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The Evolving BIT
by J.E. Alvarez

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Abstract

This essay surveys the changes to the U.S. Model BIT from 1984 to the present and compares these to other BIT programs such as China's. It contends that the U.S. BIT program has changed its ideology, along with its object and purpose, and draws larger lessons from the fact that BITs, and not only their interpretations through the arbitration process, evolve over time.

The Evolving BIT
José E. Alvarez[1]

The international investment regime fascinates international lawyers because, at long last, it finally permits us to engage in the parsing of cases. International lawyers have always had a tough time convincing people that our subject was really law because for a long time we had so little of what makes real lawyers salivate: namely, real judicial decisions. For a long time we had one or two decisions from the International Court of Justice a year to discuss; after 1994, we had in addition perhaps a dozen WTO Appellate Body decisions, along with a trickle of juicy international criminal cases dealing with mass murderers from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. But today we have a seemingly endless supply of arbitral decisions emerging virtually daily, heaps more than trade lawyers ever had and even more than those available to mass atrocities lawyers. Even though we seem to have (alas) a deep supply of mass atrocities around the world, we apparently have far more investors willing to make claims than international prosecutors willing to issue indictments.

The international investment community is happy that it has so many judicial decisions subject to real enforcement – putting certain prominent Argentina outlier cases of non-compliance to one side – that it is understandable if we obsess about the cases and the investor-state arbitration system that gives rise to them. Small wonder that at conferences like this we focus on interpretative models for treaty interpretation in dispute settlement, whether inconsistent arbitral decisions are a problem, or ways to improve the legitimacy of ICSID arbitration through better annulment procedures, the establishment of an appellate body, changes to the relevant procedural rules, or by paying closer attention to conflicts rules.

My intent here is to remind us that the subject of this conference, interpretation in investment arbitration, is ultimately about the interpretation of specific treaties – and that if those treaties change, it is likely that their interpretation will as well. My subject then is not about the evolving investment caselaw – fascinating as it is – nor about any of the proposals to lead to better reasoned arbitral decisions. I will address instead another way that interpretation in the investment regime evolves: through changes in investment treaties.

The table in the annex to this essay compares some of the changes that have occurred in the U.S. Model BIT over the past 20 years or so.[2] It compares the U.S. Model of 1984 – which set might be called the "gold standard" of BITs – to its latest iteration, the 2004 U.S. Model BIT, a treaty which Judge Schwebel (among others) has

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[2] *See* annex A *infra*. The text to the Feb. 24, 1984 U.S. Model BIT appears *in* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE app. A-3 (1992). The 2004 U.S. Model BIT is available at http://www.state.gov/e/eeb/ifd/bit/.

condemned as a regrettable retrogression and even an abdication of investors' rights.[3] We might call this latest model the "polyurethane standard."

I was once the U.S. State Department lawyer charged with negotiating U.S. BITs during the 1984 to 1987 period. Let's briefly relive those glory days – when BITs were BITs and real tough BIT negotiators were negotiating strong, testosterone fuelled-treaties on behalf of a community of united U.S. investors led by the such groups as the Business Roundtable and macho spokesmen like Daniel Price. It is easy to see what the U.S. Model BIT of 1984 was all about: it tells you in its short, admirably direct preamble. That BIT laid out its object and purpose in no uncertain terms: the point was to assure fair and equitable treatment of investors within a stable legal framework. As I and my predecessor at the State Department, Kenneth Vandevelde, told prospective BIT partners at the time, the United States had three non-negotiable goals: (1) to build a treaty network adopting the principle that the expropriation of foreign investment was unlawful unless accompanied by prompt, adequate and effective compensation; (2) to protect existing stocks of U.S. FDI by establishing certain other minimum standards of protection (including national and MFN treatment and transparent host state laws on point); and (3) to extricate the U.S. government from involvement in private investment disputes by enabling the investors to pursue their own claims against host states through a binding dispute settlement procedure.[4]

In these early days of the U.S. BIT program, the treaty's references to "reciprocal" investment flows was something of a fraud. Consider the U.S. BIT partners during my time at the State Department (through 1989): Haiti, Morocco, Panama, Senegal, Turkey, Zaire, Cameroon, Egypt, and Bangladesh, and Grenada. As this list suggests, the United States sought BITs with countries with which it did not have FCNs, typically these were LDCs that had not long before generally supported the New International Economic Order (NIEO) at the UN – and had therefore suggested some sympathy with taking bad actions towards foreign investors. The U.S. Model BIT of that period was negotiated with countries where there was largely a one-way flow of FDI from the U.S. to them. The regulatory burdens of this treaty fell almost entirely on our (LDC) BIT partners. It was the Grenadas and Bangladeshes of the world that had to reform their laws and practices to be sure that they could satisfy the U.S. BIT's treatment standards. The United States did not need to worry very much about adapting its laws or practices, not only because it drafted the model on which the negotiation was conducted and could be sure not to include in it anything that was not already consistent with its law, but also because, given the one-way flow of capital between the relevant parties, it was extremely unlikely that investors from any of those countries would emerge in any significant numbers with a presence in the United States, much less be in a position to file a complaint against the United States for breach of the BIT. The United States could afford to assume that its laws and practices were already consistent with the minimal standards contained in its BITs.

A clear goal of the U.S. BIT was to *regulate* the FDI host state; that is, to give effect to a regulatory framework for FDI that is relatively transparent, stable, predictable

[3] 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., Issue 2 (Apr. 2006).

[4] Kenneth J. Vandevelde, *The BIT Program: A Fifteen-year Appraisal*, 86 PROC. AM. SOC'Y INT'L L., 532, 534-35 (1992).

and secure – and to enforce that framework at the international level at the option of the investor. As one commentator has suggested, perhaps too candidly, the intent of such a treaty is "to restrain host country action against the interests of investors – in other words, to enable the form of legal commitments made to investor[s] to resist the forces of change often demanded by the political and economic life in host countries."[5]

The U.S. Model of 1984 also had a "facilitative" function. It sought to enable U.S. investors to protect themselves through contracts with their host states, which would receive protection in the treaty. The protection of investors' contracted-for expectations emerges repeatedly in that treaty's text. That treaty requires states to "observe any obligation" they have entered into (presumably including investment contracts) (the "umbrella clause" in article II(2)); enables investors to bring questions of interpretation and application of such investment contracts to international arbitration by defining such issues as "investment disputes" (article VI (1)(a)); specifies that such contracts remain binding and enforceable even in cases of expropriation (article VI(2)); and "does not derogate" from any better treatment that an investor might be entitled to under national law, international law, or contract (article IX). By 1987, the U.S. Model BIT included one additional feature that permitted the investor to violate contract sanctity at his/her discretion. That model's investor-state dispute settlement clause made clear that investors could deviate from their existing contracts with host states to the extent such contracts would require resolving disputes within local courts or would enable the state to accord the investor treatment that was less favorable than required by international law.[6] After 1987, the market facilitative goal of the U.S. BIT gave way to its regulatory aim.

