

INTERNATIONAL INVESTMENT LAW AS A GLOBAL PUBLIC GOOD

by
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The key characteristic of a public good is that it serves the well-being of the public. Today, however, individual well-being is often conditioned not only on the receipt of state public goods, but also on the receipt of global public goods. In part, this is because the rise of globalization has resulted in complex interconnections between states. For this reason, global public goods can bestow benefits on much of the world's population.

The system of international investment law (IIL) is slowly arising as one type of a global public good. Principally, the system of IIL meets the two characteristics of public goods: non-rivalrous and non-excludable. First, it is non-rival in that use of IIL by one state or one foreign investor does not detract from the system's utility for other users. Second, with the adoption of over 3,000 international investment agreements (IIA), the system of IIL is becoming less of a club good and more of a system of law whose benefits are non-excludable. The standardization of many of the agreements' provisions has resulted in commonalities despite the lack of a multilateral agreement and some have even argued that aspects of IIL have reached the status of customary international law. As a result, many of the benefits of IIAs transcend the individual agreements to be available to more than just signatories and their nationals.

In this sense, the system of IIL—the actual standards of protection, the meaning of those standards and the behavioral expectations they entail—has resulted in a type of global public good that benefits the world at large. These benefits include first, the provision of an overarching legal framework that guides foreign direct investment (FDI) activity and

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enhances its predictability and, second, the creation of a system that ensures that FDI benefits both states and investors alike.

The system of ILL, however, is failing to bestow both of its benefits. First, the system is exhibiting failures in indicators of legitimacy—for example by producing incoherent jurisprudence and using indeterminate rules—thereby limiting the system’s ability to establish an overarching framework for FDI activity. Second, a failure by arbitral tribunals to recognize the role of FDI in promoting a state’s development is hindering its ability to ensure that FDI benefits both investors and states. Viewing the system of ILL through a global public good lens thus highlights the system’s shortcomings, allowing for correction of these issues, and allows the system of ILL to attain the status of global public good that it deserves.

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INTRODUCTION

In 1944, the close of the Second World War brought together world leaders in Bretton Woods in an effort to create a new world order. Conscious of the contribution that economic instability had made to the commencement of the war, the architects of the new system set about to create an international economic order that would avoid the perils of the interwar period and promote world peace.¹ This vision perceived the in-

¹ Michael D. Bordo, *The Bretton Woods International Monetary System: A Historical Overview*, in *A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM* 3, 31 (Michael D. Bordo & Barry Eichengreen, eds., 1993).

ternational economic order as one in which the utilitarian, wealth-producing benefits of economic relations would be re-embedded into their social and political context.² In short, the new international economic order viewed prosperity primarily as a means to an end and not as an end in and of itself. The ultimate aim of the new order, thus, would be to enhance human welfare.³

Despite advancement of this new order by the Bretton Woods institutions⁴ and governments alike—to varying degrees of success—the pursuit of this new order is showing its age. In particular, the architecture of foreign investment, a newer and increasingly important contributor to international economic relations, is exhibiting a strong disconnect from the new international economic order. This development is particularly troubling as foreign investment has a tremendous potential to increase human welfare in states.

In 2012, foreign direct investment (FDI) flows are expected to surpass \$1.6 trillion, with nearly half of that total flowing to developed countries.⁵ While FDI flows alone do not intrinsically enhance human welfare, the enormity of the amount of FDI flows suggests that the potential for development arising from these inflows is immense.⁶ Yet at the same time, the architecture promoting FDI—international investment agreements (IIAs)—does not necessarily promote development or other non-economic goals of foreign investment. In part because of this disconnect, several states have recently withdrawn from earlier concluded IIAs.⁷ Other states, including the United States, have expressed their dissatisfaction with international investment law's power to override non-economic issues by limiting, clarifying, or revising their IIA obligations.⁸

² See generally John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

³ For example, the Consultative Board of the World Trade Organization has stated, "[T]he case for freeing trade is made very definitely in terms of enhancing human welfare." PETER SUTHERLAND ET AL., WORLD TRADE ORG., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM 10 (2004), available at http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf.

⁴ The Bretton Woods institutions include the World Bank, the International Monetary Fund, and the International Trade Organization (the predecessor to the World Trade Organization). Kathryn M. Dominguez, *The Role of International Organizations in the Bretton Woods System*, in A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM, *supra* note 1, at 357, 357.

⁵ U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES 2–3 (2012) [hereinafter UNCTAD 2012 REPORT], available at <http://www.unctad-docs.org/UNCTAD-WIR2012-Full-en.pdf>.

⁶ Ban Ki-moon, *Preface* to UNCTAD 2012 REPORT, *supra* note 5, at iii (arguing that FDI can play an "important development role").

⁷ These include Bolivia, Ecuador, and Venezuela. For further details, see *infra*, note 88.

⁸ See, e.g., U.S. Model BIT Annex B, ¶ 4(b) (2012), available at <http://www.state.gov/documents/organization/188371.pdf>.

While the vision for the new international economic order was not created specifically with IIAs in mind, today it seems clear that the role of IIAs in facilitating the vision of the new order is as important as the contribution of the other Bretton Woods institutions. Indeed, financial stability and international trade, products and by-products of the Bretton Woods and related institutions, are thought of as global public goods, or policy regimes that provide substantial cross-border public benefits.⁹

Applying a global public good lens to international investment law—the actual standards of protection for investors and investments, the meaning of those standards, and the behavioral expectations of the state that they entail—similarly suggests that it too can equally be thought of as a global public good. This is because the system of international investment law provides two key cross-border public good benefits. First, it provides an overarching legal framework that guides FDI activity and enhances its predictability and, second, it provides a mechanism by which FDI inflows benefit investors and states alike.

International investment law is, however, failing to bestow both of its benefits. First, the system is exhibiting failures in indicators of rule legitimacy—primarily by producing incoherent jurisprudence and using indeterminate rules—which is limiting its ability to establish an overarching framework for FDI activity. Second, both the failure of the substance of IIAs and of arbitrators interpreting these treaties to recognize the role of FDI in promoting a state's development is hindering its ability to create a mechanism by which FDI activity mutually benefits *both* investors and states. Examining the system of international investment law through a global public good lens thus highlights the system's shortcomings and is consequently significant to guiding its reform.

This Article is organized as follows. Part I begins by providing an overview of international investment law first by describing its origins and then by exploring its evolutionary transformation over the last half century. It then examines how, despite the law's extant patchwork nature, international investment law has become increasingly systemized and now represents a concordant practice of the rules governing international investment relations. Part II then moves to view international investment law through a global public good lens. It examines the challenges facing international investment law and discusses how viewing it as a global public good can be effective in its reform. Part II concludes by discussing international investment law's two key global public benefits and discusses the limits currently hindering international investment law's ability to achieve those benefits. Finally, Part III turns to explore how international investment law can be reoriented to delivering its public good

⁹ DEV. COMM., WORLD BANK, POVERTY REDUCTION AND GLOBAL PUBLIC GOODS: ISSUES FOR THE WORLD BANK IN SUPPORTING GLOBAL COLLECTIVE ACTION 2 (2000), available at <http://siteresources.worldbank.org/DEVCOMMINT/Documentation/90015245/DC-2000-16%28E%29-GPG.pdf>. See also the discussion of global public goods, *infra*, at Part II.B.

benefits. Part III proposes corrective mechanisms through which states can play a larger role in protecting the public good and suggests methods by which states can proactively facilitate public good considerations in the interpretations of IIAs.

I. INTERNATIONAL INVESTMENT LAW—AN OVERVIEW

While the decision to establish an investment in a foreign country is subject to a number of different variables, one increasingly important factor has become the existence of an IIA. Although generally concluded between two states or a regional group of states, these agreements, of which there are presently 3,164,¹⁰ contain a number of standard features. First, most IIAs contain standards of treatment that states must afford to foreign investors and foreign investments. Typical standards of treatment include the right to be treated fairly and equitably,¹¹ the right to be afforded the same treatment as that given to domestic investors and investments,¹² the right to be afforded better treatment if such treatment is afforded to a third party,¹³ and prohibitions against expropriation.¹⁴ Second, most IIAs contain the right to investment arbitration pursuant to which a foreign investor can initiate an arbitration against the host state for alleged violations of the standards of treatment found in the relevant IIA.¹⁵ International investment law thus comprises both IIAs and application and interpretations given to IIAs by arbitral tribunals. This Part de-

¹⁰ UNCTAD 2012 REPORT, *supra* note 5, at 84.

¹¹ *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Croat., art. II(3)(a), July 13, 1996, S. TREATY DOC. NO. 106-29 (2001) (“Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.”).

¹² *See, e.g.*, Agreement Concerning the Reciprocal Promotion and Protection of Investment, Japan-Turk., art. 3(2), Feb. 12, 1992, 1853 U.N.T.S. 211 (“Nationals and companies of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than that accorded to nationals and companies of such other Contracting Party . . .”).

¹³ *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Guy., art. 3(1), Dec. 6, 1989, 1909 U.N.T.S. 3 (“Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.”).

¹⁴ *See, e.g.*, North American Free Trade Agreement, art. 1110(1), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (“No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . .”).

¹⁵ *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ukr., art. VI, Mar. 4, 1994, S. TREATY DOC. NO. 103-37 (1996) (“In the event of an investment dispute . . . the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration . . .”).

scribes the origins and evolution of IIAs and discusses how international investment law has come to represent a specialized system of international law.

A. *Origins and Evolution of International Investment Agreements*

International investment agreements have a decidedly public ancestry. Prior to the 20th century, standards for the protection of foreign investors and foreign investments were developed primarily through the process of diplomatic protection.¹⁶ However, as conflicts arose between developed and developing countries on defining the standard of treatment that should be accorded to foreign investors, states began to search for alternative vehicles through which to protect their investors' property.¹⁷

In the late 20th century, a rising level of threats of expropriations to foreign investors' property and unsatisfactory levels of protection for expropriation under customary international law led several European nations to begin promulgating bilateral investment treaties (BITs).¹⁸ In 1959, Germany became the first country to conclude a BIT¹⁹ and several other European countries followed suit.²⁰ Germany's interest in concluding a BIT resulted from its experience of having lost much of its foreign investment during its defeat in the war, making it acutely sensitive to the risks to which foreign investment are exposed.²¹ Conversely, the motivations of Germany's BIT partner, Pakistan, could not have been more different. As the Attorney General of Pakistan later explained, Pakistan considered BITs to be "piece[s] of paper, something for the press, a good photo opportunity."²²

¹⁶ ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 5 (2009); Ben Juratowitch, *The Relationship Between Diplomatic Protection and Investment Treaties*, 23 *ICSID REV.* 10, 10–11 (2008).

¹⁷ NEWCOMBE & PARADELL, *supra* note 16, at 7–13.

¹⁸ Kenneth J. Vandeveld, A Brief History of International Investment Agreements, 12 *U.C. DAVIS J. INT'L L. & POL'Y* 157, 168–69 (2005).

¹⁹ Treaty for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 457 *U.N.T.S.* 23 [hereinafter Ger.-Pak. BIT]; see M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 39, 45 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008).

²⁰ Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 *INT'L LAW.* 655, 657 (1990); Vandeveld, *supra* note 18, at 169.

²¹ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 *HARV. INT'L L.J.* 67, 73 (2005); Salacuse, *supra* note 20, at 657.

²² Lauge Skovgaard Poulsen & Damon Vis-Dunbar, *Reflections on Pakistan's Investment-Treaty Program After 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan*, *INVESTMENT TREATY NEWS*, Apr. 2009, at 3, available at <http://www.iisd.org/itn/wp-content/uploads/2009/04/ITN-April-2009.pdf>.

The dichotomy of interests for entering into BITs represented by Germany and Pakistan is indicative of the opposing interests for BIT conclusion between developed and developing countries during this period. While developing countries like Pakistan may not have accorded much importance to BITs, developed countries considered BITs to have one main focus: insurance policies for foreign investors against the political risk faced in the host state.²³ Still, by 1990, less than 500 of these agreements had been signed.²⁴

In the late 1980s to 1990, however, in part spurred on by the United States' and Japan's entries into the BIT market and the endorsement of BITs by both the World Bank and the United Nations Conference on Trade and Development (UNCTAD), the number of BITs exploded.²⁵ States began to sign more than 100 BITs per year, increasing the number of BITs from 500 in 1990 to over 2000 within an 11 year period.²⁶ While the interest in concluding BITs during this period may have simply been a function of states trying to attract greater foreign investment,²⁷ it is plausible that interest in BIT conclusion piqued as BITs came to represent "a global standard or norm about the treatment of FDI by host countries."²⁸ In other words, regardless of whether BITs actually promoted efficiency in foreign investment, states concluded BITs during this period because they were seen as the global norm for good governance of foreign investment.

