

RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW:
ITS ROLE IN SUSTAINABLE DEVELOPMENT

by
Howard Mann*

This Essay provides an overview of the evolution of international investment treaties since their origins in 1959. It focusses on the purposes, goals and rationales put forward for their development, and in particular their uptake by developing countries. In the face of growing criticisms and concerns of these treaties, the Essay argues that the original purposes can no longer justify the overall regime and the risks it poses to sustainable development through its opaque processes and vague standards. Rather, the author argues that the purpose and rationale of the treaties must be shifted to fully encompass the central and critical relationship between FDI and sustainable development, particularly but not exclusively for developing countries. If this is done, options for reform are available. But anything less than this type of paradigm shift cannot address the fundamental problems the regime faces as part of a modern public international component for globalization.

I.	INTRODUCTION.....	522
II.	INVESTMENT TREATY TIMELINES.....	523
	A. <i>The Initial Goal of Investment Treaties: Investor Protection</i>	524
	B. <i>Investment Liberalization: The Washington Consensus Comes Alive</i>	524
	C. <i>The Growth of Investor–State Arbitration</i>	525
III.	THE QUESTIONS ARISE.....	527
	A. <i>Do Investment Treaties Attract Investment?</i>	528
	B. <i>Why Negotiate Investment Liberalization Provisions? Or, Are They the New International Law of Colonialism?</i>	529
	C. <i>What Role Does the International Investment Law Regime Play in Globalization?</i>	532
	D. <i>Why Are Environmental and Other Social Welfare Laws Such a Target for Investor–State Arbitration?</i>	533

* Dr. Howard Mann is the Senior International Law Advisor for the International Institute for Sustainable Development. This Essay is published based on spoken remarks given at the 17th Annual Lewis & Clark Business Law Forum: *Balancing Investor Protections, the Environment, and Human Rights*. Apart from a few minor changes, Lewis & Clark Law Review has neither edited nor source-checked this Essay. Interested parties may contact the author for sources.

E.	<i>Questioning the Limitation of the Regime to Investor Rights: The Emergence of Sustainable Development as the Alternative Paradigm</i>	534
IV.	ELEMENTS OF THE SUSTAINABLE DEVELOPMENT APPROACH TO INVESTMENT TREATIES	535
A.	<i>Linking Investment and Sustainable Development as an Objective</i>	537
B.	<i>Investor Rights</i>	538
C.	<i>Investment Liberalization</i>	539
D.	<i>State Rights</i>	540
E.	<i>Obligations on Investors</i>	540
F.	<i>Dispute Settlement</i>	541
G.	<i>Transparency</i>	542
H.	<i>Institutional Reform</i>	542
V.	CONCLUSIONS.....	543

I. INTRODUCTION

The origins of international investment law, which pre-date the development of investment treaties by several decades, lie largely in the customary international law theory that an affront to the rights of a foreign owned business in its host state is an affront to the sovereignty and interests of the investor's home state sovereign. From this starting point came the initial high standards by which to assess misconduct and the state responsibility for such misconduct.¹

The origins of international investment treaties have no such lofty theoretical foundations. Rather, these origins are very clear:

Since it is now widely recognized that major steps must be taken to buttress the economic position of the free-world nations, both as a measure against Soviet moves and as a means of resolving some of the demands being made by the peoples of the underdeveloped nations of the world, the notion of greater protection under international law for private investment takes on added importance.²

This direct statement of purpose goes back to the drafting of the Abs-Shawcross draft investment treaty in 1958, the immediate predecessor to the first bilateral investment treaty between Germany and Pakistan in 1959. In its fuller political context, the draft would not read as extreme as some may read it now: Hungary had seen its efforts to leave the Soviet Union sphere of influence squashed by force. The Cold War was in full force as a political and therefore economic paradigm. And decoloniza-

¹ A proper history of international investment law can be found in M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (3d ed. 2010); ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009).

² Introduction to *The Proposed Convention to Protect Private Foreign Investment: A Roundtable*, 9 J. PUB. L. 115, 115 (1960).

tion was moving from theory to reality with the attendant fears that created for capital owners in the colonized world.

So one can assume a rationality behind the origins of international investment treaties in the 1950s and early 1960s for those who were promoting them. The question for present purposes, however, is should this rationale remain the singular purpose for the regime, or even the dominant purpose of the regime some 50-plus years later?

The answer proposed herein is no, it should not. Moreover, a careful reading of the tea leaves today suggests the rationale will have to shift in very significant ways, or the regime will slowly begin to reverse itself in terms of the willingness of developing countries to continue to enter into these agreements, or to remain in them when opportunities for withdrawal arise. The overarching paradigm for understanding the future direction of investment treaties, it is suggested below, is the linkage between investment and sustainable development. Reflecting this fuller framework will take significant changes, well beyond the range of tinkering with the regime.

This Essay uses a timeline for international investment agreements (IIAs) as a tool to discuss the above hypothesis. It notes that from the origins of the treaties as pure investor-protection tools, the only significant alteration to the original model to date has been the inclusion of investment liberalization provisions. It also reviews the growth of IIAs and the resulting growth of investor-state arbitrations, which lead to growing questions about the regime itself. The number of questions that began to emerge in the second half of the 1990s and came into prominence in the 2000s are reviewed. And the nature of the response to those questions that is now emerging, not just from academics and non-governmental organizations but from inter-governmental organizations, are considered.

The conclusions of this review are, it is submitted, clear: the status quo is not likely to survive, and tinkering at the margins, or expanding the role of international arbitration to include a broad base of counter-claims, does not provide answers to the basic challenges being raised: linking the investment law regime to sustainable development.

