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Corporations as Plaintiffs Under International Law:
Three Narratives about Investment Treaties

Charles H. Brower, II*

I. Introduction

When talking about corporations as defendants under international law, the narrative and the legal framework seem clear even if the outcome does not. According to the narrative, multinational corporations involved in extractive industries collaborate with repressive governments to terrorize populations, instituting forced labor, attacking those who resist, and spoiling the environment in ways that destroy traditional cultures and, perhaps, the conditions that support human life.¹ Relying on the Alien Tort Statute,² victims invoke the jurisdiction of U.S. federal courts to pursue remedies for state-sponsored injuries.

¹. See, e.g., Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1197–98 (9th Cir. 2007) (involving allegations that an international mining corporation operated an enormous copper and gold mine in ways that severely polluted the environment in Papua New Guinea, subjected workers to “slave-like” conditions, and solicited the government to use force against those who sought to disrupt the mining project); Doe I v. Unocal Corp., 395 F.3d 932, 936, 939–40, 942 (9th Cir. 2002), reh'g en banc, 403 F.3d 708 (9th Cir. 2005) (involving allegations that an international oil and gas company aided and abetted the government of Myanmar in displacing rural villagers from a pipeline route, forcing them to work as porters for the project, executing those who refused to participate, and subjecting forced workers to rape); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92–93 (2d Cir. 2000) (involving allegations that an international oil corporation coercively appropriated land from indigenous people, substantially polluted their homeland, and recruited Nigerian security forces to suppress local opposition by armed force and torture). See also Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247, 249–51, 256 (9th Cir. 2009) (involving claims that a Canadian oil corporation aided and abetted the Sudanese government in executing security measures designed to displace indigenous people through military operations launched from the supply roads and airfields associated with oil facilities).

committed abroad against aliens, often by foreign corporations. Although the results may vary from case to case, the storyline and the analytical template encompass familiar terrain. In other words, one at least knows how to begin and to proceed with a discussion of corporations as defendants under international law.

For discussions of corporations as plaintiffs under international law, only the point of departure seems clear: Investment treaties represent the prominent gateway into an international legal process that affords corporations wide opportunities to assert rights and to seek remedies for sovereign acts harmful to their investments in foreign states. Having recognized the potential significance of investment treaties, however, one struggles to find an appropriate narrative to explain their function and, thus, to guide their application in

3. See generally Talisman Energy, 582 F.3d at 247, 249–51; Sarei, 487 F.3d at 1197–98; Unocal, 395 F.3d at 936, 939–40, 942; Wiwa, 226 F.3d at 91–93. See also Ingrid Wuerth, Wiwa v. Shell: The $15.5 Million Settlement, ASIL INSIGHT (Sept. 9, 2009), http://www.asil.org/files/insight090909pdf.pdf (emphasizing that Alien Tort Statute cases “commit substantial judicial resources to resolving difficult legal issues in cases where the conduct generally occurs abroad, largely or solely between foreigners”).

4. See Wuerth, supra note 3 (concluding that Alien Tort Statute claims remain “uncertain to litigate”). Compare Aldana v. Del Monte Fresh Produce, 416 F.3d 1242, 1247 (11th Cir. 2005) (declining to recognize claims for cruel, inhuman, or degrading treatment as actionable under the Alien Tort Statute), with Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1092–95 (N.D. Cal. 2008) (recognizing a cause of action under the Alien Tort Statute for specific conduct universally condemned as cruel, inhuman or degrading).

In addition to disagreements regarding the scope of conduct covered by the Alien Tort Statute, particular claims may fail for a variety of context-specific reasons, including preemption by other federal statutes or, simply, a lack of evidence. For example, in Bowoto, 557 F. Supp. 2d at 1086–88, the court held that the Death on the High Seas Act preempts application of the Alien Tort Statute to claims for summary execution on offshore oil platforms. In Talisman Energy, 582 F.3d at 247–48, 262–64, the court dismissed the claim for lack of evidence that the defendant oil company intended to harm civilians in southern Sudan.

While outright victories against multinational enterprises seem relatively uncommon under the Alien Tort Statute, claimants have received meaningful settlements in particular cases. For example, in 2004, Unocal settled claims relating to the construction of a pipeline in Myanmar. John Crook, Tentative Settlement of ATCA Human Rights Suits Against Unocal, 99 AM. J. INT’L L. 497, 497 (2005). While the precise terms of the settlement remain confidential, it included compensation for the plaintiffs and funds to “develop programs to improve living conditions, health care and education and protect the rights of people in the pipeline region.” Id. at 498 (quoting Press Release, Unocal, Settlement Reached in Human Rights Lawsuit (Dec. 13, 2004)). More recently, in 2009, Royal Dutch Petroleum Company and Shell Transport concluded a $15.5 million settlement with members of the Ogoni people in Nigeria. Wuerth, supra note 3, at 102.

In addition to settlements and judgments, one can hardly discount the value to claimants (and the cost to defendants) of publicity generated by claims under the Alien Tort Statute. Cf. id. (speculating that the prospect of negative publicity may have encouraged Royal Dutch and Shell Transport to settle on the eve of trial).

5. See Sosa, 542 U.S. at 724–28 (accepting that the Alien Tort Statute provides a cause of action for certain violations of international law, but urging “great caution” in recognizing new causes of action, and authorizing such recognition only for norms “accepted by the civilized world and defined with a specificity comparable to the 18th-century prohibition of piracy). See also Talisman Energy, 582 F.3d at 255–56 (applying the framework articulated in Sosa); Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 737 (9th Cir. 2008) (same); Vietnam Assoc. for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116–17 (2d Cir. 2008) (same); Bowoto, 557 F. Supp. 2d at 1089 (same).

6. See Jeswald W. Salacuse, Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution, 31 FORDHAM INT’L L.J. 138, 143–44 (2007) (discussing the recent growth of investment treaty arbitration, and emphasizing the unique and powerful character of an international legal process that allows private parties to bring highly politicized, big-dollar claims against host states). See also Karl P. Sauvant, Introduction to 1 Y.B. INT’L INVESTMENT L. & POL’Y XXI, XXI (2009) (indicating that the number of claims brought under investment treaties "has risen rapidly and reached 300 by mid-2008, with more than half of the disputes arising during the past five years").
corporate situations.

Moving beyond analogies to international commercial arbitration,7 inter-state arbitration,8 and the law of sovereign immunity (which tend to emphasize procedural issues),9 one finds at least three narratives that promise to explain the functions of investment treaties. First, drawing on domestic jurisprudence, one might regard investment treaties as elaborate choice-of-law and forum-selection clauses designed to promote certainty in international business.10 Second, drawing on scholarship, one might describe investment treaties as the functional equivalent of human rights treaties designed to protect foreign investors from serious abuse by host states.11 Third, drawing on journalism, commentary, and the campaigns of advocacy groups, one might finally portray investment treaties as dangerous tools that empower foreign corporations to avoid (or to neutralize the economic consequences of) regulation.12 While plausible up to a point, each comparison requires a level of exaggeration that becomes impossible to maintain. However, by pushing each comparison to the point of failure, one reveals a different and comparatively modest narrative about the proper role of investment treaties.

II. The Business Planning Narrative

In seeking a narrative to explain the function of investment treaties, one often feels drawn towards the Supreme Court’s famous trio of decisions on the enforcement of forum-selection clauses and arbitration agreements. Decided between 1972 and 1985, these cases not only address the enforcement of dispute-settlement clauses; as explained below, they also describe the role that such provisions play in facilitating international commerce.

Until the middle of the twentieth century, United States courts operated in an environment that treated forum-selection clauses with suspicion.13 Regarding them as devices to circumvent the normal judicial process,14 courts routinely described such clauses as “void” or “contrary to public policy.”15 Although some lower courts began to manifest greater acceptance of “reasonable” forum-selection clauses by the late 1940’s, the tide definitively turned in 1972, when the Supreme Court’s decision in M/S Bremen v. Zapata Off-Shore Co.

10. See infra Part II.
11. See infra Part III.
12. See infra Part IV.
14. Id. at 439–40, 454.
15. Id. at 439 (quoting Benson v. E. Bldg. & Loan Ass’n, 174 N.Y. 83, 86 (1903) and Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297, 300 (5th Cir. 1958)).
enforced an agreement between German and U.S. companies to litigate in England disputes arising out of a contract to tow an oil-drilling rig from the Gulf of Mexico to a location in the Adriatic Sea.\textsuperscript{16} According to the Court, judicial hostility towards such agreements threatened to retard the growth of international commerce by reinforcing the uncertainty costs associated with exposure to litigation in multiple venues, as well as the risk of litigation in a hostile or inexperienced forum.\textsuperscript{17} By contrast, enforcement of freely negotiated forum-selection clauses promotes international commerce by allowing the parties to designate in advance a single forum possessing appropriate characteristics (such as neutrality and expertise), thus bringing "vital certainty" to the resolution of contingent risks.\textsuperscript{18}

Two years later, in \textit{Scherk v. Alberto-Culver Co.}, the Supreme Court ordered a U.S. company to arbitrate a securities fraud claim against a German individual under the arbitration rules of the International Chamber of Commerce in Paris.\textsuperscript{19} In addition to recognizing the arbitrability of securities fraud claims for "truly international" agreements,\textsuperscript{20} the decision extended \textit{The Bremen} in two ways. First, it described arbitration agreements as specialized forum-selection clauses,\textsuperscript{21} thus subjecting their enforcement to the legal framework articulated in \textit{The Bremen}. Second, because the relevant clause in \textit{Scherk} contained an express choice of law (unlike \textit{The Bremen}),\textsuperscript{22} the Court took the opportunity to discuss the combined effect of forum-selection and choice-of-law clauses in promoting international trade.\textsuperscript{23} Thus, the Court described a "contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied" as an "almost indispensible precondition to achievement of the orderliness and predictability essential to any international business transaction."\textsuperscript{24}

In 1985, the Supreme Court rendered its decision in \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, which addressed the arbitrability of antitrust claims for international transactions.\textsuperscript{25} In addition to invoking comity to foreign tribunals as an additional reason for the enforcement of arbitration agreements even in the antitrust context,\textsuperscript{26} the decision also remains noteworthy for emphasizing the weight that the Court assigned to the role of dispute-settlement clauses in promoting certainty for international commerce. During the decades before \textit{Mitsubishi}, the Supreme Court had consistently emphasized the fundamental importance of antitrust laws to American capitalism. For example, in 1933, Chief Justice Hughes described the Sherman Antitrust Act as a "charter of freedom" that might be compared to a constitutional provision.\textsuperscript{27} Nearly four decades later, the Court referred to the Sherman Act as the "Magna Carta of free enterprise[, which is] as important to

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 9, 11-14, 17-18.
\item \textit{Id.} at 11-14, 17-18.
\item \textit{Id.} at 515-16.
\item \textit{Id.} at 519.
\item \textit{Compare id.} at 508 (quoting the parties' arbitration and choice-of-law clauses), \textit{with Bremen}, 407 U.S. at 13 n.15 (observing that the contract did not contain an express choice-of-law clause).
\item \textit{Scherk}, 417 U.S. at 516-17.
\item \textit{Id.} at 516.
\item \textit{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 616 (1985).
\item \textit{Id.} at 629.
\item \textit{Appalachian Coals, Inc. v. United States}, 288 U.S. 344, 359-60 (1933).
\end{enumerate}
\end{footnotesize}
the preservation of economic freedom as the Bill of Rights is to the protection of our fundamental personal freedoms."28 Under these circumstances, federal courts of appeals had uniformly treated antitrust claims as public matters not capable of settlement by arbitration.29

While recognizing the "fundamental importance" of antitrust laws, however, the Court concluded in *Mitsubishi* that the need for predictability in international commerce justified the arbitrability of antitrust disputes, "even assuming that a contrary result would be forthcoming in a domestic context."30 In other words, the Court regarded the need for certainty in international commerce as so compelling that the Court pursued it even at the expense of fundamental national policies.

