TOWARD A MINIMALIST SYSTEM OF INTERNATIONAL INVESTMENT LAW?

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I. INTRODUCTION

At the keynote address of the conference for which I have prepared these brief remarks, it was forcefully argued that the current system of international investment law, which is dominated by more than 2,000 roughly similar bilateral investment treaties (BITs), is undoubtedly a good thing.[1]

My own role here is to offer some qualifications and perhaps some mild criticisms of that position. At the outset let me admit that I am very much an outsider, far removed from the rarified world of international investment law practice. In offering my thoughts, I am reminded of a cartoon on the door of my law school's bookstore, in which the character laments that "everything is controlled by a small evil group," and the punchline, "to which unfortunately nobody I know belongs." I think it is healthy to always keep in mind the possibility that criticism of the status quo might at least subconsciously be driven by the fact, and it often is one, that the critic is effectively excluded from sharing the status quo's most tangible benefits, as neither he nor any of his friends are the ones controlling the world. But it is also healthy to be sensitive to the possibility that praise of the status quo by those who do control the world might itself be deeply colored by the fact that those insiders benefit immensely from current arrangements, not just, or not even, in purely financial terms, but more broadly in terms of the accumulation of social or symbolic capital and the psychological satisfaction that, I presume, comes from being placed in a position to authoritatively declare (or invent) binding, universal principles

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1. Hon. Stephen M. Schwebel, Former President of the Int'l Court of Justice, Distinguished Speaker at the Suffolk University Transnational Law Review Investor-State Arbitration Symposium: Perspectives on Legitimacy and Practice, The Overwhelming Merits of Bilateral Investment Treaties (Oct. 31, 2008).

of international law, and to apply those principles against sovereign states large and small, powerful and weak.[2]

My main point is that we should carefully consider whether investment treaties, while perhaps a good thing in some respects, are nonetheless largely unnecessary. My own view is that for the most part they *are* largely unnecessary, and perhaps a bit dangerous too. How do we mitigate that danger? Some on the political left have suggested that we radically expand and complicate international investment law by attempting to use international treaties to impose various social and environmental obligations on investors.[3] Those who generally support the current system, and who tend to view it teleologically as but an intermediate step in a longer journey toward a truly universal system of international legal rights for investors,[4] suggest their own complications and extensions, focused mostly on crafting appellate mechanisms designed to ensure that the decisions of tribunals are both consistent and "correct."[5]

My own suggestion, which I modestly offer for consideration as more of a proto-idea than a fully developed critique or plan of action, is to consider whether we would be better served by simplifying or minimalizing the current system. What would a minimalist system of international investment law entail? Most importantly, it would largely abandon universalism at the international level in favor of particularlism and diversity at the domestic level. By this I mean that it would put the primary onus for defining and defending the reciprocal rights and obligations of host states and foreign investors on those parties themselves, turning to municipal law and investment contracts as the primary source of law, and to municipal courts as the primary (default) forum for resolving disputes.

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2. *Cf.* YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER ch. 2 (1996) (discussing "symbolic capital" enjoyed by international commercial arbitrators).

3. *See* Int'l Inst. for Sustainable Dev. *IISD Model Agreement on International Investment*, http://www.iisd.org/investment/model (last visited Feb. 20, 2009) (reviewing nature and purpose of international investment agreements).

4. *See generally* Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27 (2004) (exemplifying teleological view).

5. *See generally,* Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?*, 7 PEPP. DISP. RESOL. L.J. 269 (2007) (discussing use of appellate mechanisms in international arbitrations).

My thoughts can thus be placed within an unfortunately small (but hopefully growing) comparative institutional literature that seeks to question the need for, or the desirability of, investment treaties as they currently exist by comparing the current system with alternative (but often hypothetical) institutional arrangements.[6] I hope that these suggestions will be controversial, not in a juvenile sense of provoking for provocation's sake, but in a serious way that spurs deeper and more thoughtful analysis of whether we need the system of international investment law that we have, and if we don't, then what a workable and sufficient alternative system might look like.

The article proceeds as follows. First I provide a very brief overview of the history of the current system. I then discuss what I view as the most troublesome aspect of the current system: that it gives private judges enormous discretionary power to make what are essentially political decisions about the proper balance to strike between investors' rights and those of host states, political decisions that states are effectively unable to overturn. The final section suggests a number of ways in which policymakers might create a minimalist system of international investment law that strikes a different, and perhaps more desirable, balance between the desires of investors to have access to international law and international tribunals to protect their investments, and the desires of states to maintain significant and primary control over important policy decisions.

II. A BRIEF OVERVIEW OF THE CURRENT SYSTEM

In the interest of space, and because the story has been told many times in many places, I will offer only a brief sketch of the basic contours of the investment treaty phenomenon.[7] In the years immediately following World War II, the world's most economically advanced countries began concluding treaties, often with developing countries, that articulated various rights for

6. *See generally,* Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007) [hereinafter *Integrating Investment Treaty Conflict*] (comparing methods of resolving international investment disputes); Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138 (2007) (exploring alternative methods for resolving international disputes).

7. *See generally* Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405 (2008) [hereinafter *Conceptual Difficulties*] (providing in-depth discussion of BITS).

each others' foreign investors. Sometimes these investment-related provisions were in more general treaties that dealt mostly with trade issues, such as any number of post-World War II "friendship, commerce, and navigation" treaties entered into by the United States. However, by the late 1950s some developed countries, such as Germany, France, Switzerland, and the Netherlands, had begun concluding investment-only treaties. The United States began pursuing its own, modern investment-only treaty program in the late 1970s. These investment-only treaties were, and still are, usually bilateral, involving just two states, and have become known in shorthand today as "BITs," bilateral investment treaties. Today there are more than 2,000 such treaties in force, including investment chapters in bilateral and multilateral free trade agreements (such as Chapter 11 of the North American Free Trade Agreement, or NAFTA). With one major exception, the Energy Charter Treaty, attempts at multilateral investment treaties have failed to gain significant traction. The Organization for Economic Cooperation and Development (OECD) sponsored negotiations for a Multilateral Agreement on Investment (MAI), but these negotiations famously collapsed and there seems to be little sign of revival any time soon.[8]

Bilateral investment treaties thus remain the primary source of international legal protections for foreign investments. While there are certainly important differences between particular treaties, and while both the scope and the language of the treaties has changed over time, as a general matter the treaties

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8. However, the WTO's agreement on "trade related investment measures," or TRIMs, does regulate important aspects of international investment law. In particular, it bans the application of certain policies, often referred to as "performance requirements," which developing countries have viewed in the past as necessary to ensure that foreign investment played a positive role in their country's economic development. While there is, to my knowledge, no empirical evidence that performance requirements harm development, foreign investors tend to complain to their home governments about them, and TRIMs accordingly bans many of them. The desire by investors to remove performance requirements and other barriers to entry, rather than the desire to protect their investments against expropriation, seems to have been the primary motivation for the modern U.S. investment treaty program; this point is evident in the Senate subcommittee hearings conducted around the time of the launching of the program. *See generally U.S. Policy Toward International Investment: Hearings Before the Subcomm. on Int'l Economic Policy of the S. Comm. on Foreign Relations*, 97th Cong. 2-12 (1981) (statement of Fred Bergsten, Senior Fellow, Carnegie Endowment for Int'l Peace) (discussing U.S. policy towards international investment).

follow a common model. The rights they offer to investors are generally wholly reciprocal; a treaty between the United States and Kazakhstan, for example, will provide United States investors in Kazakhstan with the same rights that the unlikely Kazak investor would enjoy, under the treaty, in the United States. And the rights offered typically include a panoply of broadly worded, potentially overlapping substantive guarantees—the right of the investor to be treated in accordance with customary international law (the so-called "international minimum standard," whatever that may be), the right to be treated "fairly and equitably," or to receive "full protection and security," or the right to be free from "arbitrary" government action, or to receive the same treatment as domestic investors (so-called "national treatment") or as investors from third states (so-called "most favored nation" treatment). The treaties contain guarantees against uncompensated "expropriation" or measures "tantamount to expropriation" by the host state (with "expropriation" usually undefined), and typically also guarantee the investor the right to freely transfer the investment and its returns out of the host state. Beginning in the 1980s, developed countries began routinely coupling these substantive promises with treaty-based arbitration provisions that gave investors the unilateral right to initiate binding arbitration against host states to enforce their treaty rights, generally without any corresponding obligation to first exhaust local remedies. This arbitration might take place before the International Chamber of Commerce (ICC), or be organized as an ad hoc arbitration, perhaps under the UNCITRAL Rules, or take place under the aegis of the International Centre for the Settlement of Investment Disputes (ICSID), a specialized dispute settlement body attached to the World Bank. In any case, international treaties governing the enforcement of arbitral awards (such as the New York Convention or the ICSID Convention) would ensure that arbitral awards would be very difficult to challenge in domestic courts, and could be readily enforced against host states worldwide.

The vast majority of BITs were signed and entered into force in the 1990s, and not coincidentally, the 1990s and early 2000s saw an explosion in investor-state arbitrations, which in the past had been quite rare. For example, Professor Franck identifies just two publicly available investment treaty awards issued between 1990 and 1996; in 2005 alone, tribunals issued 16

such awards.[9] Another metric is the number of cases filed with ICSID. For example, as of the date of writing these remarks, ICSID has concluded 152 cases—all but 26 of which were initially registered since 1990—and has 126 additional cases pending.[10]

III. The Problem of Political Control

The debates between supporters and critics of this rapidly expanding and increasingly well-used system of international investment law have thus far tended to focus on a relatively small number of issues and claims. The most consistently voiced critiques are twofold. First, critics on the left (and particularly those associated with the environmental movement) have argued that investment treaties, and particularly NAFTA Chapter 11, interfere with state sovereignty to regulate in the public interest.[11] A second group of observers, composed to a large degree of those who generally support the basic contours of the current system, have argued that inconsistent awards may be causing a "legitimacy crisis" that should be resolved by creating some sort of investment treaty appellate mechanism—a global Supreme Court of international investment law—that would correct "incorrect" awards.[12]

The sovereignty critique of investment treaties reflects the sense that the treaties are undesirable because they impose

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9. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 46 (2007) [hereinafter *Empirically Evaluating Claims About Investment Treaty Arbitration*].

