HARVARD INTERNATIONAL LAW JOURNAL

FEATURE
JANUARY 2014

Online
Volume 55

From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement

2013 Harvard International Law Journal Symposium Keynote Address

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In 1998, the book *Dealing in Virtue* discussed the growth of international arbitration and a cadre of elite arbitrators who, through intense competition, established themselves as trustworthy to resolve high-stakes global disputes.[1] Over the next decade and a half, opposition to arbitration developed, predominantly from leftist academics, anti-globalization groups, and States that found themselves as respondents in investment treaty arbitrations. Several States have withdrawn from the investment

[1] *See generally* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1998).

arbitration regime to differing degrees. Venezuela, Bolivia, and Ecuador have withdrawn from ICSID or have reduced the scope of their consent to ICSID arbitration;[2] South Africa is terminating its "first generation" bilateral investment treaties (BITs);[3] Ecuador plans to audit its BITs;[4] and Australia adopted a policy, recently abandoned after only two years[5] of no longer entering into treaties providing for investor-State arbitration.[6] A report published in 2012, entitled *Profiting from Injustice*, captures the spirit of arbitration opposition. It opens with the epigraph, "There is little use going to law with the devil while the court is held in hell."[7] Such opponents of investor—State arbitration argue that investment arbitration is biased in

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[2] *See, e.g.*, International Centre for Settlement of Investment Disputes [ICSID], *Bolivia Submits a Notice Under Article 71 of the ICSID Convention* (May 16, 2007), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3 (announcing Bolivia's exit from ICSID); ICSID, *Ecuador's Notification under Article 25(4) of the ICSID Convention* (Dec. 5, 2007), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9 (announcing Ecuador's limitation of the scope of disputes it consents to submit); ICSID, *Venezuela Submits a Notice Under Article 71 of the ICSID Convention* (Jan. 26, 2012), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100 (announcing Venezuela's exit from ICSID).

[3] Xavier Carim, Update on the Review of Bilateral Investment Treaties in South Africa: Prepared for the Parliamentary Portfolio Committee on Trade and Investment 8 (Feb. 15, 2013), http://www.safpi.org/sites/default/files/publications/dti_review_of_bits_ppc_20130215.pdf.

[4] *See* Mercedes Alvaro, *Ecuador Plans to Audit Bilateral Investment Treaties*, WALL ST. J., Mar. 11, 2013, *available at* https://www.google.com/url?q=http://online.wsj.com/article/BT-CO-20130311-708469.html&sa=D&usg=ALhdy2_FB_VN21ssWWMghE_VRDjrFz2y7g (softening its position several years ago that it would withdraw from all of its BITs). *See also Ecuador to Denounce Remaining BITs*, GLOBAL ARB. REV. (Oct. 30, 2009), *available at* http://www.globalarbitrationreview.com/news/article/19251.

[5] *See* Korea-Aust. Free Trade Agreement Fact Sheet, http://www.dfat.gov.au/fta/akfta/fact-sheet-key-outcomes.pdf (Dec. 6, 2013) (listing investor-State arbitration as a feature of the new treaty).

[6] *See* GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (Apr. 2011), *available at* http://pdf.aigroup.asn.au/trade/Gillard%20Trade%20Policy%20Statement.pdf.

[7] Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers Are Fuelling an Investment Arbitration Boom* 10, CORPORATE EUROPE OBSERVATORY AND THE TRANSNATIONAL INSTITUTE (Nov. 2012), *available at* http://corporateeurope.org/trade/2012/11/profiting-injustice (quoting HUMPHREY O'SULLIVAN, THE DIARY OF AN IRISH COUNTRYMAN (1831)).

favor of multinationals, either harms or fails to benefit poor States, and interferes with the ability of democratic governments to pursue policies in the public interest.[8]

Based on those premises, critics advocate a pivot away from the current neutral juridical process for resolving disputes between States and foreign investors by permitting States to exert greater influence over the arbitral process. For example, some have advocated replacing party-appointed arbitrators with panels selected through essentially political channels controlled by States. [9] Others support recognizing *post hoc* interpretive statements issued by States as binding on arbitral tribunals.[10] Still others have urged relaxing the rules of treaty interpretation to make it