After 2001, state views of BITs—regardless of development status—began to change, slowing the pace of BIT conclusion. In part, this view change resulted from the increasing number of investor–state arbitrations being filed against states. Between 2000 and 2007, the number of investor–state disputes increased three fold, and arbitrations were initiated against both developed and developing countries.²⁹ BITs therefore began to represent the threat of legal liability. In addition, states became increasingly concerned about the ability of BITs to override non-investment issues such as human rights or environmental concerns when

²³ Srividya Jandhyala et al., *Three Waves of BITs: The Global Diffusion of Foreign Investment Policy*, 55 J. CONFLICT RESOL. 1047, 1050–51 (2011).

²⁴ *Id.* at 1049 fig.1.

²⁵ *Id.* at 1054–55; U.N. CONFERENCE ON TRADE & DEV., IIA MONITOR NO. 1, LATEST DEVELOPMENTS IN INVESTOR–STATE DISPUTE SETTLEMENT I (2008), available at http://unctad.org/en/Docs/iteiia20083_en.pdf.

²⁶ Jandhyala et al., *supra* note 23, at 1048 ("From 1959 until the late 1980s, signing occurred at a moderate rate, rarely exceeding 20 treaties per year. In the 1990s, over 100 signing ceremonies were held annually . . .").

²⁷ Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 686 (1998).

²⁸ Jandhyala et al., *supra* note 23, at 1049.

²⁹ U.N. CONFERENCE ON TRADE & DEV., *supra* note 25, at 1; see also Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 163–65 (2007).

they interacted with issues of foreign investment.³⁰ Consequently, BITs began to be seen as unwarranted intrusions onto state sovereignty with respect to issues of the public interest.³¹

The realization of the potential “costs” of BITs has led to the drafting of a new generation of BITs that specifically seek to minimize the unanticipated downsides of these agreements.³² These new BITs and preferential trade agreements (PTAs), collectively referred to as IIAs, are directed towards more than simply protecting the interests of foreign investors.³³ Instead, modern IIAs recognize foreign investment as fostering economic development,³⁴ improving living standards,³⁵ promoting sustainable development,³⁶ encouraging human capital formation and local capacity building,³⁷ increasing economic prosperity,³⁸ and confirming established

³⁰ For an overview of these issues, see generally Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008).

³¹ *Id.* at 777.

³² See U.N. CONFERENCE ON TRADE & DEV., INTERNATIONAL INVESTMENT ARRANGEMENTS: TRENDS AND EMERGING ISSUES 9–11 (2006), available at http://unctad.org/en/Docs/iteiit200511_en.pdf; Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1038–39 (2010).

³³ See, e.g., U.S. Model BIT, *supra* note 8, pmb.; Agreement on the Reciprocal Promotion and Protection of Investments, Belg./Lux. Econ. Union-Kos, pmb., Mar. 9, 2010, available at [http://www.mfa-ks.net/repository/docs/Marrveshja_Ks-Belgijke018_\(anglisht\).pdf](http://www.mfa-ks.net/repository/docs/Marrveshja_Ks-Belgijke018_(anglisht).pdf); French Model BIT, pmb. (2006), available at <http://italaw.com/documents/ModelTreatyFrance2006.pdf>.

³⁴ See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments, Kaz.-Neth., pmb., Nov. 27, 2002 [hereinafter Kaz.-Neth. BIT], available at http://www.unctad.org/sections/dite/ia/docs/bits/kazakhstan_netherlands.pdf. The Kosovo–Austria BIT specifically recognizes the role of FDI as a “vital complement[] to national and international development efforts.” Agreement on Promotion and Protection of Investments, Austria-Kos., pmb., Jan. 22, 2010 [hereinafter Austria-Kos. BIT], available at [http://www.mfa-ks.net/repository/docs/Marrveshja_Ks-Aus_\(anglisht\).pdf](http://www.mfa-ks.net/repository/docs/Marrveshja_Ks-Aus_(anglisht).pdf).

³⁵ See, e.g., U.S. Model BIT, *supra* note 8, pmb.

³⁶ See, e.g., Austria-Kos. BIT, *supra* note 34, at pmb.; Abkommen über die Förderung und den Gegenseitigen Schutz von Investitionen, Egypt-Switz., pmb., June 7, 2010, [hereinafter Egypt-Switz. BIT], available at <http://www.admin.ch/ch/d/as/2012/3607.pdf>; Agreement for the Promotion and Protection of Investments, Can.-Jordan, pmb., June 28, 2009, available at <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105176>.

³⁷ See, e.g., Ghanaian Model BIT, art. 12(2) (2008) (on file with law review) (“[Foreign investors] shall to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology.”).

³⁸ See, e.g., Agreement on the Promotion and Reciprocal Protection of Investments and Protocol, Austl.-Mex., pmb., Aug. 23, 2005 [hereinafter Austl.-Mex. BIT], available at <http://www.austlii.edu.au/au/other/dfat/treaties/2007/20.html>; Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Phil.,

levels of protection for the environment³⁹ and for labor.⁴⁰ Consequently, modern IIAs often exempt environmental or human rights issues from the ambit of these agreements,⁴¹ clarify standards of protection,⁴² or limit dispute resolution options for investors in an effort to broaden state capacity for public policymaking.⁴³

An interesting example of the evolution of IIAs is particularly apparent in the transformation of German and Swiss investment treaties. As two of the earliest states to commence the practice of BIT conclusion in the early 1960s, typical German and Swiss investment treaties focused only on delineating protections for their investors. More recently-concluded German and Swiss investment treaties, however, seek to emphasize the importance of non-investment issues as well. For instance, while the 1962 BIT between Germany and Cameroon focuses only on creating “favorable conditions for investment,” the 2006 BIT between Germany and Trinidad and Tobago extends beyond investment goals to explicitly recognize the role of foreign investment in fostering economic development and the need to protect the environment.⁴⁴ Switzerland’s evolutionary approach to IIAs is equally apparent. Although its 1962 investment treaty with the Republic of Niger sought only to develop economic cooperation and trade, its 2011 investment treaty with Kosovo aims to foster sustainable development; adhere to health, safety, labor and environmental standards; and encourage investors to respect corporate social responsibility standards and principles.⁴⁵ In fact, even in renewing its 1973 BIT

pmbL., Nov. 9, 1995, [hereinafter Can.-Phil. BIT], *available at* http://unctad.org/sections/dite/ia/docs/bits/Canada_philippines.pdf.

³⁹ See, e.g., NAFTA, *supra* note 14, art. 1114; Agreement on the Reciprocal Promotion and Protection of Investments, Belg./Lux. Econ. Union-Pan., art. 5, Mar. 26, 2009 [hereinafter Belg./Lux. Econ. Union-Pan. BIT], *available at* http://unctad.org/sections/dite/ia/docs/bits/Belgium_Panama.pdf.

⁴⁰ See, e.g., Belg./Lux. Econ. Union-Pan. BIT, *supra* note 39, art. 6.

⁴¹ See, e.g., Agreement for the Promotion and Protection of Investments, Can.-Czech, art. IX, May 6, 2009 [hereinafter Can.-Czech BIT], *available at* <http://www.treaty-accord.gc.ca/text-texte.aspx?id=105128>.

⁴² See, e.g., Free Trade Agreement, U.S.-Chile, art. 10.4, June 6, 2003 [hereinafter U.S.-Chile FTA], *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file535_3989.pdf.

⁴³ See, e.g., DEP’T OF FOREIGN AFFAIRS AND TRADE, AUSTL. GOV’T, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (2011), *available at* <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

⁴⁴ Compare Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Trin. & Tobago, pmbL., Sept. 8, 2006 [hereinafter Ger.-Trin. & Tobago BIT], *available at* http://unctad.org/sections/dite/ia/docs/bits/Germany_Trinidad.pdf, with *Traité Relatif à l’Encouragement des Investissements de Capitaux*, Cameroon-Ger., pmbL., June 29, 1962, *available at* http://unctad.org/sections/dite/ia/docs/bits/germany_cameroun_fr.pdf.

⁴⁵ Compare Agreement on the Promotion and Reciprocal Protection of Investments, Kos.-Switz., pmbL., Oct. 27, 2011, *available at* [http://www.mfa-ks.net/repository/docs/Marr._Ks-Zvicer_\(Mrojta_e_Investimeve\)_033_\(anglisht\).pdf](http://www.mfa-ks.net/repository/docs/Marr._Ks-Zvicer_(Mrojta_e_Investimeve)_033_(anglisht).pdf), with

with Egypt, Switzerland inserted statements advocating for the promotion of sustainable development and the need not to lower health and environmental standards to attract investment in the new agreement.⁴⁶

Modern IIAs therefore deliberately specify dual goals for these agreements. While the promulgation of a stable investment framework for foreign investors and their investments remains important, many of these agreements also delineate the importance of foreign investment to developing the host state, either through sustainable economic contributions to the state or, at least, by not harming the public interests of the state.

B. *The System of International Investment Law*

In addition to the normative content of IIAs having evolved over the last 50 years, international investment law, as a whole, has similarly evolved. Originally, international investment law was best conceptualized as the interpretations of an investment treaty between contracting parties. Indeed, as the treaties were never multilateralized and contained variable rights and processes, it has been difficult to perceive IIAs as representing a coherent system of law.⁴⁷

However, the proliferation and diffusion of IIAs—there are over 3,000 of these treaties concluded by at least 180 states⁴⁸—have transformed international investment law, despite its extant patchwork nature, into a system.⁴⁹ Providing norms, principles, rules, and decision-making procedures for foreign investment,⁵⁰ today international investment law

Accord de Commerce, d'Investissements et de Coopération Technique, Niger-Switz., pmb., Mar. 28 1962, available at http://unctad.org/sections/dite/iaa/docs/bits/switzerland_niger_fr.pdf.

⁴⁶ Compare Egypt-Switz. BIT, *supra* note 36, pmb., with Convention Concernant l'Encouragement et la Protection Réciproque des Investissements, Egypt-Switz., pmb., July 25, 1973, available at http://unctad.org/sections/dite/iaa/docs/bits/egypt_switzerland_fr.pdf.

⁴⁷ See, e.g., Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1295 (2009) (arguing that “it is questionable whether there is any ‘system’ of investment arbitration at all”).

⁴⁸ UNCTAD 2012 Report, *supra* note 5, at 199–202 (listing all states that have concluded IIAs (over 180) and the total number each has concluded, totaling over 3,000).

⁴⁹ System in this sense refers to an organized set of doctrines, ideas, or principles intended to explain the arrangement or workings of international investment law as a whole. For scholarly discussion on international investment law as a system, see Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 186 (2003) and David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?*, 2 J. INT'L DISP. SETTLEMENT 471, 473–75, 494 (2011).

⁵⁰ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 1 (Stephen D. Krasner ed., 1983).

represents a convergence of expectations regarding the treatment of foreign investment.⁵¹

In part, the systemization of international investment law has been created through intentional linkages, overlaps, and cross-fertilizations between this patchwork of bilateral or regional treaties, meaning that a BIT or PTA rarely exists as an isolated instrument.⁵² This has been facilitated through the insertion of closely worded standards of treatment in different IIAs, the negotiation of IIAs based on model treaties, the inclusion of most-favored-nation provisions that allow states to rely on provisions in third party treaties, and multilateral processes coordinating foreign investment policy.⁵³

Nevertheless, the most important contributor to the systemization of international investment law is foreign investors' increasing use of investor–state arbitration. While rarely used until 2000, since then investors have frequently turned to investor–state arbitration to resolve their foreign investment disputes.⁵⁴ As of 2011, 450 known investor–state claims had been filed, and in 2011 alone, 46 claims were filed, the highest number of known investor–state arbitrations ever filed in one year.⁵⁵ Indeed, despite investor–state arbitration operating without an institution centralizing these disputes—like the WTO's dispute settlement forums—investor–state arbitration exhibits an institutional character.⁵⁶ Frequent and repeated determinations by tribunals of the core standards of treatment in IIAs have led to a convergence and even a consolidation of the meaning of these standards, despite textual differences in the wording of standards.⁵⁷ Standards of treatment in IIAs therefore represent, in many cases, norms of investor protection.⁵⁸

Characterizing international investment law as a system may, at first glance, appear to be an unusual way to describe an arrangement of laws

⁵¹ Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 431 (2010).