10. Statistics on ICSID's caseload are available on its website, International Centre for Settlement of Investment Disputes (ICSID), http://icsid.worldbank.org/ICSID/Index.jsp (last visited Feb. 22, 2009).

11. *See generally* David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise (2008) (discussing link between investment rules and state constitutions). *See also* Barnali Chodhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vand. J. Transnat'l L. 775, 807 (2008) (discussing lack of equilibrium between investor rights and sovereign rights of state).

12. *See generally* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing International Investment Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005) [hereinafter *The Legitimacy Crisis in Investment Treaty Arbitration*] (discussing problem of legitimacy in context of inconsistent awards), Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 Vand. J. Transnat'l L. 37 (2003) (discussing legitimacy challenges of modern investment law system).

upon developing countries certain rules of international law that constrain the ability of states to choose, through democratic processes, particular developmental or regulatory policies.[13] The easy and perhaps overly glib response to this critique is to argue that sovereignty necessarily entails some sovereign capacity to bind one's freedom of future action, that there is precious little evidence that developing countries were in any real sense *coerced* into accepting the BIT regime,[14] and that their voluntary choice to sacrifice a margin of their sovereignty should be respected as an acceptable, justifiable, and necessarily binding one. Indeed, there is evidence that most developing countries have accepted the regime quite willingly in anticipation, perhaps unrealistically, of receiving certain benefits in return, such as greater flows of foreign investment.[15]

There is much to be said for the logic of this position, but I think it misses a larger point, which is the possibility that the sacrifice of sovereignty that BITs arguably represent is not the sacrifice that developed or developing states imagined it was going to be when they originally consented.[16] The world's rich and

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13. As Schneiderman puts it, "The investment rules regime aims to secure these advantages [for foreign investors] over democratic rule by limiting, through constitution-like edict, the capacity of self-governing communities to intervene in the market." SCHNEIDERMAN, *supra* note 11, at 9.

14. *But cf.* Olivia Chung, *The Lopsided International Investment Law Regime and its Effects on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 957-59 (2007) (suggesting developing countries were coerced into accepting BIT regime).

15. "The quid pro quo for . . . attracting [foreign investment] is making oneself vulnerable to direct claims by individual investors" through investment treaties. Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 56 (2008). Evidence is mixed as to whether BITs increase foreign investment; I have presented evidence that they do not, and, more importantly, made the theoretical case that we should not expect them to. *See generally* Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC. REV. 805 (2008) [hereinafter *Bilateral Investment Treaties*] (concluding BITs have little or no effect on foreign investment).

16. *See, e.g.*, Brower, *supra* note 12, at 45 ("virtually no one foresaw [NAFTA's investment] Chapter 11's capacity to interfere with the legislative, executive, and judicial systems of the NAFTA Parties . . . This unexpected proliferation of claims has disturbed many observers . . . ."). Judge Brower, on the other hand, has suggested the opposite point of view: that the NAFTA Parties "are getting [in Chapter 11] precisely what they bargained for." Charles N. Brower & Lee A. Steven, *Who Then Should Judge? Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 195 (2001). As Professor Howse has observed in regard to the international trade law system:

less-rich states appear to have jumped on board a train whose ultimate destination remains unknown, and whose direction is to a large degree outside of the passengers' control. It might also be said with some fairness that the passengers' ability to *exit* from the BIT train is rather limited, especially to the degree that BIT jurisprudence purports to enunciate principles of customary international law, binding upon all states regardless of the absence of any specific treaty commitments.

This fear of the ultimate destination of international investment law, and distrust in the fact that control over the destination has been transferred to a significant extent from states to arbitrators—finds its clearest expression in the debate over "regulatory expropriation." Critics of investment treaties argue that there is a serious danger that tribunals interpreting the treaties' vague expropriation provisions, which will often implicate customary international law on the subject, will interpret those provisions expansively to require states to reimburse foreign investors whenever a change in government regulations harms the profitability of the investment.

It is fair to admit that early worries on the regulatory expropriation account have so far not been borne out in practice,[17] a

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> The problem is not only that democracy implies the ability of a polity to change its heart without catastrophic consequences—at least on most matters. There is also the difficulty of limited knowledge *ex ante* of the effects in practice of a given set of rules. This difficulty goes to the quality of the original consent itself. Many WTO rules are stated in quite general terms, even inviting characterization by some commentators as "standards" rather than rules. How these rules are interpreted and applied *ex post* may differ very substantially from anything predicted in democratic deliberation *ex ante*, even if one assumes that negotiators or other government officials made no effort to disguise or sweeten the real story about the kind of impact the rules might have.

Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 107 (2002).

17. Investment treaty jurisprudence on the regulatory expropriation issue shows that tribunals have been quite hesitant to award damages for adverse changes in the regulatory environment absent evidence that the regulatory change was the result of protectionist or discriminatory motivations, or entailed a breach of a specific state promise to the investor of regulatory stability or of a particular regulatory outcome. Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law*, 50 INT'L & COMP. L.Q. 811, 846 (2001). Environmentalists seem to agree. *See* H. Hamner Hill, *NAFTA and Environmental Protection: The First 10 Years*, 2006 J. INST. JUST. INT'L STUD. 157, 167 (2006) ("The first 10 years of experience in NAFTA litigation concerning environmental regulation have not been as problematic as many critics feared."). More generally, and as Professor Franck has shown, arbitral awards to date in favor of investors have been rather

fact which has clearly undermined the credibility of the most persistent BIT critics. For example, the two early cases that inspired much of the early regulatory expropriation criticism of BITs, *Metalclad*[18] and *Methanex*,[19] resulted either in a clear victory for the state's right to change regulations (*Methanex*) or in a relatively moderate award for the investor (*Metalclad*), despite their enunciations of quite different international law standards.[20]

However, the fact that the regulatory expropriation sky hasn't fallen does not mean that it will not fall in the future, or that other provisions of BITs, as equally vague and open-ended as the typical BIT's expropriation provisions (a point discussed more fully further below), will not be interpreted or applied in ways that states find unacceptable. The world is filled with potential investment law powder kegs,[21] and it is probably only a

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modest in terms of damages awarded. *Empirically Evaluating Claims About Investment Treaty Arbitration*, *supra* note 9, at 58-60.

18. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

19. Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345 (Aug. 3, 2005).

20. The *Metalclad* tribunal interpreted NAFTA's expropriation provision as requiring compensation for "covert or incidental [state] interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of the property even if not necessarily to the obvious benefit of the host state." *Metalclad*, ICSID Case No. ARB(AF)/97/1, para.103. This language was interpreted by many critics as suggesting broad host state liability to investors for adverse regulatory changes, going well beyond the requirements of the United States Constitution's Takings Clause. *See generally* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30 (2003) (discussing impact of *Metalclad* decision); Lauren E. Godshall, Student Article, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter 11*, 11 N.Y.U. ENVTL L.J. 264 (2002) (discussing aftermath of *Metalclad* decision).

21. We might worry, for instance, about a recent challenge to South Africa's "black empowerment" legislation. *See* Luke Eric Peterson, *European Mining Investors Mount Arbitration Over South African Black Empowerment*, INVESTMENT TREATY NEWS, Feb. 14, 2007, http://www.iisd.org/pdf/2007/int_feb14_2007 (discussing potential human rights issues stemming from South African arbitration). Or we might worry about a pending NAFTA Chapter 11 challenge to California's right to regulate gold mining operations. *See generally* Jordan C. Kahn, *A Golden Opportunity for NAFTA*, 16 N.Y.U. ENVTL. L.J. 380 (2008) (discussing gold minders' NAFTA Chapter 11 challenge). And of course, Argentina's current experience is placing tremendous strain on the current system. *Cf.* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L.

matter of time before one of them explodes, absent considerable restraint on the part of claimants and arbitrators. And there is good reason to doubt that such self-restraint will exist in sufficient quantities, as disgruntled investors face few disincentives to raising creative, envelope-pushing, and troublesome claims,[22] or as tribunals persist in issuing incautious and unnecessarily expansive or threatening pronouncements of what the "law" of international investment entails.[23]

To understand the fundamental reasonability of the sovereignty critique of the current system, it is necessary to under-

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307, 311-12 (2008) (discussing Argentina's attempts to limit liability to investors from country's 2001 economic crash). It seems likely that the current global financial crisis will lead to a new wave of investor-state litigation as risky investments fail. As evidence, I note that I just recently received an e-mail from the American Bar Association for a conference in Miami that will address the "The Next Big Wave of Cross-Border Litigation." One of the four panels is devoted to the "inevitabl[e]" litigation between multinational corporations and developing countries.

22. As Professor Brower notes, it is entirely predictable and understandable that investors' lawyers would argue for aggressively pro-investor interpretations of investment treaty text that is, objectively speaking, of highly indeterminate content. Brower, *supra* note 12, at 59-61. This is what international lawyers are (very) highly paid to do. One quite creative example is the claim by a United States investor that NAFTA Chapter 11 makes Canada liable for its "breach" of a campaign promise made by the Canadian prime minister not to change the tax regime applicable to Canadian Energy Income Trusts. *See* NAFTA Trust Claims, http://www.naftatrustclaims.com (last visited Feb. 24, 2009) (describing U.S. investor's intent to sue Canadian government for taxing income trusts).