II. INVESTMENT TREATY TIMELINES

As already noted, the first investment treaty was signed between Germany and Pakistan in 1959. The growth since then in numbers has been exponential:

1959	1
1980	~150
1990	~450
2000	~2000
2010	~3100

A. *The Initial Goal of Investment Treaties: Investor Protection*

The focus of the initial period of growth of investment treaties was singular: the protection of investor rights in foreign states. The fears of the expansion of communism and the oncoming period of decolonization were real. The already emerging oil expropriations in the Gulf and Northern Africa added fuel to that fear.⁴

Without entering into the legitimacy of these fears, or of the ownership of the resources by foreign investors in the first place, issues well beyond the scope of this Essay, the underlying point remains clear: the emerging investment treaty regime of the 1960s had investor protection as its only function. On this point, there is no dispute.⁵

B. *Investment Liberalization: The Washington Consensus Comes Alive*

The protection of investors remained the sole objective of IIAs until the inclusion of investment liberalization provisions. A few such provisions are found in 1980s-era treaties, but this issue began to take on real significance in the 1990s, in particular with the conclusion in 1992 of the text of the North American Free Trade Agreement and subsequent treaties by Canada and the US. Chapter 11 of NAFTA includes investment liberalization provisions between Canada, the United States, and Mexico, a model followed by most of the Canadian and U.S. treaties since then.⁶ NAFTA does not include a specific provision titled investment liberalization or investment rights, but accomplishes the liberalization objectives by including the “establishment, acquisition and expansion” of investments in the national treatment and most-favoured-nation treatment ob-

³ U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 84 (2012), available at <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

⁴ The first Iranian nationalization case, for example, was heard at the International Court of Justice in 1952: Anglo-Iranian Oil Co. Case (U.K. v. Iran), Judgment, 1952 I.C.J. 93 (July 22).

⁵ The issue of whether such treaties were actually designed to promote investment for the benefit for developing countries, or whether this was more of a marketing ploy to “sell” the treaties, will be discussed in Part III.A, below.

⁶ Of note, the most recently signed treaty by Canada, with China, breaks the Canadian pattern because it has no investment liberalization provisions. See Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Chin., Sept. 9, 2012, available at http://unctad.org/sections/dite/ia/docs/bits/canada_china.pdf. It has not been ratified as of the date of writing.

ligations, Articles 1102 and 1103, subject to the use of scheduled exclusions in the annexes.

Subsequently, the conclusion of the Uruguay Round of trade negotiations introduced investment liberalization into two of the World Trade Organization (WTO) Agreements, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS). GATS included provisions on investment liberalization through its language on “commercial presence”—the so-called Mode 3 of transboundary provision of services. The GATS required a specific listing of sectors or sub-sectors where liberalization commitments would be undertaken by each WTO Member State. Thus, each state could better control the extent of its liberalization commitment through this list-in approach. However, once made, a commitment on liberalization under the GATS cannot be rolled back unless equivalent value in other liberalization commitments is agreed with other Member States.

TRIMS does something else. It uses the trade-related linkage to restrict states from imposing any development-related requirement on an investor, such as local purchasing requirements or local sales requirements, that impact the principles of free trade. This gives investors a large degree of freedom in how to manage product inputs and outputs, but also limits key development-oriented opportunities to link foreign investments with domestic suppliers of goods and services.

More recently, the European Commission has signaled its intent to include investment liberalization demands in investment treaty negotiations it takes on after the shift of investment treaty jurisdiction from the European Union member states to the Commission.⁷ This follows the inclusion of similar demands in the Economic Partnership Agreement negotiations that have taken place over almost a decade between the former colonies in Africa, the Caribbean, and the South Pacific.

The demand for investment liberalization provisions, therefore, continues to grow from major capital exporting states.

C. *The Growth of Investor–State Arbitration*

Commensurate with the growth of investment treaties has been the growth of investor–state arbitrations under those treaties. The first known arbitration under a bilateral investment treaty was in 1987, against Sri Lanka. But the total number of arbitrations under all investment treaties did not begin to rise seriously until after the arbitrations began to materialize under the investor–state dispute settlement provisions in NAFTA. The first NAFTA arbitration was *Ethyl Corp. v. Canada*, initiated in 1996.⁸ This was followed quickly by arbitrations initiated against Mexico in

⁷ *Trade Topics: Investment*, EUROPEAN COMM’N, <http://ec.europa.eu/trade/creating-opportunities/trade-topics/investment/> (last updated Feb. 19, 2013).

⁸ *Ethyl Corp. v. Canada*, NAFTA/UNCITRAL Arb., Award on Jurisdiction (June 24, 1998), 38 I.L.M. 708 (1999).

1997.⁹ On July 22, 1998, two days after the *Ethyl Corp.* arbitration was settled by Canada, the second arbitration against Canada was initiated.¹⁰ In 1999, the *Methanex* case brought the United States into the fray in an important environmental context.¹¹

This rapid growth of NAFTA arbitrations was soon paralleled around the world, using similar arbitration provisions in the growing network of bilateral investment treaties:

1987	1
1995	~20
2000	~50
2005	~230
2008	~330
2011	~450

Importantly, it must be noted that the numbers given are only approximate. This is because an unknown number of arbitrations against states continue to proceed in secrecy. There is no effective way to know how many of these secret cases there may be.

There are multiple reasons for the growth of these arbitrations.¹³ The simple fact that foreign investment has expanded globally suggests an increase in disputes between states and investors would be likely. The growing number of IIAs gave a forum for these disputes to be heard outside of national courts.

But that is unlikely to be the full scope of the explanation. In addition, there was the ease in avoiding domestic courts through international arbitration, even where a specific investment permit or contract had a domestic-law choice-of-forum clause. There was the perception that investor treaties should be broadly interpreted to reflect the purpose of

⁹ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 209 (2002); *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1998), 5 ICSID Rep. 269 (2002). While formally commenced in 1997, the case was signaled with a formal notice of intent to arbitrate in 1996.

¹⁰ *S.D. Myers, Inc. v. Government of Can.*, NAFTA/UNCITRAL Arb., Partial Award (Nov. 13, 2000), <http://italaw.com/documents/SDMeyers-1stPartialAward.pdf>.

¹¹ *Methanex Corp. v. United States*, NAFTA/UNCITRAL Arb., Final Award (Aug. 3, 2005), 16 ICSID Rep. 40 (2012).

¹² *Latest Developments in Investor-State Dispute Settlement*, IIA ISSUES NOTE (U.N. Conference on Trade & Dev.), Apr. 2012, at 3, available at http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf. Over 50 additional arbitrations are known to have been commenced in 2012 as well.