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[8] *See, e.g.*, United Nations Conference on Trade and Development (UNCTAD), *IIA Issues Note No. 2: Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, at 1-2 n.2-4 (May 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (advocating reform of investor-State dispute settlement and citing concerns which include "a perceived deficit of legitimacy and transparency" and "questions about the independence and impartiality of arbitrators"); Declaration of the 1st Ministerial Meeting of Latin American States Affected by Transnational Interests, (Apr. 22, 2013), *available at* http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf (asserting that investment arbitration "violates . . . the sovereignty of the States as well as its [sic] legal institutions, due to the economic power of certain companies and deficiencies of the international systems of dispute settlement on investment"); Sundaresh Menon, International Arbitration: The Coming of a New Age for Asia (and Elsewhere) Keynote Address at the Opening Plenary Sessions of the ICAA Congress in Singapore (2012), *available at* http://www.arbitration-icca.org/AV_Library/ICCA_Singapore2012_Sundaresh_Menon.html (arguing that investor-State arbitration "has the potential to constrain the exercise of domestic public authority in a manner and to a degree perhaps not seen since the colonial era" and characterizing international arbitrators as "modern-day uber-sophisticated ambulance-chasing plaintiffs' lawyers . . . [because] rul[ing] in favor of investors from traditionally capital-exporting countries [is] the 'price' that has to be paid to gain credibility and access to the privileged club of elite international arbitrators."). A report from a recent debate stated that Menon "seemingly [is] retreating from previously expressed views." Sebastian Perry, *Minds Meet over Regulation*, 8(3) GLOBAL ARB. REV. 11, 13 (June 5, 2013).

[9] *See, e.g.*, Menon, *supra*, ¶¶ 68-70; M. Sornarajah, *Starting Anew in International Investment Law*, 74 COLUMBIA FDI PERSPECTIVES (July 16, 2012), *available at* http://www.vcc.columbia.edu/content/starting-anew-international-investment-law; GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 153 (2007).

[10] *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,* 104 AM. J. INT'L L. 179, 210 (2010) (advocating an approach to treaty interpretation in which arbitration tribunals would accept States' *post hoc* expressions of opinion on how their treaties should be interpreted as retroactively effective, even if the supposed "interpretations" amounted to *de facto* treaty amendments); U.S. Model Bilateral Investment Treaty art. 30(3), 2012, *available at* http://www.state.gov/documents/organization/188371.pdf (stating that "[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

easier for States to derogate from their treaty obligations by citing other fundamental values such as human rights or interpreting necessity or essential security clauses in treaties as self-judging.[11]

All proposals to "re-statify" investment dispute resolution should be rejected because they would undermine the effectiveness of the system of foreign investment protection. States created the International Centre for the Settlement of Investment Disputes ("ICSID") and committed to other neutral arbitration fora for resolving foreign investment disputes precisely to remove such disputes from earlier politicized means of settlement, such as international diplomacy and potentially volatile domestic processes, because politicization inhibited capital flows essential to economic development.[12] Thus, the Report of the Executive Directors of the World Bank on the ICSID Convention, published in 1965, observes that while disputes between foreign investors and host States were typically settled through domestic processes, they were increasingly resolved through international means which indicated a demand for other methods of dispute settlement.[13] The report explains that the Convention was motivated:

> [B]y the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it . . . . [A]dherence to the Convention by a country would provide additional inducement and stimulate a larger flow of

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decision."); Canada Model Bilateral Investment Treaty arts. 40(2), 51, 2004, *available at* http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

[11] *See* Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶¶ 378-388 (2010) (discussing and rejecting Argentina's argument that the necessity clause in a treaty is implicitly self-judging) (later annulled on other grounds in Sempra Energy Int'l v. Argentine Republic, Decision on Annulment, June 29, 2010); Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670 (2011); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?,* 60 INT'L & COMP. L. Q. 573 (2011). *See generally* Jose E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 246 (2011) (describing the rise of this line of argument).

[12] *See* UNCTAD, *IIA Issues Note No. 4: International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal* (June 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf; I.F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV.-FOREIGN INVESTMENT L. J. 1 (1986).

[13] ICSID, *Report of the Executive Directors on the ICSID Convention*, ¶ 10 (1965), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section03.htm.

> private international investment into its territories, which is the primary purpose of the Convention.[14]

To that end,

> The present Convention would . . . provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.[15]

Thus, States sought to create an independent, neutral forum with clear rules to enhance trust and encourage foreign investment. To further induce international capital flows for economic development, States proceeded to conclude thousands of bilateral and multilateral investment protection and promotion treaties, which guarantee certain standards of treatment to alien investors.[16] Many such treaties grant

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[14] *Id.* ¶ 9.

[15] *Id.* ¶ 11.