23. I would suggest two prime examples of remarkably incautious (or immodest!) awards. The first is the *Metalclad* tribunal's definition of "expropriation." *See Metalclad*, ICSID Case No. ARB(AF)/97/1, paras. 201-112 (defining expropriation as including "incidental interference" with property depriving owner of reasonably expected benefit, even if unknown to host state). This definition has continued to feed fears of the development of an expansive regulatory takings doctrine and is, in my view, totally unnecessary to the tribunal's outcome, which was more than adequately supported by the fact that the Mexican provincial government had "taken" the investor's property by declaring out of the blue that the relevant plot of land would become a "cactus preserve" in which the investor would be totally prevented from constructing the anticipated investment, or any other plausible investment. The second is the award in *Loewen*, which consists of nearly 300 largely gratuitous paragraphs in which the tribunal accuses a Mississippi judge and jury of gross incompetence, misconduct, and prejudice, only to conclude in the very final paragraphs that the tribunal has no jurisdiction over the dispute. *See* Loewen Group, Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, para. 240 (June 26, 2003) (describing investor-state arbitration under NAFTA's Chapter 11 brought against United States). The lesson of *Loewen* is one of the value of judicial modesty and judicial minimalism, at least in the writing of awards, that is sometimes lacking in current arbitral jurisprudence. "Say all that is necessary, and no more" is a maxim that international arbitrators should probably tend to follow more than they do.

stand how "lawless," in a sense, international investment law actually is. By "lawless" I mean that much of the content of international investment law, as it is expressed in investment treaties or as it is said to exist in the ether of custom, is, by its own terms and with only a bit of exaggeration, objectively indeterminate. For example, when is a government action "tantamount to expropriation?" What does it mean to say that an investor must be treated "fairly and equitably?" While these terms are typically presumed to reflect customary international law, in fact custom, to the extent that it can be discerned, and putting aside the argument that the concept of customary international law is itself a logically and empirically meaningless one, has little to say on what the terms mean, or how they should be applied. Indeed, because these alleged rules of customary international law are articulated as exceptionally broad standards, they necessarily depend on authoritative interpretations (by politicians, diplomats, scholars or judges) to give them useful meaning.[24]

Investment treaties, at least as they currently exist, do not readily resolve the problem because their most important substantive and procedural provisions are often said to reflect or restate "the" customary rule, without being any clearer as to what the rule is or how it should be applied. Thus, as Laird and Askew have accurately noted, the provisions of BITs "provide ample room for a diversity of judicial opinion," so that, despite the explosion in litigation, a great many interpretive questions remain more or less fully open.[25] This point of view is shared by many others; Muchlinski, for instance, describes investment treaty promises as "offer[ing only] a general point of departure in formulating an argument that the foreign investor has not

24. Louis Kaplow, *Rules Versus Standards*, 42 DUKE L.J. 557, 621 (1992) (concluding law must give content to rules and standards).

25. Ian Laird & Rebecca Askew, *Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System?*, 7 J. APP. PRAC. & PROCESS 285, 286 (2005); *see also* Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 387 (2003) ("Many host state concerns about [investment treaty] arbitration are understandable. Considerable ambiguity exists with respect to what constitutes 'fair and equitable' treatment. The law on expropriation is also relatively malleable, with little consensus on the standards that determine when administrative regulations give rise to a governmental taking that requires compensation").

been well treated;"[26] Sornarajah views investment treaty promises as "otiose" and "vague and open to different interpretations;"[27] Brower (the professor and not the judge) considers NAFTA Chapter 11 to be "textually indeterminate" in important respects;[28] and Klebes memorably describes investment treaties as "traités d'atmosphère," or "treaties of air."[29] It is also a view apparently shared by prominent international arbitrators themselves, as documented recently by Professor Ratner.[30]

The uncertain content of international investment law means that those who are charged with authoritatively interpreting and applying it—increasingly, international arbitrators—enjoy potentially tremendous and largely unconstrained law-*making* (or legislative) power.[31] This power is largely uncon-

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26. PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 625 (Blackwell Publishing 1999).

27. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 235-36 (2d ed. 2004).

28. Brower, *supra* note 12, at 63. Brower suggests that NAFTA Chapter 11 arbitral tribunals have nonetheless largely succeeded in "resolv[ing] the problem of textual indeterminacy" by enunciating "clear rules [or textual interpretations] that strike a healthy balance between the interests of foreign investors with the regulatory obligations of host states." *Id.* at 64. This view may overstate the clarity and consistency of NAFTA Chapter 11 jurisprudence, though Brower's more basic point—that NAFTA Chapter 11 tribunals have not yet issued any awards that meaningfully sanction the legitimate exercise of state regulatory sovereignty—appears accurate.

29. *See Conceptual Difficulties*, *supra* note 7, at 418, n.46 (noting vagueness in treaties opens door to various interpretations).

30. *See* Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 484 (2008) (describing various arbitrators' frustration with vagueness in doctrine).

31. Paul B. Stephan, *Exploring the Need for International Harmonization: Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 CHI. J. INT'L L. 333, 337 (2002). As Professor Stephan puts it, when international adjudicators are authorized "to implement broad principles in a manner that [they see] fit . . . the adjudicatory function subsumes a delegation of lawmaking authority. In the international context, such delegations raise special concerns." *Id.* The problem is similar to the one identified by Professor Reisman in regard to the application of *lex mercatoria* by international commercial arbitral tribunals:

> *Lex mercatoria* is a claim by certain members of the business community and arbitrators to break free of that [traditional] process [for generating law and policy] and to determine, for themselves and often on a case-by-case and sometimes ex post facto basis, what law and policy they will apply, without regard to the interests of the territorial communities which may thereby be affected. Given the potentially enormous impacts that international transactions may have on national economies, that is a very large claim indeed. Given the simultaneous

strained in two main ways. First, as already suggested, it is largely unconstrained by the text of investment treaties (or by customary international law more generally) because the text and understandings of custom are both capable of supporting a great many interpretations and applications. Second, it is largely unconstrained by domestic or international political processes. By this I mean that individual states will have great difficulty correcting legally plausible but politically undesirable interpretations or applications of international investment law by arbitral tribunals.

This difficulty arises from the fact that what might be called "political corrections" or "political controls" will generally require the renegotiation of large numbers of existing investment treaties.[32] Perhaps more fundamentally, political correction may

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> decline of control systems, its scope could be even greater. Its consequences for democratic political values could be severe.

W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 138-39 (1992). In my view, the indeterminate language of BITs, combined with the indeterminate nature of customary international law and the lack of adequate opportunities for political control, provides arbitrators with discretionary law-making authority similar to the kind of authority they would enjoy in an ordinary commercial dispute governed by *lex mercatoria* principles. But whereas decisions by arbitrators in purely private international commercial disputes are usually confidential, and rarely, for that reason, have even persuasive precedential value, international investment law is moving toward a public, quasi-precedential system in which the decisions of one tribunal on an issue may have meaningful, prospective law-making effect.

32. *See* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1022 (2007) (discussing renegotiation of investment treaties). Professor Caron, in his summary remarks at the conference for which this paper was prepared, made the interesting suggestion that the United Nations' International Law Commission might provide an alternative, multilateral mechanism for correcting politically undesirable arbitral statements of the content of customary international law. I also do not want to exaggerate the difficulty of modifying treaty commitments; both the United States and Norway have recently released new model investment treaties that seek to respond to some of the problems discussed here by, for example, offering clarifications as to what the treaty text is supposed to mean. *See also International Law in Brief*, AM. SOC'Y INT'L L., Apr. 21, 2008, http://www.asil.org/ilib080421.cfm#t1 (discussing Norway investment treaty); *Model Bilateral Investment Treaty*, U.S. TRADE REPRESENTATIVE, Nov. 2004, http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf [hereinafter *Model Bilateral Investment Treaty*] (describing text of 2004 U.S. model BIT). The U.S. model is notable for its length (forty pages), the number of times in which it offers textual interpretations "for greater certainty" (nine), and its inclusion of a powerful get-out-of-jail-free card in the form of a "non-excluded provisions" clause that allows the United States to escape arbitral jurisdiction simply by declaring that its actions were, in its own view, justified as necessary to protect an essential security

be impossible to the extent that a politically incorrect statement of international law is said to reflect customary international law. Customary international law, by definition, resists conscious manipulation by states, requiring, as it is said to do, evidence of long-standing and relatively uniform international practice, coupled with the psychological element of *opinio juris*.[33] Traditionally the crystallization of any particular rule of custom was understood to be a slow, haphazard, and imperfect process, and the amount of customary rules that could be produced was greatly restricted by the rule-generating process itself.[34] But the explosion of international arbitral tribunals charged with interpreting and applying customary law (as reflected in investment treaties) has made the development of customary law far easier than it was in the past; and indeed, arbitral statements as to what international investment law "is" can be said both to authoritatively describe custom, allegedly binding on all states, and to constitute that custom, which, by its nature, is ever-"evolving," as the fair and equitable treatment standard is said to be.[35] The principle difference between the current system of international investment law and the system of old is that the spread of investment treaties containing investor-state arbitration provisions has made it possible for the system to generate, reify, *and enforce* new customary legal obligations, with rule generation, reification, and enforcement driven primarily by arbitrators through increasingly frequent arbitral awards, and not

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interest. Of course, the new model does not automatically replace existing U.S. investment treaties; these still need to be renegotiated on a case-by-case basis.

