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Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements

Frédéric G. Sourgens

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Frédéric G. Sourgens*

* Associate Professor of Law, Washburn University School of Law. This Article is based on a 2007 preliminary comment, *A Preliminary Comment—The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study*, 5 TRANSNAT'L DISP. MGMT. 1 (2007), co-authored with Michael D. Nolan. This Article brings up to date that earlier comment in light of the denunciation of the ICSID Convention by Bolivia, Ecuador, and Venezuela, as well as discussion of the *Preliminary Comment* in scholarship.

This article uses "international investment law" loosely. For a systemic discussion of international investment protection in international law, see Frederic G. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection as Common Law*, 34 NW J. INT'L L. & BUS. (forthcoming 2013).

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The last twenty years have seen a radical reversal in the attitudes towards the role of private enterprise in the global economy. With the fall of the Soviet Union in 1991, political scientists, economists, and lawyers deftly proclaimed the "end of history."[1] Freedom of political choice equaled the freedom of markets. Private enterprise, unshackled from the tyranny of central planning, was the motor not only of economic growth—it became the bedrock of the re-imagined global civic commonwealth.

The political vision of the late twentieth-century became the foundation of a new world legal order. Multilateral trade agreements first conceived after the end of the Second World War were given new life in the form of the 1994 Global Agreement on Tariffs and Trade (GATT)—the foundation document of the programmatically named World Trade Organization (WTO).[2] More permanently than trade, which by its nature is transient, the legal protection of investment in host state economies reached critical mass with the signing of thousands of bilateral and multilateral treaties.[3] Much as with the GATT, this international legal revolution relied upon a Cold War seed: the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, or "ICSID Convention" for short, concluded under the auspices of the World Bank in 1965.[4]

The new regime experienced one of its best days on October 20, 1994. On that day, the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments entered into force.[5] At that time, one of the staunchest intellectual champions of regulatory power of the state over its domestic economy abandoned the so-called "Calvo Doctrine," which provided that "international law should not grant more protection to foreigners than national treatment under domestic law" and granted U.S. investors international legal rights including the direct right to claim in

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1. *See, e.g.*, FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (2006).
2. *See* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 23, 71 (John H. Jackson ed., 2d ed. 2008) ("The modern law of international trade may fairly be described as a product of World War II" but only after the Cold War did the GATT parties "reach[] agreements that previously eluded them concerning so-called 'safeguards', and concerning trade in agriculture . . . formally establish[ing] a new World Trade Organization, and they created a system of binding dispute settlement designed to be applicable to the vast new body of law developed by the Uruguay Round and its predecessors.").
3. *See, e.g.*, STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009); José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 17–20 (2009) (arguing that the conclusion of over 2000 bilateral investment treaties created a new customary international law); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 427 (2010) (arguing that the conclusion of over 3000 bilateral investment treaties created a self-contained regime of international law of investment protection); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27 (2004) ("Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties. . . . and fashioned an essentially unified law of foreign investment."). For further discussion of the consequence of the conclusion of approximately 3000 international investment agreements to date, see Frédéric G. Sourgens, Out of the Fog: Developing International Law on Investment Protection as Common Law (Feb. 2013) (on file with author).
4. *See* Int'l Bank for Reconstruction and Dev., *Report of the Executive Directors on the Convention of the Settlement of Investment Disputes Between States and Nationals of Other States*, ¶ 15 (Mar. 18, 1965), *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm.
5. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124 (1992) (entered into force Oct. 20, 1994), *available at* http://unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf.

international legal proceedings for impairment of their investments by government action before the International Centre for the Settlement of Investment Disputes (ICSID).[6] A *novus ordo seclorum* appeared secured.

The first decade of the twenty-first century sorely tested the vision and idealism of the last decade of the twentieth. Severe economic crises in Latin America were followed by deep recessions in the ancestral homes of free enterprise, the United States and the European Union.[7] Terrorist attacks the world over created new powerful enemies sending people scrambling for state protection.[8] And a meteoric rise in natural resource prices fueled the ascendancy of strongmen in key countries seeking to consolidate strategic assets in their control.[9] In short, we have experienced what Professor José Alvarez called the "return of the state," asserting significant state control over strategic sectors of domestic economies.[10]

The return of the state in the last decade put in play the protections included in the programmatic international investment agreements. International investors have filed 390 claims against host states for expropriation, unreasonable impairment of investments by state regulation, and discrimination at ICSID alone.[11] The leading claims resolved in the last few years under international investment agreements exceeded $100 billion.[12] These claims made efficacious the new regime of international legal protections by giving individuals direct, immediate, and enforceable international legal rights against the host state of their investment. More importantly still, these claims provided an international forum through which the international community could be made aware of the international illegality of blatant political retributions such as the destruction by the Russian Federation of Yukos Oil Company.[13]

Now that the need for the international legal protections pledged in better days are called upon, host states are predictably seeking every mechanism available to escape from these protections. Some states threaten to withdraw from the earlier treaties they have struck.[14] Others have followed through and terminated bilateral investment agreements.[15] The most

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6. Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 901 (2011). *See also* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 87 AM. J. INT'L L. 433, 433–35 (1993) (reporting on the significance of the transmission by President Bush of the U.S.-Argentina BIT to the U.S. Senate).
7. Larry Elliott, *U.S. and Europe Risk Double-Dip Recession, Warns IMF*, GUARDIAN (Sept. 20, 2011), http://www.guardian.co.uk/business/2011/sep/20/us-europe-double-dip-recession-imf.
8. José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 256–57 (2011).
9. *See, e.g.*, Randel R. Young & Richard Devine, *Managing Risk in Emerging Market Hydrocarbon Development Projects*, 55 ROCKY MTN. MIN. L. INST. 30-1 (2009) (describing oil nationalizations in Venezuela, Russia, and Bolivia).
10. Alvarez, *supra* note 8.
11. Int'l Centre for Settlement of Inv. Disp. [ICSID], *The ICSID Caseload—Statistics*, at 7 (2012), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32 [hereinafter *The ICSID Caseload—Statistics*].
12. Michael D. Goldhaber, *Arbitration Scorecard 2011: The Biggest Cases You Never Heard Of*, AM LAW DAILY (July 6, 2011), http://amlawdaily.typepad.com/amlawdaily/2011/07/arbscorecard2011.html.
13. *See* Quasar de Valores SICA V S.A. v. Russian Federation, SCC Case No. 24/2007, Award (July 20, 2012), http://italaw.com/sites/default/files/case-documents/ita1075.pdf.
14. *See infra* Part II.A.
15. *See infra* Part II.A.

ambitious have attacked the focal point of the investment protection system and denounced the ICSID Convention, thereby seeking to deprive investors from the necessary forum to bring international legal claims.[16] In short, the success of the twentieth-century enterprise hangs in the balance.

If states succeed in their endeavor to gut investment protection, they will have destroyed a weight-bearing part of today's world legal architecture. The reach of law, and access to justice, will have been significantly diminished. Accountability and governance will have been dealt a heavy blow. But for perhaps the first time in international law, which way the balance tips will be decided not in a purely political arena, but in a legal forum. As this Article will discuss, arbitral tribunals theoretically and practically must stand at the ready to keep the faith of earlier engagements. Tribunals must protect the faith that private actors have placed in the law to protect their legal rights. States in short must not be permitted to frustrate the very purpose of their promises to put the legality of their actions under neutral, unbiased review precisely when such review becomes necessary.

Part II of the Article lays out the architecture of the international law of investment protection. It explains the central importance of the consent to arbitration in international investment agreements as the necessary condition for the efficacy of the current international legal paradigm. Part III critiques current theories of denunciation of international investment agreements as internally inconsistent. Part IV outlines an international obligation model that takes investor rights seriously by treating investors as the immediate and intended addressees of unilateral acts by the host state to their investment.

I. The Architecture of International Investment Law

International investment law protects investments against political risk. In order to do so, this branch of international law logically must provide a stable architecture that is not itself subject to the very risk against which it seeks to ensure investors. As discussed in the following sections, it is this architectural component that current theories of termination of international investment agreements typically ignore.

This part of the Article lays out the development of the international investment law architecture chronologically. This chronology shows a trend away from diplomatic protection as the principal means of investment protection towards granting investors direct rights. The chronology further shows a move away from requiring contractual agreements between the state and the investor and towards a broader grant of rights directly to investors through standing international instruments.

A. The Beginnings of the Contemporary International Investment Architecture

The architecture of international investment law rests on post-Second World War foundations. Two of the most important early developments for the current architecture of international investment law are (1) the failed attempt to bring about a multilateral

16. *See infra* Part II.A.

international trade agreement, and (2) investment agreement and the formation of the International Centre for the Settlement of Investment Disputes.

1. The Failed Negotiations for a Multilateral Investment Agreement

Following the end of the Second World War, several attempts were undertaken to conclude a multilateral agreement that would have protected international investments. The three principal early agreements were the 1948 Havana Charter, the 1959 Abs-Shawcross Draft Convention on Investments Abroad, and the 1967 Draft Convention on the Protection of Foreign Property (negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD)).[17]

These three agreements formed the precursor for many of the substantive protections found in contemporary international investment agreements.[18] The most important protection contained in these agreements is the treatment provision that codifies the principle that host states must treat foreign investments fairly and equitably.[19] Some of these draft conventions required host states to keep their contractual engagements towards investors.[20] Some of these conventions further sought to prohibit expropriation without compensation by the host state.[21] Together, these are the key protections contained in contemporary international investment agreements.[22]

Critically, the three draft agreements did not yet contain a provision permitting affected investors to bring claims directly and immediately to arbitration. The dispute resolution mechanism of the Havana Charter calls for arbitration of disputes between the member

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17. *See* CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 48–49 (2011); CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 213–14 (2007); Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1035–37 (2000); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT'L L.J. 67, 72 (2005) (listing additional failed multilateral attempts).
18. For a detailed historical discussion, see Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N.C. J. INT'L L. & COM. REG. 33, 51–73 (2009); Franziska Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment*, 7 ICSID REV.-FOREIGN INV. L.J. 384 (1992).
19. Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87, 89 n.12 (2005); Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115, 122 (2011); Kenneth J. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. 43, 45 (2010); Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT'L L. 35, 81 n.159 and accompanying text (2003).
20. *See* Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, 51 VA. J. INT'L L. 1005, 1010–11 (2011); Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT'L L. 1, 56–57 (2009); Jason Webb Yackee, Pacta Sunt Servanda *and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1605 n.225 and accompanying text (2009); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 144–46 (2006).
21. *See, e.g.*, RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 102 (2d ed., 2012).
22. *See, e.g.*, MCLACHLAN ET AL., *supra* note 17, at 30.

states.[23] The principal means of dispute resolution under the Abs-Shawcross Convention is state-to-state dispute resolution.[24] A subsidiary means, subject to consent not contained in the Abs-Shawcross Convention itself, permits investors to commence arbitral claims "provided that the Party against which the claim is made has declared that it accepts the jurisdiction of the said Arbitral Tribunal in respect of claims by nationals of one or more Parties, including the Party concerned."[25] The 1967 OECD Draft Convention follows in material respect the Abs-Shawcross approach.[26]

Despite requiring additional consent to arbitration on the part of the host state, the mechanism to provide such a consent is of central importance for contemporary investment law architecture, as will be discussed in the following parts of this Article. The comment to Article 7 of the OECD Draft Convention states that "[a]cceptance [of jurisdiction] is effected by a unilateral declaration."[27] It goes on to explain that:

> The declaration may be revoked by the Party concerned at any time—unless the declaration itself states the contrary. The effect of the revocation is, however, not absolute. According to paragraph (c) of Article 7, jurisdiction of the A.T. continues to exist for five years in respect of claims arising out of, or in connection with, rights acquired while the declaration was valid.[28]

Although an important first step toward today's investment law architecture, these conventions fall short of granting foreign investors direct rights. The conventions so far exhibit the intent of states to maintain their primacy to use the new instruments as potential tools for diplomatic protection;[29] alternatively, they are little more than a means for states to consent ad hoc to arbitration with specific investors over specific disputes or with regard to specific projects. In those instances, the consent would have followed the classic *ex ante* allocative function essentially to provide a means through which to distribute funds for specific policy choices with regard to strategic projects in the future.[30]

Despite their inherent limitations, the Havana Charter, OECD Draft Convention, and Abs-Shawcross Convention were never adopted as multilateral treaties. They all faced

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23. Havana Charter for an International Trade Organization, *in* United Nations Conference on Trade and Employment: Final Act and Related Documents, art. 93(2), U.N. DOC. E/CONF. 2/78 (Mar. 24, 1948), *available at* http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.
24. Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention), art. VII(1) (1959), *reprinted in* U.N. CONF. ON TRADE AND DEV. [UNCTAD], INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 301, U.N. Doc UNCTAD/DITE/2 (Vol. V) (2000), *available at* http://www.unctad.org/sections/dite/iia/docs/Compendium//en/137%20volume%205.pdf [hereinafter Abs-Shawcross Convention].
25. *Id.* art. VII(2). *See also* Laura Henry, *Investment Agreement Claims under the 2004 Model U.S. BIT: A Challenge for Sate Police Powers?*, 31 U. PA. J. INT'L L. 935, 947 (2010) (noting that the Abs-Shawcross convention was the first to attempt to create a permanent international investment tribunal).
26. *See* OECD Draft Convention on the Protection of Foreign Property, 7 I.L.M. 117, art. 7(b) (1968), *available at* http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/39286571.pdf.
27. *Id.* art. 7 cmt. 7(a).
28. *Id.* art. 7 cmt. 7(c).
29. *See supra* notes19–22.
30. *See* W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 41 (1996).

significant political opposition.[31] This opposition was the strongest amongst developing countries.[32] The role of the state, or state sovereignty, was as of yet too strong to introduce sweeping international legal protections for private enterprise.[33] It certainly proved too strong to do so on a multilateral basis requiring the consensus of a critical mass of capital exporting and capital importing countries.[34]

2. Formation of ICSID

The institution that critically succeeded in pushing open the door to international legal rights for foreign investors is ICSID. Unlike the Havana Charter, the OECD Convention, and the Abs-Shawcross Convention, the ICSID Convention garnered sufficient support to enter into force in 1966.[35] Unlike those instruments, the ICSID Convention did not contain any substantive protections to which member states agreed.[36] Rather, it focused solely on opening a forum for investment disputes between states and foreign investors, should the host state consent to its jurisdiction.[37]