[16] UNCTAD has a database of these treaties, *see* http://www.unctadxi.org/templates/DocSearch____779.aspx. For the treaties' objectives, *see, for example*, the Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, Preamble ("Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party; Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties; Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources . . . ."); Treaty Between the Federal Republic of Germany and the State of Israel Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Isr., June 24, 1976, Preamble ("Intending to create favourable conditions for investments by nationals and companies of either State in the territory of the other State and Recognising that encouragement and protection of investments under this Treaty are apt to stimulate private business initiative and to increase the prosperity of both nations"); Agreement Between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments, Austl.-China, July 11, 1988, Preamble ("Recognising the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations and technical co-operation between them, particularly with respect to investment by nationals of one Contracting Party in the territory of the other Contracting Party. . . . Recognising that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments and associated activities, combined with rules designed to render more effective the application of these principles within the territories of the Contracting Parties.").

foreign investors the right to initiate arbitration against a host State before ICSID or another forum for breaches of treaty standards.[17] One of the most sophisticated empirical studies that has been conducted found that investment treaties reflecting a strong commitment to neutral dispute settlement, particularly those with arbitration clauses that omit any requirement for prior domestic dispute resolution, most effectively increase foreign direct investment.[18] Thus, there is evidence that, as envisaged by the ICSID Convention, the availability of a neutral dispute resolution forum enables a State to make a credible commitment to uphold its obligations to foreign investors, which in turn accomplishes the objective of stimulating capital flows.

Recent proposals to reform investment arbitration by increasing States' political control over the arbitral process would undermine the credibility of investment arbitration as a neutral method of resolving a dispute between an alien investor and a host State. Allowing States to interfere with arbitral decision making after a dispute arises would thus weaken the effectiveness of the system of foreign investor protection for stimulating international capital flows and promoting economic development. Moreover, the criticisms of investment treaties and arbitration that are invoked to justify politicization are based on emotion rather than on facts. Time permits me to share only a few of the many examples of how the claims of opponents of investment arbitration are either directly contradicted by data or are not supported by any evidence.

First, whereas critics contend that investment treaties favor rich Northern States, the number of intra-South BITs continues to grow and now exceeds 1,000.[19] The content of these treaties does not substantially differ from the content of North—South BITs, and more recent intra-South treaties have become more protective of foreign investors than older generation treaties.[20]

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[17] *See, e.g.*, Agreement Between Mauritius and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Mauritius-Switz., art. 9, Nov. 26, 1998.

[18] *See* Clint Peinhardt & Todd Allee, *Devil in the Details? The Investment Effects of Dispute Settlement Variation in BITs, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010-2011 (Karl P. Sauvant, ed. 2012) (finding that, after controlling for country-specific characteristics that impact treaty negotiations and thus treaty language, international investment agreements that more strongly commit to investor-State arbitration by omitting reference to domestic dispute resolution are correlated with higher foreign direct investment inflows).

[19] UNCTAD, *Recent Developments in International Investment Agreements (2008-June 2009)*, IIA MONITOR No. 3, p. 3 (2009), http://unctad.org/en/Docs/webdiaeia20098_en.pdf.

[20] *Compare, e.g.*, Agreement on the Encouragement and Reciprocal Protection of Investments Between the Government of the Republic of Korea and the Government of the People's Republic of China, S. Kor.-China, arts. 5(3), 9, Sept. 30, 1992, *available at* http://unctad.org/sections/dite/iia/docs/bits/korea_china.pdf, *and* Agreement Between Japan and the People's

Second, arbitration opponents routinely accuse arbitrators of anti-State bias.[21] In a 2012 press release explaining its exit from ICSID, the Venezuelan Government announced that ICSID tribunals had sided with investors in 232 of 242 cases throughout its history.[22] In fact, ICSID's statistics show that investors won in only 46 percent of all cases decided through June 2012. Tribunals declined jurisdiction in 23 percent of cases, dismissed all claims in 30 percent, and dismissed the claims as manifestly lacking in legal merit in 1 percent.[23] Further, an analysis of 52 investment arbitration awards finally resolving treaty claims found that of the 21 cases that investors won on the merits, damages were not high: thirteen cases resulted in a damages assessment of between $1 and $5 million. In four cases, investors were awarded between $5 and $10 million, and in only four were investors awarded more