33. This definition is now enshrined in the 2004 United States model BIT, which, in its Annex A, states that "[t]he Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation." *Model Bilateral Investment Treaty*, *supra* note 32, at Annex A.

34. Louis B. Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1, 16-17 (1978) (noting process of identifying and creating rules of customary international law "usually took a long time"); J. L. BRIERLY, THE LAW OF NATIONS 62 (6th ed. 1963) ("The growth of a new custom is always a slow process, and the character of international society makes it particularly slow in the international sphere"). The limits of custom as a rule-generating process are well illustrated by the longstanding debate over the proper international standard of compensation for expropriated property. *Cf.* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 357-414 (1994) (discussing compensation debate in depth).

35. *See* Marcela Klein Bronfman, *Fair and Equitable Treatment: An Evolving Standard*, 10 MAX PLANCK Y.B.U.N.L. 609, 668-69 (2006) (describing fair and equitable treatment).

by states through the slow accumulation of diplomatic patterns of practice.

This, in short, is the fundamental problem with the current system of international investment law: that states have granted to international tribunals the largely uncorrectable authority to say what international investment law is, both as to pure treaty law and, even more problematically, as to customary international investment law. This uncorrectable delegation of law-making authority is troublesome, because decisions as to what international investment law "is" will often entail sensitive and inherently contestable decisions about the proper balance to strike between important competing values and social preferences.[36] As Professor Cheng puts it, the legitimacy of any legal system of resolving disputes depends in large part on whether the "content of legal rules" (and, I would add, their application) adequately "balance the competing policies at stake, and whether outcomes meditated by judicial dispute resolution provide sufficient values to the interested parties."[37]

Curiously, the rapidly expanding literature on investment treaties rarely seems to frame the basic problem with the current system as one of political control, with Professor Cheng's work, along with Professor Schneiderman's, being the principle and welcome exception.[38] Most critiques and calls for change strike me as largely diversional, and even a bit surreal. Take in particular the recent debate over the alleged problem of "incon-

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36. As Professor Reisman has put it more generally: "Modern law is increasingly a complex and nuanced social instrument designed to achieve a wide range of quite detailed social and economic objectives", and law's content "can [thus] be expected to vary, quite legitimately" across states because each state's laws will "reflect[ ]. . . different values and social preferences." REISMAN, *supra* note 31, at 135, 137.

37. Cheng, *supra* note 32, at 1019.

38. *See generally* Cheng, *supra* note 32 (describing system of precedent and control in arbitrations); Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INTL'L L. REV. 465 (2005) (analyzing international investment law's impact on participants' power and authority); SCHNEIDERMAN, *supra* note 11 (discussing how to constitutionalize economic globalization). However, Cheng's concept of control is probably narrower than mine; he views control as involving "mechanisms that prevent wild deviations in the law" and ensures that judges don't make decisions that exceed the "scope of their authority" or that constitute "abuses of power." Cheng, *supra* note 32, at 1019. But a judicial decision can be politically problematic without being an "abuse of power" or without constituting a "wild deviation," and my main argument here is that the investment treaty system needs to ensure a means of correcting (or controlling) these kinds of non-abusive but nonetheless still undesirable decisions.

sistent awards," in which similar provisions of international investment law are given somewhat different meanings or applications by different tribunals. These inconsistent decisions have led a number of scholars to call for the creation of a sort of World Court of Investment that would hear appeals from arbitral tribunals and which would "correct" awards for legal errors and for inconsistency, in order to restore the "legitimacy" of the investment treaty system.[39] The idea for an appellate mechanism was even advanced by the ICSID itself, and though the idea appears to have now been abandoned,[40] it remains reflected in hortatory provisions in recent U.S. free trade agreements.[41]

What makes the debate over an appellate mechanism to correct legal errors and inconsistent awards unsatisfying is that it adopts a narrow and legalistic view of "correctness" that ignores the inherently political nature of many of the decisions that arbitrators are asked and empowered to make. Such a debate also takes for granted the very problematic notion that it is actually possible to determine with any degree of certainty a legally "correct" interpretation of the most problematic provisions of international investment law, or that an appellate body composed of private arbitrators would be any more capable of determining the legally correct interpretation than would the

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39. *See The Legitimacy Crisis in Investment Treaty Arbitration*, *supra* note 12, at 1606-10 (suggesting creation of appellate body); *see also* Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT'L L. & FOREIGN AFF. 179, 182 (2005) (discussing possibility of creating ICSID appellate body); Gleason, *supra* note 5, at 291-93 (asserting parties to arbitrations should have option of appellate review); Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444, 457-59 (2006) (evaluating desire for appeals process); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 73-75 (2006) (discussing benefits of establishing appellate mechanism); Gabriel Egli, Note, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1082 (2007) (articulating positives associated with creating appellate system); Laird & Askew, *supra* note 25, at 294-97 (addressing U.S. support for appellate system).

40. *See* Andrew P. Tuck, *Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules*, 13 LAW & BUS. REV. AM. 885, 902 (2007) (detailing ICSID rationale for shelving creation of appellate mechanism).

41. *See* Gleason, *supra* note 5, at 280-81 (discussing U.S. free trade agreements calling for negotiation to create appellate mechanism for investment disputes).

private arbitrators charged with making the determination in the first instance.[42]

My point here, though, is not to offer an in-depth critique of the appellate mechanism debate, except to note that I do not view the occasional inconsistent award either as particularly surprising – indeed, they seem entirely natural and predictable – or as all that problematic.[43] More importantly, there is an obvious danger that establishing an appellate mechanism would decrease system legitimacy (or perhaps it is better to say system stability or sustainability) by making it more likely that politically incorrect interpretations or applications would become reified as "the law" with even fewer opportunities for political correction than currently exist. Put somewhat differently, if investment treaties do not actually reflect state consensus as to what the various standards and slogans should mean (as I think is very likely), then litigation over the meaning of those contested terms becomes as much a political fight over law creation, the generation of legal rules, as much as it is an autonomously legalistic one over the application of rules that can be said to already meaningfully exist because of, and now independently of, an earlier political process. It is very far from ensured that an appellate mechanism would be willing or able to resolve these inherently political disputes in ways that states are willing and able to live with, or that they should have to live with.[44]

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42. Walsh agrees that "there is no reason to think the members of an appeal tribunal will have greater expertise . . . compared to an arbitral tribunal" to divine the "correct" interpretation of international investment law. *See* Walsh, *supra* note 39, at 457 n.79 (criticizing effectiveness of appeals mechanism). This is not to deny that an arbitral or appellate outcome is not influenced by which *individual* lawyers are chosen to decide the particular dispute or appeal. The arbitrators on an appeals tribunal may very well reach a different conclusion as to the legally correct outcome than did the members of the lower tribunal, perhaps due to differences in personal background or legal training. *Cf.* Jack J. Coe, Jr., *The State of Investor-State Arbitration—Some Reflections on Professor Brower's Plea for Sensible Principles*, 20 AM. U. INT'L L. REV. 929, 946 (2005) (discussing factors facilitating discord among investor-state awards).

43. Indeed, we can speculate that inconsistency might aid system legitimacy by leaving open the possibility of winning a particular line of argument, despite the fact that an earlier tribunal in a different case had failed to find the particular argument convincing.

44. Kalb notes this possibility as well, but seems to dismiss its importance. Kalb, *supra* note 39, at 203. Professor Brower, on the other hand, would seem to agree with my position here. While he views an appellate tribunal as offering "many advantages," he also notes that "[w]ith respect to legitimacy, the fact remains that an appellate tribunal has a judicial, as opposed to a political, character and, therefore, necessarily provides limited opportunities for democratic participation." Brower,

IV. TOWARD A MINIMALIST SYSTEM OF INTERNATIONAL INVESTMENT LAW?

What to do? Sovereignty critics of investment treaties are probably justified in criticizing the current system for its lack of political accountability, by which I mean the lack of adequate opportunities for states to modify the substantive content of international investment law in the wake of politically undesirable rulings by arbitral tribunals. But their calls for reform seem to me to be a bit stunted and unambitious, limited mostly to calls for increased "transparency" of the arbitral process and increased opportunities for interest groups to submit amicus briefs, reforms offered apparently in the hope that public pressure, organized or filtered through a privileged handful of international non-governmental organizations (who may or may not be said to legitimately represent "the public") will force tribunals to do a better job of rendering politically correct, or at least politically sensitive, awards.[45] For those concerned about maintaining (or returning) ultimate international-investment-law-making power to *states* as the first best aggregator of diverse policy preferences, however, I think it is worth considering more ambitious reforms aimed at reducing the law-making role of arbitral tribunals, while still providing investors with sufficient international legal protections against the most egregious acts of

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supra note 12, at 92. Professor Brower's discussion focuses exclusively on increasing opportunities for democratic participation in particular arbitral proceedings, such as through the submission of amicus briefs or through the attendance of open hearings. I am suggesting here that there is a need to open up the larger investment-law-generating process to political, and perhaps "democratic," participation. Under current arbitral rules, tribunals are required to make their decisions based on "law" and are not permitted to take into account, at least not openly, non-legal considerations of the type likely to be raised in amicus briefs. For that reason, I do not view reforms of the type Professor Brower mentions as providing all that much room for "politics" to enter into, or to be reflected in, arbitral awards.