¹³ See, e.g., Jeswald W. Salacuse, *Explanations for the Increased Recourse to Treaty-Based Investment Dispute Settlement: Resolving the Struggle of Life Against Form?*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 105 (Karl P. Sauvant ed., 2008).

protecting investors, which created expansionary interpretations of what had been thought to be fairly limited understandings of international customary law on key issues. This perception is in fact reflected in a number of arbitral awards that expressly take this perspective. There was also the perception of finality in the cases, and that they would be cheaper and faster than local courts. And, there was the increased marketing of international arbitration by major international law firms seeking to generate a boom in business under the treaties, as well as boutique firms that started up primarily for this purpose.

Prior to 1987, and even prior to almost the year 2000, investment treaties were thought to be relatively benign, likely to be used in only rare circumstances. By the end of the first decade of the 2000s, this was no longer the case and it was clear that investor–state arbitration under the treaties was becoming a commonly used tool for dispute settlement. Indeed, the actual filing of official disputes is likely to be just the tip of the iceberg, as governments are widely understood to be threatened with arbitration by foreign investors if a proposed new measure is adopted.¹⁴ What is certain is that investor–state arbitration has shifted from being a shield of last resort to a sword of first resort in many disputes, or potential disputes, between governments and foreign investors.

In short, by early the 2000s we saw rapid growth in the number of agreements, expansion of their scope from investor protections to include investment liberalization, and an exponential growth in the number of arbitrations under these agreements.

III. THE QUESTIONS ARISE

The growth in arbitrations brought the sharp end of investment treaties into clear relief. When the treaties were seen as largely dormant instruments, the sense of “no harm no foul” might have been prevalent. Indeed, investment treaties were the diplomatic photo-op of choice for many states over many years, providing visiting ministers, prime ministers and presidents a ready-made treaty of no consequence to sign during foreign travel. The U.N. Conference on Trade and Development (UNCTAD) hosted multiple rounds of investment treaty negotiations between developing countries and between developed and developing countries where no investments were taking place, on the presumption

¹⁴ It is extremely difficult to chronicle the so-called “regulatory chill impact” of investment treaties whereby threats of arbitration are used to try to fend off new regulations. But it is widely accepted that investors use such threats to “warn” governments of potential consequences if a planned measure is actually taken. Governments, however, generally do not state that the reason for not adopting a measure is due to such threats. However, see Luke Eric Peterson, *First Hearing in Philip Morris v. Australia Arbitration Is Pushed into 2014, as New Zealand Reveals It Is Awaiting Outcome of Australian Cases*, INT’L ARB. REP., Feb. 28, 2013, available at http://www.iareporter.com/articles/20130228_2, for a well documented instance of exactly this type of regulatory chill in practice.

that more was simply better. Then the arbitrations started. And the questions arose:

- What are the benefits of these agreements for developing countries?
- Why should developing countries sign them?
- Why the demand for investment liberalization provisions?
- What role does international investment law play more broadly in the international law on globalization? Whose international law on globalization?
- Why are laws such as environmental laws seemingly so often the target of the investors' claims in arbitrations? What constraints are being placed on legitimate government policy decisions?
- Why do so many of the decisions seem to disagree with other decisions? What can be done to get consistency?
- What are the standards of review and accountability for arbitrators?

The most significant question to emerge, however, was why the regime continued to address only the issue of investor rights one small part of the investment relationship between foreign investors, host states and communities and did not begin to address the full set of relationships.

A. *Do Investment Treaties Attract Investment?*

One of the first questions to arise late in the 1990s and early 2000s was whether, as promised, investment treaties had the impact of attracting new levels of investment. Indeed, the primary reason for developing countries to sign them, according to advocates of these agreements, was that they would attract new investments. In less diplomatic terms, this became the primary marketing point in selling IIAs to developing countries. The World Bank, UNCTAD, the Organisation for Economic Cooperation and Development (OECD), and others became willing and vocal participants in this process. Interestingly, at the time the Abs-Shawcross draft was debated in London in 1959, it was noted that there were significant questions of whether the use of such agreements could be expected to have any impact on investment flows.¹⁵ In the absence of any actual evidence, the leading "development" institutions substituted their presumptions that they would have such an impact.

In 2003, this marketing was called into serious question with a study released by World Bank economist Mary Hallward-Driemeier, famously titled *Do Bilateral Investment Treaties Attract FDI?: Only a Bit . . . and They Could Bite*.¹⁶ This study suggested that there was little to no impact in

¹⁵ Introduction to *The Proposed Convention to Protect Private Foreign Investment: A Roundtable*, *supra* note 2, at 115.

¹⁶ Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* (World Bank, Working Paper No. 3121, June 2003),

terms of attracting investment for developing countries and spawned an enormous number of studies over the next five years. By the end of the decade, it had been largely conceded that any effect of IIAs in attracting investment into developing countries was at best minimal, and more likely did not exist.¹⁷ In other words, the presumed benefit of the deal for developing country partners the basis on which they had been advised to sign the agreements by international organizations and other advocates had simply not been materializing. Moreover, at the same time, these same governments were exposing themselves to the increasing risks of international arbitrations, which were in themselves expensive to manage and litigate.

With the empirical evidence negating this reason for developing countries to join investment treaties, there was a need for a new marketing strategy by supporters of these treaties. That strategy became what is a classic marketing approach: appeal to vanity. As developing countries were growing, they too, it was suggested, would soon become capital exporting countries and would want the same protections that current capital exporters had. No cost-benefit analysis ever accompanied these assertions, just an appeal to join the club and get the same kind of protections as the current outward investors do. As the impacts of the investment treaties begin to unfold, however, such reasoning has become largely ineffective.

B. Why Negotiate Investment Liberalization Provisions? Or, Are They the New International Law of Colonialism?

Although some elements of investment liberalization were negotiated into the WTO Agreements in 1994, the inclusion of broader investment liberalization provisions in the WTO was rejected by developing countries at the 2003 Ministerial Conference in Cancun, Mexico. But the pursuit of investment liberalization simply shifted from the WTO to other forms of agreements, primarily investment treaties.