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Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, China-Japan, art. 11(2), Aug. 27, 1988, *with* Agreement Among the Government of Japan, the Government of Korea, and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment, Japan-China, arts. 11, 15, May 2012; Press Release, Ministry of Foreign Affairs of Japan, Signing of the Japan-China-Korea Trilateral Investment Agreement (May 13, 2012), *available at* http://www.mofa.go.jp/announce/announce/2012/5/0513_01.html (relinquishing national jurisdiction over claims by foreign investors), *and* ASEAN Comprehensive Investment Agreement, arts. 27-28, Feb. 26, 2009, *available at* http://cil.nus.edu.sg/2009/2009-asean-comprehensive-investment-agreement-signed-on-26-february-2009-in-cha-am-thailand-by-the-economic-ministers/ (perm itting the investor to go directly to arbitration for any substantive treaty violation). *See also, e.g.*, UNCTAD, *World Investment Report 2012* (2012), *available at* http://unctad.org/en/Publications Library/wir2012_embargoed_en.pdf; Mahnaz Malik, South-South Bilateral Investment Treaties: The Same Old Story? at the Annual Forum for Developing Country Investment Negotiators (Oct. 27-29, 2010), *available at* http://www.iisd.org/pdf/2011/dci_2010_south_bits.pdf.

[21] *See, e.g.*, Roberts, *supra* note 10, at 223, 225 (arguing that there is a flaw in the "interpretive balance of power between treaty parties and tribunals" that is hindering "more legitimate and sustainable investment treaty interpretations" and pointing to no more than three individual awards that she asserts overreached); *Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, TPP LEGAL (May 8, 2012) (asserting that investment arbitration is not independent or fair); M. Sornarajah, The Clash of Globalizations and the International Law on Foreign Investment: The Simon Reisman Lecture (Sept. 12, 2002) (alleging that the arbitral process is more susceptible to influence by investors than domestic courts because of repeat party appointments, never mind that States are more likely than investors to be repeat appointers).

[22] *Comunicado Oficial de Venezuela Sobre Su Salida del Ciadi*, EL UNIVERSAL, (Jan. 25, 2012), *available at* http://www.eluniversal.com/economia/120125/comunicado-oficial-de-venezuela-sobre-su-salida-del-ciadi.

[23] ICSID, *The ICSID Caseload–Statistics (Issue 2012-1),* at 13, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?CaseLoadStatistics=True&actionVal=ShowDocument&language=English31&requestType=ICSIDDocRH.

than $10 million.[24] Awards are typically well below the amount claimed. More than 80 percent of decisions rendered an award of less than 40 percent of the damages sought.[25] These statistics disprove the endlessly repeated anti-State bias argument.[26]

Third, the latest wave of criticism alleges that investment arbitration interferes with the freedom of action of democratically elected governments, restricting sovereignty. However, the conclusion of a treaty is itself an exercise of sovereignty, and limiting the discretion of domestic actors is what treaties do.[27] That States may not invoke their national law to override their international obligations is a principle of international law so fundamental as to be beyond serious objection.[28] The objective of investment protection treaties is credibly to promise foreign investors a certain level of treatment in order to permit the treaty parties (or one of them) to attract foreign investment and to lower their cost to each State and its citizens.[29] When a State uses its sovereign power to offer such treaty protection guaranteed by the promise of neutral arbitration, it makes a political choice to limit the discretion of current and future political actors. In other words, in exchange for certain benefits, it binds itself as a sovereign to treat foreign investors in accordance with the rule of law.

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[24] Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N. CAR. L. REV. 1, 59-61 (2007).

[25] *Id.* at 61-62; Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 81 (2010).

[26] William W. Park, *Arbitrator Integrity: The Transitory and the Permanent*, 46 SAN DIEGO L. REV. 629, 658 (2009) (discussing contentions of arbitrators' "pro-investor" bias).

[27] The foundational principle that entering into a treaty is an exercise of State sovereignty is illustrated in the Vienna Convention on the Law of Treaties, which recalls the "sovereign equality and independence of all States" and sets out rules governing how a State may express its consent as a sovereign to be bound by a treaty, including identifying persons authorized to express the State's consent and possible means of expressing that consent. *See* Vienna Convention on the Law of Treaties, arts. 2(c), 7-17, May 23, 1969, Preamble, *available at* http://www.worldtradelaw.net/misc/viennaconvention.pdf. As the World Trade Organization Appellate Body has explained, a treaty is "the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement." Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 15, WT/DS11/AB/R (Oct. 4, 1996). Similarly, the International Court of Justice has recognized that a State may, in the exercise of its sovereignty, conclude a treaty that constrains it in the realm of domestic policy, "such as that relating to the holding of free elections in its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle . . . to hinder a State from making a commitment of this kind. A State . . . is sovereign for the purpose of accepting a limitation of its sovereignty in this field." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 131 (June 27).

[28] *See* Vienna Convention on the Law of Treaties, art. 27.

[29] *See supra* note 16.