⁵² CAMPBELL McLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* ¶¶ 1.50–1.55 (2007); Stephan W. Schill, *System Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1094–95 (2011).

⁵³ STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 98–99 (2009).

⁵⁴ U.N. CONFERENCE ON TRADE & DEV., *IIA ISSUES NOTE, NO. 1, LATEST DEVELOPMENTS IN INVESTOR–STATE DISPUTE SETTLEMENT 3* (2012), available at http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

⁵⁵ *Id.* at 1.

⁵⁶ Nicolás Marcelo Perrone, *Scrutinizing States' Power in a Liberalized Economy: A Comparative Analysis of the International Investment Regime and the International Trade System* 13 (Soc'y of Int'l Econ. Law, Working Paper No. 2010/25, 2010), available at <http://ssrn.com/abstract=1633007>.

⁵⁷ Tarcisio Gazzini, *The Role of Customary International Law in the Field of Foreign Investment*, 8 J. WORLD INV. & TRADE 691, 704 (2007); Schill, *supra* note 52, at 1086.

⁵⁸ Jan Paulsson, *Awards—And Awards*, in *INVESTMENT TREATY LAW: CURRENT ISSUES III*, at 97, 97 (Andrea K. Bjorklund et al. eds., 2009) (noting that it is “well-established . . . that arbitral awards have a normative effect”).

which are mainly based on rules determined by only two states or a region of states. Certainly, the primarily bilateral or regional nature of IIAs would more likely be expected to forge a “chaotic and unsystematic aggregate of law.”⁵⁹ Yet, despite its foundation being built on bilateral or regional treaties, international investment law represents commonalities on the principles governing foreign investment, the norms of investor protection, and the processes for dispute resolution.⁶⁰

In part, these commonalities have been propelled by investor–state arbitration being built on two bases. The first of these bases are the vague or amorphous standards of treatment commonly found in most IIAs. Fair and equitable treatment, for example, is a commonly found, undefined standard of treatment referenced in most treaties. Yet, the precise normative content of these standards of treatment is difficult to discern from their wording alone. One commentator has even described “fair and equitable treatment” as “[s]o general a provision [that it] is likely to be almost sufficient to cover all conceivable cases.”⁶¹

Ascertaining concrete meaning of the standards of treatment found in IIAs is therefore reliant on the interpretations of these standards by tribunals. The contours of the content of fair and equitable treatment, for instance, have been shaped by the interpretations given to this vague standard by previous tribunals.⁶² What this means is that tribunals play a very important role in determining the normative content, or at least aspects, of IIAs—a role that is expanded by the amorphous nature of these standards.

At the same time, while tribunals play an expanded role in defining the content of IIAs, they have been given little guidance by states on the precise meaning of these provisions. Thus, while the rules of treaty interpretation governed by the Vienna Convention on the Law of Treaties prescribe the tribunal’s methods of interpretation,⁶³ sufficient textual ambiguity remains, giving the tribunals a range of options for interpreting the standard of treatment at hand.

However, while the amorphous nature of the standards of treatment may have opened the door to establishing commonalities in international investment law, it is the second factor, the *de facto* system of precedent,⁶⁴

⁵⁹ Schill, *supra* note 52, at 1094.

⁶⁰ For a discussion of these commonalities see Salacuse, *supra* note 51, at 448–63.

⁶¹ F.A. Mann, Note, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT’L L. 241, 243 (1981).

⁶² For discussions on the evolving content of the fair and equitable standard, see Barnali Choudhury, *Evolution or Devolution?: Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD INV. & TRADE 297, 297–98 (2005); Richard H. Kreindler, *Fair and Equitable Treatment—A Comparative International Law Approach*, 3 TRANSNAT’L DISP. MGMT. 1, 1 (2006).

⁶³ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

⁶⁴ The notion of a system of precedent does not refer to precedent in the sense of *stare decisis* in the common law, but rather the practice of referring to previous

which pushes it through the door and closes it. In fact, the use of precedent in international investment law is somewhat surprising as it is disavowed by many IIAs⁶⁵ and the *inter partes* nature of investment disputes is stressed in both the North American Free Trade Agreement (NAFTA) and the International Centre for the Settlement of Investment Disputes (ICSID) Convention.⁶⁶ Nevertheless, empirical evidence shows that tribunals have developed a practice of referring or citing to previous jurisprudence in the area.⁶⁷ While precedent in the form of *stare decisis*, as is found in the common law, is certainly absent from international investment law, today there are few arbitral decisions that do not refer to any previous decisions. Indeed, precedents are considered by some tribunals to be obligatory or pertinent as a matter of comparison.⁶⁸

The use of precedent in international investment law thus signals the wider applicability of international investment awards and, consequently, its development as a system. Continually citing or referring to previous discussions gives rise to, as one commentator has termed it, an “inter-temporal arbitral dialogue,” which discounts the notion that the issues and reasoning generated in the dispute are confined only to the parties to the dispute.⁶⁹ Moreover, relying on the reasoning in previous decisions can facilitate the development of international investment law in a particular direction. Thus, once content has been ascribed to a particular standard of treatment in one treaty, tribunals following that decision can adopt the content ascribed by the previous tribunal. This will enable a tribunal to continue the standard of treatment’s evolution in the direction set by the previous one.⁷⁰ Finally, precedent usage, at its most ex-

decisions. As the *AES* tribunal notes, there is no rule of precedent in international investment law, but consideration might be given to other decisions delivered by other tribunals in similar cases as a matter of consideration or inspiration. *See AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶¶ 30–31 (Apr. 26, 2005), 12 ICSID Rep. 308 (2007).

⁶⁵ Bjorklund, *supra* note 47, at 1295.

⁶⁶ NAFTA, *supra* note 14, art. 1136(1); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

⁶⁷ Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT’L ARB. 129, 148–53 (2007).

⁶⁸ *Saipem S.p.A. v. People’s Republic of Bangl.*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007), 22 ICSID Rev. 100 (2007) (noting that a tribunal has “a duty to adopt solutions established in a series of consistent cases”); *AES Corp.*, 12 ICSID Rep. 308, ¶¶ 30–31.

⁶⁹ Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT’L L.J. 391, 427 (2012) (arguing that precedent causes “an inter-temporal arbitral dialogue—where the ripples of past decisions influence the direction in which current decisions flow”).

⁷⁰ For example, the fair and equitable treatment standard has evolved in this manner. As the tribunal in *Waste Management* has held, the content of the fair and equitable treatment standard can be determined by taking together the holdings in the *S.D. Myers*, *Mondev*, *ADF*, and *Loewen* cases. *Waste Mgmt., Inc. v. United Mexican*

treme, will give rise to consistency and the harmonization of international investment law. In fact, at some point, consistent reliance on previous decisions will provide the normative content of amorphous standards of treatment such as fair and equitable treatment. This means that, to a large extent, the content of standards of treatment will be ascertainable *ex ante* by states and foreign investors. This, as one tribunal has noted, will serve the ultimate aim of international investment law meeting “the legitimate expectations of the community of States and investors towards certainty of the rule of law.”⁷¹

Some commentators have even argued that the norms of investor protection found in international investment law are so well defined that they constitute customary international law.⁷² While an exploration of that argument is beyond the scope of this Article, it seems apparent that international investment law represents, at the very least, a shared understanding about the general tenets of this area.⁷³ Extensive exchanges between arbitrators on the interpretations of similar standards of treatment have given rise to a set of general principles about the meaning of common standards.⁷⁴ In some areas, *lex specialis* in relation to a standard of treatment is so prevalent that it could be considered a general rule.⁷⁵

In short, international investment law represents “a body of concordant practice” of the rules governing foreign investment.⁷⁶ The system of international investment law is therefore able to provide both overarching standards of investment protection and relatively consistent rules for investment protection.⁷⁷

II. VIEWING INTERNATIONAL INVESTMENT LAW THROUGH A GLOBAL PUBLIC GOOD LENS

As states continue to build upon existing IIAs and conclude new agreements, the importance of foreign investment to states’ national

States (No. 2), ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), 11 ICSID Rep. 361 (2007).

⁷¹ *Saipem S.p.A.*, 22 ICSID Rev. 100, ¶ 67.

⁷² For arguments critiquing international investment law as constituting customary international law, see Patrick Dumberry, *Are BITs Representing the “New” Customary International Law in International Investment Law?*, 28 PENN ST. INT’L L. REV. 675, 676 (2010); Guzman, *supra* note 27, at 686–87. For converse arguments, see ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 584 (2d ed. 2008); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC’Y INT’L L. PROC. 27, 28–30 (2004).

⁷³ MCLACHLAN ET AL., *supra* note 52, ¶ 1.50.

⁷⁴ *Id.* ¶¶ 1.50–1.52.

⁷⁵ CMS Gas Transmission Co. v. Republic of Arg., ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, ¶¶ 72–76 (July 17, 2003), 7 ICSID Rep. 492 (2005).

⁷⁶ *Mondev Int’l Ltd. v. United States of Am.*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 117 (Oct. 11, 2002), 6 ICSID Rep. 182 (2004).

⁷⁷ Schill, *supra* note 52, at 1109.

goals is continually underlined and reinforced. At the same time, insofar as international investment law governs the methods by which states further their national goals through the use of foreign investment, its importance increases as well. However, recent events suggest that international investment law may not be furthering states' national goals. In particular, the system of international investment law faces three main challenges: a breakdown of its grand bargain, undue constraints on state sovereignty, and legitimacy.

A. *Challenges to International Investment Law*

One of the challenges faced by international investment law is the potential impairment of one aspect of its "grand bargain."⁷⁸ As Salacuse and Sullivan have argued, international investment law is premised on a quid pro quo between states—the promise to protect investment in return for the prospect of increased investment.⁷⁹ In fact, one of the central goals of the system of international investment law is to use IIAs as a means of attracting foreign investment.⁸⁰ For this reason, creating "favorable conditions for investment" is typically the first listed object or purpose of IIAs.⁸¹

However, a growing line of literature has begun to question the ability of IIAs to attract increased flows of foreign investment into a state.⁸² These studies have generally found that in many instances IIAs do not increase foreign investment flows, and even if they do, the effects are only minimal.⁸³ Similarly, as UNCTAD recently observed, there "is and can never be a mono-causal link between the conclusion of an IIA and FDI

⁷⁸ Salacuse & Sullivan, *supra* note 21, at 77 ("[A] BIT between a developed and a developing country is founded on a grand bargain: a *promise* of protection of capital in return for the *prospect* of more capital in the future.").

⁷⁹ *Id.*

⁸⁰ U.N. CONFERENCE ON TRADE & DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES 2 (2009), available at http://unctad.org/en/docs/diaeia20095_en.pdf.

⁸¹ See, e.g., Agreement for the Promotion and Protection of Investments, India-U.K. & N. Ir., pmbl., Mar. 14, 1994, available at <http://finmin.nic.in/bipa/United%20Kingdom.pdf>; Agreement on the Reciprocal Promotion and Protection of Investments, Belg./Lux. Econ. Union-China, pmbl., June 4, 1984, available at http://unctad.org/sections/dite/iaa/docs/bits/china_belg_lux.pdf.

⁸² See, e.g., U.N. CONFERENCE ON TRADE & DEV., *supra* note 80, at 2; Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 398 (2011); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite* 1 (World Bank, Working Paper No. 3121, June, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636541. There are, however, conflicting views on the ability of IIAs to attract foreign investment. For a thorough compilation on both points of view, see THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

⁸³ U.N. CONFERENCE ON TRADE & DEV., *supra* note 80, at 6; see also Yackee, *supra* note 82, at 400–01; Hallward-Driemeier, *supra* note 82, at 11, 22.

inflows.”⁸⁴ In other words, UNCTAD has found that IIAs are unlikely to be, in and of themselves, attractors of significant FDI inflows. While the difficulties of measuring the connections between IIAs and FDI inflows may never allow for a definitive characterization of the relationship between these two, the likelihood of international investment law not being able to promote increased foreign investment questions one of the main justifications for its existence.

A second challenge facing international investment law is the continuing compromises on host state sovereignty that it can impose. In addition to fostering increased foreign investment, international investment law is oriented towards translating foreign investment into a benefit for the host state. Treaties, for instance, specifically recognize that promotion of foreign investment is conducive to stimulating host state economic prosperity⁸⁵ or development.⁸⁶ While commentators disagree as to whether fostering economic prosperity or development arises naturally from international investment law’s goal of creating favorable conditions of investment,⁸⁷ most agree that international investment law should not, at the very least, compromise a state’s ability to foster its country’s best interests.