As already noted, there were some investment liberalization provisions appearing in the 1970s and 1980s, but the primary growth occurred from the 1990s forward. The issue that arises here is not whether investment liberalization is good or bad for developing countries in general, but whether broadly based and forced liberalization that is subsequently not reversible under the treaties is good for them. Any answer to this

available at <http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-3121>.

¹⁷ U.N. CONFERENCE ON TRADE & DEV., THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES, U.N. Sales No. E.09.II.D.20 (2009), available at http://unctad.org/en/Docs/diaeia20095_en.pdf; Karl P. Sauvant & Lisa E. Sachs, *BITs, DTTs, and FDI Flows: An Overview*, in THE EFFECT OF INVESTMENT TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS xxvii, lii–lvii (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

question must be prefaced by the unquestioned fact that investment treaties are not required for governments to liberalize any or all of the sectors of their economy. Indeed, governments of all stripes and levels of development have continuously liberalized and de-liberalized sectors of their economies for many decades without any reference to investment treaties or investment related obligations. This remains a matter inherently within the scope of domestic law and policy on the admission of foreign investment, unless it is limited by an international treaty.

Concerns and questions have arisen from a better understanding by developing countries of the effects of such provisions. In particular, investment liberalization provisions require foreign investors who are given liberalization commitments to be able to invest in an economy on the same basis as domestic investors.

Where such commitments are given, this essentially means that the investor with the most resources can obtain the investments that are available. For the natural resource sectors, this means that developed country investors, or investors from a small number of very large but still developing countries, and a growing number of cash-rich state-owned enterprises and sovereign wealth funds can access natural resources ahead of potential local investors by having greater resources available for exploration and development of properties or paying higher rates at auctions of exploration or development rights.

For the retail and service sectors, it means easy access for foreign investors who have the capital to establish the services or retail shops. Impacts on local service providers, local store owners, etc., cannot be a factor in accepting the investment.

Where does this help developing countries? In theory, it relies on the notion that any investment—all investment—is good investment. Indeed, for a long period of time, the level of investment in a developing country and its trade levels were accepted as proxies for growth and development. But this period has ended, and with it the assumption that all investment is good investment.

In practice, a multitude of factors play a role in determining whether an investment will make a positive or negative contribution to the sustainable development of the host state. And these factors apply to both domestic and foreign investors. In a strong regulatory environment, the legal mechanisms exist to ensure, or at least seek to ensure, that investment will make positive contributions to sustainable development in the host state. But many developing countries do not have these strong regulatory environments, and large-scale investments, often led by foreign investors, can more easily overwhelm the scope of extant regulatory structures.

However, the provisions continue to be demanded and many are in force. Why the demand? Primarily, this can be understood as a reaction to the presence of mature investment markets in the major capital exporting states. On the natural resources side, access to new investments

can be limited due to fewer new resources being available, longer environmental assessment periods, and more regulations applying to operations. Access to new natural resources is essential for businesses in capital exporting countries, either to support domestic manufacturing (the Chinese approach) or to support the marketing of the commodities produced by resource companies on global markets in order to maintain operations and profits. By creating legal rights to access these resources, governments for capital exporting countries help solidify the ability of their companies to thrive in a global market.

A similar reality is found in the services and retail sectors. Markets are largely saturated in many developed states. While the “pie” may expand slightly, the largest competition is for a share of the pie that in many sectors has slow growth. So, growing the pie means finding new external markets in which to sell products or services.

The point here is not that all domestic investment is good and all foreign investment is bad. Neither proposition would be true in any common circumstances. The point is that the ability of developing countries to make this assessment is significantly weakened, if not removed, when the liberalization obligations are taken on without the pre-existing regulatory base for doing so properly. Penalties for altering commitments are often included, or such alteration may require amendments to the treaty. It is this loss of control over the domestic economy that is likely to have a much higher impact on developing countries than developed countries. That this loss of policy space is substituted with broad rights for potential foreign investors is a significant part of what raises the comparison to how previous generations of international law have supported colonialist states and their investors.¹⁸

In addition, what has emerged in the past two decades is a strategy of seeking to link trade negotiations to investment liberalization negotiations. In order to achieve moderate benefits in tariff levels, benefits that are often limited in duration until the next treaty is signed, developing countries have become increasingly pressured to negotiate broad investment liberalization rights. Access to trade markets by developing countries is tied to access to investment markets in developing countries. This was rejected by developing countries at the WTO Ministerial Conference in Cancun, Mexico in 2003, but has continued to be a primary strategy of the EU and other developed countries since then, where negotiating leverage over developing countries is greater on a one-to-one or regional basis. In short, often transient trade gains are tied to negotiating permanent investment rights.

¹⁸ For a fuller discussion on this issue see Howard Mann, *International Investment Agreements: Building the New Colonialism?*, 97 ASIL Proc. 247 (2003).

C. What Role Does the International Investment Law Regime Play in Globalization?

A large part of the international investment treaty regime was built on the premise of supporting ad-hoc international arbitration for individual disputes. A systemic, institution-based approach like what one now sees in relation to trade law was not part of the original negotiating framework. But the consequences of this have now become apparent in a variety of ways. First, for almost every investor right—such as to national treatment, fair and equitable treatment, most-favoured-nation treatment, expropriation, etc.—there are two or three strands of jurisprudence mostly irreconcilable without legalistic gymnastics. The initial response to this by leading supporters of the status quo was that the regime is young, it will sort itself out. But this has, it is submitted, become unacceptable after over 500 arbitrations have been initiated.