In one sense, *The Bremen, Scherk, and Mitsubishi* provide little help in understanding the function of investment treaties. In the narrowest sense, those cases deal with the enforceability of dispute-settlement clauses, which seems above question in the context of investment treaties.31 Drawing broader lessons, however, the cases suggest that (1) arbitration agreements and choice-of-law clauses promote certainty, (2) certainty fuels international commerce, and (3) adjudicators should apply dispute-settlement provisions in a manner that nourishes predictability for international transactions even at the expense of other important values.

Building on the points just made, one might pause to observe that investment treaties represent elaborate dispute-settlement clauses insofar as they (1) identify standards for the treatment of foreign investment, and (2) establish procedures for the arbitration of claims brought directly by foreign investors their against host states.32 Viewed from this perspective, the Supreme Court’s narrative arguably becomes relevant by analogy: Investment treaties serve to facilitate international commerce by enhancing predictability for cross-border investment transactions. Adopting that as the frame of reference for treaty interpretation, tribunals should apply investment treaties in ways that increase certainty for foreign investors, even at the expense of values that might prevail in the domestic context.

In some academic circles, the business planning narrative has gained credence as a tool

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30. *Id.* at 634–35 (majority opinion).
31. *Id.* at 629, 630–31.
for describing the function of investment treaties. For example, at a conference in January 2007, the author made a presentation regarding the sources of decentralization and, therefore, inconsistency in investment treaty arbitration. These included decades of controversy about the standards of treatment for foreign investment, the existence of thousands of bilateral treaties as opposed to a single global instrument (or even a handful of comprehensive regional instruments), and recourse to a series of *ad hoc* tribunals as opposed to a single, permanent tribunal. Concluding his presentation, the author described human rights as another decentralized international legal regime, observed that people have come to expect a degree of inconsistency among the jurisprudence of global and regional human rights systems, and suggested that users of investment treaties could tolerate a similar divergence of outcomes. During the ensuing discussion, a well-known academic with a transactional background opined that the commercial setting of foreign investment requires a higher level of consistency than might be tolerated in the protection of human rights.

Turning from academic discourse to the decisions of tribunals, one finds at least two lines of cases that seem to regard the enhancement of predictability as a touchstone for applying investment treaties. For example, many tribunals have emphasized protection and promotion of foreign investment as the fundamental purpose of investment treaties. While unremarkable in the abstract, this insight has led many tribunals to prefer treaty interpretations on the basis of the object and purpose of investment treaties. For example, many tribunals have emphasized protection of investors and investments, and concluding that "protection of foreign investments is not the sole aim of the [t]reaty." See also *Newcombe & Paradell, supra* note 33, at 115-16 (observing that some tribunals have adopted a teleological approach that favors the protection of investors and investments, and concluding that "pro-investor interpretations on the basis of the object and purpose of [investment treaties] would seem to be defensible readings"); *Saluka v. Czech*, *Partial Award* [hereinafter *Saluka Partial Award*] (emphasizing that the "protection of foreign investments is not the sole aim of the [t]reaty").


35. *Id.* at 341-47.

36. *Id.* at 353-54.


38. *See*, e.g., *SGS Decision on Jurisdiction, supra* note 37, ¶ 116 (emphasizing the fundamental purpose of the relevant BIT as promotion and protection of investments, and concluding that "[i]t is legitimate to resolve uncertainties ... so as to favour the protection of covered investments"); RUDOLF DOLZER & CHRISTOPH SCHREUER, *Principles of International Investment Law* 32 (2008) ("Tribunals have frequently interpreted investment treaties in light of their object and purpose, often by looking at their preambles. Typically, this has led to an interpretation that is favorable to the investor."). See also *Newcombe & Paradell, supra* note 33, at 115-16 (observing that some tribunals have adopted a teleological approach that favors the protection of investors and investments, and concluding that "pro-investor interpretations on the basis of the object and purpose of [investment treaties] would seem to be defensible readings"); Jason Webb Yackee, *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, 221 n.120 (2005) (opining that "arbitral tribunals have so far not been overly stingy in interpreting ... ambiguities in favor of foreign investors").
result, some observers regard their decisions as reflecting a systematic predisposition towards the commercial interests of foreign investors as opposed to the regulatory interests of host states. While such predispositions may not give foreign investors the reassurance that any particular rule will govern their disputes with host states, they guarantee that the interests of foreign investors will receive an edge over the competing interests of host states in cases of doubt. In effect, this mirrors the Supreme Court's business planning narrative by applying the terms of dispute-settlement agreements with a bias towards the enhancement of commercial certainty, even at the expense of competing values that might prevail in a domestic context.

Moving from general inclinations to the application of specific treaty provisions, many tribunals have expressed a profound concern for establishing conditions often associated with certainty. For example, while subject to important variations in wording, virtually all investment treaties include a clause extending "fair and equitable treatment" to covered investments. While perhaps not implied by the ordinary language, several tribunals have construed this phrase to require that host states meet the "legitimate expectations" of foreign investors, including some demanding assumptions about the requirements of consistency, transparency, and stability in public affairs. Thus, according to one popular

39. *See* Noble Ventures v. Rom., ICSID Case No. ARB/01/11, Award, ¶ 52 (Oct. 12, 2005) [hereinafter Noble Ventures Award], 2005 WL 3067740 (complaining that investment treaty tribunals "too often" interpret BITs "exclusively in favour of investors"); *Gus van Harten, Investment Treaty Arbitration and Public Law* 121 (2007) (describing a "general tendency" of tribunals to "read the object and purpose of investment treaties in ways that emphasize the interests of investors over competing governmental priorities"); *Ibironke T. Odumosu, The Antinomies of the (Continued) Relevance of ICSID to the Third World, 8 San Diego Int'l L.J.* 345, 350 (2007) (suggesting that "more often than not, ICSID tribunals are preoccupied with the commercial interests of foreign investors").


42. *See, e.g., MTD Award, supra* note 37, ¶ 165 (declaring that the host state had an "obligation to act coherently and to apply its laws consistently").

43. *See, e.g., Metalclad Corp. v. Mex., ICSID Case No. ARB(AF)/97/1, Award, ¶ 76 (Aug. 30, 2000), 2000 WL 34514285 [hereinafter Metalclad Award] (concluding that "fair and equitable treatment" includes a strong obligation of transparency that leaves "no room" for "doubt," "uncertainty," "misunderstanding," or "confusion" regarding the host state's legal requirements that apply to foreign investment).

44. *See, e.g., CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005), 2005 WL 1201002 [hereinafter CMS Award] (declaring that "[t]here can be no doubt . . . that a stable legal and business environment is an essential element of fair and equitable treatment").

Responding to some of the more onerous formulations of host states' obligations with respect to consistency, transparency and stability, certain observers have criticized the investment treaty jurisprudence as unrealistic and unsupported as a matter of international law. *See MTD Equity Sdn Bhd v. Chile, ICSID Case No. ARB(AF)/01/7, Decision on Annulment, ¶¶ 66–67 (Feb. 16, 2007), 2007 WL 1215071 (expressing appreciation for the view that "the Tecmed programme for good governance" is extreme and does not reflect international law"); Zachary Douglas, Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex, 22 Arb. Int'l L. 27, 28 (2006) (referring
formulation, host states must "act in a consistent manner, free from ambiguity, and totally transparently in [their] relations with . . . foreign investor[s]." In the words of another tribunal, "the fair end equitable treatment standard consists of the host State's consistent and transparent behavior, free of ambiguity, that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor." Paraphrasing the awards just mentioned, host states must establish clear legal rules governing foreign investment, apply them consistently, and refrain from altering the basic legal and business framework governing foreign investment. While these obligations do not require host states to guarantee the success of foreign investments, or even to create the most favorable conditions for foreign investments, they demand something like certainty in the sense that legal requirements (however good or bad) must be stated clearly and protected from substantial variation in principle and in practice. Thus, mirroring the Supreme Court's narrative, businesses should have the opportunity to identify their rights with clarity before committing resources to cross-border transactions. Thereafter, competing social policies will rarely justify the disturbance of settled expectations.

Viewed from one perspective, it seems natural for the application of investment treaties to the Tecmed standard as "a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain"; Joseph E. Stiglitz, Multinational Corporations: Balancing Rights and Responsibilities, 101 AM. SOC'Y INT'L L. PROC. 462,463-64 (2007) (observing that some tribunals "have interpreted 'Fair and Equitable treatment' to entail extraordinarily high . . . levels of obligations for developing countries to provide . . . transparency, competency, responsiveness, and efficiency").

45. Tecmed Award, supra note 41, ¶ 154 (emphasis added). This formulation does not represent an outlier, but a common point of departure for awards on the topic of fair and equitable treatment. See LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 127 (Oct. 3, 2006), 2006 WL 2985837 [hereinafter LG&E Decision on Liability]; Bayindir Isnaat Turizm Tecaret Ve Snaayi A.S. v. Pak., ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶¶ 237-41 (Nov. 14, 2005), 2005 WL 3598900; CMS Award, supra note 44, ¶¶ 279-81; Occidental Exploration & Prod. Co. v. Ecuador, London Ct. Int'l Arb. Case No. UN 3467, Final Award, ¶¶ 185-87 (July 1, 2004), available at http://ita.aw.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf; MTD Award, supra note 37, ¶¶ 114-15. See also Dolzer & Schreuer, supra note 38, at 127 (observing that the Tecmed formulation "has become famous for its often-cited wide-ranging paragraph 154 in which it defined the [fair and equitable treatment] standard"); Douglas, supra note 44, at 28 (opining that the Tecmed standard "is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment"); W. Michael Reisman, The Evolving International Standard and Sovereignty, 101 AM. SOC'Y INT'L L. PROC. 462, 463-64 (2007) (observing that the relevant passage from the Tecmed Award "has been recited by many other [tribunals]."

46. LG&E Decision on Liability, supra note 45, ¶ 131 (emphasis added).

47. See MTD Award, supra note 37, ¶ 178 (recalling that "BITs are not an insurance against business risk"); Maffeziuni v. Spain, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000), 2000 WL 34513944 (emphasizing that "Bilateral Investment Treaties are not insurance policies against bad business judgments"); NEWCOMBE & PARADELL, supra note 33, at 298 (concluding that investment treaties "do not provide blanket insurance against all forms of business risk").

48. See LG&E Decision on Liability, supra note 45, ¶ 130 (observing that "the investor's fair expectations" must be "based on the conditions offered by the host State at the time of the investment"); NEWCOMBE & PARADELL, supra note 33, at 296 ("Fair and equitable treatment does not require that governments adopt specific types of economic policies. It does not require host states to liberalize, privatize, deregulate, lower taxes or engage in other economic policies that might be viewed as creating favourable conditions for private investment."). Of course, the situation changes for cases in which the host state makes specific and direct promises to particular investors about anticipated regulatory reforms designed to establish more favorable conditions for foreign investments. NEWCOMBE & PARADELL, supra note 33, at 296.
to track or even extend the Supreme Court’s business planning narrative. Assuming that international commerce demands predictability in general, the need for that element reaches its height in the context of investment transactions. As explained by Professors Dolzer and Schreuer:

[Whereas a trade deal typically consists in a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host country. Often, the business plan of the investor is to sink substantial resources into the project at the outset of the investment, with the expectation to recoup this amount plus an acceptable rate of return during the subsequent period of investment, sometimes running up to 30 years or more.