The BIT negotiations of that period were conducted on predictable lines. Consider how I described them in 1992, not long after I had left the State Department for greener (but not more lucrative) pastures in academe:

> BIT partners turn to the U.S. BIT with the equivalent of an IMF gun pointed at their heads. . . . For many, a BIT relationship is hardly a voluntary, uncoerced transaction. They feel that they must enter into the arrangement, or that they would be foolish not to, since they have already made the internal adjustments required for BIT participation in order to comply with demands made by, for example, the IMF. . . .The U.S. "cookie-cutter" approach to BIT negotiations results in a one-way conversation of imposed terms. A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft. The result is an instrument that is not by any means balanced as between the rights and responsibilities of multinational corporations. The result is a treaty that, far from settling disputes, may ironically be itself a possible source of conflict for both the United States and its partners, if attitudes toward FDI change.[7]

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[5] Jeswald W. Salacuse, *The Treatification of International Investment Law: a Victory of Form Over Life? A Crossroads Crossed?*, 3 TRANSNAT'L DISP. MGMT., Issue 3, 3(June 2006).
[6] *See* September 1987 Draft Treaty art. VI paras. 2-3, *in* Vandevelde, *supra* note 2, at app. A-4.
[7] José E. Alvarez, *Remarks*,, 86 PROC. AM. SOC'Y INT'L L., 532, 550,552-553 (1992).

The idea that the United States-Grenada BIT negotiations – conducted three years after the United States invaded that island and toppled its government to rescue some U.S. medical students – were conducted among "sovereign equals" seems worthy of a Monty Python skit.

The ideology of the U.S. Model BIT circa 1984-87 is also extremely clear. Let's put it this way: that treaty coincided nicely with the Reagan Administration's view that government was the problem. That model focuses like a laser beam on reducing or eliminating government abuses of power and regulation in order to get prices right so that the market could operate unimpeded. Prospective BIT partners were told that the whole point was to send a message that they were open to and for business. The United States refused requests to limit the BIT's protections to new investment or to include investment promotion devices such as investment incentives because these were antithetical to the ideology of the free market that the U.S. text represented.

The United States sold its BIT in this period as an essential (but minimal) building block to a free market economy and to the construction of the rule of law. Signing a U.S. BIT, we said, would send a signal that a country had accepted the basic premises of liberal economic theory – namely that free liberal capital flows would yield, consistent with the insights of David Ricardo, the most efficient use of resources and the greatest productivity. Concluding a BIT with the United States, we indicated, was consistent with, but would not itself ensure establishment of, a particular model of the state vis-à-vis the market. That model assumes that states, first, must intervene to establish and protect private rights of property and contract; that is that states adhere to and establish a basic rule of law framework that protects the bargains struck by private parties against infringement by public or private actors. Second, that the state otherwise defers to the market's allocation of recourses and does not, for example, chose winners and losers in the market or pre-determine which sectors can or cannot be subject to the market. Third, that the state may otherwise intervene only insofar as necessary to correct market failures such as to supply public goods (e.g., build public infrastructure), to counteract inefficiencies caused by externalities (e.g., to control pollution), or to restore market access threatened by anti-competitive conduct (e.g., to enact laws against monopolies).[8]

U.S. negotiators argued that the BIT offered only minimal stabilization and imposed only a few, non-onerous, and uncontroversial constraints on government action but that it was a necessary first step that governments – particularly those that had through their actions suggested a hostility to the market in the past – needed to take to convince investors that they were ready to adhere to free market principles for the long-term. Concluding a U.S. BIT was also a way that a current government could tie itself (and its successors) to the mast, to make the commitment to the market state genuine and long-lasting enough to convince investors anxious to protect their sunk costs.

In hindsight it is easy to see the initiation of the U.S. BIT program in the mid-1980s and the explosion after 1989 in the ratifications of BITs – many modeled closely on the U.S. model – as a perfect storm inspired by the victory of the Capitalist West over what was then its only rivals: failed import substitution schemes or planned economies under socialist and communist regimes. It is also easy to see that what U.S. negotiators

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[8] *See* Vandevelde, *supra* note 4, at 535.; *see also* Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501 (1998).

called a "minimal commitment" to liberal, free market principles was, in retrospect, a politically loaded treaty obligation to implement the reigning "Washington Consensus" form of governance then favored by U.S. government departments, aid agencies, and international financial institutions.[9] This mainstream ideology saw governments as markets and governmental policies not narrowly tailored to support markets as problems needing correcting. It sought to dismantle governmental failures of the past, including subsidies, price controls, tariffs, licensing arrangements, exchange controls, preferences for infant industries, and state-owned sectors, to avoid distorting the operation of the market and to enable the national market to be penetrated by global forces that were more competitive and efficient. This ideological concept of "good governance" lay behind the 1984 U.S. Model BIT.