45. Advocates of greater transparency fail to note (or strategically avoid pointing out) the possibility that greater transparency may increase the instability of the current system both by exposing to greater public scrutiny the current system's inadequacies and by increasing the "law making" effect of awards, some of which, still today, remain unpublished and which, for that reason, do not readily contribute to the development of custom or readily serve as persuasive precedent in subsequent cases. In a sense, then, increased transparency can be viewed as part of the problem, as it reflects the move of the current system from one that was primarily aimed at resolving discrete disputes in ways acceptable to both parties to the particular dispute (in a relatively non-transparent way) to a system in which the primary aim has become the generation of generally binding international legal rules *through* the (increasingly public) resolution of discrete disputes.

state misconduct. That is, I suggest considering the creation of a system of international investment law that is significantly more minimalist than the current system.

What would be the hallmarks of a minimalist system? The main characteristics are twofold. First, individual states, in conjunction with specific investors, would be given the primary responsibility for defining the rules that will govern a given investment relationship. Second, individual host states would, by default, be given primary (but not necessarily final) authority to define the content of their obligations toward investors, and to judge whether those obligations have been violated. I discuss each of these briefly in turn, before attempting to respond to potential objections.

A. Primary Reliance on Contract

The first characteristic entails a return to contract as the primary means of harnessing international law (and international arbitration) to protect foreign investments. I have made this argument in more detail elsewhere, and here will offer only a brief summary of the basic point.[46] It is sometimes said that investment treaties are necessary to establish an international legal principle of "pacta sunt servanda" (the principle that promises should usually be kept, with meaningful damages to be paid if they are not). In this story, investment treaties are useful, and indeed necessary, because they prevent states from unfairly reneging on bargains that they strike with foreign investors (bargains over, for example, the royalties that the foreign mining company will have to pay the host state per ton of mined ore). But in fact investment treaties are not necessary to render host state promises to investors fully enforceable. Foreign investors have long been able to include international arbitration clauses in their investment contracts, and international tribunals exercising this contract-based jurisdiction over any resulting contractual disputes have tended consistently to require

46. *See generally* Jason Webb Yackee, *Do We Really Need BITs? Toward a Return to Contract in International Investment Law*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 121 (2008) [hereinafter *Do We Really Need BITs*] (arguing for return to contract over continued use of BITs); Jason Webb Yackee, *Pacta Sunt Servanda In The Era Before Bilateral Investment Treaties: Myth and Reality*, FORDHAM INT'L L.J. (forthcoming 2009) [hereinafter *Pacta Sunt Servanda*].

host states to pay meaningful damages to investors in the event that the host state has breached its obligations.

The main implication of this fact is to suggest that we could do away with investment treaties entirely without significantly increasing the level of "political risk" in the international system. Investors in the riskiest sectors, such as those investing in the natural resources sectors in developing countries, would be able, or would continue, to enter into investments contracts with host state governments prior to making an investment. Those contracts would spell out the investor's and the host state's rights and obligations. And those rights and obligations could be more or less fully secured, internationally legally speaking, through a well-drafted international arbitration clause. A minimalist system of international investment law would also rely on these contracts as the primary "international law" of foreign investment. Foreign investors would be entitled to whatever substantive and procedural rights that they chose to bargain for and that a host state bargaining partner chooses to provide.

The chief benefits of a system that relied primarily on contract to define what might be called the "special" obligations of host states toward investors are twofold. First, a contract-based system may be more legitimate because it gives host states a fair opportunity to obtain reciprocal concessions from investors, that is, to gain something for something, therefore helping to mitigate the perception that unfair terms of a bargain have, through treaty, been imposed on the host state by powerful home-state governments. Second, relying on investment contracts can allow host states to more carefully calibrate their exposure to international litigation risk and to adjust current bargains to current circumstances. A contract-based regime, supported as it is by robust international legal respect for the principle of *pacta sunt servanda*, can allow host states to moderate their commitments on a case-by-case basis. If changing economic or political circumstances, or changing legal interpretations, suggest that particular guarantees are growing too costly, host states can easily amend their bargaining positions and their contractual practices on a rolling basis by choosing, in conjunction with the foreign investor, terms of bargain that best suit the host state's and the investor's joint and individual interests and needs. One important upside to this flexibility is precisely that it facilitates "political corrections" of international investment law; if tribunals

interpret a contractual obligation in a way that does not comport with a host state's *current* perceptions of its interests or needs, the host state can "correct" the interpretation going forward, as it negotiates new contracts.

As Professor Stephan has put it in the somewhat different but not entirely unrelated context of international efforts to harmonize the international law of private contract (a project which he views as "futile"):

> One of the bedrock assumptions of contract law has been that, all other things being equal, giving parties as many legal possibilities as possible increases the likelihood that people will construct relationships that best suit their needs. This tenet coexists with the belief that, within reason, people also benefit from committing in advance to restrictions on their freedom of action. A core conviction that unites these two propositions is that business people, if not burdened by any disability or victimized by fraud, largely can make effective choices about the scope, strength and content of the legal obligations they need to assume to pursue their objectives. And allowing them to make these choices in turn provides society as a whole with more and better information about their preferences and how to implement them.[47]

Here I am suggesting that the system of international investment law be one which similarly eschews most attempts to impose as matter of treaty or customary international law a harmonized or unified package of rights for foreign investors, in favor of a system that places primary responsibility for determining the "scope, strength, and content" of those rights on the host state and the investor, negotiating on an individualized basis.

B. A Major Role for Municipal Law

In some cases, and perhaps in many cases, states and investors will not be in a position, or will not desire, to create a reasonably complete, custom-made, contract-based legal regime to spell out each parties' substantive and procedural rights and obligations. Where should we turn to for gap-filling (or default) governing rules?

Perhaps the most logical (if often overlooked) source is the laws of the host state itself. A minimalist system of international investment law would, I submit, place primary reliance on

47. Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 794-95 (1999).

municipal law to provide necessary default rules to govern investor-state relations, both as to substantive and procedural matters. Of course, this proposition should be, in large respects, an uncontroversial statement of fact. When investors make foreign investment decisions, they probably do so with little or no explicit consideration of the content of *international* law that might govern their investment, but they might (one would hope) analyze relatively carefully the content of domestic laws and regulations that will, quite naturally and without any inherent controversy, govern most aspects of their planned investment.[48]

But the point I wish to make is somewhat more ambitious, and is that it may be desirable to look first and foremost at municipal law as the proper source of investment-treaty-like rules and procedures that would apply as gap-fillers or default rules in cases of incomplete or non-existent investment contracts. This is certainly possible; in an earlier era, many countries relied on municipal law "foreign investment codes" to promise investors such things as adequate compensation in the event of expropriation, stability of the national legal framework, or even guaranteed access to international arbitration.[49] There is little inherent reason why much, if not most, of international investment law could not be transferred to, or absorbed by, municipal legal systems.

Relying on municipal law to take the place of investment treaties (and in conjunction with investment contracts) offers obvious benefits in terms of increasing both the flexibility of, and the level of state control over, the contents of the package of legal rights that investors enjoy. It also promises to allow much greater experimentation with different packages of rights. While investment treaties are typically justified as necessary to promote sufficient foreign investment to the developing world,[50]

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48. "One would hope," because there is convincing qualitative evidence that the foreign investment decision making process is often driven by idiosyncratic factors, YAIR AHARONI, THE FOREIGN INVESTMENT DECISION PROCESS 16-18 (1966), and that "law" more specifically "plays only a minor role" as a "determinant of investment," Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 109 (2003).

49. *See Conceptual Difficulties*, *supra* note 7, at 447 (pointing out Greece and other countries embedded promises to arbitrate in their municipal foreign investment laws).

50. What is considered "sufficient" will obviously vary with circumstances, and especially as economic understandings and ideologies shift. *Cf.* Jason Webb Yackee,

there is absolutely no evidence whatsoever that the package of rights contained in modern treaties is the "best" (however defined) package of such rights.[51] Will countries be able to attract sufficient foreign investment if investors are offered, via domestic law, "appropriate" compensation for expropriation rather than, through treaty, "adequate" compensation? The only plausible answer, at this juncture, is "who knows?" Letting investors and states negotiate over the proper level of compensation (through contract), or letting states set the proper level of compensation, in the absence of contractual agreement, through domestic law, allows both for greater experimentation and for greater customization. Host states can offer the kinds of guarantees that they view as necessary to attract the level or kind of foreign investment that they desire to attract, just as investors can demand the kinds of guarantees that they require as a condition to invest.[52]

It may be tempting to dismiss out of hand any proposal to rely to a much greater extent on municipal law as a source of foreign investment law as an unwise and foolish return to Calvo's (allegedly) discredited doctrine. Certain propositions

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Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm, 12 U.C. DAVIS J. INT'L L. & POL'Y 195, 223 (2005) [hereinafter *Are BITs Such a Bright Idea*] (arguing that ideational theories of public policy can help explain developing country acceptance of BITs). While most observers would agree that economic development requires at least *some* foreign investment, there is no consensus as to *how much* foreign investment is needed.

51. "The form and content of useful law [for foreign investment projects] will not only depend on the details of the project and the setting, but also on the particular strategy of institutional reform and the program of economic development adopted in a particular country." Lothian and Pistor, *supra* note 48, at 110. In other words, there is "[n]o fixed set of legal entitlements" that can be adopted to ensure foreign investment success. *Id.* at 109.