ICSID was formed in response to a series of requests by governments for the President of the World Bank to resolve international investment disputes.[38] In the most visible dispute, the President of the World Bank was called upon to conciliate the dispute between the shareholders in the Suez Canal Company and the Egyptian government.[39] The Egyptian government in 1956 nationalized the Suez Canal.[40] In response to the nationalization, Great

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31. For discussion of the negotiation of these multilateral agreements, see SCHILL, *supra* note 3, at 31–64; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 79–85 (3d ed. 2010).
32. *See* Wong, *supra* note 20, at 138.
33. *See, e.g.*, SCHILL, *supra* note 3, at 31–44 .
34. *Cf.* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1526 (2005) ("Given the difficulties in promulgating sweeping reforms on a multilateral basis, these [efforts to produce multilateral investment treaties] were largely unsuccessful."). *See also* Salacuse & Sullivan, *supra* note 17, at 72; Leal-Arcas, *supra* note 18 at 51–73.
35. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention]; *see also* ANTONIO R. PARRA, THE HISTORY OF ICSID 1–10 (2012); CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY xi–xii (2d ed. 2009) [hereinafter SCHREUER 2009]; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY xvii–xviii (2001) [hereinafter SCHREUER 2001].
36. *See, e.g.*, LOWENFELD, *supra* note 2, at 539 ("The key question in drafting the Convention was what law an arbitral tribunal should apply when it had an investment dispute before it. The resolution adopted in the Convention, was to avoid all attempts to define the substantive obligations between host state and foreign investor[s] . . . .").
37. *See, e.g.*, SCHREUER 2001, *supra* note 35, at 191 ("Consent by both or all parties is an indispensable condition for the jurisdiction of the Centre. The fact that the host State and the investor's State of nationality have ratified the Convention will not suffice.); SCHREUER 2009, *supra* note 35, at 190; *cf.* LOWENFELD, *supra* note 2, at 540 (noting that during the early history of the ICSID Convention's existence "[n]otwithstanding the fact that joining the ICSID Convention did not constitute consent to arbitration of any given investment dispute, present or future, there was a widespread perception, particularly among the states of Latin America . . . that if states did sign and ratify the Convention, they would be under pressure to consent to arbitration").
38. *See* A. Broches, Note transmitted to the Executive Director, (Jan. 19, 1962), *in* 2-1 HISTORY OF THE ICSID CONVENTION 2–7 (1968); *see also* LOWENFELD, *supra* note 2, at 456.
39. *See* Broches, *supra* note 38, at 2–7.
40. *See Egypt Seizes Suez Canal*, BBC NEWS (July 26, 1956), http://news.bbc.co.uk/onthisday/hi/dates/stories/july/26/newsid_2701000/2701603.stm.

Britain and France sent troops to Egypt to reclaim the Canal.[41] Following diplomatic intervention by the United States, Great Britain and France withdrew their forces.[42] Shareholder representatives for the stakeholders in the Suez Canal Company resolved their dispute with Egypt in an amicable fashion with the help of the World Bank.[43]

In another large-scale dispute, the President of the Bank was called upon to resolve a dispute between a class of French bondholders and the City of Tokyo.[44] The *City of Tokyo Bonds* case was a dispute between the City of Tokyo and French holders of 1912 city bonds, restructured in 1937, regarding the effects of post-Second World War restructurings of Japanese debt held by former Japanese enemies.[45] When the dispute could not be amicably resolved, the parties submitted it to the President of the World Bank, Eugene Black, for conciliation.[46] On November 5, 1960, the dispute was settled by an agreement of the parties with the help of the World Bank's legal staff, whose assistance was garnered through Black's proposed payment schedule for the Metropolis of Tokyo.[47] The schedule was "based on the sum of 252.57 (New Francs) having a gold content of 0.18000 grams per franc for each 500-franc bond with all coupons matured since 1928, calculated as of March 1, 1960."[48]

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41. *Allied Forces Take Control of Suez*, BBC NEWS (Nov. 6, 1956), http://news.bbc.co.uk/onthisday/low/dates/stories/november/6/newsid_3115000/3115888.stm.
42. *Jubilation as Allied Forces leave Suez*, BBC NEWS (December 23, 1956), *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/december/23/newsid_3294000/3294305.stm.
43. *Egypt to Meet Suez Canal Shareholders: Talks in Rome Next Month*, GLASGOW HERALD, Jan. 24, 1958, at 7, *available at* http://news.google.com/newspapers?nid=2507&dat=19580124&id=1ndAAAAAIBAJ&sjid=o6MMAAAAIBAJ&pg=4696,2665434. For a discussion of the historical background of the nationalization of the Suez Canal, see Note, *Nationalization of the Suez Canal Company*, 70 HARV. L. REV. 480 (1957). The note opines on the adequacy of compensation based on the price of stock on the Paris Exchange on the day the expropriation would go into effect (as offered by Egypt) in light of Britain's withdrawal of forces from Egypt two years prior and the significant downward adjustment of the share price on the Paris Exchange following the withdrawal of forces. The discussion therefore suggests that the shares in questions were actively traded as financial instruments on an exchange prior to the nationalization of the Canal.
44. *See* Broches, *supra* note 38, at 2–7.
45. *See* MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS 83 (2011).
46. WORLD BANK GROUP ARCHIVES, WORLD BANK GROUP HISTORICAL CHRONOLOGY 82–83, *available at*: http://siteresources.worldbank.org/EXTARCHIVES/Resources/WB_Historical_Chronology_1944_2005.pdf (last visited Mar. 20, 2013).
47. *Id. See also* T.M.C. Asser, *The World Bank*, 7 J. INT'L L. & ECON. 207, 209 (1972) ("The Legal Department has also assisted the Bank and its President in the settlement of investment disputes between member countries or between a member country and private parties, such as the disputes involving the Indus Basin, the Suez Canal, the sequestration of British property in the United Arab Republic, and the City of Tokyo Bonds of 1912."). The author of the article was a lawyer in the legal department of the World Bank at the time of writing the article. Cour de cassation [Cass.] [supreme court for judicial matters] com., Mar. 7, 1967, Bull. civ. IV, No. 105 (Fr.), *available at*: http://legimobile.fr/fr/jp/j/c/civ/com/1967/3/7/6974678/.
48. WORLD BANK GROUP ARCHIVES, *supra* note 46, at 83. *See also* Asser, *supra* note 47, at 209 ("The Legal Department has also assisted the Bank and its President in the settlement of investment disputes between member countries or between a member country and private parties, such as the disputes involving the Indus Basin, the Suez Canal, the sequestration of British property in the United Arab Republic, and the City of Tokyo Bonds of 1912."). Cour de cassation [Cass.] [supreme court for judicial matters] com., Mar. 7, 1967, Bull. civ. IV, No. 105 (Fr.), *available at*: http://legimobile.fr/fr/jp/j/c/civ/com/1967/3/7/6974678/.

Although the project began as an attempt to streamline the World Bank's role in resolving investment disputes,[49] from its very inception the Centre was intended to remedy the trend of states frustrating their own arbitral engagements when investors sought to call upon them.[50] Such attempts were common in large-scale project disputes at the time the ICSID Convention was first conceived.[51] From the earliest drafts, the purpose was to secure that state arbitral consents would become international obligations of the state giving them under an international treaty, namely the ICSID Convention.[52] This mechanism was intended to strengthen both contractual consents included in investment agreements and consents given independently of a contractual relation with the investor in international treaties or domestic investment legislation.[53]

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49. Broches, *supra* note 38 at 7.
50. *Id.* at 2 .
51. *See* John T. Schmidt, *Arbitration under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in* Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, 17 HARV. INT'L L.J. 90, 90 n.1 (1976) (providing a list of cases in which host states have effectively frustrated their arbitration consent in disputes with foreign investments in the thirty years prior to negotiation of the ICSID Convention); *cf.* Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317 (1988) (analyzing in detail the practice of arbitral tribunals constituted under production sharing and economic development agreements); Note, *Foreign Seizure of Investments: Remedies and Protection*, 12 STAN. L. REV. 606, 633 (1960) (stating that "if the state party is unwilling to contest a particular claim in spite of an agreement to arbitrate and if the jurisdictional clause of the agreement provides for a tribunal to which each party must appoint a member, such unwillingness may effectively prevent arbitration. Therefore the individual should consider the possibility of inserting an 'airtight' arbitration provision, one which can operate without the cooperation of one of the parties").
52. *See, e.g.*, Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, Article II(1), (June 5, 1962), *in* 2-1 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 22 [hereinafter Draft Convention]; *cf.* President's Note to the Executive Directors, *in* 2-1 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 5 (explaining that "[w]hile, as stated, the international agreement establishing the Center would not of itself oblige members to submit to its jurisdiction, the agreement would provide . . . that once a State had voluntarily agreed to submit a specific dispute or group of disputes to the jurisdiction of the Center, this agreement would be a binding international obligations").
53. *See, e.g.*, Remark of Mr. Donner, (May 6, 1963), *in* 2-1HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 91 (discussing Germany's nascent BIT program); Remark of A. Broches, Memorandum of the meeting of the Committee of the Whole (May 28, 1963), *in* 2-1HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 93 ("Mr. Donner's point regarding avoidance of interference with existing bilateral agreements on foreign investment would be met in the next draft") [hereinafter Broches Memorandum May 28, 1963]; First Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article II(2) (Aug. 9, 1963), *in* 2-1 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at148 (making express that consent of the state can be given independently from the consent of the investor) [hereinafter First Preliminary Draft]; Letter addressed to the Bank from the Federal Ministry of Finance of the Republic of Austria (Nov. 13, 1963), *in* 2-2 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 670 (raising the concern that a later intermediate draft "no longer provides explicitly for the possibility of general statements of submission, as contained in Article 2, paragraph 2 of the first draft"); A. Broches, Memorandum from the General Counsel and Draft Report of the Executive Directors to Accompany the Convention (Jan. 19, 1965), *in* 2-2 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 956 ("Nor does the Convention require that the consent of both parties to be expressed in a single document. Thus, a host state might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.") [hereinafter Broches Memorandum Jan. 19, 1965].

The ICSID Convention gave teeth to the international obligation to abide by consents through its mechanism for the enforcement of arbitral awards. Article 54(1) of the ICSID Convention provides that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[54] The broad exception from sovereign immunity is limited only with regard to immunity from execution, thus emphasizing further that jurisdictional immunities are waived.[55] The ICSID Convention thus provided a forum with significant advantages to foreign investors over existing fora that did not contain such sovereign immunity waivers.[56]

The structure of the ICSID Convention confirms the critical nature of consent in resolving investment disputes in international law. The ICSID Convention elevates the obligation owed to an investor to an enforceable international legal obligation *because* of the consent provision giving the investor a direct right of action.[57] Without the consent provision, the investor would lack an international legal right to enforce legal obligations. Through it, the investor acts completely independent of the support—or disapproval—of its home state.[58] This mechanism formed the baseline from which mature international law on international investment disputes departed.[59]

3. The Project-Specific Paradigm

Investment protection in practice remained project-specific through much of the Cold War. The principal means through which investors (as opposed to their home states) obtained investment protection were either direct contractual undertakings from the host state or by means of political risk insurance (in which case the investor's home state would recover moneys expended through its own claim mechanisms).[60]

54. ICSID Convention, *supra* note 35, at art. 44(1).
55. *Id.* art. 55.
56. *But see* Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARB. 1 (2006) (discussing the means available to states to frustrate enforcement of ICSID awards even in light of the strong enforcement provisions of the ICSID Convention); *cf.* George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 702–06 (2008); Charity L. Goodman, *Unchartered Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449 (2007) (discussing enforcement in the context of Argentina's spirit defense against execution on a significant number of ICSID awards against it).
57. *See* ICSID Convention, *supra* note 35, arts. 25(1) (jurisdiction of the Centre depends upon consent), 52(2) (annulment is available if a tribunal manifestly exceeded its powers), 53(1) (award is binding to the parties to the dispute), 54(1) (award must be enforced in each contracting state).
58. *But cf.* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010) (arguing for a greater role of states in the shaping of the international legal rights of investors acquired through international investment treaties); *see also* Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573 (2011) (discussing why international law is more frequently generated further away from the traditional statist paradigm).
59. *But cf.* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012) (submitting that investment arbitration tribunals helped to usher in a new mode of effective, compulsory public international law adjudication).
60. For a full discussion of early investor options and their limitations, see, e.g., DUGAN ET AL., *supra* note 17, at 26–43.

a. Investment Agreements

A significant number of large-scale investment agreements in the Cold War were protected through express contractual undertakings from the host state. The main provisions in such agreements addressing political risk are so-called stabilization clauses.[61] Such stabilization agreements can operate in different manners: they may freeze the regulatory environment in whole or in part,[62] create a complex balance of rights and obligations that adapt to market conditions,[63] or impose open-ended obligations seeking to stabilize an overall "investment environment."[64]

Dispute resolution practice under such agreements confirmed that the agreements conferred direct international legal rights upon the investor against the state. Such agreements thus absolve investors of the risk of foreign policy discretion of their home state still applicable in the realm of diplomatic protection. The *Lena Goldfields* arbitration provides the classic example for the internationalization doctrine.[65] The *Lena Goldfield*s arbitration concerned a Siberian mining concession granted by the Soviet government during the time of the New Economic Policy (NEP).[66] Following a policy change abandoning the NEP, Soviet officials withheld vital services to be performed under the contract from the project, raided the property under concession, and prosecuted Goldfields' employees for counter-