A key feature in the design of such a foreign investment is to lay out in advance the risks inherent in such a long-term relationship, both from a business perspective and from the legal point of view, and then to identify a business concept and a legal structure that is suitable not only to the implementation of the project in general but also to minimize the risks that may arise during the period of investment....

...]

The central political risk that arises for the foreign investor lies in a change of the position of the host government that would alter the scheme of burdens, risks, and benefits, which the two sides have laid down when they negotiated the deal and which formed the basis of the investor’s plan and the legitimate expectations embodied in this plan. Such a change of position on the part of the host country becomes more likely with every subsequent change of government in the host state during the period of investment.

In other words, given the larger commitment of resources, the longer time periods, and the pressures for host states to revisit the balance between investment and other priorities, the application of investment treaties in good faith requires, if anything, an even greater emphasis on certainty and even more protection from competing social policies.

Viewed from another perspective, however, it seems absurd for the application of investment treaties to track (much less extend) the Supreme Court’s business planning narrative. The Bremen, Scherk and Mitsubishi each involved the application of commercial agreements between private parties, who negotiated specific provisions aimed at bringing clarity to the resolution of disputes. Under these circumstances, the Court sensibly granted the parties the full measure of their bargains on the modalities for dispute-settlement not-


50. See Rudolf Dolzer, Fair and Equitable Treatment: A Key Standard in Investment Treaties, 39 Int’l L. 87, 104 (2005) (explaining that stability and predictability of legal requirements represent issues of fundamental importance to foreign investors who commit significant capital resources to their host states for a period of years or decades).

51. DOLZER & SCHREUER, supra note 38, at 3–4. See also LEW ET AL., supra note 33, at 762 (explaining that investments “may be considerable” and “may need years for the investor to recover”).

52. See Jeswald W. Salacuse, The Treatification of International Investment Law, 13 L. & Bus. Rev. Am. 155, 156 (2007) (describing investment treaties as tools that enable foreign investors to “resist the forces of change often demanded by the political and economic life in host countries”). Thus, as tribunals have observed, investment treaties are specifically designed to protect foreign investors during times of “economic difficulty and hardship,” when political support for the imposition of harsh measures may reach a highpoint in the host state. See Sempra Energy Int’l v. Arg., ICSID Case No. ARB/02/16, Award, ¶ 373 (Sept. 28, 2007), 2007 WL 5540331; Enron Corp. v. Arg., ICSID Case No. ARB/01/3, Award, ¶ 331 (May 22, 2007), 2007 WL 5366471.
withstanding peripheral effects on enforcement of public regulatory laws.

One may, of course, identify situations in which foreign investors have commercial relationships, such as procurement contracts, with host states. In those cases, large-scale foreign investors bargain directly with their host states regarding the precise allocation of "burdens, risks, and benefits." To guide the application of such agreements directly or through an investment treaty's umbrella clause, one might adopt the Supreme Court's business planning narrative by analogy, subject to the adjustments required to account for the host state's dual role as commercial partner and regulator.

However, the relationships between foreign investors and host states often do not involve any commercial transactions. For example, when a U.S. investor acquired a project to build a hazardous waste facility near a rural Mexican town, it made an investment on Mexican territory, but did not thereby establish a commercial relationship with the host state. As a result, it did not bargain with the host state regarding the allocation of substantive obligations or the modalities for dispute settlement. Under these circumstances, the Supreme Court's business planning narrative loses relevance because it aims to facilitate the performance of bargains that simply do not exist.

Even in the absence of directly negotiated commercial arrangements, however, investment treaties provide a framework to guarantee that relationships between foreign investors and host states do not occur within a legal vacuum. Thus, mirroring the form of

53. See Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Award, ¶¶ 81–97 (Feb. 6, 2007), 2007 WL 1215068 [hereinafter Siemens Award] (describing the investor's agreement to provide the host state with national identification cards and related services); SGS Decision on Jurisdiction, supra note 37, ¶¶ 12–25 (discussing the investor's agreement to provide pre-shipment customs inspection services for the host state).

54. DOLZER & SCHREUER, supra note 38, at 4.

55. Appearing in a minority of investment treaties, so-called "umbrella clauses" arguably (though controversially) empower investors to bring treaty claims for what would otherwise constitute mere contractual disputes. See SGS Decision on Jurisdiction, supra note 37, ¶ 128; R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES 1008 (2005); DOLZER & SCHREUER, supra note 38, at 153–62; DUGAN ET AL., supra note 40, at 451; McLachlan et al., supra note 41, at 92, 111, 115–17; Redfern & Hunter, supra note 40, at 506–08; Rubins & Kinsella, supra note 40, at 234–40.

56. See Rubins & Kinsella, supra note 40, at 42 (observing that "not all investment activity involves a State contract ... and ... foreign businesses will not always have enough influence to enter into a special contractual arrangement").

57. See Metalclad Award, supra note 43, ¶¶ 28–44 (describing the relevant transaction).

58. See J. C. Thomas, A Reply to Professor Brower, 40 COLUM. J. TRANSNAT'L L. 433, 442 (2002) ("Metalclad had invested in Mexico, not with Mexico, and no commercial relationship in the sense of a contract existed between them."). Mr. Thomas represented Mexico in the dispute with Metalclad. Id. at 433 n.1.

59. See DOLZER & SCHREUER, supra note 38, at 22 (explaining that "the purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide for stability and predictability in the sense of an investment-friendly climate").

Although there was a time when customary international law supplied the necessary background rules, the combined forces of decolonization and socialist revolution sought to dethrone those norms during the 1960's and 1970's. See DOLZER & SCHREUER, supra note 38, at 14–15; Lowenfeld, supra note 40, at 469, 483–94; Newcombe & Paradell, supra note 33, at 18–19, 26–27, 31–33; Rubins & Kinsella, supra note 40, at 155–58, 160–66; Salacuse, supra note 52, at 155.

To counteract the resulting uncertainties, capital exporting states developed investment treaties as a tool for establishing a relatively clear and robust set of background rules to govern relations between foreign investors and host states. Id. at 156 (recalling the efforts of capital exporting states to reinvigorate the protection of foreign investment by negotiating treaties that would be 1) complete, 2) clear and specific, 3) unconestable, and 4) enforceable). See also McLachlan et al., supra note 41, at 17–18 (emphasizing that states "have entered into investment treaties precisely in order to reme-
commercial agreements, investment treaties establish the substantive obligations of host states with respect to the treatment of foreign investment, and give foreign investors the right to submit claims for alleged treaty violations directly to arbitration before international tribunals. Given their superficial resemblance, one understands the temptation to use commercial agreements as a basis for understanding the function of investment treaties.

However, one must take care not to exaggerate the similarities between commercial agreements and investment treaties, which pale in the face of substantial differences. For example, while private parties negotiate and perform commercial agreements, they do not participate in the negotiation of investment treaties and, thus, do not become parties to investment treaties. To the contrary, states (and only states) negotiate and become parties to investment treaties. Also, while states have an interest in promoting foreign investment to fuel economic development, they also have an interest in pursuing (and may have obligations under international law to pursue) other values, including protection of

dy perceived gaps or limitations in the protections afforded by customary international law"; Newcombe & Paradell, supra note 33, at 41 (opining that the "development of [investment treaties] was primarily a response to the uncertainties . . . of the customary international law of state responsibility to aliens").

60. See supra note 33 and accompanying text.

61. See David R. Haigh, Chapter 11—Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?, 26 CAN.-U.S. L.J. 115, 128 (2000) (stating, in the context of NAFTA’s investment chapter, that the "fundamental objective . . . is to create a bargain between host states and investors," according to which "those who respond to the invitation from the host country to invest their expertise and other resources in that state may be assured that . . . basic standards of fairness . . . will be fully observed by the host government").

62. See Loewen Group, Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, Award, ¶ 233 (June 26, 2003), 42 I.L.M. 811 (2003) [hereinafter Loewen Award] (warning that "there is no warrant for transferring rules derived from private law into a field of international [investment] law"); Salacuse, supra note 6, at 140 (emphasizing that investment treaty disputes "are not a matter of simple contract claims governed by contract law; they are disputes governed by public international law in the form of treaties—insitutions of international law—solemnly entered into by two or more states").

63. It goes without saying, however, that government agencies often consult with business interests in the development of model investment treaties. See Peter Muchlinski, Policy Issues, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3, 7 (Peter Muchlinski et al. eds., 2008) (expressing no doubt that multinational enterprises "lobby governments and intergovernmental organizations to ensure that normative development is business friendly"); Jeswald W. Salacuse, The Emerging Global Regime for Investment, 51 HARV. INT’L L.J. 427, 439 (2010) (observing that capital-exporting states have adopted model investment treaties "after significant consultation with domestic interest groups").

64. See Susan D. Franck, The Nature and Enforcement of Investment Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future?, 12 U.C. DAVIS J. INT’L L. & POL’Y 47, 73 (2005) (“Unlike private commercial law contracts, treaties involve rights negotiated and granted between two sovereigns.”). One should also bear in mind the position trenchantly taken by some states (and accepted by certain tribunals) that the substantive obligations created by investment treaties are and remain undertakings solely between or among states. See Archer Daniels Midland Co. v. Mex., ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 168-80 (Nov. 21, 2007), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docid=DC782&En&caseId=C43 [hereinafter ADM Award].

the environment, public health, human rights and labor rights.\textsuperscript{66} As a result, when concluding investment treaties, states often seek to advance the interests of several different constituencies.\textsuperscript{67} Consequently, investment treaties may not address all topics of importance to foreign investors.\textsuperscript{68} Furthermore, to the extent that they address such topics, they may not adopt the preferred solutions of foreign investors.\textsuperscript{69} Finally, given the need to reach agreement while finessing the differences among various stakeholders, investment treaties often do not reflect the specificity of commercial agreements, but formulate the obligations of host states at a high degree of generality.\textsuperscript{70} Under these circumstances, maximization of


\textsuperscript{67} See Kenneth J. Vandevelde, \textit{The Bilateral Investment Treaty Program of the United States}, 21 CORNELL INT'L L.J. 201, 210 (1988) (explaining the need for, and difficulties involved in, using inter-agency processes for the development of model investment treaties). To the extent that states shift the focus of investment promotion and protection from stand-alone investment treaties to free trade agreements that include investment chapters, they must accommodate a correspondingly wider range of interests into the negotiating process. See Peter Muchlinski, \textit{Trends in International Investment Agreements}, 1 Y.B. INT'L INV. L. & POL'Y 35, 36–37 (2009) (discussing the growth of free trade agreements with investment chapters, and noting that this extends the scope of coverage to include "trade in goods and services, intellectual property rights, competition, government procurement, temporary entry for business persons, transparency and social issues such as environment and labor").

\textsuperscript{68} By way of example, one may cite three mechanisms used to exclude topics of concern to foreign investors. For example, many investment treaties distinguish between the pre-entry and post-entry phases of investment, extending coverage only to the latter phase. See DOLZER \& SCHREUER, supra note 38, at 81; NEWCOMBE \& PARADELL, supra note 33, at 134–40. As a consequence, they aim chiefly to protect (but not necessarily to liberalize) foreign investment. See id. at 134. Even during the post-entry phase, most investment treaties do not regulate the imposition of performance requirements that force investors to operate in ways designed to serve the interests of the host state, for example by achieving certain levels of local content or export performance. See DOLZER \& SCHREUER, supra note 38, at 82–83; NEWCOMBE \& PARADELL, supra note 33, at 417–19, 422; Muchlinski, supra note 63, at 32. Furthermore, investment treaties may include exceptions or reservations that deny coverage to particular economic sectors or that exclude certain types of measures. See DOLZER \& SCHREUER, supra note 38, at 81; NEWCOMBE \& PARADELL, supra note 33, at 138–39.