52. For example, for most foreign investors, host states might link their agreement to arbitrate investment disputes with the investor's obligation to first exhaust local remedies. Or they might consent to arbitrate only a limited number of disputes or claims, such as the claim that the investor has suffered a "denial of justice" at the hands of domestic judicial institutions. But for investors who the state deems to be especially sensitive to political risk, the state might specially consent to arbitration absent any obligation on the investor to first exhaust local remedies. The example of Brazil suggests quite strongly that investment treaties are *not* necessary to attract significant quantities of foreign investment. Brazil is one of Latin America's foreign investment success stories, yet its domestic laws grant foreign investors no greater rights than those enjoyed by domestic investors, and they limit opportunities for arbitration against the Brazilian state. Brazil has also failed to ratify any investment treaties. *See* Wenshua Shan, *Is Calvo Dead?* 55 AM. J. COMP. L. 123, 148 (2007) (describing Brazil's legal regime for foreign investment).

made by Calvo are clearly difficult to support, either as a doctrinal or practical matter.[53] But I would modestly suggest that it is not so clear precisely why the most basic thrust of Calvo's argument, which I would characterize as placing primacy on municipal legal systems for providing and enforcing substantive and procedural rights for foreign investors, is so unreasonable.[54] The decision to invest abroad is the investor's alone; he decides whether a particular legal framework is sufficient to protect his interests, and if he chooses to invest under a given framework, composed mostly of municipal law that offers relatively few legal guarantees, why shouldn't that choice, which, in a sense, reflects a certain assumption of risk on the part of the investor, be respected?

Indeed, I suspect that basic recognition of this point underlies the tendency of recent arbitral tribunals to take pains to emphasize that their applications of international investment law are based on, or reflect, investor "expectations." The pretext is that investors would never have invested had they expected anything other than the application of the rule of investment law that the tribunal identifies and applies.[55] But once we recognize

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53. For instance, Calvo insists that home governments have no right to exercise diplomatic protection on behalf of foreign investors, or that host states should never grant investors special privileges or incentives. *See generally* Shan, *supra* note 52 (discussing Calvo doctrine and modern international investment law).

54. I should admit that I may be softening the Calvo Doctrine a bit around the edges. While Calvo would prohibit host states from offering foreign investors special privileges through contract or municipal law, insisting on equality of treatment between foreign and domestic investors at both the domestic and international legal levels, I am suggesting here that there is nothing, and should be nothing, preventing host states from embedding special privileges for foreign investors in enforceable contracts or in municipal law. This position is compatible with the general view of Calvo's doctrine as taking a "state-centric view of international law," based on an "absolutist view of state sovereignty." *See* Shan, *supra* note 52, at 126 (describing elements of Calvo Doctrine). I would qualify Calvo's view by suggesting that international law should be available to govern foreign investments for host states and investors if they wish, and to the extent they wish, and by suggesting that truly fundamental international legal principles, such as the principle of pacta sunt servanda, should operate to support the legal and jurisdictional choices of states.

55. These alleged expectations of investors can appear rather extravagant. As the tribunal in the *Tecmed* case described them (in relation to the "fair and equitable treatment" provision in the Mexico-Spain BIT):

> The foreign investor expects the host State to act in a consistent manner, *free from ambiguity and totally transparently* in its relations with the foreign investor, so that it *may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives*, to be

investor expectations as the first best justification for applying and enforcing foreign investment law as *international* law, it becomes quite difficult to argue that we actually need international law much at all. Investors, properly warned, can form their "expectations," as to substantive rights, as to procedural rights, and even as to the level of ambiguity, transparency, or legal stability that their investment might enjoy, by examining municipal law and practice, and by negotiating agreements with host states that supplement that law and practice, or that derogate from it, and by making their decision to invest accordingly. Expectations, in other words, provide a very weak theoretical foundation for an elaborate system of international-law based rights for investors.[56]

C. *What Role for International Law?*

The previous subsections suggest a host state- and investor-centric system of rule creation as one of the central elements of a minimally international system of foreign investment law. What role remains for international law (or for international

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> able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.

Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, para. 154 (May 29, 2003) (emphasis added). Of course, the tribunal provides no *evidence* that investors actually expect no "ambiguity", that they expect "total transparency," that they expect to know "beforehand" "any and all rules and regulations that will govern" their investment, nor does the tribunal seem to consider whether such an expectation would be reasonable, or whether it would even be possible for a state to live up to such expectations. Douglas is surely correct to characterize the *Tecmed* award as describing "a perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will attain." *See* SCHNEIDERMAN, *supra* note 11, at 98 n.21 (quoting Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko, and Methanex*, 22 ARB. INT'L 22, 28 (2006))

56. See, e.g, the famous *Methanex* case, in which a NAFTA Chapter 11 tribunal rejected the Canadian investor's claim of regulatory expropriation, noting quite reasonably that the company had voluntarily entered into a "political economy in which it was widely known, if not notorious" that environmental and health regulations might change to prohibit or restrict chemical compounds of the sort that were at the heart of Methanex's claim. Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1456 (Aug. 3, 2005). Note that this is quite different from saying that Methanex was entitled to a regulatory regime which was "totally transparent" and in which it had an internationally enforceable right to know prospectively "any and all rules" that would in fact end up governing (and reducing the value of) its investment.

tribunals) to play? On the one hand, as much of a role as host states (and individual investors) wish it to play. International law standards of treatment can be referenced in municipal laws or investment contracts, just as they can be improved upon or derogated from. Likewise, international tribunals can be granted jurisdiction over foreign investment disputes through either legal instrument. Depending on the desires of host states and the demands of investors, international law might retain a relatively important place in a minimalist system. The difference is that the level of importance that it *does* take on, and its content, is allowed to vary by circumstance and over time, at the primary direction of host states.[57]

Internationally speaking, what we need to support such a system would appear to be quite limited: in order to support the jurisdictional choices of host states and foreign investors, an international willingness to support the enforcement of arbitration agreements and awards; and in order to support the substance of whatever guarantees investors are offered (as a matter of contract or municipal law), recognition of the principle that host state promises to investors should usually be kept, a concept known as *pacta sunt servanda.* In fact, and as I discuss in more detail elsewhere, international law and practice has long supported both the institution of arbitration and the principle of *pacta sunt servanda*; investment treaties are not necessary to do so.[58]

I think it is fair to admit that under such a system, most foreign investments would be governed primarily, if not entirely,

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57. DiMascio & Pauwelyn, *supra* note 15, at 55, suggest that one of the reasons why we have investment treaties, and do not rely exclusively on municipal law to protect foreign investors, is because investors can not trust host states not to "unilaterally change any protection offered under their domestic laws," which is a risk "inherent in the asymmetrical relationship between a private investor and a sovereign state." *Id.* This is obviously a legitimate concern. I would suggest, however, that a state's concern with maintaining a reputation as a favorable place to invest provides a significant incentive to maintain a relatively stable system of municipal legal protections for investors. I would also suggest that the level of desired stability is something that can be bargained for in an investment contract, and something that can be embedded in municipal laws. For example, a foreign investment code could specify that particular provisions of the code shall not be changed as applied to existing investors, and that promise of legal stability can be coupled with a right to international arbitration for enforcement purposes.

58. *See generally Do We Really Need BITs*, *supra* note 46 (arguing BITs are not necessary to resolve credible commitment problems); *Pacta Sunt Servanda*, *supra* note 46.

by municipal law, and most foreign investment disputes would be decided by municipal courts. While some investors would be able to convince host states to grant investment-treaty-like guarantees through investment contracts (or through foreign investment codes), most states would probably not negotiate investment contracts with investors, and most states would probably not draft much foreign-investment-specific legislation. Given that most foreign investment takes place between highly developed economies, such as the members of the European Union, Canada, the United States, and Japan, which enjoy high-quality domestic legal systems in which the risk of bias against foreign litigants is objectively very low,[59] it is difficult to see how primary reliance on domestic law and domestic courts to govern and to resolve foreign investment disputes could be reasonably viewed as problematic. In that view, I think it is instructive to note that the recent Australia-United States Free Trade Agreement failed to include, at Australia's insistence, guaranteed investor access to international arbitration.[60] The United States' concession here is an important vote of confidence in the ability of the legal systems of the world's highly developed economies to fairly regulate and enforce investor rights. Moreover, it suggests that there is little reason for those countries to continue to expose themselves to the legal and political risks of international investment arbitration, either through investment treaties with other highly developed economies or, I would suggest, through fully reciprocal investment treaties with the developing world.[61]

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59. For example, data on the win rates of foreign parties litigating in United States federal courts does "not support the conclusion that xenophobia is rampant in American courts. In fact, in federal civil actions, foreign plaintiffs and defendants win substantially more often than domestic litigants." Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996).

60. Ann Capling & Kim Richard Nossal, *Blowback: Investor-State Dispute Mechanisms in International Trade Agreements*, 19 GOVERNANCE 151, 160 (2006).

61. I question the assertion of Alvarez and Park that as to investment treaties, "[s]auce for the goose ought to be sauce for the gander." Alvarez & Park, *supra* note 25, at 396. I also question the assertion of Brower and Stevens that "Justice and fairness demand that [developed countries] live up to the same substantive rules and procedural mechanisms as have been accepted by [developing countries]." Brower & Steven, *supra* note 16, at 200. Given the wholly dissimilar positions of developed and developing country political and legal institutions, it makes little inherent sense to require developed countries to grant to foreign investors the same substantive and procedural rights that developing countries may need to grant in order to attract adequate levels of foreign investment. While "abuses" of foreign investors will on occasion surely occur at the hands of developed country governments, the assumption

I expect some readers will be uneasy about the prospect of doing away, more or less entirely, with investment treaties. Let me very briefly discuss other alternative minimalizations that would maintain a somewhat more robust role for treaty-based law and for treaty-based resolution of foreign investment disputes while increasing opportunities for domestic political systems to maintain control over their exposure to, and the content of, tribunal-generated investment law.