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61. *See, e.g.*, Margarita T.B. Coale, *Stabilization Clauses in International Petroleum Transactions*, 30 DENV. J. INT'L L. & POL'Y 217 (2002).
62. *See, e.g.*, Julián Cárdenas García, *Rebalancing Oil Contracts in Venezuela*, 33 HOUS. J. INT'L L. 235, 258 (2011) (discussing freezing agreements under Venezuelan law, but noting that they have not been implemented); A.F.M. Maniruzzaman, *The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry*, 5 TEX. J. OIL GAS & ENERGY L. 79, 96 (2010) (discussing the classic freezing stabilization agreement); Evaristus Oshionebo, *Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries*, 10 ASPER REV. INT'L BUS. & TRADE L. 1 (2010) (discussing the history of freezing stabilization clauses); Catherine J. Boggs, *Project Management: A Smorgasbord of International Operating Risks*, 4 ROCKY MTN. MIN. L. INST. PAPER NO. 13, at 5 (2008) (noting that "[t]hese kinds of 'freezing' clauses are often found in older stability agreements"); Miguel I. Rivero Betancourt, *Compared Study of Bolivia, Peru and Venezuela's Legal Framework on Natural Gas (Upstream Activities)*, 2 ROCKY MTN. MIN. L. INST. PAPER NO. 19 (2007).
63. *See, e.g.*, Boggs, *supra* note 62, at 5 (noting that equilibrium agreements are currently the more typical form of stability agreements); Maniruzzaman, *supra* note 62, at 96 (discussing equilibrium clauses); A.F.M. Maniruzzaman, *National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective*, 8 J. WORLD INVESTMENT & TRADE 233 (2007).
64. Richard J.B. Price et al., *Managing Multi-Country International Risk: What to Look for before Investing*, 4 ROCKY MTN. MIN. L. INST. PAPER NO. 12, § V(B) ("For example, an investor should consider seeking a stabilization clause, by which the host government undertakes not to take any action that would undermine the value or operation of a foreign investment. These clauses typically include prohibitions against enacting or amending laws that would alter the 'investment environment' present at the time the investment was made, and often fix royalties and other taxes."). For a critique of this categorization of stabilization agreements, see Peter D. Cameron, *Stability of Contract in the International Energy Industry*, 27 J. ENERGY & NAT. RESOURCES L. 305 (2009).
65. *See, e.g.*, Coale, *supra* note 61, at 227 ("As a result of the interaction between the clauses of the agreement, the Court of Arbitration determined for the first time that a contract between a private party and a sovereign state might be internationalized."); *see also* Yackee, *supra* note 20, at 1575–77.
66. Arthur Nussbaum, *The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31, 33 (1950); *see also* V.V. Veeder, *The* Lena Goldfields *Arbitration: The Historical Roots of Three Ideas*, 47 INT'L & COMP. L.Q. 747 (1998).

revolutionary activity, leading Goldfields to abandon the project.[67] Although the Soviet Union initially participated in the constitution of the tribunal, it later withdrew from the proceedings.[68] The tribunal derogated from a Soviet choice of law provision—on the basis of which the Soviet Union arguably would have prevailed—and found liability was ultimately found on the basis of general principles of law.[69]

Dispute resolution practice under these agreements has awarded foreign investors relief in cases of termination of concessions.[70] Alternatively, the investor's producing asset was nationalized outright or investor rights under investment agreements were severely impaired.[71] Because of the severity of the interference with the investor's contractual rights, the liability imposed by host states was in fact premised upon facially inconsistent rationales that all endorsed the same result; namely, even if the contracts were treated as administrative engagements subject to administrative law oversight, the outright seizure of the investment still constituted a fundamental breach no matter the discretion afforded the host state agencies.[72]

The classic decisions rendered under investment agreements did not squarely address claims for impairment of investments through change in regulation but concerned instead obvious breaches of the investment agreement as a whole.[73] An outright taking of a concession, or outright breach of a fundamental right bestowed upon an investor in the concession, is an obvious example of state action that is both a breach of the stabilization clause and a fundamental breach of contract irrespective of stabilization clauses.[74] That said, much of pre-bilateral investment treaty (BIT) jurisprudence could be extended to support invocation of investment agreements in the context of substantial regulatory impairment of covered investments that did not rise to the level of an out-and-out taking.[75]

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67. Nussbaum, *supra* note 66, at 33.
68. *Id.* at 34.
69. *See id.*
70. *See* Coale, *supra* note 61, at 226–36; *see also* Christopher Greenwood, *State Contracts in International Law—The Libyan Oil Arbitrations*, 1982 BRIT. Y.B. INT'L L. 27; Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981); Yackee, *supra* note 20, at 1575–601. The decisions did not exclusively award monetary compensation but at times offered declaratory relief. For further discussion, see Sourgens, *supra* note 3.
71. Coale, *supra* note 61, at 226–36; *see also* Yackee, *supra* note 20, at 1575–601; Christopher Greenwood, *supra* note 70; von Mehren & Kourides, *supra* note 70.
72. Coale, *supra* note 61, at 226–36; *see also* Yackee, *supra* note 20, at 1575–601; Christopher Greenwood, *supra* note 70; von Mehren & Kourides, *supra* note 70.
73. *See, e.g.*, Thomas W. Wäelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 246 (1996) ("In all these arbitral awards, compensation was payable for revocation/breach of the investment agreement, with the specific issue of the stabilization clause largely obscured in the *ratio decidendi*. Even so, these cases clearly illustrate a lack of consistency in international jurisprudence, which in turn is indicative of the uncertainty which currently prevails over the precise status of the stabilization clause under international law.").
74. *Id.*
75. *See, e.g.*, Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 I.L.R. 117 (Arb. Trib. 1958) (*pacta sunt servanda* premised in general principles of law enforced in the context of exclusive grant to ship oil); *Czechoslovakia v. Radio Corporation of America: Arbitration Case of the Administration of Posts and Telegraphs of the Republic of Czechoslovakia*, 30 AM. J. INT'L L. 523 (1936) (*pacta sunt servanda* as duty not to compete with telegram joint venture); Julien Cantegreil, *The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment*

In sum, early arbitral decisions involving investment agreements point the way forward in significant matters. They recognize direct international legal rights vested in international investors rather than their home states.[76] The decisions developed those rights through general principles of law while straddling existing principles of customary international law and the *lex mercatoria*.[77] They granted investors meaningful monetary and non-monetary relief.[78]

And yet these early decisions evidence the limits of the project-specific model. Rights were selectively granted to few investors.[79] Despite the obvious limitations of these rights, host states nevertheless avoided abiding them by invoking state sovereignty—a plea that could leave investors without a means ultimately to enforce an arbitral award in their favor.[80] Without a reliable enforcement mechanism of arbitral awards, international legal rights bestowed upon international investors ran the systemic risk of under-enforcement.

Further, the conclusion of investment agreements was not without practical difficulties. One such difficulty was that most investors had limited leverage to negotiate agreements. In fact, domestic legislation frequently defined the scope of agreements into which a host country would enter.[81] A further difficulty was and remains that "it is not unusual for a country to demand renegotiation of the terms of the agreement as the economics of the country or the project change over time."[82] From a practical point of view, investment agreements were and are important, but arguably not the most stable set of protections for international investors.

Law, 22 EUR. J. INT'L L. 441, 442 (2011) ("The willingness of Professor René-Jean Dupuy, designated as sole arbitrator by the President of the International Court of Justice, to decide the case *en droit* and not to shy away from substantively innovative doctrinal choices has helped to make *Texaco* a keystone in the construction of the modern international law of foreign investment. The *Texaco* award must therefore be read as forward-looking. The shift from the traditional hegemony of national jurisdiction in international investment law to the internationalization of international contracts is Dupuy's long-lasting contribution to international law doctrine . . . ."); Veeder, *supra* note 66 (*pacta sunt servanda* as a general principle of law); Yackee, *supra* note 20, at 1575–601.

76. *See, e.g.*, Coale, *supra* note 61, at 227 ("As a result of the interaction between the clauses of the agreement, the Court of Arbitration determined for the first time that a contract between a private party and a sovereign state might be internationalized."); *see also* Yackee, *supra* note 20, at 1575–77.
77. *See* Nussbaum, *supra* note 66; Veeder, *supra* note 66.
78. *See* Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co., 35 I.L.R. 136, 190 (Arb. Trib. 1963) (awarding $2,650,874 in compensation); Saudi Arabia v. Arabian American Oil Co. (Aramco), 27 I.L.R. 117 (Arb. Trib. 1958) (declaratory relief)
79. *See, e.g.*, DUGAN ET AL., *supra* note 17, at 42–43 (quoting a 1968 World Bank report that "[i]n an attempt to overcome these difficulties, some investors, mostly large corporations especially in the field of extractive industry, have been able to negotiate arbitration agreements with host Governments, providing for detailed rules regarding the selection of arbitrators, the arbitral procedure and, in some cases, the law to be applied by the arbitral tribunal. It is quite clear that only a few investors can be in a position to negotiate such agreements.").
80. *See id.* ("Within the courts of the host country a variety of barriers such as partiality of the forum, immunity of the state, adoption of the Calvo doctrine and the inefficiency of such courts often left no meaningful means of redress for the aggrieved foreign investor.").
81. For a current example, see Venezuelan Decreto con Rango y Fuerza de Ley de Promocion y Proteccion de Inversiones, Decreto No. 356, art. 17 (Oct. 3, 1999), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=130142.
82. Boggs, *supra* note 62, at 6.

b. Political Risk Insurance

Apart from securing investments against political risks through investment agreements, the main means of protecting investments against political risks prior to the BIT era was through political risk insurance. In the United States, the governmental provider of political risk insurance initially was U.S. AID, followed by the Overseas Private Investment Corporation (OPIC).[83] Political risk insurance traditionally was made available for expropriation, political violence, and inconvertibility.[84]

The main protection actually invoked by investors covered by OPIC concerned inconvertibility of foreign currency.[85] Inconvertibility of foreign currency occurs when there is either active blockage of a currency exchange transaction or passive blockage of such a transaction.[86] An active blockage occurs when the central banking authorities in the host country expressly prohibited the transfer of currency.[87] A passive blockage occurs when the central banking authorities simply failed to make available foreign exchange at the official rate of exchange.[88]

OPIC inconvertibility protection, in practice, protected investors against regulatory changes relating to foreign exchange.[89] Insurance coverage froze the foreign exchange rate in place at the time the insurance contract was taken out.[90] If a regulatory change impaired the investor's ability to repatriate either profits or repayments on loans, the impairment value would be covered by OPIC insurance.[91]

The expropriation cover was significantly broader than requiring the outright nationalization of covered investments. OPIC's test was whether the host state's action deprived the investor of a fundamental right in the investment.[92] In practice, this meant that

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83. *See* 1 REPORTS OF OVERSEAS PRIVATE INVESTMENT CORPORATION DETERMINATIONS xx–xxi (Mark Kantor et al. eds., 2011) (providing historical introduction to OPIC and U.S. public political risk insurance) [hereinafter REPORTS OF OVERSEAS PRIVATE INVESTMENT].
84. *See* Michael Nolan, Frédéric Sourgens, & Mark Rockefeller, *Public Contract Guarantees by National Institutions*, *in* THE INTERNATIONALIZATION OF PUBLIC CONTRACTS (Mathias Audit & Stephan Schill eds.) (forthcoming 2013); S. Linn Williams, *Political and Other Risk Insurance: OPIC, MIGA, EXIMBANK and Other Providers*, 5 PACE INT'L L. REV. 59, 64, 76–80 (1993); Robert B. Shanks, *Insuring Investment and Loans against Currency Inconvertibility, Expropriation, and Political Violence*, 9 HASTINGS INT'L & COMP. L. REV. 417 (1986).
85. *See* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83.
86. *See* Nolan, Sourgens, & Rockefeller, *supra* note 84.
87. *See, e.g.*, General Signal Corp. (Argentina: 1973), *in* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at 160–66 (resolving active blockage claim).
88. *See, e.g.*, Bank of America (Vietnam: 1970), *in* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at 45–46 (resolving passive blockage claim).
89. *See, e.g.*, REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at xlviii (discussing Philippine inconvertibility claims).
90. *Id.*
91. *See, e.g.*, Bank of America (Vietnam: 1973(I)), *in* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at 126–35 (resolving claim regarding change in foreign exchange regulation imposing additional limitation on repatriation of profits); General Signal Corp. (Argentina: 1973), *in* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at 160–66 (resolving active blockage claim).
92. *See, e.g.*, Revere Copper and Brass (Jamaica: 1978), *in* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at 740–69. For a discussion of *Revere Copper*, see R. Doak Bishop et al., *Strategic Options Available when Catastrophe Strikes the Major International Energy Project*, 36 TEX. INT'L L.J. 635, 685–86 (2001); David A. Gantz, *Potential Conflicts between Investor Rights and*

OPIC compensated investors that lost control over their investment—even if the investor still maintained legal ownership and could enforce a right to receive some payments under relevant investment agreements.[93] In fact, the frustration of key engagements made by the host state government enticing an investment to be made would arguably rise to the level of an expropriation in the context of OPIC's claim practice.[94]

National political risk insurance carriers addressed and continue to address the leverage problem posed by investment agreements. OPIC provided and continues to provide coverage for projects in countries with which the United States has a treaty providing for certain rights of recovery in case of an insurance pay-out.[95] The home state, of course, has significantly better leverage to negotiate such coverage with the host state than most any single investor would. The OPIC model therefore provided some improvement to the leverage problem.[96]

That being said, the problem of the political risk insurance model was that it again deprived the investor of a direct right of action against the host state. The political risk insurance model is essentially premised upon diplomatic protection as the chief mechanism to address political risk.[97] In a world of growing global trade and investment, a system that is dependent on such diplomatic protection suffers from significant inefficiencies, because, for instance, it limits the places in which coverage will be made available.[98]

B. Setting Up the BIT Paradigm

The BIT era began in 1959 with the conclusion of the Germany-Pakistan BIT.[99] BITs, considered a class within International Investment Agreements (IIAs) generally, slowly took the place of treaties of friendship, commerce and navigation.[100] The pace at which similar treaties were concluded was comparatively slow prior to the end of the Cold War: from 1980 to 1990, countries concluded approximately 385 BITs.[101] The United Nations Conference on

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Environmental Regulation under NAFTA's Chapter 11, 33 GEO. WASH. INT'L L. REV. 651, 720–22 (2001).

93. *See, e.g.*, International Bank of Washington (Dominican Republic: 1971), *in* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at 59–89 (defining expropriation standard in the context of effective control over the investment).
94. *See, e.g.*, Revere Copper and Brass (Jamaica: 1978), *in* REPORTS OF OVERSEAS PRIVATE INVESTMENT, *supra* note 83, at 740–69.
95. Sam Foster Halabi, *Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT'L L. & BUS. 261, 275 (2011).
96. *See* Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 492 (2008) ("For many years, OPIC has boasted of its high recovery rate—95 percent of the amounts accepted—which observers credit to its leverage as an arm of the U.S. government."(footnote omitted)).
97. *Id.*
98. As OPIC states on its website, "From time to time, statutory and policy constraints may limit the availability of OPIC programs in certain countries." OPIC, *Finance Eligibility Checklist*, available at http://www.opic.gov/doing-business-us/applicant-screener/finance-eligibility-checklist (last visited Mar. 30, 2013).
99. *See, e.g.*, DOLZER & SCHREUER, *supra* note 21, at 6 ("The era of modern investment treaties had begun in 1959 when Germany and Pakistan adopted a bilateral agreement which entered into force in 1962.").
100. *See, e.g.*, *id.* at 17–30 (providing a brief history of IIAs); *see also* DUGAN ET AL., *supra* note 17, at 51–68; MCLACHLAN ET AL., *supra* note 17, at 26–27.
101. *See, e.g.*, MCLACHLAN ET AL., *supra* note 17, at 26.