In addition, business interests regularly push for investment treaties that fail to materialize, including the OECD’s failed Multilateral Agreement on Investment and the WTO’s failed effort to develop investment rules. Muchlinski, supra note 63, at 7. To this, one might also add the failed effort to negotiate a Free Trade Agreement for the Americas. See David A. Gantz, \textit{An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges}, 39 VAND. J. TRANSNAT'L L. 39, 46–47 & n.31 (2006) (noting that problems have led to suspension of negotiations regarding the Free Trade Agreement of the Americas, describing the prospects of their conclusion as “increasingly remote,” and opining that extension of the agreement to investment “is even more remote”); Michael D. Goldhaber, \textit{Wanted: A World Investment Court}, AM. LAW/FOCUS EUROPE, Summer 2004, http://www.americanlawyer.com/focuseurope/investmentcourt04.html (referring to the stalled negotiations for a Free Trade Agreement of the Americas).


commercial certainty seems unlikely to represent a core function of investment treaties.

Consistent with the hypothesis just stated, a recent line of cases decided under the NAFTA's investment chapter indicates that investment treaties and investment tribunals play not a central, but a peripheral role in promoting commercial certainty for foreign investors. Thus, after the pro-investor trio of Metalclad v. Mexico, S.D. Myers, Inc. v. Canada, and Pope & Talbot v. Canada, which threw the NAFTA parties into a state of near panic, a different trinity emerged. First, in 2003, the tribunal in Loewen Group Inc. v. Unit-
expressed the view that arbitrators should not to display "too great a readiness to step from outside into the domestic arena" and to impose liability even for serious "local error[s]." In other words, contrary to the ubiquitous role of domestic courts in applying the dispute-settlement provisions of commercial agreements to promote commercial certainty, tribunals should apply investment treaties to provide relief only in extraordinary cases. Two years later, the tribunal in Methanex Corp. v. United States operationalized the principle by declaring that non-discriminatory regulations enacted for public purposes in accordance with due process fall outside the scope of expropriation. Most recently, in 2009, the tribunal in Glamis Gold v. United States declared that the guarantee of "fair and equitable treatment" in NAFTA Article 1105 prohibits only the sort of "egregious," "outrageous" or "shocking" government acts condemned in Neer v. Mexico during 1926.

Together, the Loewen, Methanex, and Glamis awards represent a decisive shift away from the promotion of commercial certainty for investors and towards preservation of regulatory space for host states.

Given the Free Trade Commission's Notes of Interpretation regarding NAFTA Article 1105 (which equates "fair and equitable treatment" to the minimum standard of treatment for aliens under customary international law), and the United States' frequent role as a respondent in disputes under the NAFTA's investment chapter, one might limit Loewen, Methanex, and Glamis to the North American context and take the position that they do not necessarily reflect broader trends. State practice, however, emphatically signals a trend towards the rebalancing of investment treaties to protect the regulatory space of host states.

In a move described by a former President of the International Court of Justice as the "regressive development of international law," the United States comprehensively re-

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75. Loewen Award, supra note 62, ¶ 242.
vised its model BIT in 2004 with the intent of reducing the jurisprudential discretion of tribunals and increasing the regulatory discretion of host states. Thus, while retaining a provision on "fair and equitable treatment," the United States Model BIT of 2004 expressly defines that concept to embrace the "minimum" standard of treatment required by customary international law, as documented by actual state practice (as opposed to aspirational best practice). Likewise, while retaining a provision on expropriation, the United States Model BIT of 2004 provides that nondiscriminatory regulatory actions designed to protect public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations "[e]xcept in rare circumstances." Furthermore, it reserves the right of states parties acting jointly to remove issues from tribunal consideration and to resolve them at the political level, a possibility that seems difficult to square with the promotion of commercial certainty. Finally, the United States seems disposed to draft a new model BIT that could tilt even further towards the preservation of regulatory space for host states.

Looking beyond the United States, Canada also adopted a new model Foreign Investment Protection Agreement during 2004. In addition to provisions mirroring the United

that the new U.S. model BIT "embodies regressive changes that are deplorable").

81. Vandevelde, supra note 74, at 288. See also McLachlan et al., supra note 41, at 22 (indicating that the new U.S. model BIT "incorporates numerous innovations designed to reflect the public interests of States"); Brower, supra note 66, at 357 n.55 (indicating that the United States' 2004 Model BIT was "designed to increase the protection for host countries at the expense of investor protection"). Gilbert Gagné & Jean-Frédéric Morin, The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT, 9 J. INT'L ECON. L. 357, 367 (2006) (explaining that the new U.S. model BIT includes "substantial clarifications aimed at limiting the scope of... obligations relating to expropriation and the minimum standard of treatment").


83. See id. art. 5(2).

84. See id. annex A.

85. See id. art. 6.

86. See id. annex B, ¶ 4(h).

87. See id. arts. 30(3), 31(2), 37(4); Vandevelde, supra note 74, at 296.


States’ refinements on the minimum standard of treatment and the power of states parties to remove certain issues from tribunal consideration,90 the Canadian model includes a provision on expropriation that resembles its U.S. counterpart,91 but differs in tone. Thus, while reiterating the principle that non-discriminatory regulations adopted for public welfare purposes do not constitute indirect expropriations “except in rare circumstances,”92 the Canadian text emphasizes just how exceptional circumstances must become for regulations to cross the threshold of expropriation. Specifically, the Canadian text refers to situations in which “a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith.”93

In addition, the Canadian model breaks new ground by incorporating general exceptions drawn almost verbatim from Article XX of the General Agreement on Tariffs and Trade.94 Thus, it expressly reserves the rights of states parties to adopt and enforce measures necessary to protect human, animal or plant life or health, or necessary for the conservation of living or non-living exhaustible natural resources.95 Even according to an observer not known for his sympathy towards foreign investors, the exceptions contained in the Canadian model “are so extensive as to raise the question as to whether they . . . undermine the scope of the treaty.”96

Moving beyond North America, Norway unveiled a draft model BIT in December 2007.97 Like its U.S. and Canadian counterparts, the Norwegian text assimilates “fair and equitable treatment” to the minimum standard of treatment for aliens under customary international law,98 and authorizes the states parties to remove certain issues from tribunal consideration.99 While including a provision on expropriation,100 the Norwegian model defines the concept even more narrowly than the Canadian version. Thus, without including a qualification for exceptional circumstances, the text simply reserves the right of states parties to “enforce such laws as [they] deem[] necessary to control the use of property in accordance with the general interest.”101 Though somewhat longer and more extensive than its Cana-
of states, the Norwegian text provides that measures applied "in pursuance of legitimate policy objectives of public interest such as the protection of public health, safety and the environment" do not violate disciplines on national treatment or MFN treatment when they bear a "reasonable relationship to rational policies" not motivated by discriminatory animus. Id. arts. 3(1) & n.2, 4(1) & n.3.

102. Compare Draft Norwegian Model BIT, supra note 74, art. 24, with GATT, supra, note 94, art. XX.

103. Draft Norwegian Model BIT, supra note 74, art. 24(i), (ii), (v).

104. Id. art. 24 & n.6.

105. Id. pmbl.

106. Id. art. 12. The relevant passage provides that "[n]othing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns." Id. (emphasis added).

On the one hand, the highlighted language has a textual counterpart in the NAFTA, which some have described as a "tautological" or "hortatory" provision that does not enhance the regulatory flexibility of states. See North American Free Trade Agreement, U.S.-Can.-Mex., art. 1114, Dec. 17, 1992, art. 1114, 32 I.L.M. 605 (1993) [hereinafter NAFTA]; NEWCOMBE & PARADELL, supra note 33, at 509; Todd Weiler, A First Look at the Interim Merits Award in S.D. Myers, Inc v. Canada: Is It Possible to Balance Legitimate Environmental Concerns with Investment Protection?, 24 HASTINGS INT'L & COMP. L. REV. 173, 181–82 (2001).

On the other hand, the heading used in the Norwegian text ("Right to Regulate") may provide emphatic context for interpretations regarding the scope of investors' rights. See Official Comments on Draft Norwegian Model BIT, supra note 98, at 27 (concluding that "the main significance of the provision is as an additional interpretive factor for the scope of the protection provisions of the agreement").


community felt that the draft did not provide investors with sufficient protection, non-
governmental organizations (NGOs) complained that it placed too many restraints on the
government's capacity to regulate.109

Turning from the practice of developed states to trends among developing states, one
finds similar forces at work. In the growing network of so-called South-to-South invest-
ment treaties, which now account for over one quarter of the worldwide stock of invest-
ment treaties,110 one tends to find limitations in the levels of protection not normally in-
cluded in North-to-South treaties.111 Also, given the series of high-stakes and high-profile
claims against Argentina,112 other states in the region have begun to denounce existing in-
vestment treaties,113 to renounce investor-state arbitration in whole or in part under the
ICSID Convention,114 or to refrain from the conclusion of new investment treaties.115

While some describe the phenomenon as a “recalibration” or “reappraisal” of interna-
tional investment law (thus suggesting a change in course),116 the fact is that recent tribu-
unal decisions and state practice emphasize not the promotion of certainty for foreign inves-
tors, but preservation of regulatory space for host states. Viewed from this perspective,
investment treaties serve not to protect foreign investors from disappointment in their re-
lations with host states,117 from breaches of commercial agreements by host states,118 from

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109. Id.
110. DUGAN ET AL., supra note 40, at 52 n.33; Muchlinski, supra note 67, at 38; Salacuse, supra note 63, at
433–34; Karl P. Sauvant, The Rise of International Investment, Investment Agreements and Investment
Disputes, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, supra note 76, at 3, 9.
111. Anna Joubin-Bret, The Growing Diversity and Inconsistency in the IIA System, in APPEALS MECHANISM IN
INTERNATIONAL INVESTMENT DISPUTES, supra note 76, at 137, 139.
112. See, e.g., William W. Burke-White & Andreas von Staden, Investment Protection in Extraordinary
Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Invest-
moil in Argentina during 2001, which triggered forty-three investment treaty arbitrations seeking
roughly $8 billion, an amount that exceeded the Argentina's financial reserves in 2002).
113. See Salacuse, supra note 63, at 469–70 (describing Venezuela's termination of its BIT with the Nether-
lands, Ecuador’s termination of nine BITs, and Bolivia’s declaration of intent to renegotiate its BITs).
See also Stiglitz, supra note 44, at 14–15 (calling for a “serious rollback in agreements already
signed”).
114. See Salacuse, supra note 63, at 469 (reporting Bolivia's withdrawal from the ICSID Convention in
2007, as well as Ecuador's withdrawal in 2010).
115. See Alan Beattie, Concern Grows over Global Trade Regulation, FIN. TIMES, Mar. 12, 2008, at 9, available
at http://www.ft.com/cms/s/0/58699264-ef9c-1ldc-8al7-0000779fd2ac,sO1=1.html (quoting a se-
nior Brazilian official and a Washington trade lawyer for the proposition that the claims against Ar-
gentina have raised concerns which have made it difficult or impossible for Brazil to conclude new
investment treaties).
cluding that “BITs are presently undergoing some kind of reappraisal”); Julian Davis Mortenson, The
Meaning of “Investment”: ICSID’s Traveaux and the Domain of International Investment Law, 51 HARV.
INT’L L.J. 257, 314 (2010) (suggesting that “increasing resistance to the international investment re-
117. Azinian v. Mex., ICSID Case No. ARB(AF)/97/2, Award, ¶ 83 (Nov. 1, 1999), 1999 WL 33946449.
118. Waste Mgmt., Inc. v. Mex., ICSID Case No. ARB(AF)/00/3, Award, ¶¶ 114, 160 (Apr. 30, 2004), 2004
WL 3249803. However, as stated above, the presence of a so-called umbrella clause may have the ef-
fect of elevating certain breaches of contract into treaty violations. See supra note 55 and accompan-
ing text.
incremental development of law by host states,\textsuperscript{119} or even violations of domestic law by the officials of host states.\textsuperscript{120} In other words, the emerging narrative does not track the Supreme Court's business planning narrative. To the contrary, the emerging narrative seems to focus on the guarantee of incremental protection from serious governmental abuses.

