, grounded in the historical laissez-faire movement to expand the scope of the market, to reduce government interventions through privatization and liberalization, and to get prices right. In this picture, the 2004 U.S. Model (and others following its lead) embodies the "inevitable" protective countermovement stemming from the excesses of the earlier BIT, where the newly re-calibrated 2004 version is more apt to recognize and accept the "proper" role of government in regulating the market.[163]

In the midst of the current economic crisis, all of the participants in the investment regime are becoming more aware than ever before that, as McDougal and his associates saw long ago, the effects of economic interdependence cannot be avoided by any nation. What they will do with that realization in the context of the investment regime, however, remains a guess.

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162 KARL POLANYI, THE GREAT TRANSFORMATION (2d paperback ed. 2001).

163 *See generally* Joseph E. Stiglitz, *Foreword* to *id.* at vii (connecting Polanyi's original insights to the disenchantment with the "Washington Consensus" model of governing and development after the Asian crisis).

U.S. Model BIT (1984)	U.S. Model BIT (2004)
Preamble Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and…	**Preamble** Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards… Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;
Definition of Investment **Article I** (b) "Investment" means every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and (v) any right conferred by law or contract, and any licenses and permits pursuant to law… (e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.	**Definition of Investment** **Article 1** "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;[1] (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[2, 3] (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges. 1 Some forms of debt, such as bonds, debentures and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics. 2 Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristic of an investments. 3 The term "investment" does not include an order or judgment entered in a judicial or administrative action.

National and MFN Treatment Article II	National and MFN Treatment Article 3
1. Each party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent on reciprocity.	1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. Article 4 1. Each Party shall accord to investors of the other party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. New Exceptions Article 14 1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to . . . iii. a local level of government 4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement. 5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to: (a) government procurement; or (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.
'Umbrella' Clause Article II 2. Each Party shall observe any obligation it may have entered into with regard to investments.	'Umbrella' Clause No 'umbrella' clause is included, but breaches of investment authorizations and arguments are still subject to investor-state dispute Settlement under Art 24 (I) (see below). But note that under definitions (Article I), "investment contracts" are limited to some types of written contracts between investors and the host state.

Minimum Standard of Treatment Article II	Minimum Standard of Treatment Article 5
2. Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. 6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.	**Minimum Standard of Treatment**[8] 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provides: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article. 8 Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A. **Annex A** **Customary International Law** The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Expropriation	**Expropriation**
Article III 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially reasonable rate from the date of expropriation; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation. **Article XI** 1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party. 2. Nevertheless, the provisions of this Treaty, and in particular Articles VI and VII, shall apply to matters of taxation only with respect to the following : (i) expropriation, pursuant to Article III…	**Article 6** 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5[Minimum Standard of Treatment] (1) through (3). 2. The compensation referred to in paragraph 1(c) shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable. 3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c)—converted into the currency of payment at the market rate of exchange prevailing on the date of payment—shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement. **Article 21** 2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if: (a) the claimant has first referred to the competent tax authorities (footnote omitted) of both Parties in writing the issue of whether that taxation measure involves an expropriation; and (b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation. Also see Annex A above.

Annex B

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation] (1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Transparency **Article II** 7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.	**Transparency** **Article 10** 1. Each Party shall ensure that its: (a) laws, regulations, procedures, and administrative rulings of general application; and (b) adjudicatory decisions respecting any matter covered by this Treaty are promptly published or otherwise made publicly available. Note that Article 11 imposes additional transparency obligations on states (including provisions requiring states to provide investors rights to participate in administrative proceedings) but these provisions are not subject to investor-state arbitration under article 24(1) below.
Investor-State Dispute Settlement **Article VI** 1. For Purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation of application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment. 2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third-party procedures. If the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures. Any dispute-settlement procedures regarding expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with terms of the investment agreement, relevant provisions of domestic laws, and applicable international agreements regarding enforcement of arbitral awards.	**Investor-State Dispute Settlement** **Article 24** 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached (A) an obligation under Articles 3 through 10, (B) an investment authorization, or (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach... But new requirements are imposed for 90-day advance notice of legal and factual basis of each claim to be given to host state under Article 24 (2). Also no claim may be submitted if more than 3 years have elapsed from date claimant acquired or should have acquired knowledge of breach (Article 26 (1)). The arbitral tribunal is directed to accept and consider amicus from non-disputing parties (Article 28 (3)). Also note other special powers granted to arbitral tribunal under Article 28-29, especially with respect to transparency.

General Exceptions Article X	General Exceptions Essential Security Article 18
1. This Treaty shall not preclude the application by either Party of measures necessary in its jurisdiction for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	Nothing in this Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. **Financial Services** **Article 20** 1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system[14] Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty. 2. Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. [14] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions.

	Other New Provisions **Article 12** 1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws (footnote omitted). Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement. 2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. **Article 13** 1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement. 2. For purposes of this Article, "labor laws" means each Party's statutes or regulations, (footnote omitted) or provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. **Article 30** 3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.