Trade and Development (UNCTAD) reports that "[b]y the end of 2011, the overall IIA universe consisted of 3,164 agreements, which included 2,833 bilateral investment treaties (BITs) and 331 'other IIAs.' "[102] Since the end of the Cold War, growth in BITs thus proceeded in excess of ten times the speed of growth reached prior to the end of the Cold War.[103]

1. Broad Protection without Privity

The common theme to all BITs and other similar IIAs is the scope of the protection they entail. The 1959 Germany-Pakistan BIT "contain[ed] many of the substantive provisions that have become common in subsequent BITs," including defining the term investment broadly, "[t]he contracting states undertake a general obligation to encourage foreign investment," "[t]he parties are obliged to refrain from discrimination," "[i]nvestments are to enjoy protection and security," "[p]rovision is made for compensation due in the event of an expropriation," and transfer guaranties are included in the treaty.[104] Other treaties would add the fair and equitable treatment protection.[105] These protections were premised on the Abs-Shawcross Convention and the OECD Draft Convention that were unsuccessful in obtaining sufficient support to become viable multilateral treaties.[106]

The protections agreed upon in the first wave of bilateral investment treaties exceeded customary international law; for example, the treaty conferred new rights and obligations on the respective parties rather than stating the existing scope of rights and obligations.[107] At the time that the original bilateral investment treaties were drafted, there was significant resistance in the capital-importing world to the expropriation protections laid out in the bilateral investment treaties.[108] This resistance was at its strongest in the context of natural

102. UNCTAD, WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES 84 (2012), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf.

103. Growth in BITs, while important to date only reached approximately pre-1990 BIT levels. *Id.*

104. ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 42 (2009).

105. *See, e.g.*, F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1980 BRIT. Y.B. INT'L L. 241 (discussing early UK practice of including fair and equitable treatment provisions in bilateral investment treaties); Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 1999 BRIT. Y.B. INT'L L. 99, 113–14 ("Indeed, while some of the earlier bilateral investment treaties did not expressly incorporate the standard, by the 1970s fair and equitable treatment had assumed a position of prominence in most bilateral investment treaties." (footnote omitted)); *cf.* Vandevelde, *supra* note 19, 44–45 (positing that the fair and equitable treatment standard was prevalent from the very start of BIT practice in the 1960s).

106. *See, e.g.*, MCLACHLAN ET AL., *supra* note 17, at 26.

107. *See, e.g.*, Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 58 (2009) (discussing the influence of BITs on the creation of new customary international law); Matthew C. Porterfield, *State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations*, 37 N.C. J. INT'L L. & COM. REG. 159 (2011) (arguing that there is no empirical support that BIT standards regarding regulatory expropriation are part of customary international law). *But see* Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 998 (2012) (arguing that BITs codified existing customary international law); Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox*, 37 N.C. J. INT'L L. & COM. REG. 1107 (2012); *see also* Schill, *supra* note 6 (discussing the various approaches to investment law taken in its brief history).

108. *See* Katia Fach Gómez, *Latin America and ICSID: David Versus Goliath?*, 17 LAW & BUS. REV. AM. 195 (2011) (outlining the historical Calvo doctrine and its prevalence in Latin America in the 1960s);

resources,[109] and even greater in the context of treatment protections that would incorporate breaches of undertakings into the scope of international legal liability.[110] The resistance was premised on the understanding of national sovereignty—particularly its right to structure economic activity within its territorial scope.[111] The treaties in question thus may have shaped the development of public international law—but did not initially reflect it.

For public international law, BITs were truly innovative instruments. First, all the protections bestowed by the treaty reached beyond traditional privity requirements. The protections were not granted to a specific *investor* who had entered into an investment agreement with the host state. Instead, protections extended to all qualifying *investments*.[112] This shift was facially connected to the original claims mechanism in bilateral investment treaties: the home state would claim against the host state as was typical in the context of diplomatic protection.[113] But the coverage of *investments* significantly expanded the scope of protection beyond diplomatic protection because it precisely dispensed with effective nationality and corporate standing rules underlying the law of diplomatic protection.[114] By switching focus from the investor to the investment, BITs indelibly changed the nature of international economic law by broadening the scope of its potential applicability.[115] It is this quantum leap that distinguishes international investment agreements of the "modern era"

Porterfield, *supra* note 107 (surveying state practice regarding obligations to pay compensation for regulatory expropriations).

109. *See* Lowenfeld, *supra* note 107 (discussing the U.N. General Assembly resolution on Permanent Sovereignty over Natural Resources); Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 NW. J. INT'L L. & BUS. 101, 104–05 (2010) ("As a group, developing countries pursued these ideas in the General Assembly of the United Nations (UN) proposing a New International Economic Order ('NIEO'), which allowed them 'Permanent Sovereignty Over Natural Resources.' A cornerstone result of these efforts was the 1974 'Charter of Economic Rights and Duties of States,' which stipulated that foreign investment disputes—over expropriation or otherwise—should be settled in the courts of host states and according to domestic law." (footnotes omitted)); *see also* Cantegreil, *supra* note 75, at 449 (linking expropriation decisions by the Libyan government expressly to claims of permanent sovereignty over natural resources).

110. *See supra* notes 70–75 and accompanying text.

111. *See supra* notes 33–35 and accompanying text.

112. *See, e.g.*, MCLACHLAN ET AL., *supra* note 17, at 26 (discussing the development of treaties of Friendship, Commerce and Navigation, and bilateral investment agreements); Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 625–27 (1993) (discussing the evolution of the U.S. BIT program).

113. *See* Abs-Shawcross Convention, *supra* note 24, art. VII(1).

114. *See, e.g.*, MCLACHLAN ET AL., *supra* note 17, at 133–38 (noting that with the advent of bilateral investment treaties, "nationality no longer serves the function of defining when a home State may espouse a claim, though the threshold jurisdictional question of nationality—like the threshold question of 'investment'—looms large as the basis for potential objections to jurisdiction on the part of respondent States"); *see also* Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 HARV. INT'L L.J. 1 (2009) (submitting that nationality in investor-state proceedings should be measured only by reference to an abuse of right standard).

115. *See, e.g.*, Sloane, *supra* note 114, at 54 ("Within the limits established by the ICSID Convention's explicit text and the need to avert abuses, states should therefore be free to define nationality—without reference to the genuine link theory—more or less broadly in investment instruments authorizing resort to ICSID arbitration so as to afford them the maximum flexibility to further their particular economic, developmental, or other sociopolitical needs, as well as the values of their polities.").

from prior regimes of investment protection, for example through treaties of friendship, commerce and navigation.[116]

Second, BITs ultimately altered the substance of "sovereignty."[117] BITs effectively narrowed the range of sovereign discretion in its domestic markets by requiring the host state to pay compensation for unreasonable regulatory impairment of investments.[118] International law thus came to impose a reasonableness requirement on market regulations.[119] This reasonableness requirement most powerfully injects a free market ethos into the international legal order by limiting the role of the state within it.

2. Enforcement through Private Right of Action

From 1968 onwards, BITs were responsible for yet another quantum leap: The protections included in BITs became directly actionable by investors owning or controlling covered investments.[120] It was the direct enforcement of BIT rights that more than anything else shaped the current state of international investment law.[121] Direct enforcement transcended vague expressions of state intent to protect investors and transformed investment protection into one of a few areas of full enforcement of public international legal obligations.[122]

Clauses giving investors the right to proceed against the state directly are transformative: they provide investors direct legal rights against the state. This type of agreement is precisely

116. MCLACHLAN ET AL., *supra* note 17, at 26; Vandevelde, *supra* note 112, at 625–27.

117. *See, e.g.*, Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 658 (1998) ("BITs offer foreign investors greater protection that [sic] the Hull Rule ever did."); Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1091 (2008) (concluding that "the increasing web of binding treaties, especially in the commercial context—e.g., the vast number of bilateral investment treaties (BITs)—has resulted in a de facto surrender of sovereignty to these legal institutions.").

118. *See, e.g.*, Matthew C. Porterfield, *supra* note 107, at 168 ("This formulation of fair and equitable treatment functions as a particularly broad version of regulatory takings doctrine: the investor's 'legitimate expectations' define the economic interests that are entitled to protection from 'frustration' or impairment by regulatory or tax measures.").

119. *See, e.g.*, Dolzer, *supra* note 19, at 103 ("A second dimension covered by the requirements of fair and equitable treatment also concerns the investor's ability of planning and doing business, in regard to the conduct of the host state subsequent to the investment. Consistency in the course of actions of the host state concerns the investor in all areas of regulations, from the process of requiring and granting of permits to regulations of health and environment and the imposition of taxes, royalties and duties."); Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 105 (2007) ("[F]air and equitable treatment includes the requirement of stability and predictability of the legal framework and consistency in the host State's decision-making, the principle of legality, the protection of investor confidence or legitimate expectations, procedural due process and denial of justice, protection against discrimination and arbitrariness, the requirement of transparency and the concept of reasonableness and proportionality.").

120. NEWCOMBE & PARADELL, *supra* note 104, at 58.

121. *See* MCLACHLAN ET AL., *supra* note 17, at 26; Sloane, *supra* note 114, at 50–54; Vandevelde, *supra* note 112, at 625–27.

122. *See, e.g.*, George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 704 (2008) ("ICSID awards hold considerable attractiveness. Historically, most such awards have been voluntarily satisfied, thus making enforcement unnecessary."); *cf.* Edward Baldwin et al., *The Arbitration Risk Facing Sovereign Investors*, 23 INT'L FIN. L. REV. 22 (2004) (outlining the means to resist enforcement of ICSID awards).

of the kind identified by Hans Kelsen as bestowing international legal rights on investors.[123] Taking Kelsen's observation that direct enforcement equals bestowal of a substantive right seriously, the inclusion of a direct right of action takes investment obligations incurred under BITs beyond the reach of even the contracting states to BITs once the rights in the BIT are fully vested.[124] If the host state acts in a manner inconsistent with the rights of the investor under the BIT, the host state violates the treaty.[125] A treaty violation is directly actionable under the BIT's dispute resolution clause.[126]

The introduction of the dispute resolution provision creates legal stability in international economic law,[127] and is consistent with the overall goal of the 1990s to protect the commercial market place.[128] This stability is required for the protections enumerated in the BITs to function as a risk mitigation tool and thus to have commercial value. The dispute resolution provision therefore is the centerpiece of the current investment law paradigm.

C. The BIT Paradigm in Action

In the last decade, BIT claims have exploded. More than 40 percent of all BIT claims prosecuted have been filed within the last five years.[129] This explosion of BIT claims has placed an appreciable strain on investment arbitration because of the lack of time for reflection it permitted participants. This strain has caused an academic and political backlash against investor-state arbitration.[130] This backlash endangers the availability of investor-state arbitration at a time when it is needed the most.

1. Overview of BIT Claims

A significant number of investment treaty claims were borne from economic crisis. The single most significant group of claims concerns the Argentine financial crisis.[131] These claims assert that Argentina's reaction to the 2001–02 financial crisis deprived investors of their

123. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 143 (1952).
124. *Id.* at 143–44.
125. *See infra* Part III.A.1.
126. *See* MCLACHLAN ET AL., *supra* note 17, at 26; Sloane, *supra* note 114, at 50–54; Vandevelde, *supra* note 112, at 625–27.
127. *See, e.g.*, Susan D. Frank, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 373 (2006) (concluding that "[i]nvestment treaty arbitration in particular has a unique role to play in the future of foreign investment. Governments are likely to continue to focus upon the capacity of dispute resolution mechanisms to affect investor confidence, minimize investment risk, and create incentives for investing abroad.").
128. *Id.* at 338.
129. *See The ICSID Caseload—Statistics*, *supra* note 11, at 7 (222 claims filed with ICSID between 1972 and 2006 and 168 since 2007).
130. *See, e.g.*, Michael Waibel et al., *The Backlash against Investment Arbitration: Perceptions and Reality*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY xxxvii (Michael Waibel et al., eds., 2010) ("Commentators increasingly see signs of . . . a backlash against the foreign investment regime."); Alvarez, *supra* note 8; *see also* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007).
131. Over the past few decades, fifty-one investor-state dispute claims have been filed against Argentina. U.N. Conf. on Trade & Dev., *Latest Developments in Investor-State Dispute Settlement*, IIA ISSUES NOTE, March 2011, at 2, *available at* http://unctad.org/en/Docs/webdiaeia20113_en.pdf. The ICSID portion of these claims corresponds to more than 10% of the total case volume of ICSID as an institution. *The ICSID Caseload—Statistics*, *supra* note 11, at 7.

fundamental expectations when making investments in Argentina.[132] Most immediately, the loss of payment of concessions in U.S. dollar equivalent currency undermined the economics justifying foreign investors to invest in Argentina in the first place.[133]

In the Argentine arbitrations, a key issue was whether extreme economic conditions, or *extremis*, suspends operation of bilateral treaty obligations either as a matter of customary international law or by virtue of non-precluded measures clauses negotiated as part of the treaties themselves.[134] Arbitral tribunals generally have recognized that economic *extremis* can preclude the international wrongfulness of significant regulatory impairment of foreign investments in the right circumstances.[135] Arbitral tribunals further have concluded that the same *extremis* in the right circumstances could trigger non-precluded measures clauses included in bilateral investment treaties.[136] Tribunals remained divided on whether the actions taken by Argentina in response to the financial crisis met the requirements of either customary international law or the non-precluded measures clause in the treaty and whether these actions could serve as a defense to wrongfulness, particularly because tribunals found that Argentina's economic policies were in part to blame for bringing about the economic crisis in the first place.[137]

By far not all claims concern economic *extremis*. In many instances, political change in the host country has brought about a change in attitude towards foreign investment in general, or private investment in a particular economic field. Venezuela's nationalization of strategic (and non-strategic) industries is one of the clearest examples of such a policy change.[138] Less clear examples include the change of heart by the German government with regard to its nuclear power sector and changes in policy relating to subsidies for green energy proposals.[139]

Claims under BITs and other IIAs have significant breadth. They have led to claims against traditional capital importing countries like Zimbabwe.[140] But they have also led to a host of claims against capital exporting countries such as the United States, Canada, and

132. José E Alvarez & Kathryn Khamsi, *The Argentina Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, 2008/2009 Y.B. INT'L INV. L. & POL'Y 379, 389 (Karl P. Sauvant ed., 2009).
133. *Id.* at 390–404 (outlining the claims presented against Argentina and Argentina's affirmative defenses).
134. *Id.*
135. *See, e.g.*, LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 248–59 (Oct. 3, 2006), 21 ICSID Rev. 203 (2006).
136. *See, e.g.*, Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 374 (Sept. 28, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8. For a full discussion of the invocation of non-precluded measures clauses, see Michael D. Nolan & Frédéric G. Sourgens, *The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements*, 2010/2011 Y.B. INT'L INV. L. & POL'Y 362 (Karl P. Sauvant ed., 2011).
137. *Id.*
138. *See, e.g.*, García, *supra* note 62 (discussing Venezuela's radical policy changes in the oil and gas sector).
139. *See, e.g.*, Juergen Baetz, *Germans Face Hefty Bill to End Nuclear Power*, YAHOO! NEWS (Oct. 15, 2012), http://news.yahoo.com/germans-face-hefty-bill-end-nuclear-power-135331816--finance.html.
140. Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), http://italaw.com/documents/ZimbabweAward.pdf.