Fourth, critics argue that investment treaties and arbitration do not merely constrain States to abide by the rule of law. Rather, they contend, the prospect of facing an arbitral dispute may cause "regulatory chill," foreclosing legitimate regulation.[30] The regulatory chill argument posits that the mere prospect of an investor claim may deter a State from enacting beneficial regulations. This argument is usually made hypothetically. [31] The underlying unstated and untested assumption is that any regulatory action that might be prevented would have had a positive impact on the host State. This argument ignores that governments sometimes enact misguided, discriminatory, and harmful policies and that officials sometimes implement regulations in faulty ways.

Much criticism in this vein has focused on the possibility that investor-State arbitration could prevent States from enacting legitimate environmental regulation.[32]

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[30] *See* Michelle Sforza & Mark Vallianatos, *Chemical Firm Uses Trade Pact to Contest Environmental Law*, GLOBAL POLICY FORUM, (Apr. 1997), *available at* http://www.globalpolicy.org/component/content/article/212/45381.html ("If [investor claims challenging governmental measures justified by reference to environmental protection] were to become commonplace, governments would have to give due consideration to the potential fiscal costs before passing needed regulations."); Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (2009); *Call for Papers: Sustainable Development and International Investment Law: Bridging the Divide*, VALE COLUM. CTR. ON SUSTAINABLE INT'L INVEST. (June 14, 2012), *available at* http://www.vcc.columbia.edu/files/vale/content/Sustainable_Development_Call_for_Papers_6-14-12.pdf ("[C]laims by investors, whether successful or not, can cause a state to think twice before adopting legitimate regulations, suggesting that treaties may in fact impede states' policy space to promote sustainable development domestically.").

[31] *See* James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 79 & n.8 (2007) (also observing that such arguments typically "rely[] on hypothetical situations and weak counterfactual reasoning" and listing examples).

[32] *See* Roberts, *supra* note 10, at 191 ("However, the lawmaking role of tribunals is provoking strong expressions of concern, especially in the face of complaints that the dispute resolution process lacks independence, openness, and accountability, and that tribunals are not paying sufficient heed to state regulatory interests."); *Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, TPP LEGAL (May 8, 2012), http://tpplegal.wordpress.com/open-letter/ ("Some of these interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right of states to regulate and the sovereign right of nations to govern their own affairs."). *See also* UNCTAD, *World Investment Report 2012*, *supra* note 20, at 89 ("[P]aying due regard to sustainable development implies that a treaty should . . . provide treatment and protection guarantees to investors without hindering the government's power to regulate in the public interest (e.g. for environmental, public health or safety purposes)"); *Call for Papers: Sustainable Development and International Investment Law: Bridging the Divide*, *supra* note 30 ([C]laims by investors, whether successful or not, can cause a state to think twice before adopting

However, actual arbitral awards addressing environmental issues demonstrate great deference to environmental policy. Contrary to critics' claims, BITs do not give investors the right to sue a host State any time an investment is merely "interfered with" or the right to "demand compensation when a government-initiated change lowers the value of their assets."[33] Instead, a typical investment treaty guarantees that the host State will not discriminate against foreign investors and their investments,[34] will treat them fairly and equitably, [35] will refrain from expropriating without prescribed compensation,[36] and will provide full protection and security.[37] Those guarantees stop far short of promising that the State will not change the law or regulate the environment.

The limited nature of the rights granted in investment treaties is reflected in the outcomes of environmental arbitrations. No investment tribunal has ever ordered a State to compensate an investor for simply enacting a generally applicable environmental law or for legitimately (as opposed to pretextually) enforcing a regulation that caused an investor to suffer a loss. Very deferential standards have been applied to environmental regulatory measures. The predominant view concerning expropriation[38] is that generally applicable regulatory measures never give rise to expropriation, except possibly where the State has made particular commitments to induce the investment and then reneged on them.[39]

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legitimate regulations, suggesting that treaties may in fact impede states' policy space to promote sustainable development domestically.").

[33] Ursula Kriebaum, *Privatizing Human Rights—The Interface Between International Investment Protection and Human Rights*, 5 TRANSNATIONAL DISPUTE MANAGEMENT (2006); Joseph E. Stiglitz, *Regulating Multinational Corporations*, 23 AM. U. INT'L L. REV. 451, 457 (2007).

[34] *See, e.g.*, U.S.-Arg. BIT, at art. 2(1).

[35] *See, e.g.*, *id.* at art. 2(2).

[36] *See, e.g.*, *id.* at art. 4.

[37] *See, e.g.*, *id.* at art. 2(2).

[38] Expropriation refers generally to a taking by the State. Investment treaties do not typically define the term, but they often use it in combination with terms such as "nationalization." *See, e.g.*, U.S.-Arg. BIT, art. IV(1); UNCTAD, *Expropriation: Series on Issues in International Investment Agreements II*, at 5-12 (2012), *available at* http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf.