Governments need reasonable certainty as to the interpretation of the obligations they have taken on in order to feel reasonably confident that bona fide public policy measures will not be found to have violated a broadly read provision in a treaty. And the system needs certainty that legal correctness in an arbitration decision will be an important factor in its review. Today, the opposite is the case on both counts. There is no certainty for governments due to the competing streams of jurisprudence. The impact of the uncertainty adds to the risk of regulatory chill, as the uncertainty surrounding a large damages award is a state's primary concern if an investor brings an arbitration claim.¹⁹

Due to the standard of review applied to international arbitration awards, legal correctness is not a critical factor, unless the legal error is so egregious as to vitiate the jurisdiction of the tribunal to make the award. This very high threshold derives from international commercial arbitration where finality is a prized value. The misappropriation of the commercial system to these public law disputes has led to the same high standard being applied.²⁰

Given the role of international investment law as a critical element in the international law on globalization—regulating to a significant degree the movement of capital—the lack of consistency and lack of a standard of correctness stand as major drawbacks to its future development. These factors weigh heaviest on developing countries because they have the most need to continue advancing their regulatory environments as com-

¹⁹ Unlike the WTO, where the primary remedy is to bring the breach into conformity with the WTO agreements, which can usually be done in several ways, the principle remedy in investment cases is monetary damages. Multiple cases have awarded damages over \$100 million, and one recent case had an award of nearly \$2 billion, against Ecuador.

²⁰ See *Background Paper on Annulment for the Administrative Council of ICSID*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, 6-7 (Aug. 10, 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11>.

pared to states with highly developed regulatory environments. As discussed below, it is the development of new legislative and regulatory instruments that attracts a large number of the arbitrations against governments. Developing countries have begun to understand the risks involved and are reconsidering the role of investor–state arbitration in future agreements, and the relationship of arbitration to domestic legal processes.

D. Why Are Environmental and Other Social Welfare Laws Such a Target for Investor–State Arbitration?

This question arose early and often. The first NAFTA cases almost all involved environmental protection measures. This has continued around the world with the environment being a direct or indirect factor in multiple cases. More recently, this has been extended to claims against anti-smoking legislation brought by big tobacco. Often phrased as challenges to the policy space of states for legitimate regulation, the balance between government rights to regulate and private investor rights has been a theme of concern since the mid-1990s.

Here, some decisions have shown a reasonable balance of views, while others continue to start from a premise of strong investor rights against regulatory impacts on investment operations. In some cases, attempts to limit the scope of these clauses through narrower drafting have been made, most specifically in relation to expropriation and fair and equitable treatment (FET). But even much clearer language may not succeed. Christoph Schreuer recently opined:

The motive behind the insistence that FET is identical with the minimum standard under customary international law is evidently to minimize its practical impact. But the effect of this insistence may well be the opposite of what is intended by those who advocate it. *Dolzer* has pointed out that the more likely consequence will be to accelerate the development of customary law through the practice on FET clauses in treaties.²¹

In the face of this type of apparent determination for broadening the scope of such provisions, uncertainty will remain a significant factor. While less concern is now found in relation to claims for indirect expropriation, the concern remains, and most certainly in relation to FET clauses.

One reason for so many challenges to environmental and other health and social welfare laws is that they can impact business in a significant way, including the prohibition of certain production methods and products. Yet, historically, it has always been the purview of governments to regulate in the public interest. Not until investment treaty arbitration

²¹ Christoph Schreuer, *Fair and Equitable Treatment, in PROTECTION OF FOREIGN INVESTMENTS THROUGH MODERN TREATY ARBITRATION: DIVERSITY AND HARMONISATION* 125, 131 (Anne K. Hoffmann ed., 2010).

began to emerge as a legal force in the 1990s was this right to regulate challenged under international law. But such challenges continue today.

International arbitration makes it easy to challenge these measures. The governing law is not the law of the host state but that of the treaty, and only a majority of the arbitrators must be in agreement to win an award. Moreover, today third-party funding and contingency fee arrangements with law firms are available for claimants, meaning they face zero financial risk if they lose an arbitration. This, combined with the uncertainty in the content of the law and the vagaries of the arbitration process, make claims against such laws easy to mount, and the threat of such arbitrations particularly difficult for developing countries to address during the process of making regulatory decisions.

E. Questioning the Limitation of the Regime to Investor Rights: The Emergence of Sustainable Development as the Alternative Paradigm

Probably the most challenging issue in terms of the questions raised over the course of the 2000s concerns the scope of the regime. As investor rights began to emerge as a strong counterpoint to the ability of governments to regulate in the national interest, broader issues of the relationship between investment and development, and investment and sustainable development, began to emerge. How could investment treaties seemingly work in opposition to this central goal for developing countries, rather than in support of it?

This question poses a number of challenges to the foundation of the existing regime. In particular, if the premise of the question is correct, then the purposes of the regime have to be altered, and with that the scope must be altered to reflect new purposes. It requires a shift in thinking from all investment is good investment (and developing countries should be happy to have any at all!) to a recognition that states have a right, and indeed a duty, to seek to ensure that investments make a positive contribution to their sustainable development. It requires a shift in focus from looking at the quantity of investment as the only issue, to the quality of that investment as the key issue.

From a sustainable development perspective, the link to investment is essential. Whatever sector of the economy one wishes to consider—energy, transportation, manufactures, chemicals, mining, etc.—shifting from unsustainable production methods and products to sustainable ones requires new investment. Investment in research and development, new technologies, new production facilities, new product chains, etc. While governments do make investments in research and development, industry has a much larger role to play today in comparison to government, and certainly the primary role to play in bringing new technologies and products to the global market. Industry has to be involved and indeed play the leading role in promoting these investments to be made. Governments can send signals and can ensure new directions are set out clearly. They can ensure that companies that do not want to make the

needed investments do not have the opportunity to establish themselves in new markets. But government cannot make the primary investments needed today to move from unsustainable to sustainable practices and products; they must come from the private sector.

From a purely environmental perspective, foreign direct investment (FDI) provides a very valuable way to disseminate new technologies and processes, and thus to more rapidly advance the goal of sustainable development at the different levels of communities, states, and globally. FDI, from this perspective, is not only desirable but essential to meet the challenges of sustainability as quickly as possible.

From a broader sustainable development perspective however, taking fully into account social and economic development factors as well as environmental, more subtle approaches are needed. Poverty eradication and economic and social development must be equal factors. And the protection and promotion of human rights is both a necessary goal and a measure for the achievement of sustainable development. Indeed, in many instances the instruments used to achieve human rights and sustainable development, for example the right to food and water, will be one and the same.