Germany.[141] These agreements have even prompted claims by nationals from states, such as Venezuela, against their former colonial powers.[142] Stakes are high and growing with claims in the tens of billions of dollars becoming the new norm.[143] In some instances, the very threat of action has arguably influenced domestic policy decisions in countries as far apart as the United States and Mongolia.[144] The effectiveness of the private enforcement in bringing an international economic law agenda to the forefront is nearly unparalleled in international law—and has brought more than a fair share of critics to the scene.

2. The State Strikes Back

The growth of international investment law as a discipline has led to a host of criticisms of the investment protection paradigm. The complaints raised against the current paradigm have ranged from accusations of bias by private tribunals in favor of investors to traditional concerns about state sovereignty.[145] These complaints have grown particularly in academic circles, with entire edited volumes being dedicated to the backlash against the investor-state paradigm.[146] Although no coherent theme of criticism of the investor-state paradigm has yet emerged, the very existence of the web of bilateral investment treaties and its private enforcement mechanism has become a political, and perhaps even ideological, powder keg. Calls for its abolition are growing louder—leaving investors with uncertainty as to whether

141. *See, e.g.*, Glamis Gold Ltd. v. United States, Award (June 8, 2009), http://www.state.gov/documents/organization/125798.pdf; Merrill & Ring Forestry L.P. v. Canada, Award (Mar. 31, 2010), http://italaw.com/sites/default/files/case-documents/ita0504.pdf; Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011), http://italaw.com/documents/VattenfallAward.pdf.

142. Inversión y Gestión de Bienes, IGB, S.L. v. Kingdom of Spain, ICSID Case No. ARB/12/17, Pending (Reg. July 9, 2012).

143. *See* Goldhaber, *supra* note 12 ("ALM's 2011 Arbitration Scorecard shines a light on 113 billion-dollar cases: 65 based on old-fashioned contracts and 48 based at least in part on investment treaties or legislation.").

144. *See, e.g.*, Paushok v. Mongolia, Award on Jurisdiction and Liability, ¶ 181 (UNCITRAL Arb. Trib. Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf ("In August 2009, Mongolia repealed the WPT, with the repeal being effective in 2011."); Robert Feinberg, *EU Crisis: Searching for the Bernanke Put*, MONEYNEWS (Oct. 8, 2012), http://www.moneynews.com/StreetTalk/Bernanke-put-EU-CATO/2012/10/08/id/459106 ("At a CATO event in June, Efraim Benmelech, a Harvard economics professor, presented data showing that a surprising share of TALF funding went to foreign banks, predominantly in the European Union."); Inst. of Int'l Bankers, *Institute Urges the Federal Reserve to Include Foreign Government-Controlled Banks in the Term Asset-Backed Securities Loan Facility*, 30 INT'L BANKING FOCUS 2 (Feb. 27, 2009), *available at* http://www.iib.org/associations/6316/files/20090227Focus.pdf ("The Institute has asked the Federal Reserve to reconsider the exclusion of foreign government-controlled banks from the TALF on the grounds that their inclusion would promote the purposes of the program and be consistent with both statutory requirements and the principle of national treatment and related U.S. treaty obligations.").

145. *See, e.g.*, GUS VAN HARTEN, *supra* note 130; THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, *supra* note 130; William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010).

146. *See, e.g.*, THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, *supra* note 130.

the commitments upon which they relied will remain effective for the duration of their investments.[147]

The vehemence of the "Return of the State" has left a mark on investment law.[148] Drafts of new international investment agreements are both far more specific in the protections they extend to foreign investment and far more permissive of regulatory action in the market place with regard to the protections the treaties continue to extend.[149] Paradoxically, these changes are more prevalent in the BITs of traditional capital exporting countries like the United States and Norway than they are in those concluded between capital importing states.[150] These prospective changes to new bilateral investment agreements, of course, have only a very limited impact on existing treaty obligations.

The "Return of the State" has also led to a noticeable change in attitudes of arbitrators. As one treatise notes, the jurisdictional review conducted by arbitral tribunals today is markedly more searching than it was even a decade ago.[151] The "second generation" of decisions addressing the Argentine financial crisis was far more ready to find that *extremis* suffered in Argentina suspended applicability of BITs than the first generation was.[152] Further, tribunals today are far more likely to inquire into proof of asserted customary international law protections by investors than they would have been as little as five years ago.[153] The

147. *See, e.g.*, Gus Van Harten et al., *Public Statement on the International Investment Regime*, ALAINET.ORG (Sept. 2, 2010), http://alainet.org/active/40578.

148. Alvarez, *supra* note 8.

149. *See, e.g.*, Kenneth Vandevelde, *A Comparison of the 2004 and 1994 U.S. Model BITs*, 2008/2009 Y.B. INT'L INV. L. & POL. 283, 314 ("Ultimately, the 2004 model is an instrument of retrenchment. The single greatest innovation in the BITs had been the creation of the investor-state disputes provision and, in the 2004 model, the United States reclaimed some of the power handed to the tribunals in the 1994 and earlier models. Thus, the 2004 model clarifies certain substantive provisions for the benefit of tribunals, takes certain issues from the tribunals entirely, clarifies the limits of the remedies tribunals may provide, adds mechanisms to divert some claims to other means of dispute resolution, injects greater transparency into the process, and seeks to improve the efficiency of investor-state arbitration. Substantive obligations that were the core of prior models either have been clarified in an effort to avoid an expansive application or have been hedged with larger numbers of exceptions. In the few instances where new substantive obligations have been imposed, these generally are outside the scope of the investor-state disputes provision, thereby avoiding any expansion of the power of the tribunals.").

150. *See id.*; *see also* Charles H. Brower II, *Corporations as Plaintiffs under International Law: Three Narratives about Investment Treaties*, 9 SANTA CLARA J. INT'L L. 179, 194–97 (2011) (comparing the 2007 Model Norwegian BIT to the 2004 Model U.S. BIT).

151. MCLACHLAN ET AL., *supra* note 17, at 18–23.

152. *See* Continental Casualty Co. v Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), http://italaw.com/sites/default/files/case-documents/ita0228.pdf; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), 21 ICSID Rev. 203 (2006); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award (June 10, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8; Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010), http://italaw.com/documents/EnronAnnulmentDecision.pdf. For a discussion of decisions, see Leah D. Harhay, *The Argentine Annulments: The Uneasy Application of ICSID Article 52 in Parallel Claims*, 2011/2012 Y.B. INT'L INV. L. & POL. (Karl P. Sauvant ed., 2012).

153. *See, e.g.*, Glamis Gold Ltd. v. United States, Award, ¶ 22 (June 8, 2009), http://www.state.gov/documents/organization/125798.pdf. For a discussion of *Glamis*, see José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 27–28 (2011).

discipline thus has undergone a significant shift in its last several years of growth even outside of the treaty-drafting world.

Beyond these internal modifications that seek to adjust the scope of international investment protection within the current system, some states have begun the process of leaving the system as a whole. Venezuela, Bolivia, and Ecuador recently withdrew from the ICSID Convention.[154] All three either have or are contemplating withdrawing from existing BITs.[155] All three withdrew from the ICSID Convention in part with an eye to frustrating potential claims by existing investors at the time of the withdrawals.[156] As discussed in the remainder of the Article, this attempt to undermine the existing system of investment protection will not be efficacious.

As appreciable as the backlash against investor-state arbitration is, it is in large part a mirage: a distraction from the underlying policy goals of those states decrying that the investor-state arbitral system has essentially failed. States like Venezuela continue to conclude BITs that call for investor-state arbitration—just with different partners (such as Cuba and Iran).[157] Similarly, the Russian Federation continues to expand its own BIT arsenal despite withdrawal from the Energy Charter Treaty during the pendency of arbitrations concerning the expropriation of the Yukos Oil Company.[158] The continued use by states like Venezuela and the Russian Federation of BITs is important context for statements that these instruments constitute unacceptable encroachments on state sovereignty. The actions of these states instead reveal a simple change in geopolitical alignment underneath the current bluster rather than honest disagreement with the bilateral investment treaty paradigm.

Given the unsurprising geopolitical undertones of the current backlash against the investment protection paradigm, the ease with which states can deny prior commitments is critical to the efficacy of the system as a whole. A system that permits exit at will and without

154. *Bolivia Submits a Notice under Article 71 of the ICSID Convention*, ICSID News Release (May 16, 2007), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3 [hereinafter *Bolivia Notice*]; *Ecuador Submits a Notice under Article 71 of the ICSID Convention*, ICSID News Release (July 9, 2009), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20 [hereinafter *Ecuador Notice*]; *Venezuela Submits a Notice under Article 71 of the ICSID Convention*, ICSID News Release (Jan. 26, 2012), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100 [hereinafter *Venezuela Notice*].

155. *See, e.g.*, Gómez, *supra* note 108, at 217.

156. *See id.*

157. U.N. Conf. on Trade & Dev., *Total Number of Bilateral Investment Treaties Concluded: Venezuela* (June 1, 2012), *available at* http://unctad.org/Sections/dite_pcbb/docs/bits_venezuela.pdf.

158. Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶ 34 (Nov. 30, 2009), http://italaw.com/documents/YULvRussianFederation-InterimAward-30Nov2009.pdf; U.N. Conf. on Trade & Dev., *Total Number of Bilateral Investment Treaties Concluded: Russian Federation* (June 1, 2012), *available at* http://unctad.org/Sections/dite_pcbb/docs/bits_russia.pdf.

cost makes compliance with international legal obligations of the state purely voluntary.[159] Such a system does not in fact bestow legal protections on participants on which they can rely prospectively. Instead, it serves as a purely allocative mechanism to distribute a fixed pool of assets set aside by the state to qualified investors retrospectively; for example, for harm that has already occurred and for which claims have already been presented.[160] The nature of the entire system of investment protection thus depends upon the following question: What is the consequence of an exit from the system?

II. Current Theories of Withdrawal from International Investment Agreements Are Inadequate

As withdrawals from international investment agreements are increasing, scholarship on the consequence of withdrawal from IIAs no longer addresses an interesting thought experiment. It now addresses a live issue, with real consequences for investors and host states. This changed reality throws into relief how and why this area of law remains fundamentally under-developed.

This Section discusses the main theoretical approaches to withdrawal from international investment agreements by (a) setting out the current practice of withdrawal from international investment agreements that theories of withdrawal must address; (b) critiquing the currently prevalent "offer-and-acceptance" model of investor-state consent and its consequences for withdrawal from international investment agreements; and (c) addressing the "firm offer" model developed when withdrawal from international investment agreements was first exercised.

A. Current Practice of Termination of Investment Agreements

States withdraw from obligations owed to international investors under IIAs in two principal ways. First, states can withdraw from IIAs or terminate investment laws providing substantive protections to international investors. Second, states can withdraw from the ICSID Convention, thus attempting to deprive investor-state arbitrations under IIAs of their efficacy. These two manners of withdrawal from international investment obligations represent attempts to deprive the investor completely of its treaty rights. They are discussed first.

1. Denunciation of International Investment Agreements and Investment Laws

Venezuela's abandonment of international investment agreements is a significant example of the practice of withdrawal. On April 30, 2008, six months prior to the expiry of the initial

159. *Cf.* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 419 (2011) ("As a legal theory the doctrine of self-limitation cannot be interpreted otherwise than as a denial of the binding force of international law.").

160. Alternatively, it may consist of setting aside or budgeting exposure at the front end and thus again representing an allocative rather than rights-redemptive function. *Cf.* Reisman, *supra* note 30, at 41.

term of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (Netherlands-Venezuela BIT), Venezuela notified the Netherlands of its intention to terminate the agreement.[161] The Netherland-Venezuela BIT states that the treaty had an initial term of fifteen years.[162] The term was to be extended by an additional ten years "[u]nless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity."[163] The treaty finally provides that "[i]n respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date."[164]

Significant investments to Venezuela were routed through Dutch entities.[165] A substantial number of claims were already pending under the Venezuela-Netherlands BIT at the time of issuance of the termination notice.[166] For these cases, Venezuela does not appear to have submitted that termination of the treaty had any impact on pending proceedings.[167] But several claims against Venezuela have been filed *after* termination took effect but before expiry of the fifteen year sunset period.[168] These cases will have to decide upon the effect of termination of the BIT on the right of investors to pursue direct claims against Venezuela.