For example, if we are going to continue to have investment treaties with roughly similar substantive content to those that we currently have, treaty negotiators should consider the potential desirability of implementing some version of the venerable local remedies rule, which would require investors in at least some, and perhaps most, circumstances to first seek to resolve their investment-related claims through the domestic court system before being permitted to seize an international arbitral tribunal.[62] Most modern investment treaties almost entirely do away with any local remedies requirement.[63] Investors who view the host state as having violated the investors' international legal rights are permitted, and indeed, through "fork in the road provisions," explicitly encouraged, to seek international redress in the first instance, rather than the last.[64] This is in marked con-

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should be that "when [those] abuses do occur . . . that state's own domestic system will provide an internal correction mechanism." Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 348 (2006) (suggesting international law should make "distinctions" based on "quality of domestic institutions").

62. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472-81 (2003) (outlining the local remedies rule generally); CHITTHARANIAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW (2004) (examining local remedies role historically and in modern international law).

63. For example, NAFTA Chapter 11 does not require the exhaustion of local remedies as a condition precedent to seizing an international arbitral tribunal. *See* William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 357-58 (2000) (noting parties can bring claims directly to international forum). However, a number of NAFTA Chapter 11 tribunals have suggested that exhaustion of local remedies may nonetheless be required for at least certain kinds of Chapter 11 claims. *See* Bryan W. Blades, *The Exhausting Question of Local Remedies: Expropriation Under NAFTA Chapter 11*, 8 OR. REV. INT'L L. 31, 99-113 (2006) (discussing effects of local remedies rule on Article II).

64. Fork in the road provisions provide investors with the option of pursuing a treaty-based claim *either* before local courts *or* before an international arbitral tribunal; the investor's choice of one forum precludes resort to the other. In practice, fork in the road provisions have been interpreted narrowly to preserve the investor's op-

trast to international human rights treaties (most prominently the European Convention on Human Rights) which maintain fairly robust local remedies rules as "prophylactic" devices that "reduce [political] tension" by "insisting on prior settlement at [the] local level."[65] Insisting on exhaustion of local remedies in investment disputes would also accord with the long-standing practice of the United States Department of State,[66] and with the investor-state dispute provisions in the draft Norwegian model investment treaty, which has recently been released for public comment and which requires prior recourse to domestic courts as a condition precedent to arbitration.[67]

What might be the benefits of a more robust local remedies rule in international investment treaties? Professor Dodge suggests a number of potential benefits. Granting host state institutions the first opportunity to adequately resolve foreign investment disputes may help the legitimacy of the system by signaling "respect" for the "sovereignty of the host."[68] Requiring exhaustion may also benefit "the host State in a more tangi-

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tion of international arbitration. *See* Occidental Exploration and Production Company v. Republic of Ecuador, London Ct. Int'l Arb. Case No. UN3467, Final Award, (July 1, 2004), *available at* http://ita.law.uvic.ca/documents/oxy-EcuadorFinalAward_001.pdf.

65. A.A. CANÇADO TRINDADE, THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 11 (1983) (discussing extensively exhaustion of local remedies rule in relation to European Convention on Human Rights). The treaty establishing the International Criminal Court also requires resort to domestic tribunals in most circumstances. Rome Statute of the International Criminal Court, arts. 2, 17, July 17, 1998, 37 I.L.M. 999.

66. Under international law and practice the United States does not formally espouse claims on behalf of U.S. nationals unless the claimant can provide persuasive evidence demonstrating that certain prerequisites have been met. The most important of these requirements are that the claimant was at the time the claim arose and remains a U.S. citizen, that all local remedies have been exhausted or the claimant has demonstrated that attempting to do so would be futile, and that the claim involves an act by the foreign government that is considered wrongful under international law.

U.S. Department of State, *Bilateral Investment and Other Bilateral Claims*, http://www.state.gov/s/l/c7344.htm (last visited Jan. 12, 2009).

67. *International Law in Brief*, *supra* note 32 (containing draft Norweigian model investment treaty). Article 15 provides for investor-state arbitration if 36 months have passed from the dispute's submission to local courts. *Id.* art. 15.

68. AMERASINGHE, *supra* note 62, at 200. Put a bit differently, resulting decisions by municipal courts in favor of investors may be more likely to be viewed as legitimate by those who generally disfavor strong investor rights precisely because they are the product of domestic judicial institutions. It is difficult to argue that one's own state courts are likely to be, or were biased against the state.

ble way by permitting the resolution of a [foreign investment] dispute at a lower cost and with less publicity than an international adjudication."[69] More importantly, and more to the point of this paper's basic argument, requiring exhaustion of local remedies may increase opportunities for national control of the direction of development of international investment law. This is especially the case if a robust requirement of exhaustion were coupled with treaty-based rules mandating some level of deference by international tribunals to the decisions of municipal courts in the event of an appeal from the final decision of the host state's highest judicial organ.[70]

There are alternative possibilities, of course. We might maintain investment treaties more or less as they currently exist, while relying exclusively (except where contract or municipal law provide otherwise) on inter*state* arbitration to resolve disputes over treaty interpretation or application, a system that has

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69. Dodge, *supra* note 63, at 361-62. The Local Remedy Rule also benefits the host state by providing its domestic institutions an opportunity to develop more sophisticated legal capacity—"practice makes perfect," in a sense.

70. Requiring international tribunals to review municipal court decisions with a certain level of deference is compatible with DiMascio and Pauwelyn's more general observation that "if investment treaties are meant to prohibit acts that countries are unlikely to want to undertake anyway, there is reason to interpret investment disciplines with a high degree of deference to the regulating country." DiMascio & Pauwelyn, *supra* note 15, at 57. In that spirit, investment treaties might couple an exhaustion of local remedies provision with the opportunity for the investor to appeal adverse final decisions by local courts to international arbitral tribunals, while restricting the tribunal's jurisdiction to the question of whether the municipal decision was "arbitrary and capricious" (borrowing from United States administrative law) or constituted a "denial of justice." *See generally* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) (describing arbitral tribunals as mechanism for holding states accountable). In other words, a minimalist investment law system might couple *procedural minimalism* with *substantive minimalism*. Dodge suggests that international tribunals "should adhere to the traditional customary international law rule that the decisions of courts are not binding on them as res judicata . . . [in order] to encourage foreign investors to pursue their remedies in domestic court in the hopes that at least some investment disputes may be resolved at the local level." Dodge, *supra* note 63, at 382-83. By requiring exhaustion, however, we can require reviewing international tribunals to grant some level of deference to domestic court decisions without driving investors out of domestic courts. The 1992 BIT between Paraguay and the Netherlands provides an example of the kind of arrangement that I am suggesting deserves furthers consideration. That treaty limited investor-state arbitration to arbitral review of domestic court judgments for violations of international law or for obvious unfairness.

worked reasonably well so far in the regulation of international trade disputes.[71]

Alternatively, we might draft substantively minimalist investment treaties, granting investors, as a "highly useful default rule," no more than a relatively unqualified right to non-discriminatory treatment, a rule that is of (relatively) certain content and, more importantly, enjoys "a certain durability and putative legitimacy"[72] and which nonetheless addresses one of the two primary concerns of foreign investors.[73]

Finally, we might generalize NAFTA's "Free Trade Commission" (FTC) to investment treaties more generally. Under NAFTA, the FTC, which is made up of the three trade ministers of the NAFTA countries, has the authority to issue binding "interpretations" of NAFTA text.[74] The FTC has used this authority to attempt to clarify (and limit) the meaning of NAFTA's "fair and equitable treatment" standard. While the FTC's interpretation has been fairly criticized as unnecessarily vague,[75] it seems likely that the mechanism provides an exceptionally im-

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71. Indeed, to the extent that the WTO system of state-state dispute settlement has been criticized, those criticisms point in the direction of increasing political control of panel decisions, and certainly *not* in the direction of creating a private right of action akin to what investors currently enjoy under investment treaties. *Cf.* Howse, *supra* note 16, 108-13 (criticizing WTO system for failing to allow sufficient "democratic experimentalism at the domestic level"). Howse also suggests that one benefit of the old GATT dispute settlement system, which required consensus of the GATT membership for a panel report to become binding, was that it facilitated "ex post diplomatic adjustment of interpretations by dispute settlement organs" much easier than is the case under current WTO dispute settlement rules. *Id.* at 108.

72. *Id.* at 97. Howse is discussing the norm of nondiscrimination in relation to international trade law, though his argument has obvious parallels to the international investment law regime.

73. DiMascio & Pauwelyn, *supra* note 15, at 55 ("[W]hy is there a need for international law on investment protection? The first answer is that host states can unilaterally change any protection offered under their domestic laws . . . The second, but related, answer is that foreign investors fear discrimination."). *Id.* DiMascio & Pauwelyn's article provides a valuable discussion of the interpretive difficulties that non-discrimination standards pose in the distinct contexts of international trade and investment. While I have asserted that a non-discrimination standard is of "[relatively] certain content," I do not mean to imply the lack of any interpretive difficulties. There are significant ones, though probably far fewer than afflict the "fair and equitable treatment" standard.

74. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1131(2), Jan. 1, 1994, 32 I.L.M. 605 [hereinafter NAFTA].

75. Jeffrey T. Cook, Comment, *The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 PEPP. L. REV. 1085, 1113 (2007).

portant political safety valve to Chapter 11 by providing the NAFTA parties with a relatively easy way of correcting politically undesirable trends in NAFTA arbitral jurisprudence. Critics of the FTC have criticized its interpretations on precisely those grounds, that its "interpretations" are really surreptitious (and legally illegitimate) amendments to the treaty, what Professor Brower has called a "crude assertion[ ] of unrefined power."[76] I should admit that I find this kind of critique a bit curious, as I think it misses the larger point already suggested above, which is that the law-generation process depends for its essential legitimacy on the ability of political principals to influence the generation of international laws binding upon them and upon their constituents, through the exercise of their law-making power. It does not strike me as very surprising, nor as inherently troublesome, to see that the NAFTA parties have used their interpretive authority to direct not just the outcome of future cases, but even to "interpret" NAFTA in ways that impact the outcome of pending cases.[77] This possibility may, in fact, make the Chapter 11 regime inherently more legitimate, and inherently more stable, than equivalent investment treaty regimes that do not similarly provide for the possibility of amendment-*cum*-interpretation.