This presents a wide range of elements for consideration in terms of how to reflect them in an investment law regime. Yet, with the growing acceptance of this premise, approaches to establishing the full relationship between sustainable development and investment have been developed. As will be seen below, they go far beyond what can conceivably be accomplished in the regime by adding exceptions and counterclaims, as is discussed elsewhere in this Issue.²² Indeed, some fundamental shifts must be made in the regime to incorporate these elements. For some, this is a daunting task and one that should not be taken on by the investment regime—the status quo with a little tinkering at the margins is good. For others however, it is recognized that, absent fundamental change, the investment law regime will begin to reverse its penetration and diminish in legitimacy as its focus on investor rights and freedom of investment proves to be of less and less value to developing countries.

IV. ELEMENTS OF THE SUSTAINABLE DEVELOPMENT APPROACH TO INVESTMENT TREATIES

Perhaps the largest difference between the concept of using exceptions or counterclaims or other similar approaches is that they can, at best, only adjust for excessive obligations being imposed on states as a result of overly broad interpretations of existing treaty texts. In other words, they can reduce the harm actually or potentially done to seeing investment as part of a sustainable development process. But they cannot

²² See Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461 (2013); Kenneth J. Vandeveld, *Rebalancing Through Exceptions*, 17 LEWIS & CLARK L. REV. 449 (2013).

adequately, it is submitted, seek to harness the positive side of the relationship: that FDI done well can make very significant contributions to economies, both developing and developed, and to sustainable development at the local, national, and global levels. FDI can put in place elements that promote these positive impacts by signaling them in the treaty and by clearly enabling governments to utilize tools and measures that promote such results.

There is a growing international consensus that more is needed from investment treaties if they are to have a meaningful future, or any future at all. This consensus is increasingly revolving around the sustainable development paradigm. And the critical elements for promoting this positive relationship have begun to emerge with a significant level of consistency.

Perhaps one can site the origins of this fuller approach to the International Institute for Sustainable Development's *Model International Agreement on Investment for Sustainable Development*, (IISD Model Agreement) published in 2005.²³ But much has happened since then and the approach has been developed though considerable effort, both directly and indirectly.

Three new projects from intergovernmental organizations completed in 2012 provide evidence of this continuing shift to a new consensus. In June 2012, UNCTAD published its *Investment Policy Framework for Sustainable Development*.²⁴ In July 2012, the Southern African Development Community (SADC) completed work on its *SADC Model Bilateral Investment Treaty Template with Commentary*.²⁵ And in August 2012, The Commonwealth Secretariat launched its Guide, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*.²⁶

In addition, the work of Professor John Ruggie as Special Representative of the Secretary General on Business and Human Rights provides a slightly different window on the issues, but one no less committed to seeing changes in the relationship between investors and their invest-

²³ HOWARD MANN ET AL., INT'L INST. FOR SUSTAINABLE DEV., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT: NEGOTIATOR'S HANDBOOK (2d ed. 2006), available at http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf.

²⁴ U.N. CONFERENCE ON TRADE & DEV., INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2012), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.

²⁵ S. AFRICAN DEV. CMTY., SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>. Note: the present author served as an advisor to SADC on this process.

²⁶ J. ANTHONY VANDUZER ET AL., INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE FOR DEVELOPING COUNTRIES (2012), available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf.

ments on the one hand, and the communities and states they invest into on the other hand.²⁷

All of these projects, and most notably the three that have produced materials specifically related to the negotiation of investment treaties, go beyond the perspective of limiting actual or potential harm done by such agreements to look also at what can be done in a positive and promotive way to enhance the relationship between FDI and sustainable development. Each covers a similar range of issues:

- linking investment and sustainable development as an objective
- investor rights
- investment liberalization
- state rights
- obligations on investors
- dispute settlement

UNCTAD's Framework defines this as the new generation of investment treaties, a view implicitly recognized in the other two documents.

A. *Linking Investment and Sustainable Development as an Objective*

A frequent issue in investor–state arbitration has been the focus in treaty preambles on investor rights as a rationale for giving expansive interpretations to the traditional provisions on investor protections. To end this interpretive approach, the new models expressly endorse referring to sustainable development as the broader goal of the investment agreements, rather than the protection of investor rights. This reorients the interpretive role of the preamble into a more balanced approach that requires a greater recognition of ongoing state rights and responsibilities even in the presence of investor rights. Given the ongoing propensity of some arbitrators to continue the expansive interpretation of these rights based on earlier preambular language,²⁸ this shift has potentially significant impacts.

²⁷ Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie); Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State–Investor Contract Negotiations: Guidance for Negotiators*, U.N. Doc. A/HRC/17/31/Add.3 (May 25, 2011).

²⁸ One of the most recent examples of this is *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, ¶¶ 431–33 (Mar. 3, 2010), <http://italaw.com/sites/default/files/case-documents/ita0445.pdf>.

B. *Investor Rights*

The recommendations for articulating investor rights suggest that they be narrowed in each case. National treatment is more carefully drawn out. Most-favoured-nation (MFN) treatment is subject to clear limitations, depending on the model, excluding dispute settlement issues and/or other investment treaties either in whole or in part based on whether they were concluded before or after the agreement in question. The point of this latter approach is to ensure that more narrowly drawn provisions are not simply overridden by the inclusion of an MFN provision that allows pre-existing treaties with broader language to be used instead of the newer provisions.

The fair and equitable treatment provision is subject to considerable thought in all three texts. The primary trend is to suggest avoiding this provision, as seen expressly in the SADC document. But in all cases, limiting language is suggested should states continue to include this provision. The SADC Model goes one step further to suggest a very different formulation based on language derived from domestic administrative law standards of due process and fair administrative practice, without any reference to the controversial international law language of FET.