The U.S. BIT of this period, and of those nations that came to emulate it, later lauded by Thomas Friedman as part of his "Golden Straightjacket,"[10] was a necessary element in a package of reforms directing nations to acquire fiscal discipline, reorient public expenditures, engage in tax reform, liberalize their interest rates, adopt unified and competitive exchange rates, open their economies to trade and foreign direct investment, privatize government owned sectors, engage in deregulation, and make every effort to secure property rights.[11] Although these goals were politically intrusive, a principal goal of the BITs was to make openness to FDI appear to be above politics. As Vandevelde points out: "The function of the BIT was to insulate private investment from politically driven foreign or domestic public policy – in effect, to depoliticize investment matters by placing the protection of private investment under an apolitical legal regime."[12] The goal was to separate the market from politics by establishing a stable legal regime that would avoid having investors at the mercy of the political branches of the host government, while at the same time avoiding the disruptions (and possible distortions) to U.S. foreign policy caused by prior U.S. government interventions in foreign investment disputes. The BIT's investor-state dispute settlement was intended to erect a "wall of separation" that would "insulate politics from business as much as business from politics."[13]

The United States' view that its BIT's requirements were but minimal intrusions in a government's ability to regulate in the public interest was also based on the belief that much of what the U.S. BIT contained was already reflected in the traditional principles of international law regarding the treatment of aliens, drawn from the doctrine of state responsibility. These customary norms included the rule proclaimed by U.S. Secretary of State Cordell Hull against Mexico on behalf of prompt, adequate, and effective compensation upon expropriation (the "Hull rule"), the international minimum standard of treatment, and the need to ensure full protection and security to aliens and avoid denials of justice.[14] A principal goal of U.S. BITs was to entrench these customary rights – and the underlying private law legal regimes necessary to support market

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[9] *See, e.g.*, David Kennedy, *The "Rule of Law, Political Choices, and Development Common Sense, in* THE NEW LAW AND ECONOMIC DEVELOPMENT 95, 129 (David M. Trubek & Alvaro Santos eds., 2006).
[10] THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (2000).
[11] *See, e.g.*, DANI RODRIK, GROWTH STRATEGIES, tbl.2 (2004) *available at*http://ksghome.harvard.edu/~drodrik/growthstrat10.pdf.
[12] Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. LAW., 159, 160-161 (1993).
[13] *Id.* at 161.
[14] *See, e.g.*, ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 391-403 (2003).

transactions – and enable international law to become a force to dismantle public law regulations inimical to the market.[15] To this end, the U.S. Model provides, in article II(2) that "[i]nvestment 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." Secondly, it provides that in cases of expropriation, investors have the right to be treated "in accordance with due process of law and the general principles of treatment provided for in article II(2)"(article III). Thirdly, it states that investors subject to expropriation have the right to prompt review by the appropriate judicial or administrative authorities of the host state which, among other things, shall make sure that any compensation "conforms to the provisions of this Treaty and the principles of international law" (article III (2)). Finally, as noted, it asserts that nothing in the treaty derogates from the investor's getting the better of any treatment accorded under, among other things, "international legal obligations" (article IX).

As these clauses demonstrate, the U.S. BITs of this period, like many other BITs, were, at least in part, explicit efforts to provide investors with the traditional protections of customary law, including the international minimum standard and protections against denials of justice and assurances of full protection and security. Clauses such as those enumerated above are not efforts to *exclude* these ordinarily applicable general legal rules, as does *lex specialis,* but, on the contrary, to affirm them.[16] This is certainly what U.S. BIT negotiators repeatedly said was the intent.[17] Notice too that incorporating

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[15] It has been suggested that the attempt by the U.S. government to use its BITs to improve the general investment environment of its BIT partners, and not merely to protect investors, distinguishes U.S. BITs from their European counterparts. *See, e.g.*, Akira Kotera, *Regulatory Transparency*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 617, 623 (Peter Muchlinki et. al., eds., 2008). This effort, Kotera points out, was particularly evident with respect to U.S. BITs with former socialist regimes such as Poland. Id. at 624.

[16] It may therefore be a bit misleading to state, as a leading casebook does, that BITs "[a]s *lex specialis* between the parties . . . supersede any inconsistent customary international law and may embrace or exclude any incipient norms." R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES CASES, MATERIALS AND COMMENTARY 1007 (2005). The language of most BITs welcome or even require the residual application of CIL; it is much harder to point to concrete instances where they explicitly exclude it. For consideration of the consequences of this in connection with some cases against Argentina raising the applicability of the CIL norm governing necessity, *see* José E. Alvarez and Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 2009 Y.B. INT'L INVESTMENT L. & POL'Y 379, *available at* http://www.vcc.columbia.edu/pubs/documents/Alvarez-final.pdf.

[17] Thus, one of the early negotiators of U.S. BITs and the leading scholar on the U.S. BIT program has stated:

> One of the most important of the absolute standards requires that covered investment enjoy treatment no less favorable than that required by international law. This provision incorporates customary international law into the BIT, so that any violation of customary international law also would violate the BIT. The practical implication is that the BIT disputes mechanisms, which apply to treaty violations, can be used to remedy violations of customary international law.

Vandevelde, *supra* note 4, at 537.Vandevelde also attributes the United States' resistance to making concessions regarding the BIT's treatment provisions to the felt need to use these treaties to "bolster" CIL. *Id.* at 536. He indicates that, by contrast, since the BIT's national treatment and most favored nation provisions were not grounded in CIL, the United States was more ready to make concessions on those provisions (as with respect to derogations from MFN when BIT partners were members of customs unions). *Id.* at 537.

customary legal protections into BITs was not a useless or superfluous act. By including these clauses in a BIT and making these the basis of an investor-state claim – alongside other BIT rights that are not customary but based only on the treaty, such as the right to NT and MFT – rights that would otherwise depend for enforcement on the political intercession of governments (and once led to gunboat diplomacy) were now subject to ostensibly "apolitical" dispute settlement. (To this end, these treaties defined "investment disputes" that could be brought to international arbitration as including breaches of any right "*conferred*" by the treaty (that is where merely the forum is supplied by the treaty but applying pre-existing rights under CIL or an investment contract) and not merely those "created" by the treaty.)[18]

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But the relatively simple world of the U.S. Model BIT of 1984 was not to last. The U.S. Model BIT has not stood still. Today, the United States negotiates off of a very different model agreement, first released in 2004 and greatly influenced by the investment chapter of the NAFTA.[19] The new U.S. model has now formed the basis of successful negotiations with, among others, Uruguay, Singapore, Chile, and Morocco. There is no greater evidence of the changing dynamics and shifting ideologies of some investment treaties over time than the changes to the U.S. Model. As is clear when we compare the text of the 2004 model with its 1984 predecessor, the United States has, in the course of 20 years, developed a far more cautious attitude when it comes to protecting foreign investment. It is no longer accurate to portray today's U.S. model BIT as a single-minded quest to protect the interests of U.S. investors overseas. Its content and its ideology has shifted.