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76. Charles H. Brower II, *Emerging Dilemmas in International Economic Arbitration: Mitsubishi, Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907, 926 (2005).

77. It has been suggested, and plausibly so, that one purpose of the FTC's interpretation of the meaning of "fair and equitable treatment" was to direct the outcome of the then-pending proceedings in the *Pope & Talbot* case. Cook, *supra* note 75, at 1113 n.188. While this kind of interference in the adjudication of ongoing disputes may strike some readers as indefensibly lawless, a sort of retroactive application of a change in the law, it is interesting to note that U.S. courts are quite liberal in allowing Congress to change laws in ways which directly impact the viability of pending lawsuits against the federal government. *See* Robertson v. Seattle Audubon Society, 503 U.S. 429, 437-41 (1992) (noting changes in law directly impacting lawsuits). Retroactivity is also reliably tolerated in U.S. administrative law and practice. *See generally* Geoffrey C. Weien, Note, *Retroactive Rulemaking*, 30 HARV. J.L. & PUB. POL'Y 749, 752-54 (2006) (describing judicial tolerance for retroactive rulemaking). Courts, of course, also often retroactively apply changes in the law under the guise of "interpretation." On the other hand, the European Court of Human Rights has suggested that at least in certain circumstances, legislative interference with a pending municipal court action might violate due process principles. Stran Greek Refineries & Stratis Andreadis v. Greece, 301-B Eur. Ct. H.R. (ser. A) 1, 16 (1994). It is not clear whether, or how, this rule might be extended to impose equivalent due process requirements on arbitral proceedings.

D. A Brief Discussion of Objections

There are, of course, many possible objections to these ideas, and I will plead "lack of space" to address them in any detail here, though I will very briefly address two of them.

First, the current system is sometimes justified on the ground that it promotes legal "uniformity" or "predictability" (a related but not identical concept), and investors crave these things. Would not a minimalist system reduce uniformity and perhaps predictability as well? I would suggest that we not exaggerate the degree of uniformity or predictability that the current system provides investors, nor exaggerate how much investors actually care about legal predictability or especially about legal uniformity. The first point: the legal uniformity and predictability that investment treaties appear to provide is largely illusory for reasons already suggested above. The standards are open-ended, and of highly uncertain meaning and application. As to the second point, which also relates to the first, why should we expect investors to highly value legal uniformity in regard to a very narrow set of potentially investment-relevant legal issues? There is no single set of legal entitlements that can guarantee the success of a given investment project. To the extent that investors in fact take "law" into account when deciding whether to invest, or when, as is probably more likely, deciding how to structure an investment that is already going to be made, the investor will care most about any number of sector-specific or investment-specific types of laws and regulations, and these will necessarily vary, and perhaps vary tremendously, by jurisdiction.[78] In other words, investors will already be required to conduct a context and jurisdiction-specific analysis of the particular investment location's legal, social, political, and economic characteristics. What possible planning benefit could there be for the investor to *not* analyze the jurisdiction's domestic laws on government takings, which might reasonably differ from those with which the foreign investor is already familiar?

Put somewhat differently, if investment treaties do increase legal uniformity (itself a doubtful proposition) there is little reason to think that this increased uniformity is meaningful enough to lower what might be called the investor's "transaction costs"

78. Lothian & Pistor, *supra* note 48, at 109 (recognizing no single set of laws govern all investment projects).

of making an investment. The law that matters, to the extent that law matters, will continue to be overwhelmingly of local origin and content.

How about predictability? Again, available evidence suggests that investors seldom take law into account when deciding whether to invest. Where investors are worried about legal predictability, they are primarily concerned with the predictability of domestic laws specific to the particular investment, and there is no reason to think that these domestic laws can not be sufficiently predictable, or made sufficiently predictable, in the absence of an investment treaty.[79]

A second potential objection is that a minimalist system would risk "repoliticizing" the resolution of investment disputes.[80] I think the easy response is that the international resolution of investment disputes has probably never been as politically salient, or as politically charged, as it is now. To the extent that it might have been more charged in the late 1960s and early 1970s, I think it fair to admit that the lack of investment treaties had little to do with the political tensions of the era, which were driven by ideology and a desire among newly independent developing countries to clean their slates of often disadvantageous colonial-era relationships. Indeed, in the modern era, the proliferation of investment treaties has given rise to literally hundreds of high-profile international arbitrations, around which various political forces have mobilized, precisely because the stakes involved in those disputes are more obvious, and perhaps much higher, than they were in the past. The idea that legalization necessarily lessens the political sensitivity of

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79. I would also add that I doubt that investors need or expect perfect, long-term predictability, as the TECMED tribunal, seems to imply. *See generally* Tecnicas Medioambientales TECMED S.R v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (May 29, 2003) (describing foreign investors' expectations). One of the principle lessons from the foreign investment turmoil of the 1960s and 1970s is that overly rigid arrangements between foreign investors and host states can promote *instability*, and that the key to promoting stability can be, somewhat paradoxically, the creation of flexible frameworks that allow the investment relationship to adapt successfully to unpredictably changing circumstances. *Cf.* Thomas W. Walde, *Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development*, 10 LAW. AM. 265, 279 (1978) (noting advantages of contractual flexibility).

80. It is often argued that one of the principle benefits of the current system is that it "depoliticizes" investment disputes. *See, e.g.*, Ibrahim F.I. Shihata, *Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID-FOREIGN INV. L.J. 1 (1986).

foreign investment, or the political sensitivity of foreign investment dispute settlement, seems somewhat naïve. Legalization can cause increases in tension by creating eminently disputable rights, and by encouraging a resort to litigation to define the contours of those rights whenever the status quo becomes undesirable. Thus, whereas in the past most emergent investment disputes would have quietly resolved themselves through domestic litigation, relatively non-transparent contract-based arbitration, or diplomacy, today they explode upon the international stage in highly public ways.

A perhaps more interesting response is to question the extent of politicization in the earlier, pre-BIT era. For example, those who view the current regime as desirable are often quick to assert that without BITs we would return to the nasty and primitive world of "gunboat diplomacy,"[81] in which foreign investment disputes are settled in the investor's favor at the point of the home state's sword (or looking down the barrel of the home state's ship-to-shore artillery). But the modern risk of gunboat diplomacy, and, more importantly, its historical reality, appears greatly exaggerated. For example, a recent empirical study by Michael Tomz, a political scientist, found remarkably little evidence that developed countries used the threat of military force to coerce developing states to repay debts to foreign investors; Tomz' analysis of the prototypical example of gunboat diplomacy, the 1902 British and German intervention against Venezuela, was, counter to the gunboat myth, not motivated by a desire to protect foreign investors.[82] If "politicization" does not mean gunboat diplomacy, but rather merely the state espousal of investor claims,[83] or the settlement of investment disputes by diplomacy, I would suggest that a return to this kind of "politicized" arrangement, roughly the same arrangement that exists to settle international trade disputes, is perhaps quite desirable, as it would give states greater ability to screen from international litigation sensitive disputes whose resolution by

81. *See* Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Law Regime*, 19 MICH. J. INT'L L. 373, 382 (1998) (explaining rise of BITs resulting from desire by developed countries to find "alternatives to gunboat diplomacy").

82. MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES ch. 6 (2007).

83. Brower & Steven, *supra* note 16, at 195 (suggesting BITs "'depoliticize' resolution of investment disputes by eliminating need for State-State adjudication.").

international tribunals would cause more societal harm than good, while ensuring the possibility of international law-based dispute settlement in those cases where it is both necessary and politically desirable.

V. Conclusion

In these comments I have suggested that investment treaties are largely replaceable by what I have called a minimalist system of international investment law. By moving to a minimalist system, we should be able to increase opportunities for political control of foreign investment law, while allowing for greater diversity of approaches and more legal experimentation. We would also help secure the long-term stability and legitimacy of the system by ensuring that the role of international law and of international tribunals in resolving investment disputes remains largely a role of last resort, rather than of first resort, as I fear it may be becoming reserved primarily for governing inherently complex investor-state relationships (such as relationships in the natural resources sector, and through contract) or for correcting serious failings or resolving serious disputes on the basis of very basic and largely uncontroversial principles that, in a sense, can truly be considered "universal," such as the principal that promises should normally be kept, or perhaps the principle of "denial of justice." There is little reason to think that such a move would cause foreign investment flows to the developing world to collapse. Indeed, I suspect they would remain more or less entirely unaffected.

This does not mean that international law or international tribunals have no role to play in resolving foreign investment disputes. Rather, I have emphasized that international law and international tribunals should have as much of a role to play as host states and investors wish to give them. What I am questioning is the need to impose international law and international tribunals upon *all* investors, as a matter of default rights established by international treaty or by custom. The argument for BITs builds upon several misplaced ideas: that BITs are necessary to make host state promises enforceable; that prospective investors care deeply about receiving a certain one-size-fits-all treaty-based package of legal rights; that uniformity and predictability are essential to the decision to invest, and that BITs adequately provide both; and perhaps most importantly, that the

interpretation and application of vague, open-ended, constitution-like investment treaty promises can (and should) somehow take place divorced from the messy world of politics.