Other examples are seen in relation to:

- The Definition of Investment: Language is suggested to either limit the scope of an asset-based approach, or alter the approach to an enterprise-based definition that protects the assets of an operating enterprise, but not, for example, intellectual property rights not tied to an operating business in the host state.
- Expropriation: Recommendations tend towards very clear language that ensures that public welfare regulations adopted by a state to protect the environment, health, etc. are not considered as indirect expropriations. Such language tends to go farther than the language in the U.S. Model BIT of 2012 by stating categorically that such regulations are not expropriations, rather than that except in undefined rare circumstances they are not expropriations as per the U.S. Model text.
- Repatriation of Capital: While the principle of an investor's right to repatriate capital invested and profits or other returns on investment remains recognized in the new models, the scope for exceptions has expanded to better enable states to apply capital controls in times of economic crisis. While generally stated as time limited, the exceptions also tend toward self-determining rights, akin to national security determinations by states as a basis for exceptions to treaty rights of foreign investors.
- Hiring of Expatriate Employees: Recommendations here tend towards the inclusion of a requirement that the hiring of expatriate personnel be tied to obligations for training local employees for more senior employment positions, both in terms of management levels and technological skills. This reflects the view that one of the major presumed benefits of FDI—skills

transfer to local personnel—be made more concrete in the treaties.

- **Umbrella Clauses:** Umbrella clauses are provisions in a treaty that say, in essence, that the government undertakes to fulfill all of its other promises or obligations to investors, in whatever form they have been undertaken. Umbrella clauses allow an alleged breach of any such obligation or promise to be arbitrated under the treaty, rather than in the normal dispute settlement process available in the host state. These clauses are generally rejected in the new models, as well as formulations similar in effect, such as the U.S. Model BIT, which includes investment permits and investment contracts within the scope of the dispute settlement process. Rather, the use of treaty-based dispute settlement is kept more tightly tied to the obligations expressly set out in the text of the treaty itself.

C. Investment Liberalization

Investment liberalization is not favoured for inclusion in the treaty models. The more favoured approach is the inclusion of a simple provision saying that investment shall be promoted and accepted into each country in accordance with their domestic law. In some cases this is tied to language that requires the domestic law to be applied in good faith in making decisions relating to the admission of investments. This provides would-be investors with a degree of protection from inappropriate use of government discretion in decision-making, but not with a right of establishment on national treatment terms. Perhaps the clearest example of where this might lead to a right of action by a would-be investor is if the decision is made based on bribes paid to a decision-maker by a third party to ensure a favorable decision for that other party.

To the extent the new models recognize that states may choose to include investment liberalization provisions, the recommendations are for a GATS-like approach of positive listing of commitments, rather than the NAFTA-like approach of broad obligations subject to exclusions listed in an Annex. This provides better control for states over the liberalization provisions.

With the general rejection of investment liberalization, one finds the rejection or non-inclusion of prohibitions on performance requirements. Such requirements in various treaties have gone beyond what is required in TRIMS and have constrained governments from making basic economic development linkages to the domestic economy a requirement for foreign investors.

Not only are such provisions rejected, but the models go further to reflect the right of states to impose such conditions, as long as this is done prior to an investment decision being finalized by the investor. This ensures the rules of the game are clearly understood in this regard before the investment is made. This approach is consistent with actual international practice broadly accepted as best practice in many sectors

where large-scale investments are made. In short, this approach reflects not theoretical models of investment liberalization and deregulation under the Washington Consensus, but the actual emerging practice that leading corporations are operating with.²⁹

D. State Rights

State rights to regulate in the public interest and for development purposes are expressly noted in the new models. This provides a direct counterpoint for understanding and interpreting the scope and application of investor rights. These rights are generally not stated as exceptions to investor rights, but rather as fully articulated rights of states. This is an important difference, as exceptions to investor rights will generally be narrowly interpreted, while affirmative rights must be given full and equal interpretive force in any arbitration.

Additional areas of state rights in the new models have included a right to accurate information from the investor prior to the investment being made. This is intended to ensure a sound basis for decision making in relation to proposed investments.

E. Obligations on Investors

The inclusion of obligations on investors is perhaps the most significant new element in the new model for investment treaties, and the most controversial. Part of the controversy is conceptual, relating to the ability to enforce them in particular. Part is more ideological: many believe that investment treaties should be only about investor rights and freedom to invest with as few requirements or obligations as possible, and should not seek to put in place minimum standards of conduct for investors to have the benefits of the agreements. The new models clearly reject this latter ideological approach, and seek new avenues to promote the enforcement of the investor obligations, generally tied to the use of the investor-state dispute settlement process by investors. The models either limit the ability for such use when an investor has not complied with its obligations or admit counterclaims for damages resulting from breaches of the obligations.³⁰

Suggested investor obligations generally track similar issues:

- **Environment**: This includes minimum international standards such as those of the International Finance Corporation (IFC)

²⁹ This is seen most clearly in the International Bar Association's Model Mine Development Agreement (MMDA) provisions on economic and social development. MINING LAW COMM., INT'L BAR ASS'N, MODEL MINE DEVELOPMENT AGREEMENT 82 (2011), available at http://www.mmdaproject.org/presentations/MMDA1_0_110404Bookletv3.pdf.

³⁰ The context for suggesting counterclaims here, as compared to suggesting counterclaims under the existing treaty models, is very different due to the fuller surrounding context.

for environmental assessment and onward environmental management where domestic law is below these international standards.

- Labor: Application of the International Labour Organization's Core Labour Standards.
- Human Rights: Recognition of the responsibility of investors to protect and promote human rights and not to be complicit in the violation of human rights by government or para-military entities.
- Economic and Social Development: The need for FDI to provide economic and social development benefits to the local communities through growing economic linkages, local purchasing of goods and services, training opportunities, health and education commitments, and other possible opportunities. Gender equality is also a feature. In no cases are precise prescriptive standards included, but the principle of the need for active engagement in this regard is clear.
- Anti-corruption and Anti-fraud: The obligation on investors to avoid corruption and fraud in the making of investments was first made clear in arbitration decisions.³¹ The general approach is to tie such obligations to the jurisdiction of any potential investor–state dispute settlement tribunal, denying jurisdiction for the breach of these obligations.
- Corporate Governance Standards: Requirements to apply generally accepted accounting standards and to avoid transfer pricing are included here.

These basic obligations reflect international standards under the IFC, found in the results of Professor Ruggie's work, in existing sectoral standards from accounting to mining, and so on. Their inclusion in new models of investment treaties is not ground-breaking in this sense, but affirms a new relationship between investors and host states that is increasingly seen as critical for inclusion in the text of investment treaties.