Comparing the two texts suggests the extent to which the United States' experience, particularly as a defendant under the NAFTA's investment chapter over the past decade or so, has made the U.S. considerably more cautious about extending treaty based protections to foreigners. 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 challenging California's rights to protect its ground water as a violation of the overly broad guarantees of fair and equitable treatment or asserting that a Mississippi jury award of punitive damages against a Canadian investor constituted an illegal taking of property.[20] It 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.[21] The changes to the United States' model treaties also reflect at least a decade of pressure by numerous NGOs, 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,

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[18] *See, e.g.*, Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. VII para. 1, Nov. 14, 1991, S. Treaty Doc. No. 103-2.

[19] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[20] *See*, e.g., Methanex Corp. v. United States of America, Final Award 44 I.L.M 1345 (NAFTA ch. 11 Arbitral Tribunal, 2005); The Loewen Group, Inc. et al. v. United States of America, Award, ICSID (W. Bank) ARB (AF)/98/3, 42 ILM 811 (2003).

[21] For a thorough discussion of some of these cases with respect to this issue, *see* Alvarez & Khamsi, *supra* note 16.

rightly or wrongly, that the network of BITs and other investment agreements threaten the rights of federal, state, or provincial governments to regulate in the public interest.[22]

The United States is no longer as sanguine about proposing open-ended relative or absolute guarantees to foreign investors or about its own ability to comply with these.[23] The new U.S. treaty, roughly twice the length of the original, has grown to make the investors' rights more hedged.

As a comparison of the language from the 1984 U.S. Model BIT 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 (see, in particular the new language added to the preamble and new provisions such as articles 12 and 13). Perhaps most significantly, the United States has now narrowed all the substantive guarantees of its treaty. There are now fewer constraints imposed on the sectors that a party can declare to be exempt from NT and MFN (compare article II, 1984 Model to articles 3(1) and 4(1) of the 2004 Model), exemptions from these obligations for local government measures (article 14(1)), for actions taken in compliance with the TRIPs Agreement (article 14(1)), with respect government procurement (article 14(5)), and for subsidies or grants provided by state parties (article 14(5)). In addition, investors can no longer attempt to 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 as that clause no longer appears in the 2004 Model (compare article II(2) of the 1984 Model to article 5(1) of the 2004 Model). In addition, in all agreements concluded under the 2004 model, the United States has further restricted the scope of the treaty's MFN clause to provide that its new (post 2004) treaty partners cannot claim treatment as favorable as that guaranteed by any prior BIT or FTA.[24]

The 2004 U.S. Model limits the extent to which an investor can bring a treaty claim on the basis of a breach of her investment contract with the host state since it eliminates the 'umbrella' clause (compare article II(2) of the 1984 Model). Although under the 2004 Model, investors can still bring investor-state claims based on their written investment contracts[25] (see article 24(1)), 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 a written investment contract no longer suffices to prompt an investor-state treaty claim.

The "minimum standard of treatment" has been dramatically limited in scope, in accord with an interpretation of a comparable clause issued by the parties to the NAFTA on July 31, 2001.[26] Investors are now accorded only that treatment which they would have been accorded in any case under customary international law's "minimum standard

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[22] *See generally* Peter Muchlinski, *Corporate Social Responsibility*, *in* MUCHLINSKI ET AL, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 637-87 (2008).

[23] 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*, 2009 Y.B. INT'L INVESTMENT L. & POL'Y 283.

[24] *See* Vandevelde, *supra* note 23, at 301.

[25] Compare the definition of "investment contracts" in the 2004 Model at article I(e) to the broad definition of "investment" in article 1(b) of the 1984 Model, annex A *infra*.

[26] NAFTA COMM'N, NOTE OF INTERPRETATION (July 31, 2001). Compare old article II in the 1984 Model to article 5 of the 2004 Model, annex A *infra*.

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 (article 5(2) and 5(3)). Further, the guarantee of "fair and equitable treatment" is essentially limited to what once were designated as "denials of justice" (see article 5(2)(a)), while "full protection and security" is limited to failure to accord "police protection" (article 5(2)(b)). Yet a further limitation on the investors' rights may be suggested by annex A's narrow definition of the meaning of "customary law" (which is now limited to the "economic" rights of aliens under annex A).

Investors' absolute rights in case of expropriation have been narrowed by making that clause inapplicable to the revocation, limitation or creation of intellectual property rights when these are in accord with the TRIPs Agreement (article 6(5)) and by requiring that claims of expropriation based on taxation measures need to be submitted first to both state parties' tax authorities and only if these authorities disagree enabling such claims to be submitted to arbitration (article 21(2)). More importantly, the expropriation guarantee now eliminates the "tantamount to expropriation" language (compare article II of the 1984 Model to article 6 (1) of the 2004 Model), states that the expropriation treaty right is no different than that contained in customary international law (annex B (1)), and subjects claims of "indirect" expropriation to a "case-by-case" inquiry that requires consideration of at least three balancing factors (annex B(4)).[27] Finally, the new U.S. Model states that "except in rare circumstances," non-discriminatory regulatory actions taken to protect legitimate public welfare objections do not constitute "indirect" takings (annex B(4)(b)).

Apart from restricting the scope of what once were far more open-ended investor protections, the new 2004 Model further restricts the discretion of arbitrators charged with deciding investor-state disputes. The new investor-state dispute settlement provision (new article 24; compare to old article VI) now requires investor claimants to give host states 90-day advance notice indicating the legal and factual basis of each one of their claims (article 24(2)) and effectively imposes a three year statute of limitations on claims (article 26(1)). In addition, the new requirements with respect to transparency in connection with investor-state claims and requiring the admission of amicus from non-disputing parties (articles 28-29), might be seen by some investors (and their lawyers) as imposing additional burdens and costs on the bringing of 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 (under article 18)[28] or by

[27] The three factors are drawn from a leading takings case decided by the U.S. Supreme Court. Penn Central v. City of New York, 438 U.S. 104, 123-25 (1978).

[28] 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, some recent U.S. BITs (such as the 2006 Peru-United States 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." *See* United States – Peru Trade Promotion Agreement, U.S.-Peru, n.art. 22.2 April 12, 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text (not yet in force). (Compare this language to that in the NAFTA, *supra* note 19, art. 1138, which although dealing with an essential security clause that also includes arguably "self-judging" language (*see* art. 2102 which includes the telling phrase "which it considers"),

invoking a wholly new exception permitting states to adopt or maintain "measures relating to financial services for prudential reasons" (article 20(1)) or non-discriminatory measures of general application "in pursuit of monetary and related credit policies or exchange rate policies" (article 20(2)). 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 (article 30).