Yet this is the very complaint alleged by several states. For instance, Bolivia, Ecuador, and Venezuela have recently withdrawn from some of their IIAs due to the constraints they allege international investment law has placed on their sovereign ability to promote their countries’ development.⁸⁸ Concerns about limitations on policy space to promote non-

⁸⁴ U.N. CONFERENCE ON TRADE & DEV., *supra* note 80, at 6; *see also* Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1 J. INT’L DISP. SETTLEMENT 341, 346 (2010) (arguing “it seems most unlikely that the signature of BITs lead directly to an increase in foreign investment”).

⁸⁵ *See, e.g.*, Austl.-Mex. BIT, *supra* note 38, pmb.; Can.-Phil. BIT, *supra* note 38, pmb.

⁸⁶ *See, e.g.*, Kaz.-Neth. BIT, *supra* note 34, pmb.; Ger.-Trin. & Tobago BIT, *supra* note 44, pmb.

⁸⁷ Some tribunals have assumed a natural connection between investment protection and state development, observing, “to protect investments is to protect the general interest of development,” *Amco Asia Corp. v. Republic of Indon.*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 23 (Sept. 25, 1983), 1 ICSID Rep. 377 (1993), and “the promotion and protection of such investments by means of a treaty may serve to stimulate private initiative and improve the well being of both peoples,” *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 290 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009). For a converse argument, *see* Anne van Aaken, *Opportunities for and Limits to an Economic Analysis of International Economic Law* 24 (U. of St. Gallen Law & Econ., Working Paper No. 2010-09), available at <http://ssrn.com/abstract=1635390> (“Investment protection does not equal development [I]nvestment protection is the object of the treaty; investment promotion an intermediary purpose and development the ultimate purpose of an IIA.”).

⁸⁸ Salacuse, *supra* note 51, at 469; *Bolivia Submits a Notice Under Article 71 of the ICSID Convention*, ICSID (May 16, 2007), <https://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (follow “Denunciation of ICSID Convention” hyperlink);

economic issues have also prompted some Organisation for Economic Co-operation and Development (OECD) member-states to redraft their treaties to increase sovereign power in these areas.⁸⁹ India and Singapore have even removed some of the typical standards of treatment afforded to foreign investors in their IIA such as the requirement to provide fair and equitable treatment.⁹⁰

The need for states to protect their sovereign regulatory authority from IIAs was most recently highlighted by a series of awards directed at the government of Argentina for actions it took to protect its nationals' interests in the face of an economic crisis.⁹¹ At the same time, the constraints on state sovereignty imposed by IIAs have been reinforced by one tribunal, which concluded that a state's human rights obligations cannot override its IIA obligations. Implicit in this holding is the notion that in the case of a conflict a state cannot further the interests of its peoples' human rights if to do so would interfere with an investor's interests.⁹²

Given the already established tenuous connection between IIAs and increased foreign investment, the justification for this system of law is doubly challenged if it is also seen as an unwarranted, intrusive constraint on state sovereignty. Furthermore, whether economic development and prosperity are the ultimate purpose of IIAs, or simply by-products, it seems clear that they are an integral component of the reasons for concluding an IIA. Thus, international investment law's failure to promote this goal threatens its viability.

A final problem that has emerged in connection with international investment law is concern about its legitimacy.⁹³ As the principal vehicle for organizing and governing foreign investment relations, the legitimacy

Ecuador Submits a Notice Under Article 71 of the ICSID Convention, ICSID (July 9, 2009), <https://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (follow "Denunciation of the ICSID Convention by Ecuador" hyperlink); *Venezuela Submits a Notice Under Article 71 of the ICSID Convention*, ICSID (Jan. 26, 2012), <https://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> (follow "Denunciation of the ICSID Convention by Venezuela" hyperlink).

⁸⁹ See, e.g., U.S. Model BIT, *supra* note 8, art. 12; Canadian Model BIT, arts. 10–11 (2004), available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

⁹⁰ Comprehensive Economic Cooperation Agreement, India-Sing. ch. 6, June 29, 2005, available at <http://wits.worldbank.org/GPTAD/PDF/archive/India-singapore.pdf>.

⁹¹ For a greater discussion of this topic, see Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670, 674 (2011).

⁹² *Suez, Sociedad Gen. de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 240 (July 30, 2010), <http://italaw.com/sites/default/files/case-documents/ita0813.pdf> [hereinafter *Agbar I*]; *Suez, Sociedad Gen. de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (July 30, 2010), <http://italaw.com/sites/default/files/case-documents/ita0826.pdf> [hereinafter *Agbar II*].

⁹³ Legitimacy is defined as "that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process." Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988) (emphasis omitted).

of the system of international investment law is integral to its acceptance by those who are affected by its rules and principles. International investment law has, however, seemingly fallen short in adopting many of the indicators of legitimacy. Principally, the system has been critiqued for being opaque,⁹⁴ for generating inconsistent decisions,⁹⁵ for exhibiting pro-investor bias by arbitrators adjudicating the disputes,⁹⁶ and for failing to consider the disparity in the economic status between developed and developing countries.⁹⁷ Commentators have even warned of the looming “legitimacy crisis” that has befallen or will befall international investment law.⁹⁸

International investment law’s tenuous grasp on legitimacy poses innumerable risks to the longevity of the system. Attacks on its legitimacy make it increasingly more difficult for those developing international investment law and those affected by it to accept it as a medium for the governance of foreign investment relations. Legitimacy failures may also further risk fragmenting this system of law. At the very least, this would hinder its ability to provide stability and predictability to the increasing amount of global FDI flows and, at worst, would obviate its ability to promote states’ economic development or prosperity.

The challenges faced by international investment law suggest that in order for it to be able to exert its influence over international investment relations, it is in strict need of reform. While commentators have argued for a variety of prescriptive changes by which this system of law could be transformed,⁹⁹ its reform has rarely been considered in light of the inter-

⁹⁴ See, e.g., James Harrison, *Recent Developments to Promote Transparency and Public Participation in Investment Treaty Arbitration*, 29 L’OBSERVATEUR DES NATIONS UNIES 119, 120 (2010); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 684–85 (2007).

⁹⁵ See, e.g., Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT’L ENVTL. L. REV. 51, 53 (2004); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1522 (2005); Sornarajah, *supra* note 19, at 73.

⁹⁶ See, e.g., Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627, 627–28 (Stephan W. Schill ed., 2010); Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* 3–5 (2012) (unpublished manuscript), available at <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>.

⁹⁷ See, e.g., Salacuse, *supra* note 51, at 469; Sornarajah, *supra* note 19, at 41; see also Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT’L L. REV. 237 (2007).

⁹⁸ Afilalo, *supra* note 95, at 52–53; Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471, 471 (2009); Franck, *supra* note 95; Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT’L L.J. 345, 373 (2007).

⁹⁹ See, e.g., Franck, *supra* note 95, at 1606; Gottwald, *supra* note 97, at 270–72; Vandeveld, *supra* note 18, at 192.

national benefits it can offer. Taking a global public goods view of international investment law, however, can offer just that and, at the same time, be instrumental to guiding its reform.

B. *Global Public Goods*

International investment relations are likely best associated with increasing privateness. Liberalizing foreign investment is, after all, an invitation to *private* foreign investors to establish factories, businesses, portfolios, and other investments in a host state. It is perhaps not surprising then that the system of international investment arbitration evolved out of the practice of international commercial arbitration, which is solely focused on ordering the relations between two private contracting parties.¹⁰⁰

Today, however, international investment relations also exhibit an increasing sense of publicness, in the sense of growing connections between different regions of the world. The impact of an investor–state dispute in Australia can be felt by an investor or a state in Latin America; a model investment treaty concluded by the United States can be “copied” by a state halfway around the world; a collection of thousands of “different” bilateral treaties can give rise to norms or commonalities in standards of investor protection. In this way, the interconnections between individual aspects of international investment relations can give rise to public goods—benefits that are available for public consumption and that have the potential to affect the public at large.¹⁰¹ Moreover, when these benefits extend to a vast proportion of the world’s states and people, these connections can give rise to global public goods.¹⁰²

1. *What Are Global Public Goods?*

At the most general level, global public goods are those goods that exhibit benefits with strong qualities of publicness and whose benefits extend to a vast proportion of the world.¹⁰³ More specifically, global public goods have been defined as being public in the sense of being non-rival and non-excludable. In addition, their benefits must be quasi-universal in the sense of covering more than one group of countries; accrue to several, if not all, population groups; and extend to both current and future generations of people, or alternatively, meet the needs of current generations without foreclosing development options for future generations.¹⁰⁴

¹⁰⁰ Choudhury, *supra* note 30, at 786; Franck, *supra* note 95, at 1538–45.

¹⁰¹ Inge Kaul et al., *Why Do Global Public Goods Matter Today?*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 2, 3 (Inge Kaul et al. eds., 2003).

¹⁰² See generally Inge Kaul et al., *Defining Global Public Goods*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 2 (Inge Kaul et al. eds., 1999).

¹⁰³ *Id.* at 2–3.

¹⁰⁴ *Id.*

Examples of global public goods include world peace,¹⁰⁵ global justice,¹⁰⁶ and international trade.¹⁰⁷ The term “goods” therefore is viewed not only in its classic sense but also encapsulates conditions, systems, practices, and frameworks.¹⁰⁸ That is, it is the effects, rather than the things themselves, that are important.¹⁰⁹

Viewing a good through a global public good lens enables it to be reconceptualized along two lines: public and global. A good that is seen as *public* reinforces the idea that it provides a benefit to the public at large. It does not necessarily mean that a state must be instrumental in providing it or even that it will provide the same level of utility to all.¹¹⁰ Rather, it emphasizes that the benefits provided by the good are in the public domain and that they concern and affect everyone. In addition, it reminds those that organize the benefits of the good that they are also in the public as they receive their authority and mandate from the public at large.¹¹¹

Similarly, viewing a good as *global* emphasizes that the benefits it bestows affect a significant percentage of the world. This not only reinforces the importance, power, and reach of the good, but also underlines the need to prevent the good from turning into a bad, since any harm that it produces could result in a domino effect. One need only look at the most recent financial crisis to see an example of the ripples that can ensue when a global good, such as the international financial markets, create harm.¹¹² Viewing a good as global further reinforces the connections that are needed to sustain the good. Thus, although states must cooperate to establish and promote the units of the good, they must similarly be able to act to develop their own interests when the good produces externalities within their borders. As commentators have noted, “[i]nternational

¹⁰⁵ Ruben P. Mendez, *Peace as a Global Public Good*, in GLOBAL PUBLIC GOODS, *supra* note 102, at 382, 382; Bjørn Møller, *Peace as a Global Public Good* 15 (Research Ctr. on Dev. & Int'l Relations, Working Paper No. 127, 2004), *available at* http://vbn.aau.dk/files/33966535/workingpaper_127.pdf.

¹⁰⁶ Amartya Sen, *Global Justice: Beyond International Equity*, in GLOBAL PUBLIC GOODS, *supra* note 102, at 116, 116.

¹⁰⁷ See Petros C. Mavroidis, *Free Lunches? WTO as Public Good, and the WTO's View of Public Goods*, 23 EUR. J. INT'L L. 731, 741 (2012); Ronald U. Mendoza, *The Multilateral Trade Regime: A Global Public Good for All?*, in PROVIDING GLOBAL PUBLIC GOODS, *supra* note 101, at 455, 455. Mendoza argues that the trade regime is a global public good while Mavroidis argues that the WTO as a forum for tariff negotiations and the WTO adjudication process are public goods.

¹⁰⁸ Kaul et al., *supra* note 102, at 13–15.

¹⁰⁹ Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651, 653 (2012).

¹¹⁰ Stephany Griffith-Jones, *International Financial Stability and Market Efficiency as a Global Public Good*, in PROVIDING GLOBAL PUBLIC GOODS, *supra* note 101, at 435, 436; Kaul et al., *supra* note 101, at 9.

¹¹¹ See Kaul et al., *supra* note 101, at 8–9.

¹¹² Griffith-Jones, *supra* note 110, at 435–36.

cooperation starts at home.”¹¹³ Finally, seeing a good as global underscores the need to have it produce sustainable benefits. Given the global reach of the benefit of the good in question and the international cooperation needed to sustain it, it seems prudent to maintain it only if, in producing its benefit, it does not hinder or cease the ability of future generations to enjoy similar benefits.