### III. The Human Rights Narrative

Assuming that protection from abuse has become a focus of investment treaty practice, one feels the temptation to draw on human rights narratives to describe the function of investment treaties. Although first raised with irony in academic discourse on critical race theory and although historically resisted by tribunals when deciding investment disputes, this perspective has gained a measure of credence among observers and at least one tribunal, which used an investment treaty to provide remedies for paradigmatic human rights violations.

As far as the author knows, Professor José E. Álvarez drew the first analogy between investment treaties and human rights treaties in 1997, during a conference at which he observed that the application of critical race insights to foreign relations would "benefit both international lawyers and traditional race critics, albeit for different reasons."\textsuperscript{121} Developing this theme, Álvarez predicted that race critics would discover how U.S. treaty practice "serves to entrench or even exacerbate racial and ethnic divides within other nations."\textsuperscript{122} Following with concrete examples, Álvarez unveiled a sharp assessment of the NAFTA's investment chapter, which he described as "the most bizarre human rights treaty ever conceived."\textsuperscript{123}

As described by Álvarez, the NAFTA's investment chapter grants foreign investors "direct access to binding denationalized adjudication of any governmental measure that interferes with their ample rights."\textsuperscript{124} Elaborating the substance of those rights, Álvarez explained that they echo many of the themes contained in the principal human rights instruments, including the rights to security and undisturbed ownership of property, as well as the freedom of movement and freedom from discrimination.\textsuperscript{125} Contrasting these with the complete absence of any rights or freedoms granted to the local employees of foreign investors, Álvarez condemned the NAFTA's investment chapter as a "human rights treaty for a special-interest group."\textsuperscript{126}

In addition to emphasizing the disparity of concern for the interests of corporations and the physical welfare of human beings in U.S. treaty practice, Álvarez consciously sought to juxtapose concepts (investment treaties and human rights) not often regarded as logical pairs.\textsuperscript{127} Viewed from this latter perspective, his discourse accurately captured the state of

\textsuperscript{119} Parkerings Award, supra note 41, ¶ 332; Mondev Award, supra note 74, ¶ 133.

\textsuperscript{120} Glamis Award, supra note 77, ¶ 770.


\textsuperscript{122} Id.

\textsuperscript{123} Id. at 307.

\textsuperscript{124} Id.

\textsuperscript{125} Id. at 307–08.

\textsuperscript{126} Id. at 308–09.

\textsuperscript{127} See id. at 309 ("It might be said that the comparison between the NAFTA and human rights instru-
play for investment arbitration. As of the 1990's, tribunals showed a strong preference for maintaining rigorous distinctions between international investment and human rights law. For example, in Biloune v. Ghana Invs. Ctr., Ghanaian authorities ordered a Syrian investor to stop work on a construction project previously approved by the host government, and then partially demolished the works before expiration of the time allotted to the investor for responding to the stop-work order. Contemporaneously, Ghanaian authorities commenced an investigation into financial improprieties allegedly committed by the investor, arrested him at night, held him without charge for thirteen days, and permanently deported him, summarily terminating his residence in Ghana after more than two decades.

Invoking the dispute-settlement provisions of his investment agreement with the host state, the Syrian investor commenced an ad hoc arbitration in which he accused the host state and related entities of expropriating his investment by permanently depriving him of the opportunity to complete the construction project. In addition, he claimed that the host state violated his human rights by subjecting him to arbitrary arrest and detention. While accepting that the investor's permanent deportation supported his claim for expropriation, the tribunal held that it lacked jurisdiction to consider the human rights claim as such because the host state's consent to arbitration extended only to disputes "in respect of" foreign investment.

Perhaps motivated by Professor Alvarez's challenge for stakeholders to adopt broader frames of reference for analysis of investment treaties, observers and tribunals have begun to explore the ways in which human rights could inform the application of investment treaties. At the level of theory, one writer probed the genealogy of modern international law on (1) civil and political rights, and (2) the protection of foreign investment, tracing the development of both subjects to a common foundation in the customary international law of state responsibility for injuries to aliens. As a result, one could easily discern a shared emphasis on the creation of zones of autonomy or freedom from governmental intervention. More importantly, however, the recognition of shared roots tends to contradict the need for maintaining rigorous distinctions between human rights and international investment law. To the contrary, the existence of a common source justifies a measure of cross-fertilization between the two traditions. Consistent with this observation, other...
writers have recognized that human rights may have a role to play in the application of investment treaties depending on their precise wording and the nature of the underlying claims.\textsuperscript{137}

Moving from theory to practice, at least one recent award supports the use of investment treaties to redress the sort of abuse normally associated with human rights violations. Thus, in \textit{Desert Line Projects v. Yemen}, the host state’s president invited an Omani investor to undertake road construction projects of signal importance for the host state’s national security and economic development.\textsuperscript{138} Despite the absence of a clear agreement on compensation, the head of state encouraged the investor to begin and to continue work, promising that he would receive fair remuneration in due course.\textsuperscript{139} Notwithstanding such assurances, the host state made no progress payments for eighteen months, then provided a measure of compensation but quickly fell behind, and finally declared that it had actually overpaid for the work completed to date.\textsuperscript{140} When the investor threatened to stop work, the host state subjected his construction sites to treatment described by one senior military commander as a “siege.”\textsuperscript{141} Thus, faced with enormous pressure to continue work, the investor consented to a summary arbitration procedure in which the head of state instructed the Yemeni tribunal not to consider the underlying contract or the investor’s actual costs when establishing the measure of compensation.\textsuperscript{142}

While the Yemeni arbitral tribunal heard and decided the case in just six weeks, did not provide any reasons for its decision, and allegedly committed vast miscalculations, it rendered a substantial award in favor of the investor.\textsuperscript{143} Rather than directing his government to satisfy the award, however, the head of state “advised” the investor that it would be “in [his] interest” to accept a far lower sum offered by the Ministry of Public Works.\textsuperscript{144} Contemporaneously, the host state renewed a “siege” of the investor’s construction site, arrested three of his managers (including his son), and denied his operations protection from “harassment, threat and theft by armed third parties.”\textsuperscript{145} Shortly thereafter, the investor’s contacts in Yemen warned him to leave the country because his life was in danger.\textsuperscript{146} Under these circumstances, the investor departed from Yemen, accepted an unfavorable settlement agreement with the host state through local agents, and then commenced a second arbitration against the host state under a bilateral investment treaty.\textsuperscript{147}

Although the host state pleaded the settlement agreement as a definitive resolution of the investor’s claims, the investment treaty tribunal regarded that instrument as the prod-

\textsuperscript{137} See Newcombe & ParadeLL, supra note 33, at 107. See also Bjorklund, supra note 128, at 861 (describing the reluctance of investment treaty tribunals to consult human rights jurisprudence as a “regrettable failure to use all available resources and to commence a dialogue among the bodies that make important decisions about the standards for a functioning judicial system”).

\textsuperscript{138} Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award, ¶¶ 4–5, 164 (Feb. 6, 2008), 2008 WL 2912764 [hereinafter Desert Line Projects Award].

\textsuperscript{139} Id. ¶¶ 5, 24, 165, 182, 185, 188.

\textsuperscript{140} Id. ¶¶ 165–66.

\textsuperscript{141} Id. ¶¶ 18, 22, 25–27, 166–67.

\textsuperscript{142} Id. ¶¶ 29, 166–68.

\textsuperscript{143} Id. ¶¶ 30–32, 169–70.

\textsuperscript{144} Id. ¶¶ 41, 127(e), 170, 179.

\textsuperscript{145} Id. ¶¶ 33, 38, 179, 185.

\textsuperscript{146} Id. ¶ 185.

\textsuperscript{147} Id. ¶¶ 38–41, 43, 48, 50, 144, 146.
uct of "physical and financial duress." Consequently, the settlement agreement possessed no legal force and could not defeat the investor’s treaty claim. Turning to the merits of that claim, the tribunal described the host state’s use of physical and financial coercion as a denial of the “fair and equitable treatment” required by the investment treaty. To remedy that violation, the tribunal awarded the investor the full amount of the Yemeni arbitral award, minus the sums already paid by the host state under the coerced settlement agreement.

In addition to restoring the economic and financial status quo ante, the tribunal also granted the investor’s claim for “moral damages” to compensate for the “stress and anxiety of being harassed, threatened, and detained by the [host state] as well as by armed tribes.” While recognizing that investment treaties primarily aim to protect economic and property interests, the tribunal concluded that the “malicious” application of “physical duress” justified an award of moral damages in the “modest” amount of $1 million.

Although described by the tribunal as a financial consequence of the investment treaty violation, the award of moral damages represents a striking development in the investment context, where treaties seek to regulate economic relationships involving substantial commitments of resources, where disputes involve substantial economic losses, and where damage awards focus on economic concepts. By contrast, awards of moral damages seem more deeply rooted in human rights jurisprudence, where claimants frequently experience pain, suffering, mental anguish, and humiliation without substantial economic loss. Given these facts, one might describe the Desert Line Projects award as a

148. Id. ¶¶ 142, 145, 147, 186, 194.
149. Id. ¶¶ 148-49, 157-58, 162, 179, 186, 194.
150. Id. ¶¶ 190-94.
151. Id. ¶¶ 195, 204-05, 246-47.
152. Id. ¶¶ 286, 289-91.
153. Id. ¶¶ 289-91.
154. See Sergey Ripinsky & Kevin Williams, Damages in International Investment Law 309 (2008) (observing that “claims for recovery of moral damages have been made in very few investment arbitrations”).
155. See id. at 307 (“In the context of investment disputes, losses almost invariably concern material damage, ie [sic] damage to property, contractual or other economic interests of investors.”).
157. See Ripinsky & Williams, supra note 154, at 308 (emphasizing the practice of the European and Inter-American Courts of Human Rights to award moral damages for “pain and suffering, mental anguish, humiliation”). See also Thomas M. Antkowiak, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond, 46 Colum. J. Transnat’l L. 351, 391 (2008) (observing that awards of moral damages have pragmatic application in human rights claims because “hard evidence of material loss is often scarce”); Ben Saul, Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights, 19 Am. U. Int’l L. Rev. 523, 556 (2004) (emphasizing that suffering represents a touchstone for the assessment of moral damages, which may be assumed in grave human rights violations involving death, disappearances, incommunicado detention, and torture).
rare but concrete example that proves the viability of drawing on human rights narratives to guide the application of investment treaties, at least in cases where the host state's conduct involves the sort of abuse normally associated with human rights violations.\textsuperscript{158}

While some have emphasized the extraordinary nature of the circumstances justifying moral damages in investment claims,\textsuperscript{159} that was not always the case. During the nineteenth and early twentieth centuries, investment claims often resembled the sorts of human rights claims that call for moral damages.\textsuperscript{160} Upon reflection, the overlap makes sense. At the time, foreign investors had to justify their claims under the customary law of state responsibility for injuries to aliens,\textsuperscript{161} which also served as a conceptual foundation for the development of international law on civil and political rights.\textsuperscript{162} Under those circumstances, investment claims necessarily resembled human rights claims.