The provisions of the 2004 U.S. Model appear to be influencing other states, particularly China. 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, for example, adopts a hedged definition of the minimum standard of treatment that closely approximates the United States' post-2004 articulation of "fair and equitable treatment."[29] Similarly striking is the China-India BIT of 2006, which largely reproduces the United States' new limits on "indirect takings,"[30] or the China-New Zealand FTA of 2008, which includes a number of innovations to investor-state dispute settlement clearly inspired by the 2004 U.S. Model, including 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.[31] The China-New Zealand FTA, like the 2004 U.S. Model, also evinces comparable concerns with respect to labor and the environment.[32]

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only excludes from investor-state dispute settlement decisions barring the entry of foreign investment premised on essential security (as under the United States' CFIUS legislation). Art. 1138 appears to presume that other issues involving national security could still be subject to investor-state dispute settlement.) If the language of the Peru BIT is taken seriously and is combined with the proposition that when the essential security clause is successfully invoked it serves as a "primary rule" exempting the host state from any of the BIT's substantive obligations (as is erroneously suggested by the CMS Annulment Committee, CMS Gas Transmission Co. v. Argentine Republic, ICSID ARB/01/08, para. 146 (Decision of the ad hoc Committee on the Application for Annulment)(Sept. 25, 2007)), today's U.S. BIT protections can be rendered illusionary at the discretion of any host state willing to deploy its "essential security" exception. For a critique of the CMS Annulment Committee's views in this respect, *see* Alvarez and Khamsi, *supra* note 16, at 455-60. Unfortunately, at least one tribunal has apparently taken the dicta in the CMS Annulment to heart and, worse still, has combined the proposition that the essential security clause in that treaty is a primary rule with the equally untenable proposition that the interpretation of the wholly different article XX of the GATT is somehow relevant for its interpretation. *See* Continental Casualty Co. v. Argentine Republic, ICSID Award ARB/03/9 (Sept. 5, 2008).

[29] *See* Bilateral Investment Treaty, Mex-P.R.C., art. 5, (reportedly signed in Beijing on July 11, 2008) (on file with Transnational Dispute Management) (stating that 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 the international law minimum standard of treatment of aliens as evidence of State practice and *opinio juris*" and that " a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article")).

[30] *See* Cai Congyan, *China-U.S. BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, J. INT'L ECON. L. 1, 22 (forthcoming 2009) (quoting the protocol to the P.R.C.-India BIT of 2006 which qualifies the meaning of "indirect expropriation").

[31] *See* Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China, N.Z.-P.R.C., arts. 153-54, 156-57, Apr. 7, 2008, *available at* http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php.

[32] *See* Memorandum of Understanding on Labour Cooperation, N.Z.-P.R.C., April 2008, and Environment Cooperation Agreement, N.Z.-P.R.C., March 2008, *available at* http://www.chinafta.govt.nz/1-The-agreement/1-Key-outcomes/6-Labour-and-environment-agreements/index.php (both of which are integral parts of the China-New Zealand FTA).

These changes to the Chinese treaties should not surprise us. As Stephen Schill has indicated, for some time the Chinese BIT program has been evolving, with some understandable lag times, to emulate the current U.S. model.[33] For a time, the Chinese BIT evolved from a treaty with very weak investor-protection towards greater acceptance of what Schill considered to be prevailing "international standards" – such that, at least 2005-06 Chinese BITs looked much like the U.S. Model BITs of 1984-87.[34] More recent treaties such as the Chinese-New Zealand BIT of 2008 suggests that the Chinese are now embracing much of the 2004 U.S. Model.[35]

How does one sum up the changes to the U.S. Model BIT?

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.[36] To be sure, some changes in that model are obviously intended to bring post-2004 U.S. BITs more in line with the changes that were originally introduced in the NAFTA's Chapter Eleven – and to make this investment treaty more compatible with the WTO's trade regime.[37] But the changes go beyond these goals. Their cumulative impact suggests that the new U.S. Model reflects a different ideology.

One can criticize the new U.S. text as a regrettable back-tracking on the old "grand bargain" promised by BITs. We can argue, as does Judge Schwebel, that it merely caves to far-fetched NGO criticisms at the expense of investors' rights. There is much in Schwebel's criticisms with which I agree but for my purposes here, let us assume that the second-term Bush Administration that redrafted the BIT did not set out to undermine the rights of Republican businesspeople. Let's assume that they had little sympathy for anti-globalization NGOs seeking a "greener" or more human rights oriented BIT. If so, what can be said to have been their real goal?

Here is a more "Republican" sounding justification: the new U.S. model has become longer in order to protect the rights of sovereigns. While the new U.S. Model does not protect host states as much as the NIEO did – which avoided imposing any international legal obligations on states vis-à-vis foreign investors altogether – it is not farfetched to suggest that its new text evinces a new-found respect for many of the "sovereign rights" that the United States ridiculed at the General Assembly during the 1970s.

If the U.S. Model BIT circa 1984-87 represented the triumph of the Washington Consensus, the 2004 version reflects what some have characterized as a newly chastened form of neo-liberalism brought about by disillusion with the political and social results of neo-liberal "market shock" transitions, popular opposition to "structural adjustment" policies in much of the South, and vulnerabilities felt even in the North concerning the impact of globalization.[38] To be sure, the 2004 U.S. Model still adheres to a capitalist conception of the role of the state vis-à-vis the market and the threefold premises of the original U.S. BIT outlined earlier; that is, it still expects that states will protect the bargains struck by private parties, generally defer to the market, and intervene in the

[33] 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).
[34] *Id.* at 113.
[35] *See generally* Congyan, *supra* note 30 (discussing the "Americanization" of the Chinese BIT).
[36] *See, e.g.*, Vandevelde, *supra* note 23, at 285-86, 291 and 296.
[37] *Id.* at 300.
[38] *See, e.g.*, Kennedy, *supra* note 9, at 150.

market only insofar as necessary. It still adheres to the "welfare economics" characteristic of European and American welfare states.[39] But the new U.S. BIT reflects changes in mainstream thinking about economic development since the mid-1990s brought about by criticisms of the so-called Washington Consensus. It has gone beyond legalizing the insights of David Ricardo in order to concede the points of economists like Joseph Stiglitz, Dani Rodrik, and Amartya Sen.[40] Whereas the original U.S. BIT focused exclusively on reducing forms of governmental overreach or "government failure," the new model suggests a new-found awareness that merely assuring that assets are in private hands and subject to accurate price signals does not produce the desired beneficial outcomes that the preamble to the U.S. Model of 1984 anticipated.