2. *Public Goods—The Foundation for Global Public Goods*

Before turning to assess how international investment law can be classified as a global public good, it is useful to revisit the concept of public goods as they provide the basis upon which the notion of global public goods is built. Public goods are those goods in which society has a common interest in having available for public consumption but, because they are not profitable or because their price cannot be effectively fixed, are seen as “market failures.”¹¹⁴

A public good is characterized by two qualities. First, it is non-rival, in that consumption by one does not reduce consumption by others.¹¹⁵ Second, it is non-excludable, in the sense that once a good is provided, payers and nonpayers alike can continue to receive its benefits.¹¹⁶ A classic example of a public good is a lighthouse whose ability to help guide the way for ships is not reduced if more than one ship benefits from its light and whose benefits cannot be confined to only paying ships. Although technically lighthouses themselves can be privately owned, the benefits they bestow—their lights, the shared meaning that their presence gives to ship captains, and the behavioral expectations they entail—are public goods.¹¹⁷

Still, few goods are purely public. Goods that exhibit only one of the qualities of publicness or only aspects of one or both qualities are considered impure public goods.¹¹⁸ Nevertheless, as most public goods are impure, the concept of global public goods generally includes those that are both pure and impure.¹¹⁹

Impure public goods can, however, be broken down further into two classifications: club goods and joint products.¹²⁰ Club goods are goods that are excludable.¹²¹ Members interested in obtaining the benefits of

¹¹³ Kaul et al., *supra* note 101, at 12.

¹¹⁴ Erik André Andersen & Birgit Lindsnæs, *Public Goods: Concept, Definition, and Method*, in *TOWARDS NEW GLOBAL STRATEGIES: PUBLIC GOODS AND HUMAN RIGHTS* 29, 30, 34 (Erik André Andersen & Birgit Lindsnæs eds., 2007).

¹¹⁵ Kaul et al., *supra* note 102, at 2–4.

¹¹⁶ Todd Sandler, *Assessing the Optimal Provision of Public Goods: In Search of the Holy Grail*, in *PROVIDING GLOBAL PUBLIC GOODS*, *supra* note 101, at 131, 132.

¹¹⁷ See Kaul et al., *supra* note 102, at 4.

¹¹⁸ Sandler, *supra* note 116, at 133.

¹¹⁹ Kaul et al., *supra* note 102, at 4.

¹²⁰ Sandler, *supra* note 116, at 137.

¹²¹ James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1, 13 (1965); Aseem Prakash & Matthew Potoski, *Private Authority Certification Regimes: A Club Theory*

the good must pay a user fee or a toll to be able to use or benefit from it.¹²² Examples of global club goods include satellite communication networks and orbital slots.¹²³

Conversely, joint products are goods which simultaneously produce two or more classes of goods.¹²⁴ For instance, a joint product activity, such as peacekeeping, may result in a pure public good, a private good, or a club good.¹²⁵ As peacekeeping reduces instability and threats to a region it produces a pure public good. Since it also promotes stability in a particular state, it also produces a private good for that state. Finally, states can cooperate together to form a stronger joint-peacekeeping operation that offers services only to those states that contribute to the operation, thereby forming a club good.

3. *Global Public Goods and International Investment Law*

In order to view international investment law—that is, the standards of protection for investors and investments and the behavioral expectations those standards entail¹²⁶—through a global public good lens, it is prudent to begin by applying the global public good framework to international investment law to confirm that it is indeed a global public good. While the concept of a global public good is used primarily in the sense of a normative framework here, it is equally possible to view international investment law, from a positivist view, as a good that has been underprovided by the market.¹²⁷ In either case, however, the focus is on the benefits international investment law can provide.

As stated above, a global public good must first exhibit the two qualities of publicness: non-rivalry and non-excludability. It must then produce a benefit that is global in nature, i.e. affecting a vast proportion of

Perspective, in THE CHALLENGES OF GLOBAL BUSINESS AUTHORITY: DEMOCRATIC RENEWAL, STALEMATE, OR DECAY? 39, 44 (Tony Porter & Karsten Ronit eds., 2010); Sandler, *supra* note 116, at 137.

¹²² Sandler, *supra* note 116, at 137.

¹²³ *Id.*

¹²⁴ See generally Richard Cornes & Todd Sandler, *The Comparative Static Properties of the Impure Public Good Model*, 54 J. PUB. ECON. 403 (1994); Matthew J. Kotchen, *Green Markets and Private Provision of Public Goods*, 114 J. POL. ECON. 816 (2006).

¹²⁵ Sandler, *supra* note 116, at 137.

¹²⁶ As international investment law does not have any centralized institutions akin to the WTO in international trade law, the consideration of international investment law as a global public good does not include any institutions such as ICSID that administer aspects of international investment law.

¹²⁷ Under this rationale, international investment law is both a vehicle through which global benefits can be delivered and also a private “good” that is being undersupplied by the market. The distinction between a good and a global public good is well exemplified by Bodansky. As he notes, diplomatic immunity provides benefits to sending states and diplomats, but it becomes a global public good by “enabling international diplomacy.” Bodansky, *supra* note 109, at 653. Similarly, human rights norms offer benefits to individuals, but become a global public good through the benefits that protection of human rights offer to the international community as a whole. *Id.*

the world's states, a significant portion of the world's population, and current and future generations.

International investment law is non-rival in the sense that the use of the system by one foreign investor or one state does not detract from the system's utility for other users. Whether one or 450 investors are initiating investor–state arbitrations or whether 500 or over 3,000 IIAs are drafted, the system of international investment law as an overarching, legal framework governing international investment relations continues to maintain its utility.

Ascertaining whether international investment law is non-excludable is, however, more difficult. A skeptical view of international investment law might first perceive it as only a club good. After all, the system of international investment law is only available to those states who have concluded IIAs and their nationals.¹²⁸ The transaction costs associated with negotiating and drafting an IIA might be analogized to a user fee or a toll, suggesting that only those states that pay to join the international investment law “club” can partake in its benefits.

Still, a better description of international investment law is that of a joint product. Viewed as a joint product, the system of international investment produces three goods. First, it produces a state-specific, private benefit in the sense that benefits such as promotion of the rule of law,¹²⁹ access to investor–state arbitration, protection for the state's nationals when they invest abroad, economic development, and the potential ability to attract increased foreign investment are provided only to contracting states.

Second, in providing an overarching legal framework governing international investment relations, international investment law could be considered a club good. Not only do states that conclude IIAs garner state-specific, private benefits that are detailed in their IIAs, but they also obtain benefits prevalent in the system of international investment law that may not even appear in the texts of their IIAs. For instance, most-favored-nation (MFN) provisions in IIAs entitle investors to benefits that are absent in their own treaty but are available in other treaties.¹³⁰ An MFN provision can enable an investor to circumvent procedural rules de-

¹²⁸ See Stefan D. Amarasingha & Juliane Kokott, *Multilateral Investment Rules Revisited*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 119, 120–22 (Peter Muchlinski et al. eds., 2008).

¹²⁹ Echandi argues that for developing countries in particular, international investment law “promot[es] greater effectiveness of the rule of law at the domestic level.” Roberto Echandi, *What Do Developing Countries Expect from the International Investment Regime?*, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 3, 12–15 (José E. Alvarez & Karl P. Sauvant eds., 2011).

¹³⁰ See *MTD Equity Sdn. Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶¶ 100–104 (May 25, 2004), 12 ICSID Rep. 3 (2007).

tailed in its IIA¹³¹ or entitle it to better substantive treatment.¹³² Club members can also benefit from general principles and rules about the meaning of common standards of protection derived from cross-fertilizations, linkages, and overlaps between investor–state cases and multilateral processes coordinating foreign investment policy.

Finally, international investment law could be considered to produce a pure public good by failing to exclude states from at least some of its benefits. Principally, it produces a framework that efficiently facilitates the transfer of capital between states. In this sense, along with the international trade regime, the system of international investment law plays an important role in furthering economic growth, an important aspect in reducing the economic causes of world wars. Its framework also minimizes protectionism and encourages cross-border investments, producing, to some extent, an increasingly shared fate between states. More importantly, the system seeks to promote the development or prosperity of states which could ultimately lead to a substantial reduction in economic disparities between states. Insofar as the system of international investment law is able to achieve these outcomes, members and non-members alike could benefit. This possibility is further reinforced by the global nature of international investment law. With more than 180 states participating in the system, a significant percentage of the world's population is affected by international investment law.¹³³ Moreover, to the extent that international investment law fosters a state's economic development and prosperity, current and future generations alike can benefit from this global public good.

C. Viewing International Investment Law Through a Global Public Good Lens

Seen as a global public good, then, international investment law can be conceived of as providing two primary benefits to the world at large. First, it provides an overarching legal framework that guides foreign investment and enhances its stability and predictability, regardless of the locus of investment. Second, it acts as a vehicle that helps to foster a state's economic development.

International investment law, however, is failing to fully bestow both of its benefits. For one, it faces constant criticisms about its legitimacy, preventing it from becoming a fully accepted overarching legal framework for FDI activity. In addition, arbitral tribunals' reluctance to recognize the role of FDI in promoting a state's economic development hin-

¹³¹ See, e.g., *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, ¶ 56 (Jan. 25, 2000), 5 ICSID Rep. 388 (2002); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 68 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009).

¹³² See, e.g., *MTD Equity*, 12 ICSID Rep. 3, ¶¶ 100–104.

¹³³ See UNCTAD 2012 REPORT, *supra* note 5, at 199–202.

ders its ability to help states foster their economic development. Each of these limitations is explored further below.

1. *Limits to Becoming an Overarching Legal Framework*

Given its historical origins as a forum in which gunboat diplomacy¹³⁴ was needed to resolve foreign investment disputes, international investment law has played an instrumental role in depoliticizing international investment relations and, in turn, in facilitating and propelling foreign investment activity. Today, the legal standards of protection found in IIAs are thought to be highly relevant to a foreign investor's decision to establish an investment, even if the decision to establish the investment is not based on the presence of an IIA alone.¹³⁵ The rule of law inherent in international investment law has further been recognized as beneficially transforming related domestic legal environments within certain states.¹³⁶ International investment relations, in short, have benefitted from a legalization of this historically politically-oriented area.

However, the development of an area of law and its acceptance by those affected by it hinge on its legitimacy.¹³⁷ Perceptions of legitimacy are what "pull states and other participants toward voluntary compliance" with the principles and rules set out in the system of law.¹³⁸ Thus, to act as an overarching legal framework for the governance of international investment relations, international investment law must exhibit the qualities of legitimacy.

Legitimacy is premised on two qualities, determinacy and coherence,¹³⁹ both of which lay the foundation for predictability, the ultimate hallmark of a legitimate system.¹⁴⁰ Determinacy is the ability of a system of law to transmit a clear message about its requirements.¹⁴¹ Laws which are determinate are "textually" clear, making those to whom they are addressed acutely aware of what is expected of them.¹⁴² Alternatively, if textual clarity is lacking, laws can still be determinate if a legitimate authori-

¹³⁴ Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 329 (1994); Ray C. Jones, Note, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 529.

¹³⁵ Echandi, *supra* note 129, at 11.

¹³⁶ *Id.* at 12–15; Paulsson, *supra* note 84, at 346.

¹³⁷ Ian A. Laird, *The Emerging Jurisprudence of International Investment Law: Introduction to Conference*, in INVESTMENT TREATY LAW: CURRENT ISSUES III, at 89, 91, 95 (Andrea K. Bjorklund et al. eds., 2009).

¹³⁸ Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 51 (2003).

¹³⁹ See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 52, 61 (1990) [hereinafter FRANCK, LEGITIMACY].

¹⁴⁰ Brower, *supra* note 138, at 58 ("[L]egal regimes cannot achieve legitimacy without predictable operation . . .").

¹⁴¹ THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 30 (1995) [hereinafter FRANCK, FAIRNESS]; Franck, *supra* note 93, at 713.