[39] Methanex Corp. v. U.S., Final Award of the Tribunal on Jurisdiction and the Merits, 44 I.L.M. 1345, pt. IV, ch. D, ¶¶ 7-9 (Aug. 3, 2005); S.D. Myers v. Canada, Partial Award, 40 I.L.M. 1408, ¶¶ 281, 285 (Nov. 13, 2000); Chemtura v. Can., Award, ¶ 266 (Aug. 2, 2010), *available at* http://www.worldcourts.com/pca/eng/decisions/2010.08.02_Chemtura_v_Canada.pdf. *See also* Waste Management v. Mex., ICSID Case No. ARB(AF)/98/2, Award, ¶ 98 (Jan. 17, 2000); Revere Copper & Brass, Inc. v. Overseas Private Invest. Corp., 17 I.L.M. 1321, 1331 (Feb. 26, 1980). A second view adopts the more investor-protective stance of the European Court of Human Rights and finds no principle of customary international law that exempts regulatory action from giving rise to expropriation if "the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or

Similarly, the obligation to accord investors fair and equitable treatment ("FET"), contained in most investment treaties,[40] has uniformly been interpreted to give States very broad leeway. Tribunals have shown great deference to public concerns, domestic laws, and political processes, focusing their analyses on whether States have acted in bad faith, unfairly, or without due process.[41] Tribunals also have deferred to the precautionary principle—which many States apply in some form to permit environmental regulatory action on the basis of "possible risks" where there is no conclusive evidence of danger to human health or the environment[42]—by declining to assess the wisdom or scientific foundation of environmental policy decisions.[43]

Thus, tribunals have held States liable for purportedly environmental measures only where they have concluded that the environmental rationale was pretextual or government officials violated domestic law. Investment tribunals have found States liable for pretextually environmental measures in only three cases, and in each case the tribunal concluded that based on the evidence the purportedly environmental action was not taken in good faith or in accordance with domestic law.[44] Notably, in all three cases, the government organs at issue had themselves identified no threats to the

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decision have been neutralized or destroyed." Técnicas Medioambientales Tecmed, S.A. v. Mex., ICSID Case No. ARB(AF)/00/2, Award, ¶ 116 (May 29, 2003) [hereinafter Tecmed]. This approach sets the very high bar that an investment must be neutralized or destroyed to ground an indirect expropriation claim. It also imposes a second hurdle: even if the investment has been destroyed, a further proportionality test examines whether there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realized." *Id.* ¶¶ 121-122.

[40] *See Fair and Equitable Treatment Standard in International Investment Law, Working Papers on International Investment* 5, (OECD Working Paper No. 2004/3, 2004), *available at* http://www.oecd.org/daf/inv/internationalinvestmentagreements/33776498.pdf; Agreement Between The Hashemite Kingdom of Jordan and The Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Jordan-Switz., art. 2(2), Nov. 11, 1976.

[41] *See, e.g.*, Chemtura, ¶¶ 123-127; Tecmed, ¶ 122; Unglaube v. Costa Rica, ICSID Case No. ARB/09/2, Final Award, ¶¶ 258-59 (May 16, 2012). *See also* Saluka Investments v. Czech, Partial Final Award, ¶¶ 253–65 (Mar. 17, 2006).

[42] *See* David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 657 (2001); *Communication from the Commission on the Precautionary Principle*, at 7, COM (2000) 1 final (Feb. 2, 2000), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0001:FIN:EN:PDF.

[43] *See* Chemtura, ¶¶ 134-136, 153; Methanex, pt. III, ch. A, ¶¶ 4-102.

[44] *See generally* Metalclad Corp. v. Mex., ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000); Tecmed; S.D. Myers. In two frequently cited "environmental expropriation" cases in which the claimants were awarded damages, the State acknowledged that it had expropriated the property for which compensation was awarded. The disputed issues were when the expropriation occurred and what compensation was due. *See* Unglaube, ¶¶ 128, 137, 155, 200-203, 217-219; Compañía de Desarrollo de Santa Elena, S.A. v. Costa Rica, ICSID Case No. ARB/96/1, ¶¶ 77, 79-81 (Feb. 17, 2000).

environment or public health that would have justified their actions under their own law and policy.