The new model reflects, as Stiglitz recommends, renewed attention to the need for governments to be able to respond to market failures, that is, to use the government to ameliorate "private rent seeking, private efforts to use the political process to thwart the effects of virtuous deregulatory policies, failures of private decision making and entrepreneurial culture."[41] The new treaty re-emphasizes the role of government and is more open to a greater diversity of local institutions that may encourage development, along with multiple plans for using government to achieve a range of public goods.[42] Whereas the object and purpose of the 1984 U.S. BIT was to protect the foreign investor at all costs – as if development was defined by market freedom and by the protection of property[43] – the 2004 version implicitly recognizes that host states may choose to define freedom more broadly, as does Sen, to include other forms of human flourishing in addition to entrepreneurial freedom.[44]

The object and purpose of the 2004 Model is less about the investor and more about the rule of law itself. Like the old BIT, it emphasizes the need to establish stable rules of the road to guide both the investor and the state but seems more concerned with building the rule of law itself as a legitimate development objective shared by host and parent state alike.[45] The 2004 Model's purpose appears to be at least in part to "balance" the rights of private investors on the one hand and states on the other. The new treaty emphasizes the need for states to regulate in the public interest far more than the old treaty. While the rights of foreign investors remains the focus of the treaty's substantive guarantees, the old model's "asymmetries" have been reduced through reminders of the states' competing regulatory goals and by re-inserting the power of the state at crucial intervals – as by enabling the state parties to issue interpretations binding on investor-state arbitrators or re-inserting the role of tax authorities before some takings claims can be brought.

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[39] *Id.* at 151.
[40] *See, e.g.*, Rodrik, *supra* note 11; JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).
[41] Kennedy, *supra* note 9, at 153 (relying on Stiglitz, *supra* note 40).
[42] *Id.* tbl.7, at 158. *See also* Rodrik, *supra* note 11.
[43] Compare the respective preambles of the 1984 and 2004 Models in annex A *infra*. While the 1984 BIT's preamble (in a section not contained in annex A) "recogniz[ed]" that the agreement will stimulate the flow of private capital and the economic development of the parties, neither of these was stated as the purpose of that treaty.
[44] *See generally* Kennedy, *supra* note 9, at 157 (citing Sen's *Development as Freedom*, *supra* note 40).
[45] *See generally id.*

More significantly, the new text suggests a greater appreciation for the fact that even reliance on customary international law protections such as the "international minimum standard" may, in the hands of arbitrator-interpreters, result in something more than a "minimal commitment" to liberal, free market principles but may intrude in a highly visible way on the discretion some governments believe they ought to retain. The new model suggests a different approach toward general rules of international law such as custom and general principles. Whereas the 1984 Model referenced these as residual backdrop rules, useful to backstop other treaty rights and to re-affirm their continued applicability even with respect to non-BIT parties, the new model suggests that at least with respect to some investment protections (expropriation, FET, full protection and security), these general rules define the outer limits of investors' protections. To the extent that this effort is successful, the new version of U.S. BITs is less a sword in the hands of investors than a shield on behalf of host states.

The new U.S. BIT also reflects greater appreciation that the BIT's standard protections – now reduced in scope and number – may be more onerous or more controversial than assumed by the Reagan-era free marketers, whose influence is evident on the 1984 model. The new text demonstrates a more subtle appreciation that it may be impossible to erect a "wall of separation" to wholly insulate business from politics and that an investment treaty and its enforceable dispute settlement provide no escape from politics. On the contrary, the new text, by acknowledging the need to "balance" the competing rights of private parties and the state (as with respect to "indirect" expropriations), seems to assume that some arbitral decisions, like some decisions by national courts, necessarily implicate political, and perhaps even constitutional, concerns. Awareness of the public policy implications of investor-state dispute settlement is also suggested by the new assurances in the treaty for transparency and greater participation rights in the investor-state claims process.

All of this casts the 2004 U.S. Model in a positive or "progressive" light. There are darker aspects. More ominous is that Model's new-found appreciation for the views of Calvo. 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 in 2002, that henceforth the United States should not grant foreign investors "greater" rights than those enjoyed by U.S. nationals.[46] The United States' attempt to render the treaty's indirect expropriation guarantee comparable to that provided under existing U.S. (Supreme Court)

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[46]. The trade promotion authority's objectives stated in relevant part:

> [r]ecognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than that 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 . . . .

Trade Act of 2002, Pub. L. No. 107-210, § 2102 para. 3 (2002) (current version at 19 U.S.C. § 3802 (2004). This would not be the first time that the United States would have attempted to render treaty obligations indistinguishable from its own law. *See, e.g.*, U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. § 4781 (1991), para. I (3) (stating that the treaty's references to "cruel, inhuman or degrading treatment or punishment" meant whatever the Fifth, Eigthth and/or Fourteenth Amendments to the U.S. Constitution mean).

jurisprudence appears to be a clear bow to such Calvo-like concerns. This change may mean that, ironically, the expropriation provisions contained in the Cuba-Cambodia BIT or in some older Chinese BITs, for example, may now provide investors with greater protections than do contemporary U.S. investment agreements.[47] Taken to its logical conclusion, a view that BITs and FTAs can accord no more than whatever national law provides from time to time would eviscerate such treaties and would render their conclusion an almost entirely pointless exercise.[48]

To some extent the new U.S. model, like the proverbial canary in the mine shaft, may be a harbinger of more extreme efforts to "re-balance" or re-caliberate BITs. Other countries, such as Norway, have gone even farther in the direction of "re-balancing" the rights of investors and states. As is suggested by the lengthy preamble to the latest Norwegian Model BIT, that treaty is explicitly more amenable to interpretations that consider the other international obligations of states outside the four corners of a BIT.[49] The preamble to that treaty suggests how far some countries have gone from the original conception of investment treaties as relatively discrete efforts to protect foreign investors.