F. Dispute Settlement

For many if not most developing countries, the bloom is off the rose of investor–state dispute settlement. None of the three new models at the core of this discussion are unequivocally in support of the existing investor–state system. For the SADC Model, the clear recommendation is simply not to include such a mechanism in future BITs. For the other two, the recommendations are perhaps more subtle. These subtleties are

³¹ World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 143–46 (Oct. 4, 2006), <http://italaw.com/documents/WDFv.KenyaAward.pdf>; Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶¶ 240–44 (Aug. 2, 2006), http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf; see S. AFRICAN DEV. CMTY., *supra* note 25, at 32.

reflected as well in the SADC Model for those states that do decide to include investor–state dispute settlement. Among the issues raised:

- Clarifying the preconditions for recourse to investor–state as absolutely legally binding, in contrast to some arbitral decisions that have rather inexplicably defined them as flexible or non-binding upon the tribunals, including notice periods;
- Revisiting the inclusion of a provision on exhaustion of local remedies prior to recourse to international arbitration (a requirement in the SADC Model);
- Limiting the use of investor-state arbitration to alleged breaches of the specific treaty obligations towards investors, and excluding the use of umbrella clauses or mechanisms that include “any investment dispute” or disputes over investment contracts;
- Deferring to other dispute settlement fora where they are specifically set out in investment contracts or permits where breaches of these instruments are part of the underlying claim to a breach of the treaty;
- Ensuring that tribunals cannot issue awards for punitive damages;
- Addressing the conflict of interest issues many see as rampant in the current arbitration system, most notably those situations where arbitrators act at the same time as counsel in other arbitrations; and
- Including a clear provision allowing the state parties to the treaty to issue binding interpretive statements, based on the NAFTA model.

G. Transparency

Full transparency of the investor–state arbitration process is another consistent recommendation of the three new models. This is not new in IIAs, but is also not universal. The clear recognition of transparency as a basic standard for the legitimacy of the investor–state process is evident in the three texts.

H. Institutional Reform

Institutional reform is a more difficult issue to address in model treaties, and thus it remains largely absent from them. However, issues such as legal correctness in final decisions and appeals processes, both tightly tied to institutional reform, remain important issues to grapple with. It is noteworthy that after approximately 125 General Agreement on Tariffs and Trade (GATT) arbitrations, the WTO established a process to ensure consistency and legally correct decisions before they become binding on states. With the investor–state system under investment treaties now passing 500 arbitrations, no such basic standard of either consistency or correctness is being applied. And efforts to restrict the application of legal

correctness standards, even as it relates to the jurisdiction of arbitral tribunals to hear a case on the merits in the first place, continue in the U.S. Supreme Court and elsewhere, with no recognition of the critical differences between private arbitration and the very different realm of investor–state arbitration.³²

V. CONCLUSIONS

For those who argue that the current IIA regime is correctly defined as being limited to investor rights and freedom of investment, then the approach of tinkering at the margins through exceptions to these rights or counterclaims within the current investor–state dispute system will suffice to address any minor issues.

Yet this assessment, it is submitted, should be considered against the view that is rapidly gaining currency: that the current scope of IIAs is insufficient to reflect the fuller relationship between investment and the ultimate goals for such investments—sustainable development. Those who take this approach are beginning to act in more concrete ways: Brazil has rejected ratifying any of the 14 BITs it has signed; South Africa has initiated its promised process of beginning to withdraw from existing BITs and has not ratified its signed agreement with Canada or signed any BIT with the United States;³³ Ecuador continues to review its options in this regard; Venezuela has withdrawn from ICSID; most developing countries did not enter into Economic Partnership Agreements with the EU, due in part to overly large demands on investment liberalization and the lack of related development funding or effective trade access. In addition, leading actors in various industrial and natural resource sectors have already recognized the legitimacy of the demands of developing countries to relate their investments to sustainable development objectives in the host states. Investment treaties are now playing catch-up to this operational reality.

So what are the prospects of such advances being made? Contrary to the perception of many, these prospects depend on whether developed countries that currently see themselves as the primary beneficiaries of these agreements as the home state of capital exporting companies begin to recognize the need for a broader set of principles to be brought into play. As long as leading capital exporting states cling to the objectives of investor protection and investment liberalization, future growth of the regime will be difficult.

³² For a recent view on this see the amicus curiae submission of a group of U.S. arbitration law professors, Motion for Leave to File Amicus Curiae Brief & Brief of Professors & Practitioners of Arbitration Law as Amici Curiae in Support of Writ of Certiorari at 25–26, BG Grp. PLC v. Republic of Arg., No. 12-138 (U.S. Aug. 29, 2012), available at <http://www.scotusblog.com/case-files/cases/bg-group-plc-v-republic-of-argentina/>.

³³ The United States and Canada are, nonetheless, the two biggest capital exporting countries to South Africa since the end of apartheid.

The reason developed countries are reluctant to expand the investment treaty model can only be surmised at present. Presumably, this reflects the intent of seeing as few obligations on their investors abroad as possible, which in turn limits their liabilities and related expenses to meet such obligations. As the vast majority of FDI stock remains from traditional capital exporting countries, the continued maintenance of a rights-based regime with no obligations is likely seen to reflect their interests.

On the other hand, as states, and especially resource rich states, increasingly look at withdrawing from the current regime entirely, the more recalcitrant developed states may find greater motivation for rethinking current approaches.

In addition, the need to understand investment law as part of a broader part of international law relating to globalization suggests the need for a better method of integrating human rights, environmental, and other areas of law in a more transparent and conflict-free dispute settlement environment. The systemic and institutional reforms needed for this purpose most certainly cannot be read into the regime through exceptions or counterclaims approaches or other limited “fixes.”

In short, the international investment law regime appears to be at a crossroads: moving forward to reflect the broader role on investment in the sustainable development process, or beginning to see itself shrink in the face of withdrawals and non-participation by key states. One thing is certain: the argument that the regime should continue as it has just because that is what it has done in the past will not hold sway. To continue to base a modern international investment law regime on objectives tied to the context of the 1950s and 1960s and failed Washington Consensus economics is to doom it to its own failure.