Subsequently, capital-exporting states used investment treaties as a tool to clarify and strengthen international standards for the protection of foreign investment,\textsuperscript{163} which eventually drew the discipline beyond the customary standards associated with human rights law.\textsuperscript{164} However, as noted above, recent investment treaty practice signals a retreat from

\begin{itemize}
\item \textsuperscript{158} But see ADM Award, supra note 64, ¶ 171 (rejecting the proposition that “the nature of investors’ rights under [NAFTA’s investment chapter are] comparable with the protections conferred by human rights treaties”).
\item \textsuperscript{159} See Desert Line Projects Award, supra note 138, ¶ 289; Ripinsky & Williams, supra note 154, at 310–11.
\item \textsuperscript{160} See Bjorklund, supra note 128, at 817 (observing that early denial-of-justice cases involved allegations that would support human rights claims today); Luke Eric Peterson, The Future of Moral Damages in Investment Arbitration, Kluwer Arbitration Blog (Apr. 14, 2009), http://kluwerarbitrationblog.com/blog/2009/04/14/the-future-of-moral-damages-in-investment-treaty-arbitration (conjuring “memories of... older days... when alien claims oftentimes looked like ‘human rights’ claims with businesspersons rouged up, arrested on trumped up charges, and left to stew in custody for long stretches”). See also Merrill & Ring Award, supra note 74, ¶¶ 195–201 (describing early cases that involved violations of due process, denial of justice, and physical mistreatment as a “first track” in the development of international minimum standards for the treatment of aliens).
\item \textsuperscript{161} See Bjorklund, supra note 128, at 818 (“International investment protections, including the doctrine of denial of justice, developed within the ambit of the law of state responsibility for injuries to aliens.”); Ryan J. Bubb & Susan Rose-Ackerman, BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment, 27 INT’L REV. L. & ECON. 291, 293 (2007) (“Prior to the modern era of bilateral investment treaties, customary international law on foreign investment provided weak protections to foreign investment. Traditionally, the international law protecting the property of foreign investors was part of the general law on state responsibility for injuries to aliens.”); Katherine E. Lyons, Piercing the Corporate Veil in the International Arena, 33 SYRACUSE J. INT’L L. & COM. 523, 527 (2006) (“International law on foreign investment grew out of the already existing norms on the ‘diplomatic protection of citizens abroad and of state responsibility for injuries to aliens.’”).
\item \textsuperscript{162} See Dinah Shelton, Remedies in International Human Rights Law 104 (1999) (describing the law of state responsibility as “a precursor to international human rights law”); Henry J. Steiner et al., International Human Rights in Context 86 (3d ed. 2008) (describing the law of state responsibility as “a branch of international law that was among the important predecessors to contemporary human rights law”). See also Merrill & Ring Award, supra note 74, ¶ 201 (describing the process by which the international minimum standard for the treatment of aliens merged into human rights law).
\item \textsuperscript{163} Newcombe & Paradell, supra note 33, at 41; M. Sornarajah, The International Law on Foreign Investment 213 (2d ed. 2004); Salaruse, supra note 63, at 436–40.
\item \textsuperscript{164} See Merrill & Ring Award, supra note 74, ¶¶ 205–13 (describing the rise of specialized regimes for the protection of foreign investment and the contemporaneous appearance of a more liberal “second track” concerning the development of international minimum standards for the treatment of aliens in the context of business, trade and investment). See also International Institute for Sustainable Development & World Wildlife Fund, Private Rights, Public Problems 5–6 (2001) [hereinafter Private Rights], available at http://www.iisd.org/pdf/trade_citizensguide.pdf (explaining that in-
the high-water mark of investor protection and a return towards customary norms, perhaps even to the very standards that prevailed during the early 1900’s. To the extent that “egregious,” “outrageous,” or “shocking” government conduct again become the standards for assessing the liability of host states, successful investment claims will once again come to resemble human rights claims. As that happens, one might feel not just the temptation, but the obligation, to draw on human rights narratives when applying investment treaties.

Despite the functional similarities, the shared historical roots, and the common emphasis on curtailing serious abuse by host states, one should not lose sight of compelling practical differences between human rights claims and investment treaty claims. To begin with, most human rights claimants are individuals who seem relatively powerless and vulnerable compared to the respondent states. Also, depending on the particular human rights instrument, the opportunity to pursue individual complaints may not exist, or may be

vestment treaties first sought to protect foreign investors from outright takings and discrimination during the 1950’s, 1960’s, and 1970’s, but later expanded their scope to include undertakings with respect to liberalization of foreign investment).

165. See supra notes 75–107 and accompanying text.
166. See supra note 77 and accompanying text.
167. See supra note 77 and accompanying text.
168. Cf. Bjorklund, supra note 128, at 819 (concluding that “to the extent that the human rights of investors are at stake, however, the legal regimes of investment protection and human rights protection could eventually reintersect”).
169. See supra note 128, at 819 (concluding that “to the extent that the human rights of investors are at stake, however, the legal regimes of investment protection and human rights protection could eventually reintersect”).
170. See STEINER ET AL., supra note 162, at 59.

In typical instances of [human rights] violations, the police of state X torture defendants to extract confessions; the government of X shuts the opposition press as elections approach; prisoners are raped by their guards; courts decide cases according to executive command; women or a minority group are barred from education or certain work.

Id. Even when authoritarian governments take repressive action against wealthy and powerful individuals, they generally attack their victims as individuals, confiscating their assets, treating them as common criminals (or worse), and thus emphasizing the vulnerability of anyone who dares to challenge the regime. See Yelina Kvurt, Note, Selective Prosecution in Russia—Myth or Reality, 15 CARDozo J. INT’L & COMP. L. 127, 127–30 & nn.1–14 (2007) (discussing the case of Mikhail Khodorkovsky, a Russian citizen who founded one of the world’s largest privately-held oil companies (Yukos) and became the world’s sixteenth wealthiest man, but whom the Russian government later subjected to arrest, economic ruin, unfair trial, and a nine-year prison sentence in retaliation for his political ambitions).


sharply curtailed. Next, even when available, such mechanisms typically require claimants to exhaust local remedies and may not result in binding decisions, much less decisions capable of global enforcement in domestic courts. Finally, even when available and effective, such mechanisms generally result in modest, if any, damage awards against the respondent states. In other words, human rights law provides comparatively weak claimants with comparatively weak remedies.

By contrast, investment treaty claims often involve multinational corporations with economic resources and leverage that may rival those of their host states. Also, despite some exceptions, most investment treaties guarantee claimants not only the right to submit claims directly to arbitration before international tribunals, but also to influence the composition of those tribunals. Next, when available, such mechanisms generally do not require exhaustion of local remedies. In addition, such mechanisms virtually always re-

171. Under the American Convention on Human Rights, individuals have the right to petition the Inter-American Commission on Human Rights, but only the Commission and states parties may refer cases to the Inter-American Court of Human Rights. American Convention on Human Rights arts. 44, 61(1), July 18, 1978, 1144 U.N.T.S. 123.


173. See First Optional Protocol, supra note 170, art. 5(4) (providing that the Human Rights Committee shall forward its ”views” to the individual complainant and to the state party that is the subject of the complaint). See also MANFRED NOWAK, UN Covenants on Civil and Political Rights: CCPR Commentary 668-69 (2d ed. 2005) (emphasizing that the views of the Human Rights Committee lack binding legal effect); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 739 (2d ed. 2000) (observing that the First Optional Protocol contains no provision recognizing the views of the Human Rights Committee as binding legal determinations).

174. See R v. Sec'y of State for the Home Dep't, [2005] UKHL 14 (Eng.) (explaining that “the focus of the [European] Convention is on the protection of human rights and not the award of compensation,” and that the European Court of Human Rights’ monetary awards “have been noteworthy for their modesty”); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 224 (2002) (observing that the European and Inter-American Courts of Human Rights have awarded or recommended only modest amounts of compensation or damages); DINAH L. SHELTON, REGIONAL PROTECTION OF HUMAN RIGHTS 797 (2008) (discussing remedies in the European Court of Human Rights and observing that “[v]iolations of procedural rights ... rarely have resulted in relief beyond a declaration of violation; no compensation has been given to most prisoners, except where physical mistreatment is proven]; homosexuals, vagrants, and aliens also generally have been denied compensation”).

175. See VAN HARTEN, supra note 39, at 4 (indicating that the foreign investors protected by investment treaties are “for the most part multinational firms”). See also SORNARAJAH, supra note 163, at 67 (observing that “many multinational corporations have financial resources that are greater than many states can muster”); Stiglitz, supra note 44, at 16 (recognizing that the “economic powers of multinational corporations are huge—often far larger than that of the countries with which they are dealing”).

176. DUGAN ET AL., supra note 40, at 52; LEW ET AL., supra note 33, at 763, 768; LOWENFELD, supra note 40, at 570; NEWCOMBE & PARADELL, supra note 33, at 70; REDFERN & HUNTER, supra note 40, at 468. See also supra notes 32-33 and accompanying text.

177. See DUGAN ET AL., supra note 40, at 128; RUBINS & KINSELLA, supra note 40, at 340.

178. DUGAN ET AL., supra note 40, at 120, 357; NEWCOMBE & PARADELL, supra note 33, at 241; RUBINS & KINSELLA, supra note 40, at 133-34, 272-73. There may, however, be an obligation to exhaust local remedies in order to pursue claims based on a denial of justice. See Loewen Award, supra note 62, ¶¶ 142-57; NEWCOMBE & PARADELL, supra note 33, at 241-42.
result in binding awards capable of global enforcement in domestic courts under the ICSID Convention (without any judicial review) or the New York Convention (with limited judicial review). Finally, while not always the case, the proceedings can result in substantial damage awards against the respondent

Depending on the state’s resources, even the cost of defending claims can be onerous. In other words, investment treaties provide powerful claimants with powerful remedies.

Building on the points just made, one might portray investment treaties as forceful and potentially dangerous tools that could empower foreign corporations (1) to intimidate host states and, thus, to discourage them from regulating foreign investors even when needed to safeguard the public interest, or (2) at least to neutralize the financial consequences of regulation. Viewed from this perspective, one might either reject the use of human rights narratives to guide the application of investment treaties or, as explained below, one might invert the use of such narratives to protect host states and their citizens from the potentially harmful consequences of foreign investment.

179. DOLZER & SCHREUER, supra note 38, at 287–88; DUGAN ET AL., supra note 40, at 87–88, 679; LEW ET AL., supra note 33, at 801, 803–04. One must take care, however, to draw a distinction between the enforcement of awards and the legally distinct issue of execution against assets. With respect to the latter question, principles of sovereign immunity can remain a serious impediment to securing compensation from recalcitrant states. DOLZER & SCHREUER, supra note 38, at 289–90; DUGAN ET AL., supra note 40, at 684, 699–700; Alan S. Alexandroff & Ian A. Laird, Compliance and Enforcement, in OXFORD HANDBOOK, supra note 63, at 1171, 1176–85.

180. See Salacuse, supra note 6, at 142 (claiming that investment treaty awards can be “onerous” in relation to host-state resources, and citing four awards, which ranged from $71 million to $824 million). One should bear in mind that investors lose slightly more cases than they win and, when successful, tend to receive awards in the neighborhood of $25 million. See Susan D. Franck, Empirically Evaluating Claims About Investment Treaty Arbitration, 86 N.C. L. REV. 1, 49, 60 (2007) (concluding that investors won in 38.5% of surveyed cases, and that the average award fell into the range of $25.5 million). However, even those statistics establish that tribunals impose liability in a substantial proportion of cases and that average awards involve sums that can be substantial to states where GDP per capita may range between $7 and $37 per day. See World Factbook Country Comparison: GDP-Per Capita, CENTRAL INTELLIGENCE AGENCY, available at https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html (listing the annual GDP per capita of states, including $2,500 for Pakistan and $13,400 for Argentina).