While this preamble retains language on the need for stable and favorable "conditions for investors," virtually every paragraph in it now hedges on that guarantee, in order to stress the need for such rights to provide "mutual" benefits for both state parties, to protect health, safety, the environment, and internationally recognized labor rights, to maximize the sustainable utilization of resources, to embrace corporate social responsibility, protect human rights, and to combat corruption. This broad preamble is virtually a restatement in treaty form of Sen's attempt, in *Development as Freedom*, to redefine human rights not as a tool to facilitate development but as development itself.[50] Norway's incorporation of all of these diverse goals into the BIT – its preamble's suggestion that all of these are part of the treaty's object and purpose– may breed revolutionary new interpretations of that treaty's substantive guarantees – which are otherwise not radically different from those in other more traditional BITs. One can only speculate, for example, what preamblar language like this entails for an arbitrator's effort to apply in a specific context the FET guarantee. There is even a hint in this preamble that the promotion of investments may implicate the efforts of both investors and their home governments – and does not only require the efforts of host states.

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I am not sure what to make of the new Norway's BIT or the 2004 U.S. model. At times, I agree with those who contend that the latest U.S. model may not be worth the paper it is written on, especially since its new self-judging essential security clause seems to be a get-out-of-jail-free card just waiting for any host state that wants to use it.

In my more philosophical moments, these new BITs seem part of the inevitable ebb and flow of history. It is possible to read the rise and subsequent evolutions of BITs and FTAs within the larger historical framework provided by Karl Polanyi in his highly influential 1944 classic, The Great Transformation.[51] One might see the U.S. Model BIT

[47] Compare the text on expropriation in the Cuban-Cambodia BIT, *infra* note 62, to the expropriation provision in 2004 U.S. Model at annex A *infra*.
[48] *See, e.g.*, Daniel M. Price, *Keep international protections: Bilateral treaties and free trade agreements are key*, WASH. TIMES (D.C.), May 14, 2009, A17 *available at* 2009 WLNR 9186232.
[49] *See* annex B *infra* (text of Norwegian preamble).
[50] Sen, *supra* note 40, at 3.
[51] KARL POLANYI, THE GREAT TRANSFORMATION (2d ed., Beacon Press 2001)(1944).

of 1984 as the embodiment of Polanyi's concept of "utopian market liberalism," that is, a single-minded effort, grounded in the historical laissez-faire movement, to expand the scope of the market, reduce government interventions through privatization and liberalization, and get prices right. In this picture the 2004 U.S. Model and others following its lead, including Norway's current model, represent Polanyi's inevitable protective countermovement. One might see these more recent model BITs as attempting to stem the excesses of market liberalism reflected in earlier models and accord far more deference to the "proper" role of government in regulating the market.[52]

On my more pragmatic days, the new U.S. BIT seems an astute response to the extreme criticisms and backlash generated by BITs based on the 1984 U.S. model. Most participating in this conference know that calling such treaties modern forms of colonial "capitulation" agreements or dismissing investor-state dispute settlement as "gunboat arbitration"[53] are grave misrepresentations. Most of us know, thanks to the work of scholars like Susan Franck, that investor-state arbitration is nowhere near as "biased" against the state as some suggest; that states continue to win the majority of investor-state disputes and that the typical award when investors win is more like $10 million and not the $100 plus million seen in some of the Argentina cases.[54] Most of us know that investor-state arbitrators are honestly trying to render a fair and just award and are not in the pocket of investors. And we suspect that most investors and their lawyers are not crazed ambulance chasers trying to get the international law equivalent of punitive damages over a frivolous claim but folks who would very much like to stay in the host state where they have serious sunk costs but who see arbitration as a last-resort effort to secure some recompense.

And yet, as was said at the recent annual meeting of the American Society of International Law, in the end, perceptions probably matter more than facts do. Governments may need to react to what influential elites and NGOs believe, even if it is not true. On those days when I think of the public relations challenges facing the investment regime, the new U.S. model appears to be a wise concession to real politick. The new U.S. model may be, as compared to the 1984-87 "gold" standard, an inelegant, polyurethane imitation, but if so, we should be mindful that polyurethane nonetheless resists the corrosive action of the elements and may prove enduring. Even the new version of U.S. BITs may serve a useful purpose.

What larger lessons can we draw from the changes in BITs over time?

Here are three:

Lesson Number One: we need to rid ourselves of the North/South paradigm when addressing contemporary international investment law.

The evolutions in the texts of investment treaties over time are another reason why it is a caricature to describe the evolving investment regime as a neo-colonialist

[52] *See generally* Joseph Stiglitz, *Foreword* to *Polanyi, supra* note *51* (relating Polanyi's original insights to the disenchantment with the "Washington Consensus" model of governing and development after the Asian crisis).

[53] *See, e.g.*, Santiago Montt, *What International Investment Law and Latin America Can and Should Demand from each Other, Updating the Bello Doctrine in the BIT Generation*, 3 REVISTA ARGENTINA DEL RÉGIMEN DE LA ADMINISTRACION PÚBLICA 80 (2007).

[54] Susan D. Franck, Empirically *Evaluating Claims About Investment Treaty Arbitration*, 86 N. C. L. REV. 1 (2007).

scheme to protect the Western capital interests of the metropole over the periphery.[55] In 1998 Andrew Guzman described the world of BITs as a regrettable instance where LDCs signed treaties "that hurt them" out of a misguided effort to defect from their successful effort to topple the customary rules protecting foreign investors via the NIEO.[56] His description of the investment regime as a nightmare scenario of a prisoners' dilemma game ending (predictably) badly plays into the long history of seeing international investment law exclusively in North/South terms, as if the investment regime continues to be an imperial game played by the West on the rest.