¹⁴² Franck, *supra* note 93, at 713.

ty—who has the necessary authority to interpret and is subject to making coherent decisions—interprets the laws to provide clarity.¹⁴³

Conversely, coherence requires that a system of law transmits consistent signals about its requirements.¹⁴⁴ As Franck observes, coherent rules are those that treat “like cases alike and when the rule relates in a principled fashion to other rules of the same system.”¹⁴⁵ Coherence is also based on the notion of consistency wherein a rule is applied uniformly in every applicable instance and where inconsistencies are explained by reference to a principled distinction.¹⁴⁶

Working together, then, determinacy and coherence lay the foundation for predictability. As Brower remarks, predictability gives “subjects a meaningful opportunity to understand, and conform their behavior to, systemic requirements.”¹⁴⁷ This opportunity is derived both from the clarity of the rules provided by its determinate qualities and from the perceptions of fairness and justice that coherence in rules instill.¹⁴⁸

The notion of predictability as an underlying foundation for assessing the legitimacy of international investment law is particularly apt as foreign investment decisions are based on a predictable and stable environment.¹⁴⁹ As international investment relations grew out of a practice in which foreign investors feared takings or nationalizations of their investments by host state governments,¹⁵⁰ the central focus on creating a predictable and stable framework for international investment relations is hardly surprising. Yet predictability in international investment law is equally important for states and investors alike as its presence enables both parties to plan their conduct accordingly.

However, international investment law is exhibiting some deficiencies in its determinacy and coherence, which is in turn impacting its predictability and therefore its legitimacy. For instance, since determinacy emphasizes the need for rules to be clear, the vague, undefined standards

¹⁴³ FRANCK, FAIRNESS, *supra* note 141, at 33–34; FRANCK, LEGITIMACY, *supra* note 139, at 61, 82.

¹⁴⁴ FRANCK, FAIRNESS, *supra* note 141, at 38; FRANCK, LEGITIMACY, *supra* note 139, at 142, 174; Franck, *supra* note 93, at 738, 741, 750.

¹⁴⁵ FRANCK, FAIRNESS, *supra* note 141, at 38.

¹⁴⁶ *Id.* at 38, 41; FRANCK, LEGITIMACY, *supra* note 139, at 163.

¹⁴⁷ Brower, *supra* note 138, at 52.

¹⁴⁸ FRANCK, FAIRNESS, *supra* note 141, at 33, 38–41.

¹⁴⁹ See, e.g., Letter of Submittal from George P. Shultz, Sec’y of State of the U.S., to Ronald Reagan, President of the U.S. (May 20, 1986), in S. TREATY DOC. NO. 99-24, at v, vi (1986) (submitting Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, Sept. 29, 1982) (“By providing certain mutual guarantees and protections, a BIT creates a more stable and predictable legal framework for foreign investors in the territory of each of the treaty Parties.”). Mexico was also found liable for failing to provide a foreign investor with a “predictable framework” for its business planning and investments. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 99, 101 (Aug. 30, 2000), 5 ICSID Rep. 209 (2002).

¹⁵⁰ NEWCOMBE & PARADELL, *supra* note 16, at 7–10.

of treatment prevalent in IIAs suggest that the rules of international investment law are indeterminate. From the text alone, it is difficult to see how standards such as “fair and equitable treatment” or “indirect expropriation” clarify the required standard of conduct. More importantly, the indistinct nature of these rules makes it difficult for states or investors to ascertain *ex ante* the necessary standard of conduct.

Determinacy of international investment rules is, furthermore, not always assisted through interpretation by a legitimate authority. Principally, these authorities—international investment arbitrators—may not necessarily possess sufficient expertise to adjudicate the wide range of issues involved in international investment disputes. Questions have also been raised as to whether it is legitimate for private individuals to determine what are essentially public questions of law.¹⁵¹

At the same time, the predictability of international investment law is also being limited by its lack of coherence. Most notably, the lack of consistency in decision-making, in at least some areas, has raised questions about the coherence of international investment law.¹⁵² For example, in the *Lauder* arbitrations—two proceedings brought out of the same set of facts—two different tribunals rendered diametrically opposed awards: one finding that the state had breached its IIA obligations, the other finding that it had not.¹⁵³ Inconsistencies in jurisprudence have also been located in tribunals’ awards on umbrella clauses,¹⁵⁴ the scope of MFN clauses,¹⁵⁵ and the meaning of “investment.”¹⁵⁶ More recently, in a series

¹⁵¹ See generally GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007).

¹⁵² For a good comparison of the consistent versus inconsistent treatment of some areas of international investment law, see Brower, *supra* note 138, at 63–73.

¹⁵³ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arb., Partial Award, ¶ 624 (Sept. 13, 2001), <http://italaw.com/documents/CME-2001PartialAward.pdf>; *Lauder v. Czech Republic*, UNCITRAL Arb., Final Award, ¶¶ 160–165, 204, 235 (Sept. 3, 2001), <http://italaw.com/sites/default/files/case-documents/ita0451.pdf>. The foreign investor, Ronald Lauder, initiated an arbitration against the Czech government in his personal capacity under the U.S.–Czech Republic BIT and under the rubric of his company under the Netherlands–Czech Republic BIT. Both BITs contained similar language and both tribunals found that the Czech Republic had discriminated against Mr. Lauder and his company. For a thorough discussion of the facts and holding of the arbitrations, see Franck, *supra* note 95, at 1559–67.

¹⁵⁴ See, e.g., *SGS Société Générale de Surveillance SA v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, ¶¶ 163–165 (Aug. 6, 2003), 8 ICSID Rep. 518 (2005); *SGS Société Générale de Surveillance SA v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶¶ 119–126 (Jan. 29, 2004), 8 ICSID Rep. 406 (2005).

¹⁵⁵ See, e.g., *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, ¶ 21 (Nov. 13, 2000), 5 ICSID Rep. 419 (2002); *Plama Consortium Ltd. v. Republic of Bulg.*, ICSID Case No. ARB/03/24, Order on Provisional Measures, ¶ 32 (Sept. 6, 2005), 13 ICSID Rep. 324 (2008).

¹⁵⁶ See, e.g., *Consortium Groupement LESI-DIPENTA v. People’s Democratic Republic of Alg.*, ICSID Case No. ARB/03/8, Award, ¶¶ 10, 13 (Jan. 10, 2005), 15 ICSID Rep. 7 (2010); *Saba Fakes v. Republic of Turk.*, ICSID Case No. ARB/07/20,

of decisions arising out of the Argentine financial crisis,¹⁵⁷ different tribunals have interpreted the same “necessity” clause¹⁵⁸ in the U.S.–Argentina BIT in a variety of ways.¹⁵⁹ This has resulted in Argentina being able to rely on the necessity clause in the BIT in some cases—exempting it from liability—while in others it has not been able to do so.

In these areas, then, inconsistencies in the jurisprudence can send contradictory messages about the requirements of international investment law.¹⁶⁰ For instance, it now remains unclear as to whether a state is obliged to offer foreign investors *all* rights detailed in a third party treaty in the presence of an MFN clause, what precisely constitutes an “investment,” and whether a breach of a contractual right constitutes breach of an IIA obligation. Such conflicts can characterize international investment law as being arbitrary in nature and hence illegitimate. Problems with coherence therefore create uncertainties, which hamper the predictability and stability of international investment law as an overarching framework for guiding foreign investment activity.

2. *Limits to Fostering State Economic Development*

It is now well settled that, in addition to protecting the interests of their investors abroad, states enter into IIAs in order to attract foreign investment.¹⁶¹ As Paulsson observes, the objective of protecting foreign in-

Award, ¶¶ 95–98 (July 14, 2010), *available at* http://italaw.com/documents/Fakes_v_Turkey_Award.pdf; *Salini Costruttori SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 43–52 (July 23, 2001), 6 ICSID Rep. 400 (2004).

¹⁵⁷ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 59 (May 12, 2005), 14 ICSID Rep. 158 (2009); *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 160 (Sept. 5, 2008), *available at* <http://www.italaw.com/sites/default/files/case-documents/ita0228.pdf>; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 63, 71 (May 22, 2007), *available at* <http://italaw.com/documents/Enron-Award.pdf>; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 35 (Oct. 3, 2006), 21 ICSID Rev. 203 (2006); *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶¶ 106, 122, 138, 168, 194 (Sept. 28, 2007), *available at* <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>.

¹⁵⁸ The clause states that the U.S.–Argentina BIT “shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or the restoration of international peace or security, or the protection of its own essential security interests.” Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.–Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. No. 103-2 (1993).

¹⁵⁹ For an overview of the varying approaches taken by the tribunal, see generally Choudhury, *supra* note 91.

¹⁶⁰ For a converse view, see Stanimir A. Alexandrov, *On the Perceived Inconsistency in Investor–State Jurisprudence*, in *THE EVOLVING INTERNATIONAL INVESTMENT REGIME*, *supra* note 129, at 60.

¹⁶¹ Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 953, 953–54 (2005); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567, 1567 (2005); Salacuse & Sullivan, *supra* note 21, at

vestors through IIAs is for states “to convince investors to invest for the longest time possible.”¹⁶² However, the precise reasons for states wanting to attract foreign investment remain less clear.

Under views deriving from the Washington Consensus, the classic rationale justifying states needing foreign investment is that FDI and the protection of property rights improves states’ economic development.¹⁶³ The preamble to the ICSID agreement, which articulates the role of international investment in fostering economic development, reinforces this view.¹⁶⁴ The thought is then that while IIAs promote foreign investment, foreign investment fosters a state’s economic growth, which enhances the welfare of the state’s population. Consequently, states enter IIAs to attract foreign investment as a means of advancing their economic development. Van Aaken even argues that investor/investment protection is the object of IIAs, while fostering economic development is their purpose.¹⁶⁵ International investment law can thus be viewed as an important vehicle for state economic development.

Foreign investment, however, only serves to foster a state’s economic development if it generates spillovers and does not result in the production of negative externalities.¹⁶⁶ Spillovers include any benefits to the state that are not appropriated by the foreign investor or the factors of production and can include technology transfers, increases in supplier efficiency, and human capital transfers.¹⁶⁷ Conversely, negative externalities refer to any of the third-party impacts foreign investment can have on the state’s population, including costs on labor, the environment, and human rights. As a global public good, then, international investment law works to foster state economic development mainly by encouraging spillovers and minimizing negative externalities.

However, as with its efforts to become an overarching legal framework, international investment law equally faces limitations in working to lessen economic disparities between states. While its spillovers in terms of promoting good governance in the host state have been found to be

77; Jennifer Tobin & Marc L. Busch, *A BIT is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 *WORLD POL.* 1, 2 (2010).

¹⁶² Paulsson, *supra* note 84, at 347.

¹⁶³ See generally Theodore H. Moran et al., *Introduction and Overview*, in *DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT?* 1, 2 (Theodore H. Moran et al. eds., 2005); John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 5, 7–8 (John Williamson ed., 1990). For an application of this premise to international investment law see Dolzer, *supra* note 161, at 953–54.

¹⁶⁴ ICSID Convention, *supra* note 66, pmbl. (“Considering the need for international cooperation for economic development, and the role of private international investment therein . . .”).

¹⁶⁵ van Aaken, *supra* note 87, at 22.

¹⁶⁶ Moran et al., *supra* note 163, at 3.

¹⁶⁷ *Id.*

questionable,¹⁶⁸ even more importantly, its benefits in this area are being thwarted by investment arbitral tribunals' reluctance to recognize the importance of economic development in the context of foreign investment. This reluctance has manifested itself mainly by investment arbitral tribunals interpreting IIAs without regard to any other interest besides investment protection.

In part, some tribunals favor this interpretive approach to IIAs because they consider that international investment law serves only one goal: protection of investors and investments.¹⁶⁹ As the *SGS v. Philippines* tribunal noted, the purpose of a BIT is to protect investments, thus it is "legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."¹⁷⁰ Similarly, the *Enron* tribunal found that the object and purpose of a BIT was to protect the rights of investors.¹⁷¹ Using such a unitary lens to interpret IIAs has enabled arbitral tribunals to give expansive, investor-centered interpretations to provisions in the treaties. In fact, preliminary results from an empirical study of investment arbitration found that tribunals give expansive interpretations to several key investment protection issues, particularly when the investor hails from a traditional capital-exporting state.¹⁷²

While expansive interpretations accorded to IIA provisions may not, in and of themselves, be problematic to furthering states' economic development, they can become particularly troublesome when tribunals use these expansive interpretations to restrict states' regulatory public interest powers. Thus, when tribunals, in interpreting the fair and equitable standard, require states to act in such a way that foreign investors will be informed beforehand of "any and all rules and regulations that will gov-

¹⁶⁸ Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 122 (2005) (arguing that the "impact of BITs on subsequent governance is ambiguous . . . [and that] under some circumstances BITs may lead to lower institutional quality").

¹⁶⁹ See the discussion on this topic by the tribunal in *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶¶ 68–69 (Apr. 27, 2006), 21 ICSID Rev. 488 (2006). See also *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 52 (Oct. 12, 2005), 16 ICSID Rep. 216 (2012) ("[I]t is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors . . ."); M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT*, 234–35 (3d ed. 2010) (discussing the trend of "excessively pro-investor interpretations" given by arbitral tribunals).