181. See VAN HARTEN, supra note 39, at 123 n.13 (reporting that one state spent half the budget for its Ministry of Justice in defending a single claim); Salacuse, supra note 6, at 143 (reporting that in CME v. Czech, the respondent spent $10 million on its defense); Louis T. Wells, Letter to the Editor, Private Justice System Can only Survive if Parties Consider It Just, FIN. TIMES, Nov. 19, 2007, at 12 (reporting that “the legal fees for a single case reach millions of dollars, which poor countries can ill afford”).


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IV. The Anti-Globalist Narrative

Assuming that investment treaties impair the capacity of host states to regulate or even to protect the human rights of their citizens, one might feel the temptation to draw on anti-globalist narratives to describe the function of investment treaties. As explained below, this perspective has found purchase in the work of advocacy groups, mainstream journalism, the highest levels of academic discourse, and human rights reports within the United Nations system.

As far as the author recalls, advocacy groups first trumpeted the anti-globalist perspective on investment treaties. After spearheading a successful campaign to scuttle the OECD’s draft Multilateral Agreement on Investment (MAI) during the late 1990’s, many advocacy groups sought to discredit the NAFTA’s investment chapter, which seemed a likely starting point for negotiations regarding the investment disciplines in a Free Trade Area for the Americas (FTAA). For example, in 2001, the International Institute for Sustainable Development and the World Wildlife Fund published a layman’s guide to the NAFTA’s investment chapter, which warned that corporations had transformed the instrument into a “sword” or “strategic weapon” that could either defeat the ability of host states to regulate in the public interest or, alternatively, require them to compensate foreign investors for the costs of regulatory compliance.

During the same year, Public Citizen and Friends of the Earth released an assessment of the NAFTA’s investment chapter. Expressed designed to influence negotiations of investment rules for the FTAA, that document referred to the then-pending NAFTA in-


184. In some respects, concerns about early NAFTA Chapter 11 claims seem to have fuelled NGO opposition to the MAI. See NEWCOMBE & PARADELL, supra note 33, at 55 (observing that “MAI negotiations were commenced at the same time that several NAFTA investment claims attained a high public profile,” and opining that this contributed to abandonment of the MAI); Riyaz Dattu, A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment, 24 FORDHAM INT’L L.J. 275, 299 (2000) (noting that NGOs “forcefully opposed the [MAI’s] provisions in light of the increasing number of NAFTA Chapter 11 challenges brought by U.S. businesses with respect to Canada’s environmental regulations under the investor-state dispute resolution mechanism”); Jürgen Kurtz, A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, 23 U. PA. J. INT’L ECON. L. 713, 769 (2002) (describing how Canada’s settlement of the Ethyl Corp. claim under NAFTA Chapter 11 reinforced NGO opposition to the MAI); Rafael Leal-Arcas, The Multilateralization of International Investment Law, 35 N.C. J. INT’L & COM. REG. 33, 68 (2009) (asserting that NGO “opposition to the MAI ... started largely in Canada after the Ethyl Corporation dispute under NAFTA”).

185. See PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY 5 (2001) [hereinafter BANKRUPTING DEMOCRACY], available at http://www.citizen.org/documents/ACF186.pdf (predicting that the FTAA “would spread NAFTA’s rules to an additional 31 Latin American and Caribbean nations”). See also PRIVATE RIGHTS, supra note 164, at 2 (explaining that the authors—two NGOs—sought to ensure that negotiators would not repeat the NAFTA’s “mistakes” when adopting investment rules for the FTAA).

186. See PRIVATE RIGHTS, supra note 164, at 1, 16, 33–34.

187. See generally BANKRUPTING DEMOCRACY, supra note 185.

188. See id. (adopting the subtitle “Lessons for Fast Track and the Free Trade Area of the Americas”).
vestment claims as an "extraordinary attack on normal government activity." According to Public Citizen, foreign investors were using the NAFTA "to demand payment for any government action that impacts the value of [their] property." As a result, it predicted that taxpayers faced "billions" of dollars in liability. Given those stakes, Public Citizen warned that foreign investors could "bully" host states and, thus, prevent them from adopting measures designed to protect the public interest.

Although the anti-globalist perspective represents standard fare among certain advocacy groups, it quickly and surprisingly found resonance in mainstream news outlets. Thus, in a 2001 article, the New York Times reported that secret tribunals operating under the NAFTA's Chapter 11 had already allowed foreign investors to revoke national laws, question the justice systems of host states, and challenge regulations. Furthermore, the journalist warned that "the clash between investor rights and public policy" could "grow [even] more intense."

During a PBS television broadcast aired in 2002, respected journalist Bill Moyers declared that multinational corporations were using the NAFTA's investment chapter to "challenge democracy." According to Moyers, that phenomenon included "attack[s]" on "public laws that protect our health—and our environment," as well as "the American judicial system." In deciding those matters, secret tribunals could "force taxpayers to pay billions of dollars" or, possibly, compel "radical changes in public policy." In a grim assessment, Moyers described the situation as an "end-run around the Constitution."

Despite the passage of time and the limited success of foreign investors in securing nine-digit awards, anti-globalist critiques of investment treaties continue to surface with some regularity in mainstream newspapers. For example, in 2004, the New York Times published an editorial that described investment treaty arbitration as a "one-sided [process] favoring well-heeled corporations over poor countries." Furthermore, according to the newspaper, "secret trade courts" could award compensation to foreign investors harmed by government measures required to protect public health, safeguard the environment, or prevent economic collapse. As a result, their decisions could discourage states from regulating, and could even encourage foreign investors to regard investment

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189. Id. at ii.
190. Id. at iv.
191. Id. at vi.
192. Id. at vii.
194. Id.
196. Id.
197. Id.
198. Id.
199. Id.
201. Id.
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treaties as insurance policies against the normal “risks of doing business.”

In addition to voicing their own concerns, newspapers have provided a forum for certain academics to reinforce anti-globalist perspectives on investment treaties. Thus, in November 2007, the Financial Times published a letter in which a Harvard business professor described investment treaty arbitration as an expensive, unpredictable and unbalanced process that reflects the unequal bargaining power of developed and developing states. Likewise, in February 2010, the Guardian published an opinion piece in which a Boston University professor of international relations claimed that investment treaties “enable private firms to circumvent environmental laws and then parachute away with large sums of government money.” In addition to demanding that firms “stop panning for gold” in investment treaty arbitration, he called on the Obama administration to change U.S. investment treaty practice as needed to “[s]top private firms [from] exploiting poor states.”

Turning from journalism to the academy as such, some of the nation’s most distinguished and influential scholars have expressed anti-globalist themes in their assessments of investment treaties. For example, Professor Joseph Stiglitz (a Nobel laureate, former chair of the President’s Council of Economic Advisers, and former chief economist at the World Bank) has publicly criticized investment treaties as “one-sided” and “unbalanced” arrangements that “have undermined democratic processes” and “inhibit[ed] legitimate government efforts” to regulate in the environmental, health, and employment contexts.

Likewise, Professor John Ruggie (an influential political scientist from Harvard, former Assistant Secretary-General of the United Nations, and current Special Representative of the Secretary General for Business and Human Rights) has expressed sharp criticism of investment treaties in official reports to the United Nations Human Rights Council. At the outset of his 2008 report, Professor Ruggie sought to focus attention on “governance gaps created by globalization,” which can “permit corporate-related human rights harm to occur even where none may be intended.” As an example of “imbalances between firms and

202. Id.
203. Wells, supra note 181, at 12.
205. Id. Substantively, Professor Gallagher recommended changes that would afford host states greater flexibility to regulate. Procedurally, he recommended a shift from investor-state to inter-state arbitration (in which context investors’ home states must decide whether to espouse claims against host states), or at least the imposition of a requirement that foreign investors exhaust local remedies before commencing investment treaty claims.
States that may be detrimental to human rights,” he cited the “more than 2,500 bilateral investment treaties currently in effect”:

While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards—even when the legislation applies uniformly to all businesses, foreign and domestic.210

Later, in a section on “policy alignment,” Ruggie described the problem of “horizontal” policy incoherence, defined as the situation where various departments within a single government, “such as trade, investment promotion, development, [and] foreign affairs—work at cross purposes with the State’s human rights obligations and the agencies charged with implementing them.”211 As an example of this phenomenon, he again cited investment treaties:

They promise to treat investors fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions. But investor protections have expanded with little regard to States’ duties to protect [human rights], skewing the balance between the two. Consequently host states can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.

This imbalance creates potential difficulties for all types of countries. . . . During the investment’s lifetime, even social and environmental regulatory changes that are applied equally to domestic companies can be challenged by foreign investors claiming exemption or compensation.

The imbalance is particularly problematic for developing countries[;] . . . it is precisely in developing countries that regulatory development may be most needed.212

In his 2009 and 2010 reports, Professor Ruggie reiterated similar concerns about the negative effects of investment treaties on the regulatory capacities of host states:

[R]ecent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government’s ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.213

. . . .

There is a saying that the first thing to do when you are stuck in a deep hole is to stop digging. Yet countries unwittingly get stuck in metaphorical holes that may constrain their ability to adopt legitimate policy reforms, including for human rights. The prime examples the Special Representative has studied in depth . . . are bilateral investment treaties (BITs) . . . .

A current BIT case illustrates the problem. European investors have sued South Africa . . . contending that certain provisions of the Black Economic Empowerment Act amount to expropriation, for which the investors claim compensation. A policy review examined why the Government had agreed to such BIT provisions in the first place. It explains that, among other reasons, “the Executive had not been fully apprised of all the possible consequences of BITs.”

210. Id. ¶ 12.
211. Id. ¶ 33.
212. Id. ¶¶ 34-36.
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In conclusion, one important step for States in fulfilling their duty to protect against corporate-related human rights abuses is to avoid unduly and unwittingly constraining their human rights policy freedom when they pursue other policy objectives.214

Viewed from this perspective, one might draw on human rights narratives not to reinforce the freedoms granted to foreign investors, but to (1) expose the potentially dangerous consequences of their operations, and (2) strengthen the capacity of host states to protect local populations from harm. In fact, this hypothesis mirrors two lines of cases in which tribunals have invoked human rights principles either to invite scrutiny of foreign investments or to limit international scrutiny of host-state actions to protect local interests. Thus, in a series of investment disputes involving the operation of privatized water distribution and sewage services in metropolitan areas, tribunals have accepted amicus curiae submissions from organizations seeking to emphasize the controversies' implications for human rights, including the right of access to potable water.215 Likewise, while not uniformly embraced, at least one investment treaty tribunal has drawn on human rights doctrine for the proposition that host states deserve a “margin of appreciation” when adopting measures to uphold public order or to protect essential security interests during periods of grave economic crisis.216 In other words, while foreign investors can invoke human rights narratives to validate the wide zones of autonomy granted to them under investment treaties, skeptics can turn the tables by invoking human rights narratives to protect host states and their citizens against the dangers posed by the operations of foreign investors.217

Coming full circle, the narrative for corporations as plaintiffs under international law might come to resemble the narrative for corporations as defendants under international law. According to that view, when granted too much autonomy, foreign investors may conduct their operations in ways that pose serious threats to the environment, the safety of workers, and protection of human rights in host states. Worse yet, instead of providing a means to redress some of those dangers (as the Alien Tort Statute arguably does), investment treaties establish a legal environment that permits foreign investors to undertake harmful activities, to avoid discipline, and to demand compensation when host states alter


216. See Continental Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶¶ 181, 187 (Sept. 5, 2008), 2008 WL 5783990. But see Siemens Award, supra note 53, ¶ 354 (observing that “Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the [relevant BIT].”).