In *Metalclad v. Mexico*, provincial and municipal officials denied the investor necessary construction permits on grounds outside of their authority under Mexican law. They thus thwarted the investor's continued operation of a landfill despite the investor's receipt of all required environmental approvals, compliance with environmental laws, and repeated endorsements from the federal government.[45] The State did not even contend that the landfill posed any risk of environmental degradation; to the contrary, all investigations undertaken in response to local opposition showed the operation to be "consistent with, and sensitive to, [Mexico's] environmental concerns."[46]

Similarly, in *Tecmed v. Mexico*, the claimant had purchased a landfill and acquired all the necessary environmental permits to operate it. Shortly thereafter, newly elected local officials led a campaign against the landfill that resulted in such significant local opposition that the investor agreed to move it to a different location despite the acknowledgment of the municipality and the Federal Government that there was no "evidence of any risk to health and the ecosystem" and no "legal, ethical, or logical arguments" in favor of its closing.[47] In response to political pressure, the claimant and the local and Federal governments agreed to cooperate to relocate the landfill at substantial cost to the investor. Several months later, while steps were being taken to carry out that agreement, pressure from local authorities led the Federal Government to issue a resolution on pretextual grounds, ordering the immediate closure of the existing site.[48] As justification, the resolution cited infractions of the investor's operating permit, even though officials had previously assessed those infractions and determined them to be minor warranting no sanction more serious than a fine. Whereas during the arbitration Mexico defended its actions as being environmentally motivated, the resolution did not cite environmental concerns,[49] and contemporary documentary evidence showed that after assessing the infractions officials had concluded that there was no "indication that risks for the population's health or the environment might exist."[50] They did not subsequently reverse that determination.[51] Further, the Mexican official who issued the resolution admitted during her testimony

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[45] Metalclad, ¶¶ 78-80, 85, 92.
[46] *Id.* ¶¶ 76-105.
[47] Tecmed, ¶¶ 109-110.
[48] *Id.* ¶¶ 123-132, 151 (discussing contemporary written communications and testimony presented during the arbitration from government officials affirming that the operation complied with applicable environmental and health laws and regulations and had been found to pose no environmental or health risks and conceding that the resolution was driven by other, political factors).
[49] *See id.* ¶ 124.
[50] *See id.* ¶¶ 123-125.
[51] *See id.*

in the arbitration that the denial of the permit was motivated by political pressure to relocate the landfill.[52] In short, the evidence showed that throughout the entire process, the landfill operated in accordance with applicable Mexican laws and regulations with only minor regulatory infractions, and no government authority had made any finding of a risk to human health or the environment that justified a serious sanction, much less closure of the site.[53]

Finally, in *S.D. Myers v. Canada*, the tribunal applied a good-faith test and found overwhelming evidence that a ban on exporting certain chemical manufacturing waste was not imposed on legitimate grounds under Canadian law but instead was motivated by a "desire and intent to protect and promote the market share of enterprises" that would carry out the remediation of the chemical in Canada.[54]

Thus, a survey of the cases fails to support the claim that investment tribunals pose a threat to *bona fide* environmental regulation—measures implemented on the genuine grounds of environmental protection rather than invoking environmental protection as a pretext—that might cause regulatory chill. Given States' undefeated record in arbitrations challenging *bona fide* environmental regulations, critics of arbitration have shifted to arguing that the very possibility of a claim rather than its potential grounds of success might cause regulatory chill.[55] But the clear message of cases decided so far has been that an investor challenging public interest regulatory action faces a steep climb. The high cost of pursuing an arbitral claim[56] will tend to deter resort to arbitration where the probability of success is low. Future environmental claims will likely be even more limited than past ones given that tribunals have been so uniform in confirming States' expansive authority to regulate environmental issues. Further emphasizing the deference they afford States in this realm, tribunals have required

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[52] *See id.*
[53] Tecmed, ¶¶ 109-10, 124-32, 161-64.
[54] S.D. Myers, ¶¶ 162-189.
[55] *See, e.g., Call for Papers: Sustainable Development and International Investment Law: Bridging the Divide*, *supra* note 30; Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, INT'L INST. FOR SUSTAINABLE DEV. (Feb. 2008), *available at* http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf; Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 132-35 (2008); *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investment Rights*, INT'L INST. FOR SUSTAINABLE DEV., 42 (2001), *available at* http://www.iisd.org/pdf/trade_citizensguide.pdf.
[56] *See* John Y. Gotanda, *Consistently Inconsistent: The Need for Predictability in Awarding Costs and Fees in Investment Treaty Arbitration*, 28 ICSID REV. 420, 423 (2013); Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 774 (2011).

unsuccessful claimants to bear the entire cost of the arbitration and some or all of the prevailing State's legal fees.[57]