¹⁷⁰ *SGS Société Générale de Surveillance SA v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

¹⁷¹ *Enron Corp.*, *supra* note 157, ¶ 331.

¹⁷² Gus Van Harten, *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern*, INVESTMENT TREATY NEWS (Apr. 13, 2012), <http://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/>; see also Gus Van Harten, *Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration*, 1 OÑATI SOCIO-LEGAL SERIES, no. 4, 2011, at 3, 14 n.13, 15.

ern [their] investments, as well as the goals of the relevant policies and administrative practices or directives,”¹⁷³ they limit state ability to react to public interest issues that arise after the establishment of the investment and yet still affect it.¹⁷⁴ Moreover, with the growing number of public interest issues being affected by foreign investments, the need for states to be able to react to these issues is becoming increasingly important.¹⁷⁵

The tribunals’ focus on the importance of investor protection in interpreting IIAs has also impacted their ability to give credence to human rights or environmental issues that arise in international investment law. As economic development is only furthered when foreign investment does not create negative externalities, giving credence to the development function of international investment law requires tribunals to ensure that interpreting IIAs does not, at the very least, inhibit state actions to further these goals. Nevertheless, for the most part, tribunals have either tried to circumvent, or failed to give much importance to, non-economic issues that have intersected with foreign investments.¹⁷⁶ An example of this disconnect was evident in the *Biwater Gauff* award which involved, among other issues, the Tanzanian peoples’ right to water.¹⁷⁷ Although the tribunal recognized that issues of human rights were involved in the dispute—thus allowing *amicus curiae* to make submissions on that point and vaguely alluding to their submissions at one point in the award—their final decision makes no explicit reference to human rights.¹⁷⁸ Similarly, in *Glamis Gold*, an investment dispute that implicated environmental and indigenous rights issues, the tribunal specifically made reference to the importance of the underlying social issues in the dispute but held that it would not be required to decide these “contro-

¹⁷³ *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003), 10 ICSID Rep. 134 (2006).

¹⁷⁴ Schill argues that international investment law forces states to adapt their behavior to avoid liability by, for example, allowing investors to charge higher tariffs for water, even if in doing so, parts of its population become unable to access the water at that price. Stephan W. Schill, *International Investment Law and Comparative Public Law—An Introduction*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 96, at 3, 14–15.

¹⁷⁵ For an overview of the public interest issues being affected by international investment law, see generally Choudhury, *supra* note 30; Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALBERTA L. REV. 983 (2009).

¹⁷⁶ One notable exception is *Methanex Corp. v. United States of Am., NAFTA/UNCITRAL Arb., Final Award on Jurisdiction and Merits*, pt. IV, ch. E, ¶¶ 20–22 (Aug. 3, 2005), 16 ICSID Rep. 40 (2012).

¹⁷⁷ *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanz.*, ICSID Case No. ARB/05/22, Award, ¶ 387 (July 24, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf>.

¹⁷⁸ The tribunal stated that the issues raised by *amicus curiae* were “useful” and that they “informed the analysis,” and subsequently alluded to the arguments in interpreting the fair and equitable standard. *Id.* ¶¶ 387, 392, 601, 814.

versial issues.”¹⁷⁹ More recently, tribunals in two related disputes have specifically noted that a state’s human rights obligations cannot supersede its investment treaty obligations.¹⁸⁰ Thus, to the extent that investment arbitral tribunals disregard the ability of foreign investors to create negative externalities through their investments, a state’s economic development will be hindered.

There have been, however, a few tribunals that have deliberately tried to introduce the importance of economic development into their interpretations of IIAs. Mainly, this effort to incorporate concepts of economic development in IIAs has been effected through interpretations of the term “investment.” In *Salini*, for instance, the tribunal held that the conditions signifying that an investment had been made consisted of, among others, a contribution to the economic development of the host state.¹⁸¹ The tribunal went on to observe that a contract to construct a highway furthered the economic development of the state, because it was a function traditionally effected by the state or by public authorities, it served the public interest, and it provided the state with know-how in relation to the work.¹⁸²

Economic development, as a necessary element of determining whether an investment has been made, has also been recognized in a few other cases.¹⁸³ These tribunals have found that contributions to the development of state infrastructure,¹⁸⁴ significant spending or outlays of resources,¹⁸⁵ or a benefit to the state¹⁸⁶ can further economic development. In *Malaysian Historical Salvors*, the sole arbitrator even rejected jurisdiction of the dispute on the grounds that the investor had not established a project akin to a public infrastructure project with lasting value that

¹⁷⁹ *Glamis Gold, Ltd. v. United States of Am., NAFTA/UNCITRAL Arb., Award*, ¶ 8 (June 8, 2009), available at http://italaw.com/documents/Glamis_Award.pdf.

¹⁸⁰ *Agbar I*, *supra* note 92, ¶ 240; *Agbar II*, *supra* note 92, ¶ 262.

¹⁸¹ *Salini Costruttori SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 6 ICSID Rep. 400 (2004).

¹⁸² *Id.* ¶ 57.

¹⁸³ See, e.g., *Malaysian Historical Salvors Sdn, Bhd v. Government of Malay.*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 68 (May 17, 2007), available at <http://italaw.com/sites/default/files/case-documents/ita0496.pdf>; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pak.*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 137 (Nov. 14, 2005), available at <http://www.italaw.com/sites/default/files/case-documents/ita0074.pdf>; *Joy Mining Mach. Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶ 53 (Aug 6, 2004), 13 ICSID Rep. 123 (2008); *Ceskoslovenska Obchodni Banka, AS v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, ¶ 64 (May 24, 1999), 5 ICSID Rep. 335 (2002).

¹⁸⁴ *Ceskoslovenska Obchodni Banka*, 5 ICSID Rep. 335, ¶¶ 88–89; *Joy Mining Mach. Ltd.*, 13 ICSID Rep. 123, ¶ 62.

¹⁸⁵ See, e.g., *Ceskoslovenska Obchodni Banka*, 5 ICSID Rep. 335, ¶¶ 88–89; *Joy Mining Mach. Ltd.*, 13 ICSID Rep. 123, ¶ 62.

¹⁸⁶ *Joy Mining Mach. Ltd.*, 13 ICSID Rep. 123, ¶¶ 60–61.

could provide positive economic development to the host state.¹⁸⁷ Although the award was subsequently annulled,¹⁸⁸ one of the members of the annulment committee issued a strongly worded dissent in which he stressed that foreign investments must promote economic development.¹⁸⁹ He argued that without the requirement for investments to further economic development, states would be obliged to protect entities that were also systematically earning their wealth at the expense of the development of the host state.¹⁹⁰

Nevertheless, despite these outliers, most tribunals have been reluctant to consider a specific role of foreign investment in furthering economic development. Rather, tribunals have simply assumed that protecting foreign investments will act as a proxy for economic development despite the lack of evidence supporting this notion.¹⁹¹

III. TOWARDS INTERNATIONAL INVESTMENT LAW AS A GLOBAL PUBLIC GOOD

Viewing international investment law through a global public good lens thus highlights its ability to deliver public benefits to the world at large and also demonstrates its present shortcomings in doing so. Notably, both its inability to deliver an overarching legal framework for international investment relations and its weaknesses in acting as a vehicle that contributes to lessening economic disparities between states are tied primarily to the ad hoc nature of international investment arbitration. More specifically, the root of both of these problems lies in the interpretation of IIAs by arbitral tribunals and in the inability of those affected to “correct” any problems with these interpretations. Examining international investment law through a global public good lens therefore suggests that harnessing its benefits may warrant a revision of the process by which IIAs are interpreted in order to produce their desired outcomes.

¹⁸⁷ *Malaysian Historical Salvors*, *supra* note 183, ¶¶ 143–46.

¹⁸⁸ *Malaysian Historical Salvors Sdn, Bhd v. Government of Malay.*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 83 (Apr.16, 2009), available at <http://italaw.com/sites/default/files/case-documents/ita0497.pdf>.

¹⁸⁹ *Id.* at Dissenting Opinion of Judge Mohamed Shahabuddeen (Feb 19, 2009), ¶ 2.

¹⁹⁰ *Id.* ¶ 22.

¹⁹¹ See, e.g., *Saba Fakes*, *supra* note 156, ¶ 111 (“The promotion and protection of investments in host States is expected to contribute to their economic development.”); *Casado v. República de Chile*, ICSID Case No. ARB/98/2, Award, ¶ 232 (May 8, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0639.pdf> (“[I]n protecting the investments, the [ICSID] Convention promotes the development of the host state.” (translation by author)). For a discussion of how investment protection, alone, does not act as a proxy for economic development, see generally DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT?, *supra* note 163; van Aaken, *supra* note 87.

A. *Corrective Mechanisms*

One way to correct interpretations of IIAs, which are either illegitimate or fail to recognize the development dimension of these treaties, is to provide for an appellate mechanism. In fact, creating an appellate court to take on international investment issues has been a frequently advocated solution for curing most of the ills of international investment law.¹⁹² To be sure, an appellate court offers a number of key advantages to improving aspects of international investment law's legitimacy, including having established members of the court who would likely offer a more nuanced analysis of IIA provisions and a forum for resolving conflicting awards. At the same time, an appellate mechanism would not necessarily be more receptive to infusing international investment law with a greater ethos of development considerations since the members would be drawn from the community of arbitrators who have previously tended to overlook the importance of non-economic interests in international investment law.¹⁹³ Indeed, an appellate mechanism risks further polarizing international investment law from public interest issues, and therefore the global public at large.

A better approach would be to revise international investment law such that interpretations of IIAs are consistent with the dual benefits of international investment law when viewed as a global public good. One way to achieve these desired interpretations is to create a greater role for states in arriving at the ultimate arbitral award.

At first glance, creating a greater role for states might appear worrisome given that international investment law evolved out of an attempt to depoliticize international investment relations and therefore reduce the role of states. At the time, the concern was with the imbalance in power between states and foreign investors, the latter of whom were at the mercy of the host state's power. While modern international investment law has worked to readjust the power balances between states and foreign investors, it has failed to take into account the state's role as the guardian of the public interest.¹⁹⁴ Moreover, a global public goods lens highlights the importance of the state role since states are seen as the primary pro-

¹⁹² See, e.g., Franck, *supra* note 95, at 1606; Michael D. Goldhaber, *Wanted: A World Investment Court*, FOCUS EUR., Summer 2004, at 26, 28; VAN HARTEN, *supra* note 151, at 152. But see Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, *supra* note 19, at 231, 231 (concluding that "the cure in this case could well be worse than the disease.").

¹⁹³ Jan Paulsson, *Avoiding Unintended Consequences*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, *supra* note 19, at 241, 258–59 (arguing an appellate mechanism would be "detrimental" as it would have to, and yet could not, be "responsive to different articulations of substantive norms").

¹⁹⁴ Yackee, *supra* note 69, at 420 (arguing "states are likely to remain the first and best aggregators of societal values and preferences" and implicitly arguing that states promote the common good).

vider of public goods.¹⁹⁵ The rebalancing exercise of international investment law must therefore take into account these state roles.

One approach to enlarging the role of states is to allow them to make submissions to the tribunal as non-disputing parties on how best to interpret the IIA, a practice adopted by recent U.S. and Canadian model treaties.¹⁹⁶ While states involved in the dispute will normally make these types of submissions as part of their defense, states that are a party to the IIA but are not involved in the dispute could similarly be given an opportunity to make such submissions.¹⁹⁷ In doing so, states can ensure that interpretations that they favor—for instance ones that work towards a *jurisprudence constante* or that take into account development considerations—are emphasized to the tribunal. In fact, the U.S. has argued that if the interpretation offered by the non-disputing state party accords with the view of the disputing state party, this is evidence of state practice reflective of customary international law.¹⁹⁸

Second, states can be given a chance to comment on arbitral awards before they are finalized. For example, the U.S.–Chile Free Trade Agreement allows the disputing parties to request the circulation of a draft award, which is then sent to the investor, the state party involved in the dispute, and the non-disputing state party.¹⁹⁹ The disputing parties are then allowed to provide comments on the award. Again, this is an opportunity for states to propose changes to the legal reasoning of the award to better reflect the public good. While the tribunal is not obliged to incorporate the offered comments into its award, it is required to consider them before issuing its award.²⁰⁰

Third, state parties to an IIA can issue an interpretation on a specific provision in the treaty. For example, under the NAFTA, the Free Trade Commission, comprised of representatives from each of the three NAFTA states, issued a binding interpretation on the meaning of the minimum standard of treatment after tribunals began to interpret this provision in a way that was contrary to the views of the states.²⁰¹ A similar

¹⁹⁵ MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 15 (1965).