217. See NEWCOMBE & PARADELL, supra note 33, at 108 (observing that human rights principles have been invoked more often “by respondent states to justify the measures complained of, and thus as defences against liability” under the relevant investment treaties).
the rules of the game. In other words, investment treaties transform international law from a source of hope into an instrument of harm.

Given the strength and resilience of concerns expressed not just by advocacy groups, but also by influential journalists, leading academics, and distinguished figures in intergovernmental organizations, one must give serious consideration to the anti-globalist narrative about investment treaties. However, one must also consider the extent to which antagonists exaggerate the potentially dangerous qualities of investment treaties. In fact, one might more appropriately emphasize their weakness and mutability.

With respect to the weakness of investment treaties, one should observe that the resistance of NGOs, developing states, and other opponents has foiled serious efforts by the Organization for Economic Co-operation and Development, the World Trade Organization, and the states of the Americas to conclude a comprehensive multilateral agreement on foreign investment during the last fifteen years, just as all similar efforts have failed for the last eight decades. In other words, a truly global or comprehensive regional system for the protection of foreign investment does not exist and its prospects seem dim. Viewed from this perspective at least, it becomes hard to accept descriptions of investment treaties as ominous and growing threats.

Moving from the multilateral to the bilateral context, states have concluded an impressive stock of more than 2600 BITs. However, the limited scope, bilateral character and textual ambiguity of those instruments leave broad avenues for states to retreat from commitments thought to produce socially undesirable results. To illustrate the mutable character of bilateral treaties, one may begin by recalling the obvious fact that (unlike human rights treaties) none of their undertakings rise to the level of jus cogens. Thus, they lend themselves to periodic renegotiation and updating according to models that currently emphasize substantial reductions of the autonomy granted to foreign investors and a cor-

218. See Brower, supra note 34, at 348–49.
219. See Patrick Julliard, Variation in the Substantive Provisions and Interpretation of International Investment Agreements, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES, supra note 76, at 81, 103 (observing that there "have been a number of attempts at drafting a multilateral treaty, and none of them has been successful"). In 1929, the League of Nations and the International Chamber of Commerce proposed a Draft Convention on the Treatment of Foreigners. VAN HARTEN, supra note 39, at 19; A.A. Fatouros, An International Code to Protect Private Investment—Proposals and Perspectives, 14 U. TORONTO L.J. 77, 79 (1961); Arthur K. Kuhn, The International Conference on the Treatment of Foreigners, 24 AM. J. INT'L L. 570, 570–73 (1930). After World War II, discussion of an international investment code resurfaced within the framework of negotiations relating to the proposed International Trade Organization. MCLACHLAN ET AL., supra note 41, at 218; SORNARAJAH, supra note 163, at 87; VAN HARTEN, supra note 39, at 19–20; Fatouros, supra, at 79–81. In 1959, a group of capital exporting states promoted the Abs-Shawcross Draft Convention on Investments Abroad. SORNARAJAH, supra note 163, at 87–88; VAN HARTEN, supra note 39, at 20–21; Fatouros, supra, at 79–81. In 1967, the OECD floated a Draft Convention on the Protection of Foreign Property. DOLZER & SCHREUER, supra note 38, at 18–19; VAN HARTEN, supra note 39, at 21. All of these efforts failed.
220. See Thomas W. Walde, Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy, 1 Y.B. INT'L INV. L. & POL'Y 505, 518 (2009) (opining that "it is quite unlikely that within the foreseeable future...a unified...system...would emerge" because "[a]ll prior efforts...have conspicuously failed").
221. REDFERN & HUNTER, supra note 40, at 468 n.14; Muchlinski, supra note 67, at 36; Salacuse, supra note 63, at 428.
222. See Brower, supra note 66, at 369 n.110, 372 (identifying categories of jus cogens norms and opining that they have little relevance for the vast run of investment treaty disputes).
responding reinforcement of the capacity of host states to protect health, safety, and the environment.\textsuperscript{223} While renegotiations have not been frequent in the past, they have occurred. For example, from 1998 to 2008, states renegotiated a total of 132 BITs.\textsuperscript{224} With “numerous” renegotiations in progress, one may anticipate an acceleration of this trend.\textsuperscript{225}

Although there may have been a time when capital-exporting states would have resisted such trends,\textsuperscript{226} their leadership in the rebalancing of model treaties indicates that they might accept the renegotiation of treaties already in force.\textsuperscript{227} Even if they do not, denunciation of bilateral treaties remains a possibility now openly discussed and occasionally used by states eager to change the rules of the game.\textsuperscript{228} While observers correctly note that denunciation may not provide host states with immediate relief because many BITs include clauses that extend protection for several years following denunciation,\textsuperscript{229} the fact is that a credible threat of denunciation can prompt investment treaty tribunals to adopt rulings better suited to the interests of host states.\textsuperscript{230}

This leads to what may be the most salient point of all: BITs tend to articulate standards

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\bibitem{223} See supra notes 80–107 and accompanying text.
\bibitem{225} Id. Perhaps of greater concern should be the growing number of investment chapters contained in bilateral or regional free trade agreements. Unlike stand-alone investment treaties, these instruments place the treatment of foreign investment into a larger package that includes disciplines on trade in goods, trade in services, intellectual property, government procurement, and technical standards, as well as annexes that set forth a range of carefully negotiated exceptions. See Muchlinski, supra note 67, at 36–37. In this context, the revision of investment disciplines even by like-minded states becomes unappealing, as it opens up the entire package for renegotiation. See \textit{Bankrupting Democracy}, supra note 185, at 38 (quoting then Mexican President Vicente Fox for the proposition that “we are not in favor of opening up clauses of the free trade treaty, because if we open one, then we would have to open many”); \textit{Private Rights}, supra note 164, at 49 (observing that “suggestions that NAFTA’s text be reopened have met with strong resistance from governments who fear the potential for a wholesale renegotiation”).


\bibitem{227} See id. (predicting a rise in the number of BIT renegotiations because “a growing number of BITs are nearing expiry of their initial period of validity, and more countries are revising their model BITs to reflect new concerns related to environmental and social issues, including the host country’s right to regulate”).
\bibitem{228} See Salacuse, supra note 63, at 469–70 (discussing Venezuela’s denunciation of its BIT with the Netherlands, Ecuador’s denunciation of nine BITs, and Russia’s decision to terminate provisional application of the Energy Charter Treaty).
\bibitem{229} See id. at 472–73.
\bibitem{230} See \textit{Loewen Award}, supra note 62, at ¶¶ 241–42 (recognizing that the claimant had been subjected to a “miscarriage of justice,” but declining to “put it right,” in part because an eagerness to rule against the United States on a monumental claim could damage “the viability of NAFTA itself”).
\end{thebibliography}
of treatment that, at such high levels of generality, grant tribunals a wide latitude to define (and redefine) the obligations of host states, a possibility that is reinforced by the absence of any formal system of precedent for investment treaty arbitration. As described above, many tribunals have shown little reluctance in issuing awards likely to serve the preferences (and thus to maintain the confidence) of host states. In other words, investment treaty tribunals themselves can play an important role in the rebalancing of obligations through adjudication. While the ad hoc nature of investment treaty arbitration does not guarantee the perpetuation of this trend, the present trajectory of jurisprudence casts substantial doubt on assertions that investment treaties empower multinational corporations to inflict harm, frustrate democracy, or undermine the capacity of host states to protect the welfare of citizens.

V. Conclusion

The foregoing discussion has sought to examine the limits of three narratives frequently used to describe the function of, and thus to guide the application of, investment treaties. First, while the business planning narrative emphasizes the role of dispute-settlement provisions in promoting certainty for international commercial transactions between private parties, the fact remains that states do not negotiate investment treaties with private parties, that states pursue a variety of goals in treaty practice, and that investment treaties consequently do not emphasize certainty to the same extent as contracts. Second, while the human rights narrative emphasizes the capacity of investment treaties to protect foreign investors from serious abuse by host states, one quickly discovers that claimants under human rights treaties and claimants under investment treaties occupy fundamentally different positions. Whereas human rights claimants represent relatively powerless individuals with limited access to weak enforcement mechanisms that result in modest awards of damages at best, investment treaty claimants often possess substantial resources, as well as direct access to robust enforcement mechanisms capable of producing awards that can strain national treasuries. Third, while the anti-globalist narrative emphasizes the capacity of investment treaties to liberate foreign investors (and to restrict host states) in ways that may undermine the public interest, it often ignores the existence of formal and informal avenues to facilitate the recalibration of treaty obligations and, thus, create opportunities to pursue more socially desirable results.

Having tested the limits of three narratives, one feels the temptation to close with an analogy that better captures the functions of investment treaties. Indulging that desire, one might compare investment treaties to health insurance plans that provide a measure of protection when traveling “out-of-network,” but do not seem particularly generous and leave beneficiaries exposed to serious risks. However, the point is that analogies never capture the full picture and, thus, tend to obscure nuance. Under these circumstances, it seems

231. See Brower, supra note 66, at 355–56, 365–66; Salacuse, supra note 63, at 452–53.
232. See Dolzer & Schreuer, supra note 38, at 36; Newcombe & ParadeLL, supra note 33, at 102–03; Salacuse, supra note 63, at 460; Christoph Schreuer & Matthew Weiniger, A Doctrine of Precedent, in OXFORD HANDBOOK, supra note 63, at 1188, 1191.
233. See supra notes 75–77 and accompanying text.
wiser to draw conclusions based on an overall assessment of the lessons to be drawn from the foregoing narratives.

Taken together, the three narratives suggest that foreign investors need and should receive a measure of protection against political risks in their host states. Although investment treaties have a role to play in providing the necessary assurances, they do not guarantee the success of investments, protect against disappointment, or require host states to satisfy best practices in the conduct of public affairs. To the contrary, they provide recourse against serious abuse by government officials in host states, though that leaves open the question as to exactly what constitutes "serious abuse" in the twenty-first century, and whether the concept might vary depending on the particular characteristics of the investor or the host state. While recognizing that foreign investors deserve effective protection from serious abuse, one must not lose sight of the fact that their economic resources and political leverage often rival those of their host states. Because investment treaties add direct access to an international dispute settlement process that can produce nine-digit awards capable of enforcement worldwide, they represent powerful tools that may be applied in useful or pernicious ways. While that justifies public discussion and monitoring of investment treaty practice, one should recall that investment treaties have a second characteristic: a mutability that facilitates the adjustments needed to achieve socially desirable results.

In other words, the ebb and flow of practice suggests that investment treaties lie on a path traversing the territory among competing paradigms. Although the meandering track may represent a source of confusion at times, one hopes that it embodies a middle path that draws on the best of human experience, instead of the limited insights afforded by exaggeration and categorical views.

234. See Glamis Award, supra note 77, ¶ 22.

The Tribunal further finds that although the standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was [in 1926] under Neer; it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously.

Id.

235. See Generation Ukr., Inc. v. Ukr., ICSID Case No. ARB/00/9, Award, ¶ 20.37 (Sept. 16, 2003), 2003 WL 24065652 [emphasizing the need to "consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations, the protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties"). As stated by another tribunal:

In 1998, at the time of the Agreement, the political environment in Lithuania was characteristic of a country in transition from its past being part of the Soviet Union to candidate for the European Union membership. Thus, legislative changes, far from being unpredictable, were in fact to be regarded as likely. As any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement. The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment. Therefore, in such a situation, no expectation that the laws would remain unchanged was legitimate.

Parkerings Award, supra note 41, ¶ 335. But see Glamis Award, supra note 77, ¶ 615.

The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor.

Id.