Canada has been the most frequent respondent in treaty claims arising out of purportedly environmental regulations, but there is no indication that the challenges have chilled environmental regulation there. After Dow AgroSciences notified Canada of its intent to seek arbitration under NAFTA in 2009 on the basis of a pesticide ban adopted by the Province of Quebec, five other provinces enacted similar bans.[58] Additionally, Canada has enacted several new federal environmental laws in recent years.[59] These past awards and experience indicate that if the specter of investor challenges risks "chilling" anything, it is the abuse of regulatory power.[60]

Therefore, an examination of the actual evidence on investment treaties and investor—State arbitration fails to reveal the threats and harms that have been posited. There is no indication of bias against States or developing countries, and investment tribunals have shown wide deference to regulatory action. Further, as

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[57] *See* Methanex (claimant ordered to pay the United States $2.9 million for its costs and to bear the entire cost of the arbitration); Chemtura (claimant ordered to bear the costs of the arbitration and 50 percent of Canada's costs).

[58] *See Pesticide Free? Oui!: A Comparison of Provincial Cosmetic Pesticide Bans*, DAVID SUZUKI FOUND. (May 2011), *available at* http://www.healthyenvironmentforkids.ca/sites/healthyenvironmentforkids.ca/files/pesticide-free-oui-2011.pdf. Dow AgroSciences instituted NAFTA arbitration against Canada after the province of Quebec banned the chemical 2,4-D, used in cosmetic lawn care. Dow pointed out that the Government had itself concluded after a review that there was no evidence that the chemical was harmful to the environment or humans. Ultimately Canada settled the claim quite favorably to itself, paying Dow no compensation and maintaining the ban. Canada's concession in the settlement was to publicly acknowledge its previous finding that products containing the chemical do not pose an unacceptable risk to the environment or human health as long as the instructions on the label are followed. *See* Press Release, Canada Welcomes Agreement with Dow AgroSciences (May 27. 2011), *available at* http://www.international.gc.ca/media_commerce/comm/news-communiques/2011/145.aspx?view=d.

[59] *See* Environment Canada: Acts, Government of Canada (Feb. 28, 2013), *available at* http://www.ec.gc.ca/default.asp?lang=En&n=E826924C-1.

[60] Others analyzing this issue have concluded that there is no reason to conclude that any impact on regulation will be negative. *See* Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use*, 20 PACE ENVTL L. REV. 19, 59-60 (2002) ("Each of these potential implications-towards greater centralization and less localism, and towards more comprehensive and less discretionary regulatory regimes-carries both risks and benefits. There is enormous controversy about the benefits of more decentralized regimes, and about the tradeoff between flexibility and comprehensiveness. The implications of NAFTA's investor protection provisions upon the distribution of authority between the federal, state and local governments and between environmental and land use regulatory schemes therefore are not necessarily undesirable.").

indicated by the growing number of investment treaties between developing States,[61] there are still many States facing reputational hurdles concerning their treatment of foreign investment that want and need this tool to attract and reduce the cost of foreign capital. That is unsurprising, since empirical research shows that States with high political risk stand to gain the most inbound investment by concluding investment treaties.[62] Malaysia recently affirmed the benefits of investor-State arbitration to developing countries by publishing an official response to critics of the mechanism in which it confirmed its continued commitment to investor—State arbitration to promote its economic development.[63] States that have, for various reasons, decided to opt out and would-be reformers should refrain from tinkering with the system and undermining its ability to fulfill its intended purposes for those that wish to use it.

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[61] *See* UNCTAD, *IIA Monitor No. 3: Recent Developments in International Investment Agreements,* at 3 (June 2009), http://unctad.org/en/Docs/webdiaeia20098_en.pdf. Treaties between developing States typically provide comparable levels of foreign investor protection to treaties between developed and developing States, including recourse to international arbitration for violations of treaty protections. *See, e.g.*, UNCTAD, *World Investment Report 2012*, *supra* note 20, at 90.

[62] *See generally* Kim Sokchea, *Bilateral Investment Treaties, Political Risk, and Foreign Direct Investment*, 11(1) ASIA PAC. J. ECON. & BUS. (June 2007) (controlling for endogeneity and finding significant correlation between BITs and foreign investment, with a stronger correlation as a country's political risk increases); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567, 1568 (2005) (finding that concluding BITs with a number of capital-exporting States could result in a near doubling of foreign direct investment, but that the effect diminishes as domestic legal institutions improve).

[63] *See* Brief on the Trans-Pacific Partnership, Ministry of International Trade and Industry of Malaysia (July 17, 2013), *available at* http://www.miti.gov.my/storage/documents/c94/com.tms.cms.document.Document_62357eea-c0a8156f-2c11008e-9a1ecbed/1/TPP%20-%20Briefing%20Notes.pdf.