Even if Guzman were right about the origins of BITs – which I do not believe he is[57] – his North/South game is a misleading description of today's investment regime. As the new generation of PRC BITs suggest, those treaties are no longer about protecting capital from the West as it goes to the rest. Today's investment regime is increasingly universal in scope. By the end of 2008, more countries (180) had entered into at least one investment protection agreement than had joined the WTO.[58] 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 27 percent of the BITs in existence are between developing countries[59] and a considerable portion of capital flows going to the West from the East, investment agreements cannot be explained simply as variations of the one-sided 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 nearly 3000 investment agreements, those entering them today are a cosmopolitan lot. Apart from China, today's evolving investment regime includes as prominent players, countries such as Cuba. Cuba – whose government once defined itself in opposition to rights of foreign investors[60] – now has concluded about as many investment agreements (62) as has the United States.[61] And Cuba's BITs, as I have suggested, are not very different from the highly investor-protective U.S. Model BIT of 1984.[62]

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[55] *See also* José E. Alvarez, *The Contemporary Foreign Investment Regime: Empire of Law or Law of Empire?*, ALA. L. REV. (forthcoming 2009).
[56] Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them*, 38 VA. J. INT'L L. 639 (1998), *updated in* Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, 73 (Karl P. Sauvant & Lisa Sachs, eds., 2009) [hereinafter EFFECT].
[57] *See* José E. Alvarez, *The Once and Future International Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN (forthcoming 2009).
[58] UNCTAD, TD/B/C.II/MM.3/2,THE DEVELOPMENT DIMENSION OF INTERNATIONAL INVESTMENT AGREEMENTS, , 2 (December 2008)..
[59] *See, e.g.*, Lisa Sachs and Karl Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, *in* EFFECT, *supra* note 56, xxvii, at xxxiv.
[60] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
[61] El Sitio Web de la Industria Cubana Inversiones [website for Cuba Industria], http://www.cubaindustria.cu/webs/acuerdos_protec_inver.htm.
[62] The Cambodia-Cuba BIT, for example, provides at article IV:

> 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;

The United States' affection for free capital flows is now widely shared – and even includes governments that do not identify themselves as capitalist. Most countries now worship at same shrine of David Ricardo as the United States does. 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.

North/South views are also outdated because, as the changes in U.S. BITs suggest, BITs bite their drafters back. BIT or FTA signatories like Canada and the United States are reacting by changing the regime and its ideology. Even accepting Guzman's bizarre view of capital flows as a zero sum game, those countries' new BITs don't "hurt" host states quite as much as the old ones ostensibly did.

And the changes to even a single country's treaties over time tell us that we need to be cautious about describing the world of BITs and FTAs through any single lens, North/South or other. If even a single country like the United States now has concluded treaties as distinct as those based on the 1984 and 2004 BIT Models, one should not underestimate the differences among the nearly 3000 investment agreements that exist. 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' most investor protective model of 1987) exists (and by its terms will remain in effect at least for existing investors for some time), alongside agreements like the U.S.-Uruguay BIT of 2004 (based on the 2004 U.S. Model) and PRC treaties based on all of that country's various models over the years. We also have a world where seemingly identical BIT guarantees – such as FET – exist within treaties whose objects and purposes may be as starkly different as are suggested by the respective preambles of the 1984 U.S. BIT and the latest Norwegian Model.

Lesson Number Two: changing the investor-state arbitral process and its caselaw is not the only way to remedy the investment regime's legitimacy problems. Other, more traditional forms of "Exit and Voice" remain alive and well.

Although we frequently talk about the investment regime as if the only remedy lies with its arbitrators or ICSID, the changes to investment agreements over time remind us that with less than 3000 BITs and FTAs in existence, there is still plenty of room for new investment treaties to be concluded. There is not, for example, at this writing a

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> b. the measures are non discriminatory basis; 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.

Agreement Between the Government of the Kingdom of Cambodia and the Government of the Republic of Cuba Concerning the Promotion and Protection of Investments, Cambodia-Cuba, May 28, 2001, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/cuba_cambodia.pdf.
From an investor's standpoint, this text compares favorably to the United States' latest iteration in its 2004 Model, see annex A *infra*.

single investment agreement in place between the United States and any of the BRICs. There are also plenty of opportunities even for countries with long-established BIT programs to change their model agreements and even re-negotiate their existing BITs. And despite the lengthy termination periods contained in some BITs or the fact that often their protections remain in effect for a period for established investors, exit from BITs and even from ICSID (or at least threats to do so) remains an option, which is more than can realistically be said of the WTO, for example. Further, even without terminating their existing BITs, treaty parties can still seek to amend them or to issue (as under the NAFTA) binding interpretations of their terms. Finally, as Argentina's regrettable reactions to recent ICSID awards remind us, even the "foolproof" enforcement scheme backing investor-state arbitration has an Achilles Heel: when push comes to shove it is hard to get money from an entity with sovereign immunity, especially when that entity is no longer subject to IMF strictures. State-driven "civil disobedience" remains a form of extreme exit and may yet compel changes to the investment regime.

Lesson Number Three: there may be ways to achieve greater coherence apart from achieving the holy grail of many investment lawyers: a single multilateral treaty governed by a single investment court. Consider one alternative scenario: what if the current BIT negotiations between the United States and China were to succeed?

There are possibilities wherein the investment regime will eventually coalesce and develop more harmonious law, where the risks of fragmentation and illegitimacy can be overcome. While few believe that over the short term there will be yet another attempt to negotiate a single multilateral treaty on investment, it is possible that coherence might be achieved through different routes. It is possible, for example, that the positions taken in some recent BITs, particularly those concluded by China and the United States, will come to have greater influence, particularly since the combined capital flows of these two states alone eclipse those of most other states combined. This is most likely to be the case should a United States-China BIT emerge but may even occur without it. It is possible that the most recent Chinese and U.S. BIT models, which are becoming increasingly similar in their terms, will exert this influence not only because of the net capital flows they collectively impact but simply because more countries than ever before are, like the PRC and the United States, capital exporters *as well as* capital importers – or would like to be. This reality may also confer a form of legitimacy to those countries' most recent model BITs.[63]

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.[64] If this indeed the case, the Chinese and United States' respective BIT programs might suggest how other countries' investment treaties should evolve, as they also seek to conclude treaties that strike a balance between the rights of private capital and the rights of sovereigns. Under this scenario for global harmonization, the states – and not the investor-state arbitrators – would remain in the driver's seat, as their investment treaties evolve toward more common provisions.

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[63] *See, e.g.*, Congyan, *supra* note 30, at 37-50 (discussing how a P.R.C.-U.S. BIT holds the prospect for "reconstructing" the investment treaty regime).
[64] JOHN RAWLS, A THEORY OF JUSTICE (1971).