¹⁹⁶ See U.S. Model BIT, *supra* note 8, art. 28(2); Canadian Model BIT, *supra* note 89, art. 35(1).

¹⁹⁷ Thus, in an investment dispute brought by an Argentinean investor against the U.S. under the U.S.–Argentina BIT or in an investment dispute brought under NAFTA by a Mexican investor against Canada, a role would be created for the Argentine government in the first dispute and the U.S. government in the second.

¹⁹⁸ Michael K. Tracton, *Provisions in the New Generation of U.S. Investment Agreements to Achieve Transparency and Coherence in Investor–State Dispute Settlement*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES*, *supra* note 19, at 201, 204–05.

¹⁹⁹ U.S.–Chile FTA, *supra* note 42, art. 10.19(9) (a)–(b).

²⁰⁰ Tracton, *supra* note 198, at 204.

²⁰¹ NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*. SICE FOREIGN TRADE INFO. SYS. (July 31, 2011), http://www.sice.oas.org/tpd/nafta/Commission/CHI1understanding_e.asp (interpretation issued pursuant NAFTA, *supra* note 14, art. 1131).

practice is followed in the Association of Southeast Nations (ASEAN) agreement in which, at the request of the disputing state party, the state parties can jointly determine whether a state has expropriated an investment through the adoption of a taxation measure.²⁰² While the states' determination under the ASEAN is not binding, unlike the NAFTA practice, tribunals are required to "accord serious consideration" to the determination.²⁰³ Again, if states believe that an IIA provision should be interpreted in line with previous decisions or in view of development interests, having a provision in the treaty that allows states to issue a binding interpretation or a joint determination that enables them to decide this issue can enable them to do just that.

Finally, a more radical approach for enlarging the role of states is to follow the practice followed in the Mercado Común del Sur (MERCOSUR) Agreement.²⁰⁴ MERCOSUR allows investors to initiate proceedings, but then requires the investors' home state to represent the investor during the proceedings.²⁰⁵ MERCOSUR therefore transforms the investor-state dispute resolution process into effectively a state-to-state process after the proceedings commence. Adopting a MERCOSUR practice thus enables states to better align investor interests with their broader state (public good) interests.

Nevertheless, for critics there remains a concern that by enlarging the role of states in investment arbitrations, the balance between state and investor rights will shift too heavily in favor of states. To assuage this fear, the words of a former NAFTA state party's general counsel, and now Secretary-General of ICSID, may be of comfort: "[States] as disputing parties, capital exporters, recipients of investments of other Parties and as sovereign states [have] a clear interest in the proper operation of the [IIA that] transcends the merits of specific cases."²⁰⁶ In other words, states that abuse any enlarged powers that are given to them as sovereigns risk losing their other roles as capital exporters or recipients of FDI.

B. Promoting Desired Outcomes

While creating a larger role for states in interpreting IIAs creates avenues by which public good interests can be more easily inserted into the international investment arbitration process, that alone does not neces-

²⁰² ASEAN Comprehensive Investment Agreement, art. 36(7), Feb. 26, 2009, available at http://www.thaifta.com/trade/ascorner/asean_doc2.pdf.

²⁰³ *Id.* art. 36(8).

²⁰⁴ Treaty Establishing a Common Market, art. 24, Mar. 26, 1991, 30 I.L.M. 1044 (1991).

²⁰⁵ Protocol of Brasilia for the Settlement of Disputes, arts. 25-27, Dec. 17, 1991, 36 I.L.M. 691 (1997).

²⁰⁶ *Pope & Talbot Inc. v. Government of Canada*, NAFTA/UNCITRAL Arb., Letter from Meg Kinnear, General Counsel, Trade Law Division, to Tribunal (Oct. 1, 2001), available at <http://naftaclaims.com/Disputes/Canada/Pope/PopeCanadaSecondSubReFTCStatement.pdf>.

sarily guarantee that the desired interpretations of these agreements will arise. One reason for this is because, in many instances, states themselves have been lax with promoting the development aspects of IIAs. In *Siemens v. Argentina*, for example, the tribunal observed that Argentina had failed to develop its human rights argument thereby obviating the need for the tribunal to consider the issue.²⁰⁷ Similarly, in a recent case, amicus curiae were denied standing to explore indigenous rights issues as the state, Zimbabwe, had failed to raise these rights in its defense.²⁰⁸ A second reason is that many of these agreements have been drafted without repeated explicit references to non-economic issues, suggesting that these issues are outside the scope of these treaties. Prompting investment arbitral tribunals to interpret IIAs consistently with development outcomes therefore requires that states facilitate tribunals' work in this area by making cogent arguments in this regard and by drafting IIAs that consistently and pervasively address development issues.

Arguably, with the increasing recognition of the links between international investment law and non-investment issues, states will likely improve their ability to further advance development-oriented arguments in international investment disputes.²⁰⁹ To that end, the growing literature exploring these links and advocating methods by which states can demonstrate the impacts of international investment law on non-economic issues should raise states' awareness of the different arguments available to them.²¹⁰

At the same time, there is a growing concern that developing countries, in particular, may lack the resources to participate fully and effectively in the investor–state dispute resolution process. These capacity issues may even arise before a state faces an international investment claim if a state has failed to understand the consequences of particular provisions of IIAs or lacks the “resources to negotiate the agreements it wishes

²⁰⁷ *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 79 (Feb. 6, 2007), 14 ICSID Rep 518 (2009).

²⁰⁸ *von Pezold v. Republic of Zim.*, ICSID Case Nos. ARB/10/15 and ARB/10/25, Procedural Order No. 2, ¶¶ 38, 59, 64 (June 26, 2012), <http://www.italaw.com/sites/default/files/case-documents/ita1044.pdf>.

²⁰⁹ See, e.g., Chester Brown, *Bringing Sustainable Development Issues Before Investment Treaty Tribunals*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW*, 175, 175–77 (Marie-Claire Cordonier Segger et al. eds., 2011); Omar E. García-Bolívar, *Economic Development at the Core of the International Investment Regime*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 586, 595–99 (Chester Brown & Kate Miles eds., 2011); Markus W. Gehring, *Impact Assessments of Investment Treaties*, in *SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW*, *supra*, at 149, 153–55; Asif H. Qureshi, *The Economic Emergency Defence in Bilateral Investment Treaties: A Development Perspective*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 631, 635 (Christina Binder et al. eds., 2009).

²¹⁰ See, for example, the arguments developed in the sources described *supra* note 209.

to negotiate.”²¹¹ Indeed UNCTAD cautions that these capacity challenges threaten to undermine the entire system of international investment law as they increase the risk that states “will enter into agreements that they are unprepared to honour fully.”²¹²

Capacity challenges of developing countries are further evident in many states’ lack of access to the legal expertise necessary to prepare a proper defense in investor–state arbitration. Due to budgetary constraints, for example, the Seychelles government defended an investor–state arbitration without access to any legal databases, proper legal texts, or any expertise on international investment law.²¹³ Not surprisingly, they lost the arbitration and a judgment of approximately \$4.6 million was awarded against them.²¹⁴ Similarly, when the Argentine government first began defending against investor–state arbitrations, its defenses were drafted without access to fundamental legal resources and involved its counsel purchasing key arbitration texts days prior to the hearings with his own money.²¹⁵

One way to surmount these capacity challenges is to offer developing countries legal assistance in defending against investor–state claims by adopting the World Trade Organization’s (WTO’s) model in this area. The Advisory Centre on WTO Law²¹⁶ offers legal advice on WTO law, support to parties in WTO dispute settlement proceedings, and provides training to government officials in WTO law.²¹⁷ The Centre offers free services to developing and least developed countries including legal advice and training on WTO law and charges discounted rates for assistance in dispute settlement proceedings.²¹⁸ Borrowing from the WTO model, an advisory center for international investment law could be similarly set up that provides free or discounted legal advice and training on international investment law and provides discounted rates for assistance in investor–state arbitration.²¹⁹ An advisory center could work towards reducing many of the capacity challenges faced by developing countries at the negotiating, drafting, and arbitration stages of IIAs.

Finally, there is a need to ensure that development issues are widely disseminated throughout the text of IIAs to reinforce the connection be-

²¹¹ U.N. CONFERENCE ON TRADE & DEV., IIA MONITOR NO. 2, DEVELOPMENT IMPLICATIONS OF INTERNATIONAL INVESTMENT AGREEMENTS 2, 8 (2007), *available at* http://unctad.org/en/Docs/webiteia20072_en.pdf.

²¹² *Id.* at 8–9.

²¹³ Gottwald, *supra* note 97, at 255.

²¹⁴ CDC Grp. PLC v. Republic of the Sey., ICSID Case No. ARB/02/14, Award, ¶ 62 (Dec. 17, 2003), http://italaw.com/documents/CDCvSeychellesAward_001.pdf.

²¹⁵ Gottwald, *supra* note 97, at 263–64.

²¹⁶ Agreement Establishing the Advisory Centre on WTO Law, art. 1, Nov. 30, 1999, 2299 U.N.T.S. 249.

²¹⁷ *Id.* art. 2.

²¹⁸ *Id.* at Annex IV. The Centre is funded both by developed and developing countries.

²¹⁹ For a full development of this argument, see Gottwald, *supra* note 97, at 269–74.

tween investment and non-investment issues in international investment law. While references to fostering development are found in the preambles to many IIAs, interests promoting development outcomes are not found as often in the main text of these agreements.²²⁰ In this regard, recent treaties from the governments of Canada and Kosovo are instructive as both countries have emphasized the importance of non-investment issues throughout the text of their IIAs.²²¹ Moreover, reference to development issues in the substantive aspects of IIAs removes the need to analyze this issue at the jurisdictional stage, which, as *Malaysian Historical Salvors* and its ilk have demonstrated, can be problematic.

States wary of tribunals' expansive interpretations and the effects on development outcomes are further cautioned to elaborate on the meaning of the two most commonly used standards of treatment: fair and equitable treatment and indirect expropriation. For example, the *Investment Agreement for the COMESA Common Investment Area* limits the standard of fair and equitable treatment to "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."²²² Similarly, state policy flexibility to regulate in the public interest can be maintained by explicitly excluding non-discriminatory, good-faith regulations enacted for a public purpose from the definition of "indirect expropriation," a practice followed by the U.S.²²³

While *ex ante* articulation of how non-investment issues should be treated when they intersect with investment issues can never be entirely comprehensive, references to non-investment issues in the treaties emphasize the importance of these issues to the overall interpretation of these IIAs. Tribunals interpreting these treaties are therefore much more likely to interpret provisions of these IIAs in accordance with desired outcomes.

IV. CONCLUSION

International investment law, in its modern form, must be recognized as being more than a tool by which private investment relations are ordered. The reach and impacts of its rules, principles, and policies extend well beyond the parties to the treaty, causing such a broad global impact that it warrants the label "global public good."

²²⁰ See, e.g., Austl.-Mex. BIT, *supra* note 38; French Model BIT, *supra* note 33; Ger.-Trin. & Tobago BIT, *supra* note 44.

²²¹ See, e.g., Austria-Kos. BIT, *supra* note 34, arts. 4-5; Can.-Czech BIT, *supra* note 41, art. IX(1).

²²² Investment Agreement for the COMESA Common Investment Area, art. 14(1), May 22-23, 2007, available at <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreementcomesa.pdf>.

²²³ See, e.g., The Dom. Rep.-Central Am.-U.S. Free Trade Agreement, Annex 10-C, ¶ 4(b), Aug. 5, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

Nevertheless, as we have seen, international investment law is struggling to generate both of its global benefits. This puts it at a crossroads: it can either continue on the path that it has already trodden or reorient itself towards a different direction. While continuing the status quo is the easier option, at the same time, it risks marginalizing the increasing number of states that have already indicated their discontent with the system. Maintaining the status quo may even encourage more states to follow the route of Bolivia, Ecuador, and Venezuela and exit the system altogether.

A second option is for international investment law to be reoriented towards a different path, one in which the global public benefits it can deliver are placed at its core. In other words, interpretations by tribunals of IIA standards, the text of the IIAs themselves, and the complementary policies and principles of international investment law should all be geared toward promoting both an overarching legal framework and a role in economic disparity reduction. It is only when all the actors in the international investment law system view that law in terms of these global benefits that this system of law has any chance at endurance.