Like Venezuela, Ecuador is currently in the process of withdrawing from a significant number of BITs. Ecuador's president requested permission to withdraw from thirteen of the country's BITs.[169] The treaties in question included those concluded between Ecuador and the United States, the United Kingdom, the Netherlands, Germany, France, Canada, Switzerland, Finland, Sweden, and China.[170] The Ecuadorian national assembly recently took

161. Luke Eric Peterson, *Venezuela Surprises the Netherlands with Termination Notice for BIT, Treaty Has Been Used by Many Investors to "Route" Investments into Venezuela*, INV. ARB. REP. (May 16, 2008), http://www.iareporter.com/articles/20091001_93; *cf.* Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, Neth.-Venez., Oct. 22, 1991, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_venezuela.pdf [hereinafter Neth-Venez. BIT].
162. Neth-Venez. BIT, *supra* note 161, art. 14(1).
163. *Id.* at 14(2).
164. *Id.* at 14(3) (the "sun-set period").
165. Peterson, *supra* note 161.
166. *Id.*
167. The denunciation is not mentioned in two jurisdictional decisions issued in these proceedings. *See* Mobil Corp. Venezuela Holdings B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1510_En&caseId=C256; CEMEX Caracas Inv. B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction (Dec. 30, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1831_En&caseId=C420.
168. *See, e.g.*, Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22 (Reg. Aug. 15, 2012); OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25 (Reg. Sept. 26, 2011). *See also Who's Suing Venezuela? A Round-Up of Recent Claims*, DUTCH CARIBBEAN LEGAL PORTAL (Sept. 5, 2012), http://www.dutchcaribbeanlegalportal.com/news/latest-news/2366-who-s-suing-venezuela-a-round-up-of-recent-claims.
169. Gómez, *supra* note 108, at 217.
170. Michael D. Nolan, Frédéric G. Sourgens, & Erin Culbertson, *Milbank Client Alert: The Erosion Bit by BIT of Investment Protection in Ecuador*, MILBANK, TWEED, HADLEY & MCCLOY LLP (Nov. 3, 2009), http://www.milbank.com/images/content/5/7/573.pdf.

the first step to do so, declaring that the treaties violate the Ecuadorian constitution.[171] Bolivia similarly has withdrawn from bilateral investment agreements such as the U.S.-Bolivia BIT.[172] Denunciation of these treaties similarly could lead to arbitration of the issue in the future.

There is also relevant state practice concerning the withdrawal from investment laws containing both substantive protections and a consent to ICSID arbitration. Because there is relatively little guidance on the withdrawal from international investment treaties, this practice is instructive because of its analogous effect on investor rights. Thus, in the ICSID arbitration between Rumeli and Kazakhstan, the investor invoked a Kazakh investment law as an additional basis for its claim.[173] The Kazakh investment law had been in force when the investment had been made, but the consent to ICSID arbitration had been removed prior to commencement of Rumeli's claim.[174]

The *Rumeli* tribunal concluded that it had jurisdiction under the Kazakh investment law.[175] It expressly recognized that "[t]he fact that the Foreign Investment Law was repealed as of January 8, 2003, does not have an impact on ICSID jurisdiction" because the Investment Law "was indeed valid and effective at all times relevant to this dispute" and "Article 6(1) grants foreign investors protection against adverse changes in legislation for a period of ten years from the date they made their investment, or for the entire duration of the contract exceeding ten years entered into with authorized State bodies."[176] It determined that "[t]his [was] the case here."[177]

2. Denunciation of the ICSID Convention

Bolivia, Ecuador, and Venezuela, as of the date of the writing of this Article, were the only states to withdraw from the ICSID Convention. ICSID received Bolivia's notice of withdrawal on May 2, 2007,[178] Ecuador's on July 6, 2009,[179] and Venezuela's on January 24, 2012.[180] In all of these cases, ICSID did not post receipt of the notice on its website and did not otherwise immediately notify the general public that it received the withdrawal notice for several days.[181]

171. *See id.*; *cf.* Gómez, *supra* note 108, at 217.
172. *See* Notice of Termination of United States-Bolivia Bilateral Investment Treaty, 77 Fed. Reg. 30,584 (May 23, 2012).
173. Republic of Kazakhstan v. Rumeli Telekom A.S., ICSID Case No. ARB/05/16, Award, ¶¶ 221, 308 (July 29, 2008), http://italaw.com/documents/Telsimaward.pdf.
174. *Id.* ("According to Respondent, Claimants' purported reliance on the FIL as founding jurisdiction for this Arbitral Tribunal is also misplaced. Indeed, the consent to arbitrate disputes relating to foreign investment under the FIL was no longer effective at the time of the commencement of these proceedings, as the FIL had been repealed. Claimants' contention that the consent to ICSID arbitration survives this repeal by reason of Article 6 (1) FIL is misconceived;" as briefed by claimants, "Article 6(1) of the Law specifically grants foreign investors protection against adverse changes in legislation for a period of ten years from the date they made their investment, or for the entire duration of a contract exceeding ten years entered into with authorized State bodies.")
175. *Id.* ¶ 333.
176. *Id.*
177. *Id.*
178. *Bolivia Notice*, *supra* note 154.
179. *See id.*; *Ecuador Notice*, *supra* note 154.
180. *Venezuela Notice*, *supra* note 154.
181. *Ecuador Notice*, *supra* note 154; *Venezuela Notice*, *supra* note 154.

The ICSID Convention provides in relevant part in Article 71 as follows: "Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice."[182] The ICSID Convention further states in Article 72 that:

> Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.[183]

These provisions to date have not been interpreted by international investment tribunals. As a result, the interplay between consent provided in international investment agreements and the denunciation of the ICSID Convention is likely to give rise to hotly contested disputes.

Most of the currently pending disputes may well give a misleading answer: in most relevant currently pending disputes, the investor's consent to ICSID arbitration was communicated to the host state in the six month period prior to the denunciation having taken effect.[184] This posture means that the efficacy of treaty consent to ICSID arbitration after denunciation has taken effect will not be directly tested.

The case most likely to give an answer to that question—and so far the only case that will have to provide such an answer—is *Pan American Energy LLC v. Plurinational State of Bolivia*.[185] As reported in the press, Pan American Energy's consent to ICSID arbitration in that dispute post-dated Bolivia's 2007 denunciation of the ICSID Convention by several years, and in fact concerned an expropriation taking place in 2009.[186] Pan American Energy relies on the BIT consent in the U.S.-Bolivia BIT,[187] which permits investors a choice of forum, including ICSID arbitration.[188]

B. Current Practice Reveals the Failure of the "Offer-And-Acceptance" Model of Investment Protection

The most commonly held view of consent to investor-state arbitration under BITs is that the host state makes an offer of arbitration that the investor in turn accepts, entitled the

182. ICSID Convention, *supra* note 35, art. 71.
183. ICSID Convention, *supra* note 35, art. 72.
184. The author understands that all cases registered against Venezuela at the end of August 2012 in fact have an investor consent date preceding the expiration of the six month withdrawal period that began to run on January 24, 2012 given the time taken by the ordinary ICSID registration process. The latest registration date is August 27, 2012. The same is true of most arbitrations commenced against Bolivia.
185. *See* Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8 (Reg. Apr. 12, 2010).
186. Fernando Cabrera Diaz, *Pan American Energy Takes Bolivia to ICSID over Nationalization of Chaco Petroleum*, INVESTMENT TREATY NEWS (May 11, 2010), http://www.iisd.org/itn/2010/05/11/pan-american-energy-takes-bolivia-to-icsid-over-nationalization-of-chaco-petroleum/.
187. *Id.*; *cf.* Treaty between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Bol., Apr. 17, 1998, S. TREATY DOC. No. 106-26 (2000), *available at* http://unctad.org/sections/dite/iia/docs/bits/us_bolivia.pdf [hereinafter U.S.-Bolivia BIT].
188. U.S.-Bolivia BIT, *supra* note 187, art. IX(3).

"offer-and-acceptance" model.[189] As discussed in this Section, the model of consent to arbitration similarly applies to the substantive protections included in the bilateral investment treaty. For example, the investor must accept the protections or risk losing them through subsequent state action. Furthermore, the offer-and-acceptance model of investment protection is ultimately internally inconsistent as well as unworkable. The flaws in the offer-and-acceptance model are revealed by many of the fact patterns already at issue in currently pending cases involving the denunciation of investment treaties.

1. The "Offer-and-Acceptance Model" of Investment Protection

The most commonly held view of investment protection is borrowed from contract law: the state makes an offer in a bilateral investment treaty or in legislation and the investor accepts that offer.[190] The manner in which the investor accepts the offer of protection is through consenting to investor-state arbitration.

The offer-and-acceptance approach was best developed by Professor Christoph Schreuer. In the leading commentary on the ICSID Convention, Professor Schreuer explains that investor-state arbitration functions along the same lines as contractual arbitration and requires a written agreement to arbitrate.[191] This written agreement to arbitrate does not need to be contained in a single instrument but can be embodied in an exchange of writings between the host state and the investor: there is an offer of arbitration by the host state in the form of the bilateral investment treaty or legislation.[192] This offer must be accepted by the investor to become binding.[193]

This approach follows the commercial arbitration paradigm. In the context of the New York Convention, the Contracting States obligate themselves to recognize agreements in writing in which parties undertake to submit a dispute to arbitration.[194] The New York Convention further explains that the "term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[195] The question in the context of commercial arbitration then is whether there is a separate contract in existence between the parties agreeing to the arbitration of their commercial disputes founded in an offer-and-acceptance of arbitration (rather than a broader agreement on the entire contract). In both instances, offers to arbitrate are thus analogous to offers in common contract law: they have to be "accepted" by the offeree to bind the offeror.[196] Acceptance "perfects" consent to ICSID arbitration.[197]

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189. *See infra* Part II.B.1.
190. *See* SCHREUER 2001, *supra* note 35, at 192, 206; *cf.* SCHREUER 2009, *supra* note 35, at 190–92.
191. SCHREUER 2001, *supra* note 35, at 1285–86; *cf.* SCHREUER 2009, *supra* note 35, at 1280–82.
192. SCHREUER 2001, *supra* note 35, at 192; SCHREUER 2009, *supra* note 35, at 190–92.
193. SCHREUER 2001, *supra* note 35, at 206 ("While a host state may express its consent to ICSID's jurisdiction through legislation, the investor must perform some reciprocal act to perfect consent. Even where consent is based on the host State's legislation, it can only come into existence through an agreement between the parties."); SCHREUER 2009, *supra* note 35, at 211.
194. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(1), *done* June 10, 1958, 21 U.S.T. 2517.
195. *Id.* art. II(2).
196. SCHREUER 2001, *supra* note 35, at 206; SCHREUER 2009, *supra* note 35, at 211.
197. SCHREUER 2001, *supra* note 35, at 1285; SCHREUER 2009, *supra* note 35, at 1280–82.

Consistently, with the offer-and-acceptance paradigm, an offer to arbitrate with an investor, even one included in a treaty, can be revoked. Article 25(1) of the ICSID Convention refers to "consent in writing" as being irrevocable. An "offer" to consent is not a consent.[198] Not accepting the offer in a timely fashion, and particularly waiting to consent until institution of arbitral proceedings, "runs the risk that the offer may be withdrawn at any time before then."[199]

As a matter of trite contract law, an offer can be revoked without informing the offeree directly. The United States Restatement (Second) of Contract Law thus states that "[a]n offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect."[200] Further, "the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available."[201]

Consistent with the contract law paradigm, denunciation of the ICSID Convention is revocation of the offer. A revocation has immediate effect. In other words, once made and received, the offer can no longer be accepted.[202] The revocation is effective immediately even with regard to offers that on their face appear to allow acceptance to be made in a longer period of time.[203] Similarly, the denunciation of a BIT should have immediate effect on the investor-state arbitration provisions. Those provisions are the offers in question. Denunciation of the BIT is the actual revocation of the offer and has the immediate effect of depriving the investor of a direct remedy against the state.

2. The Offer-and-Acceptance Model Draws an Inapposite Contract Law Analogy

The offer-and-acceptance model is incoherent. Its focus on the relationship between host state and investor blocks out the existing relationship between the host state and the home state. It transforms a three dimensional relationship into a two dimensional playing field. Assuming that the appropriate reference point is in fact the law of contracts and commercial arbitration, the consequences of the third dimension—the treaty relationship between home state and host state—must be taken into account.

Within contract law, situations where a non-party to a contract receives rights under a contract fall under the subject of the law of third-party beneficiaries, not the law of offer-and-acceptance.[204] The law of third-party beneficiaries recognizes that a person acquires a right as an intended beneficiary "if recognition of a right to performance in the beneficiary is

198. RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981) (requiring mutual assent for formation of a contract).
199. SCHREUER 2001, *supra* note 35, at 253.
200. RESTATEMENT (SECOND) OF CONTRACTS § 43 (1981).
201. *Id.* § 46.
202. *Id.* §§ 42, 46. Because the offer is a general one—e.g., "by advertisement in a newspaper or other general notification to the public"—the making of a denunciation in the same manner as the original notification terminates the power of acceptance. *Id.* § 46.
203. Dickinson v. Dodds, 2 Ch. Div. 463 (1876); *see also* E. ALLAN FARNSWORTH, CONTRACTS 157–61 (4th ed. 2004).
204. For the difference between both regimes, see FARNSWORTH, *supra* note 203, at 694–99 (discussing how third-party beneficiary rights vest).

appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance."[205]

Promises to arbitrate disputes can be enforced by third-party beneficiaries of a contract against one of the contracting parties.[206] This is recognized not only in U.S. law, but also in mature civil law jurisdictions.[207] The right of third-party beneficiaries to enforce arbitration provisions was further recognized by international law tribunals such as the Iran-U.S. Claims tribunal.[208] The investor-state arbitration provision in a bilateral investment treaty itself therefore is a right bestowed upon the investor as a third-party beneficiary.

205. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). On the historical development of the law of third-party beneficiaries, see, for example, Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992); Anthony John Waters, *The Property in the Promise: A Study of the Third-Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

206. *See, e.g.*, JP Morgan Chase v. Conegie, 492 F.3d 596, 600 (5th Cir. 2007) (enforcing arbitration clause in nursing home care agreement signed by mother of the resident against the resident); John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 59–61 (2d Cir. 2001) (compelling arbitration when sought by a third-party beneficiary under the National Securities Dealers Code requiring NASD members to arbitrate claims upon demand of a customer); E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir. 2001); Lucas v. Hertz Corp., 875 F. Supp. 2d 991 (N.D. Cal. 2012) (arbitration clause enforceable by and against third-party beneficiaries); Ripmaster v. Toyoda Gosei, Co., 824 F. Supp. 116, 117 (E.D. Mich. 1993) (holding that an employee was a third-party beneficiary bound by the arbitration clause of a consulting agreement between employer and foreign firm); Shahan v. Staley (*In re* Matter of Shahan Irrevocable & Inter Vivos Trust), 932 P.2d 1345, 1348 (Ariz. Ct. App. 1996) (compelling arbitration when sought by a third-party beneficiary of a trust against a broker under the section 12(a) of the National Securities Dealers Code requiring NASD members to arbitrate claims upon demand of a customer); Nama Holdings v. Related World Market Ctr., 922 A.2d 417, 431 (Del. Ch. 2007) (confirming that a third-party beneficiary is bound by an arbitration clause to the same extent as the signatories); Tortoriello v. Gerald Nissan of North Aurora, Inc., 882 N.E.2d 157, 180 (Ill. App. Ct. 2008) (quoting Dannewitz v. Equicredit Corp. of Am., 775 N.E. 2d 189, 192 (Ill. App. Ct. 2002)); *Dannewitz*, 775 N.E.2d at 192 ("The third-party beneficiary doctrine applies to arbitration agreements."); Carolyn L. Dessin, *Arbitrability and Vulnerability*, 21 TEMP. POL. & CIV. RTS. L. REV. 349, 358 (2012) (noting that third-party beneficiaries can compel arbitration); George Lee Flint, Jr., *Securities Regulation*, 63 SMU L. Rev. 795, 801 (2010) (discussing enforcement of FINRA arbitration provisions by third-party beneficiaries); Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 540–48 (2008) (advocating the use of arbitration clauses by third-party beneficiaries to enforce human rights obligations); Michael H. Bagot, Jr. & Dana A. Henderson, *Not Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 TUL. MAR. L.J. 413 (2002) (discussing use of third-party beneficiary claims to enforce arbitration provisions in maritime law disputes); R. Doak Bishop et al., *Strategic Options Available When Catastrophe Strikes the Major International Energy Project*, 36 TEX. INT'L L.J. 635, 683 (2001) (discussing the use of third-party beneficiary arguments to compel arbitration in international energy project disputes); *cf.* Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 362–63 (5th Cir. 2003) (explaining that there was insufficient evidence to enforce an arbitration clause against the Government of Turkmenistan on the theory that Turkmenistan was a third-party beneficiary under a joint venture agreement).

207. *See* Vera van Houtte et al., *What's New in European Arbitration?*, DISP. RESOL. J., Nov. 2011/Jan. 2012, at 13, 14–15 (reviewing Swiss Federal Supreme Court case of April 19, 2011 enforcing arbitration clause at the request of third-party beneficiaries to a contract); James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 523–29 (2004) (discussing growing convergence between the United States, France, and England in their recognition that third-party beneficiaries may enforce arbitration provisions).

208. *See* Hosking, *supra* note 207, at 527 (discussing Land Serv. Inc. v. Iran and Ocean-Air Cargo Claims Inc. v. Iran).

Arbitration provisions in BITs further prove that an investor under a BIT meets the definition of an intended beneficiary.[209] Thus,

> In order to qualify as an intended beneficiary, one must meet two requirements. First, one must show that 'recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties.' Second, one must show that either:
>
> '(a) The performance of the promise will satisfy an obligations of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'[210]

The dispute resolution provision clarifies that the parties intended enforcement of the other protections provided in the treaty by qualifying investors, thus meeting the first prong of the intended beneficiary test under the Restatement: "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties."[211] The arbitration provision also evidences the home state's intention to give the benefit of the promised performance, thus satisfying the second element: the final award will be due and payable in full to the investor, rather than to the home state.[212] This modality of performance on the final award derogates from traditional public international law of diplomatic protection that paradigmatically viewed the injury at issue in public international law proceedings as one done to the home state and not the investor—thus paying the home state rather than the investor without any requirement that the home state hold the sums awarded in trust for the persons taken under protection.[213]

The consequence of third-party beneficiary status is that investors have rights against the host state: "Once it is decided that a party is an intended beneficiary, it follows that the party has a right against the promisor. The beneficiary can enforce that right without joining the promise in an action against the promisor for damages or specific performance."[214]

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209. *See* Carlos J. Bianchi, *A Look at Some Recurring Issues in Investment Arbitration*, DISP. RESOL. J., May/July 2012, at 63, 66 (2012) ("In effect, the alchemy of consent renders the investor a third-party beneficiary of the BIT."). Using government contracts as an analogue, such a provision manifests the intention of the government to bestow a right on the individual, thus meeting the stricter third-party beneficiary test for government contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS § 313 (1981). For a discussion, see Waters, *supra* note 205.

210. FARNSWORTH, *supra* note 203, at 678 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981)).

211. *Id. See also* Bianchi, *supra* note 209, at 66. The law of third-party beneficiaries further permits making of a promise for third-parties if the "beneficiary's identity can be determined at the time the promise is to be performed." FARNSWORTH, *supra* note 203, at 679.

212. Born, *supra* note 59, at 831–43.

213. *See* Barcelona Traction, Light & Power Co., (Belg. v. Spain), 1970 I.C.J. 3, 45 (Feb. 5) ("The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the state is asserting. . . . The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action.").

214. FARNSWORTH, *supra* note 203, at 692.

The result of applying the appropriate contract law analysis to the denunciation of investment protection treaties forces the opposite conclusion from the one advocated by the offer and acceptance model. Under a third-party beneficiary analysis, the rights of the beneficiary can, if at all, only be modified or discharged by agreement between the promisor and the promisee.[215] In the context of the denunciation of a bilateral investment treaty, the unilateral act of terminating that treaty is irrelevant as such because it is not an act of rescission, modification, or discharge agreed upon by *both* treaty parties.[216] The act of terminating the treaty is only important in so far as it triggers other provisions in the principal "contract," which here is the investment treaty, under which the investor is a beneficiary.[217] Typically, this importance comes from the sunset provision in international investment agreements.[218] By virtue of these sunset provisions, existing investments will be covered for an additional period of ten to fifteen years—and investors will maintain a right to claim for breach of the treaty for that period.[219] Further, the termination notice itself may not cut off the protections for investments made after its issuance: the termination provisions themselves may permit new beneficiaries to grandfather into the sunset period within the termination period.[220]

Similarly, denunciation of the ICSID Convention cannot have the effect of foreclosing ICSID as a potential forum for dispute resolution under a bilateral investment treaty. The principal contract—the BIT—gives the investor a right to pursue a claim at ICSID. Denunciation of the ICSID Convention while the BIT is in force violates that right. The investor has a right to specific enforcement of the ICSID arbitration option. Put differently, depriving the investor of such recourse is tantamount to denying the investor third-party beneficiary status in the first place.[221]

Under a third-party beneficiary analysis, consent by the host state to ICSID arbitration vested in the investor, whether or not the investor also consented in writing to ICSID jurisdiction. It is the vesting of the right to arbitration, not the consent to arbitration, that binds the state not to withdraw its consent. It is the divestiture of the consent that positively requires the consent of the investor. Consequently, any act that *de facto* divests the investor of a right the investor cannot be deprived *de lege* without its consent is a bad faith act.[222] The

215. RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981) (noting that in the absence of a term limiting their ability to do so, the promisor and promisee retain the power to discharge or modify the duty owed the beneficiary by subsequent agreement).
216. *See supra* Part II.A.1.
217. *See supra* Part II.A.1.
218. *See supra* Part II.A.1.
219. *See supra* Part II.A.1.
220. *See supra* Part II.A.1.
221. This is the reason that arbitration provisions are specifically enforceable by third-party beneficiaries. *See supra* notes198–99.
222. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981) ("Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.") For further discussion of the concept of good faith in the comparative law context, see

state cannot be given the benefit of its own bad faith, meaning that the host state cannot raise its denunciation as a jurisdictional defense against vested investors, a conclusion that is consistent with the plain language of Article 72 of the ICSID Convention.[223]

This result is markedly different from the offer-and-acceptance approach, which posits that the host state can readily revoke an offer to arbitrate at its discretion.[224] The third-party beneficiary analysis concludes that this is not the case because the state has entered into an obligation with the home state to make arbitration available to covered investors.[225] This principal obligation turns a "revocation" of the offer to arbitrate into a breach of the principal contract.[226] The investor has a right to claim for specific performance of that contract—including the arbitration clause.[227] Thus, the promise in an investment treaty to arbitrate is insulated from discretionary derogation by the host state.

Third-party beneficiary law does rely on an offer-and-acceptance analogy in the very limited context of determining the consequence of a modification or discharge of the principal contract by promisor *and* promisee for the rights of the third-party beneficiary. As the *Restatement (Second) of Contracts* explains, the contracting parties to the principal contract retain some freedom to change their bargain.[228] The parties' power to modify or discharge their bargain "terminates when the beneficiary, before he receives notification of the discharge or modification" *either* "materially changes his position in justifiable reliance on the promise" *or* "brings suit on it or manifests assent to it at the request of the promisor or promisee."[229] As the comments to the restatement clarify, the rule regarding assent "rests in part on an analogy to the law of offer-and-acceptance and in part on the probability that the beneficiary will rely in ways difficult or impossible to prove."[230]

Vesting of rights in the investor under an international investment treaty is significant only in the context of an agreed upon change in the treaty instrument. In that context, an analogy to the law of third-party beneficiaries would require that the vested rights remain unaffected by the change in the agreed upon scope of the bilateral investment treaty.[231] Thus, if two contracting parties agree upon an amendment to a bilateral investment treaty, or agree upon an interpretation that modifies its original scope, such changes have effect only

E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47 (1995); Saul Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645 (1997).

223. *See supra* Part II.A.2.
224. *See supra* Part II.B.1.
225. *See supra* Part II.B.2.
226. *See supra* Part II.B.2.
227. *See supra* Part II.B.2.
228. RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981).
229. *Id.* § 311(3).
230. *Id.* § 311 cmt. h.
231. *See, e.g.*, Jean Fleming Powers, *Expanded Liability and the Intent Requirement in Third Party Beneficiary Contracts*, UTAH L. REV. 1993, at 67, 67–68 (1993) (proposing "a test for third party standing based on the promisee's intent to benefit the third party, the promisor's knowledge of that intent, and the promisor's contractual undertaking (duty) to provide the benefit to the third party"); Joseph Siprut, *Third-Party Beneficiary Basics: When Can Noncontracting Parties Sue for Breach?*, 93 ILL. B.J. 462, 465 (2005) ("[T]he original parties to the contract retain the right to discharge or modify the rights of third-party beneficiaries, without that third-party's assent, until those rights vest in the third-party.").

prospectively for investors that have not yet ratified their rights, acted in reliance, or commenced proceedings under that treaty.[232] The concept of the vesting of rights means that the contracting parties to the BIT have entirely abrogated their ability to amend, interpret, or affect the rights of investor-beneficiaries once vested through acceptance or reliance.[233]

In sum, if a contractual analogy is relevant to the denunciation of investment protection treaties or the ICSID Convention, the analogy must be to the law of third-party beneficiaries rather than the law of offer-and-acceptance. The analogy to third-party beneficiaries is more appropriate than the analogy to offer-and-acceptance because it accounts of the existing principal relationship between the host state and the home state upon the basis of which the investor could file suit. This relationship is ignored entirely in the offer-and-acceptance model in a way that is fundamentally inconsistent with the law of contract on which it relies for inspiration. The consequence of relying on the law of third-party beneficiaries is the recognition that investors in fact have rights under bilateral investment treaties—and to delineate these rights against the rights of the treaty states to change their bargain at a later point in time. Because of these investor rights, denunciation of a BIT or of the ICSID Convention is without immediate consequence.

3. Practice of Denunciations of the ICSID Convention Reveals an Additional Practical Shortcoming of the Offer and Acceptance Model

The practice of denunciation of the ICSID Convention reveals an additional shortcoming in the offer and acceptance model. That model assumes that denunciation of a treaty is an effective revocation so long as it has been communicated in accordance with the respective treaty mechanisms.[234] In actual practice, denunciation of, for example, the ICSID Convention is properly notified for a period of days to the ICSID Secretariat before it is communicated to the general public.[235] The offer-and-acceptance model cannot appropriately account for the

232. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 386 (Sept. 28, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8 ("[E]ven if this interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries. In fact, Article XIV of the Treaty provides that in case of termination, the investment will continue to be protected under its provisions 'for a further period of ten years.' So too, with reference to rights protected under the Energy Charter Treaty, the tribunal in *Plama* has held that any denial of advantages to which an investor might have rights 'should not have retrospective effect,' as such a situation would result in making legitimate expectations false at a much later date."); Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 337 (May 22, 2007), http://italaw.com/documents/Enron-Award.pdf.

233. RESTATEMENT (SECOND) OF CONTRACTS § 311(3) (1981). In practice, the concept of vesting of third-party beneficiary rights can be analogized to BIT practice because assent is manifested either by ratification or commencement of a legal action (including an arbitration). Ratification would occur at the time the investor would inform the host state of its consent to arbitrate disputes under the treaty at ICSID. *See* Drury v. Assisted Living Concepts, Inc., 262 P.3d 1162, 1166 & n.5 (Or. Ct. App. 2011) (noting that the right to modify a bargain including third-party beneficiaries must consider assent "for example, by ratifying it or asserting a claim for relief under the agreement" and referring expressly to assent "to a contract containing an arbitration clause").

234. SCHREUER 2001, *supra* note 35, at 1285; SCHREUER 2009, *supra* note 35 1280–82.

235. *See supra* notes 201–02 and accompanying text.

status of the "offer" to arbitrate during the window in which the denunciation was under review in accordance with the treaty mechanism but not yet notified to investors.

Remaining within the offer and acceptance metaphor, the practice of denunciation of the ICSID Convention reveals a mailbox problem. In the U.S. common law of contracts, the mailbox rule provides that an acceptance mailed by an offeree prior to his receipt of a communication revoking an offer is effective and concludes a contract.[236] The power to accept terminates upon receipt of a revocation if received before any acceptance is mailed.[237] Here, the problem is the investor (or, offeree for purposes of offer and acceptance) is not in fact a recipient of a direct communication by the host state. The investor is not even an indirect recipient of a communication from the host state because neither the ICSID Convention nor bilateral investment treaties impose any obligation upon the ICSID Secretariat or the home state to communicate a treaty denunciation broadly.[238] Rather, both do so as a matter of administrative convenience.[239]

The mailbox problem could be overcome by press statements made by relevant government officials because presumably the original offer had been a "general offer"—one made by "other general notification to the public."[240] But reliance on such statements exacerbates the problem: the relevant statement to consider would be a "manifestation of an intention not to enter into the proposed contract."[241] High-ranking Venezuelan and Ecuadorian officials repeatedly made such statements prior to the denunciation of the ICSID

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236. RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981). *Cf.* U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 98-9 (1983), 1489 U.N.T.S. 3 ("An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise."); *compare* Larry A. DiMatteo & Daniel T. Ostas, *Comparative Efficiency in International Sales Law*, 26 AM. U. INT'L L. REV. 371, 379 (2011) (noting that the Convention on the International Sale of Goods adopts "the civil law's receipt rule for the effectiveness of acceptances over the common law's dispatch or mailbox rule" (citation omitted)).

237. RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981).

238. ICSID Convention, *supra* note 35, art. 75(f) ("The depositary shall *notify all signatory States* of the following: . . . denunciations in accordance with Article 71." (emphasis added)); Neth-Venez. BIT, *supra* note 161, art. 14(1) (stating with regard to manner of communication that "Contracting Parties" must "notif[y] each other in writing").

239. For this reason, the communication does not meet the requirements for revocation of a general offer. Restatement of Contracts (Second), section forty-six provides,

> Where an offer is made by advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available.

RESTATEMENT (SECOND) OF CONTRACTS § 46 (1981). The communication of denunciation to the other respective states is not a notification to the general public. The modification of the mailbox rule with regard to revocation of general offers by publication thus is not applicable to the problem at hand because there is no publication mechanism in the first place.

240. *Id.*; *see also* Shuey v. United States, 92 U.S. 73, 76 (1875) (accepting revocation of a reward for information leading to the capture of a fugitive so long as the offer of a reward "was withdrawn through the same channel in which it was made" and the "same notoriety was given to the revocation that was given to the offer").

241. RESTATEMENT (SECOND) OF CONTRACTS § 42 (1981).

Convention and BITs.[242] If such statements are a revocation of an offer to arbitrate—and consequently the protections afforded to an investor by a BIT—revocation did not require denunciation of the ICSID Convention and would have preceded the majority of claims filed at ICSID against Venezuela.[243] The fact that this argument was not even raised by Venezuela in these proceedings confirms the absurdity of this conception.[244]

This mailbox problem confirms that one cannot look to ICSID arbitration, particularly ICSID arbitration pursuant to international investment agreements, from the point of view of offer-and-acceptance. Such proceedings—and the protections on which they rely—lack privity.[245] It is therefore unsurprising that the rules of contract formation simply will not fit them. Instead, the ICSID system has to account for arbitration without privity and should analogize the law of third-party beneficiaries as the closest analogue. [246]

4. The Offer-and-Acceptance Model Contradicts the Terms of Both International Investment Agreements and the ICSID Convention

The offer and acceptance approach is fundamentally at odds with clear treaty language in both bilateral investment treaties and the ICSID Convention. This approach posits that an offer to arbitrate is revoked immediately upon receipt of the notice of withdrawal.[247] This is inconsistent with provisions in both BITs and the ICSID Convention governing the manner in which a state party can withdraw from the respective treaties.[248] This is further support that the offer and acceptance model is fundamentally incapable of explaining the consequences of withdrawal by a host state from its treaty obligations in place when an investment was made.

BITs in particular have relatively complex denunciation mechanisms. In the case of the Netherlands-Venezuela BIT, for instance, the state parties could not withdraw from the treaty for the period of its initial validity of fifteen years.[249] A notice of withdrawal from the treaty in, for example, year six or seven of the treaty's initial term would not have had effect for several years as a matter of international law.[250] Not so under the offer and acceptance model: the term protects only the treaty parties, not the investor in its conception.[251]

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242. *See*, *e.g.*, Mark Weisbrot, *IMF and World Bank Face Declining Authority as Venezuela Announces Withdrawal*, HUFFINGTON POST (May 3, 2007), http://www.huffingtonpost.com/mark-weisbrot/imf-and-world-bank-face-d_b_47562.html.
243. *See, e.g.*, *id.* Venezuela's withdrawal from ICSID was notified to ICSID in January 2012. *Venezuela Notice*, *supra* note 154.
244. *See* Mobil Corp. Venezuela Holdings B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1510_En&caseId=C256; CEMEX Caracas Inv. B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction (Dec. 30, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1831_En&caseId=C420.
245. *See* Jan Paulsson, *Arbitration without Privity*, 10 ICSID REV. FOREIGN INV. L.J. 232 (1995).
246. *Id.*
247. SCHREUER 2001, *supra* note 35, at 1285; SCHREUER 2009, *supra* note 35, at 1280–82.
248. *See, e.g.*, ICSID Convention, *supra* note 35, art. 71; Neth-Venez. BIT, *supra* note 161, art. 14(1).
249. Neth-Venez. BIT, *supra* note 161, art. 14(1).
250. *Id.*
251. SCHREUER 2001, *supra* note 35, at 1285; SCHREUER 2009, *supra* note 35, at 1280–82.

This result of the offer and acceptance model is highly implausible. Currently, BITs are almost exclusively enforced through proceedings brought by international investors.[252] Withdrawal periods differ significantly between different investment treaties.[253] The offer and acceptance model would render the withdrawal periods practically meaningless despite the fact that treaty parties bargain for greater or lesser withdrawal rights in actual treaty practice.[254] They would be far less likely to do so if they considered the point to be arbitrary or superfluous.

The denunciation mechanism of the ICSID Convention is similarly inconsistent with the offer and acceptance approach. The ICSID Convention provides that a denunciation of the ICSID Convention takes effect six months after receipt by the ICSID Secretariat of a notice of withdrawal.[255] Given the ICSID Convention's sole purpose to make available a dispute resolution forum to investors, neutering the denunciation period is again highly implausible.[256]

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252. BIT arbitrations between states are exceedingly rare. Reported instances have involved the United States and Peru, the Czech Republic and the Netherlands, the United States and Ecuador, and Italy and Cuba. *See* Italy v. Cuba, Interim Award (Ad Hoc Arb. Trib. Mar. 15, 2005), IIC 518 (2011); MCLACHLAN ET AL., *supra* note 17, at 33 (discussing the United States/Peru and Czech Republic/Netherlands proceedings); Dapo Akande, Ecuador v. United States *Inter-State Arbitration under a BIT: How to Interpret the Word "Interpretation"?*, EUR. J. INT'L L. BLOG (Aug. 31, 2012), http://www.ejiltalk.org/ecuador-v-united-states-inter-state-arbitration-under-a-bit-how-to-interpret-the-word-interpretation/.
253. *See, e.g.*, Agreement between Japan and the Islamic Republic of Pakistan Concerning the Promotion and Protection of Investment, Japan-Pak., art. 14(3), Mar. 10, 1998, U.N. Registration No. 48366, ("In respect of investments and returns acquired prior to the date of termination of the present Agreement, the provisions of Articles 1 to 13 shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement."), *available at* http://treaties.un.org/doc/Publication/UNTS/No%20Volume/48366/Part/I-48366-08000002802d0152.pdf.; Agreement between the Government of the French Republic and the Government of the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments, Alg.-Fr., art. 12, Feb. 13, 1993, 2336 U.N.T.S. 215 ("Upon termination of the period of validity of this Agreement, investments made while it was in force shall continue to enjoy the protection of its provisions for an additional period of fifteen years."); Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XIV(3), Nov. 14, 1991, S. TREATY DOC. No 103-2 (1991) ("With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.").
254. *See supra* notes 246–50.
255. ICSID Convention, *supra* note 35, art. 71.
256. The early drafts of the Convention shed light on the concerns that gave rise to the period of six months specified in Article 71. The period was originally meant to address situations in which a state had objected to a modification of the Convention, which nevertheless had been passed by the Contracting States to the Convention. *See, e.g.*, Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States, Article IX, Comment, (Oct. 15, 1963), *in* 2-1 HISTORY OF THE ICSID CONVENTION II, *supra* note 38, at 229 [hereinafter Preliminary Draft] ("No provision is made regarding States which oppose the amendment after its adoption. It would, however, always be open to a State to declare its withdrawal from the Convention under Section 5 of Article XI. The period specified for effectiveness of the denunciation could be made to conform to the period required for the effectiveness of the amendment adopted, thus permitting a State which wished to denounce the treaty to do so immediately following adoption of the amendment and thereby avoid becoming subject to the Convention as amended. The proviso in Section 2 ensures that amendments will not have retroactive effect."). In those circumstances, a state was to be given a chance to escape unwanted changes in the Convention by making the period for denunciation of the Convention equal to the 6 month period for modifications

In conclusion, despite being widely espoused, the offer-and-acceptance model fundamentally fails as a model of investment protection. Its analogy is ill-chosen because it does not account for the fact that investors are third parties to BITs and most other forms of investment protection instruments but acquire rights under them. Thus, the analogy to draw to the law of contract runs to the law of third-party beneficiaries rather than offer and acceptance. Further, offer-and-acceptance runs into mailbox problems with regard to the receipt of a denunciation notification precisely because the investor is not the intended recipient of that communication. The lack of a treaty-mandated means of communicating denunciations to investors thus further weakens the analogy to the law of offer-and-acceptance. Finally, the offer-and-acceptance model is incongruous with treaty provisions governing denunciation. These mechanisms do not give immediate effect to withdrawal notices. The offer-and-acceptance model on the other hand requires to the contrary that such denunciations immediately extinguish investor rights.

C. Current Practice Reveals the Failure of the "Firm Offer" Model of Investment Protection

Emmanuel Gaillard developed an alternative offer-and-acceptance model that remedies some of the problems of the that approach.[257] Professor Gaillard's approach addresses principally denunciation of the ICSID Convention.[258] It can, however, be analogized more broadly to denunciation of investment protection obligations in general.

1. The "Firm Offer" Model of Investment Protection

Professor Gaillard developed a "firm offer" model of investment protection to avoid the chief pitfalls of the offer-and-acceptance approach.[259] His analysis begins with Article 72 of

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to become effective. *See id.* at 229. Given the requirement under Article 66(1) that agreement must be ratified by all contracting states, the concern about amendments that was at the core of the drafter's discussion of denunciation has been described by a leading commentator as otiose. *See* SCHREUER 2001, *supra* note 35, at 1283–84. The logic was that any obligation incurred by the state in this pendency period would still be governed by the old, unmodified Convention, even if this obligation had consequences under the Convention beyond the notice period. *See* Preliminary Draft, *supra* note 38, at 229. Concretely, if a state would be subject to suit after both its denunciation and the modification, this obligation would be considered to have been incurred before the denunciation had become effective and would thus be governed by the Convention as it stood before its modification. *See also* Diane Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239, 261 (2012) ("The view that investors can file claims in ICSID during the six-month notification period, but not after, seems to have prevailed.").

257. Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, 237 N.Y. L.J. 3 (June 26, 2007).

258. *Id.*

259. *See id.* at 8. Thomas Wälde has addressed the same issue in a similar fashion in *Investment Arbitration under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation*, 12 ARB. INT'L 429, 450 n.81 (1996); *see also* Bianchi, *supra* note 209; Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241, 268–71 (2007) (endorsing Professor Gaillard's view); Christian Tietje et al., *Once and Forever? The Legal Effects of a Denunciation of ICSID*, 74 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (Mar. 2008) (Ger.), *available at* http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft74.pdf (explaining that the U.K.-Bol. BIT provides an agreement to consent because it uses UNCITRAL arbitration as the default dispute resolution mechanism).

the ICSID Convention. Premised upon that article, Gaillard's model distinguishes between "unqualified consent" and mere "agreement to consent."[260] According to this model, denunciation is without effect to the extent that a firm consent had already been given in an IIA, whereas termination of the ICSID Convention would deprive the investor of an opportunity to have recourse to ICSID once denunciation became effective under an IIA, which merely included an offer to arbitrate at ICSID.[261]

The difference between an unqualified consent and an agreement to consent turns on the drafting of the arbitration provision in a BIT.[262] An unqualified consent by its terms leaves no doubt that a dispute "shall be submitted" to ICSID arbitration.[263] Professor Gaillard describes the agreement to consent by way of the following example:

> Article 8 of the Bolivia-UK BIT of May 24, 1988 . . . provides that disputes 'shall . . . be submitted to international arbitration if either party to the dispute so wishes' but adds that '[w]here the dispute is referred to international arbitration, the investor and the contracting Party concerned in the dispute may agree to refer the dispute either to [ICSID or ICC or ad hoc arbitration],' which is an indication that a further agreement is necessary before the initiation of an ICSID arbitration (with UNCITRAL arbitration being the fallback position if no agreement is reached after a period of six months from written notification of the claim).[264]

The focus on the language of the BIT should apply equally in the context of denunciation of a bilateral investment agreement. In that context, unqualified consent would survive for the sunset period of the bilateral investment treaty. Agreements to consent, however, arguably would not, as the host state would now have acted in a manner that is fundamentally inconsistent with reaching the requisite agreement to create the consent. Denunciation of those treaties, as a matter of logic, should deprive the investor of rights to claim after the denunciation has taken effect but before the sunset period has run.

The starting point for this model is the offer-and-acceptance approach. For example, it is premised on the following conception of the history of the ICSID Convention:

> Such consent may traditionally be given in an arbitration clause contained in a contract or through a compromise once the dispute has arisen. It may also be given separately by the host state and the investor, the latter accepting, at the time the dispute has arisen, the prior and general consent to arbitration given by the former in a provision of its domestic legislation or in an investment protection treaty.[265]

Rather than break with offer-and-acceptance as the paradigm of investment protection, Professor Gaillard's model treats BITs as potential firm offers, or options. In the context of the Uniform Commercial Code, a firm offer is an offer in writing between merchants that will be left open by its terms for a reasonable period of time.[266] This is the basic approach of civil

260. *See supra* note 259.
261. *See supra* note 259.
262. See Gaillard, *supra* note 257, at 8.
263. *Id.*
264. *Id.* at 7 (quoting Agreement between the United Kingdom of Great Britain and Northern Ireland and Bolivia for the Promotion and Protection of Investments, May 24, 1988, 1640 U.N.T.S. 3 (1991)).
265. *See id.*
266. U.C.C. § 2-205 (2012).

law jurisdiction like, for example, Germany.[267] Contract law codification projects based on comparative law have adopted the civilian approach, so long as it is reasonable for a party to rely on the firmness of such an offer for a reasonable period of time.[268]

The "firm offer" model significantly improves the offer-and-acceptance model. It addresses the problem that BITs as well as the ICSID Convention have specific mechanisms governing withdrawal. It enforces these mechanisms in an evenhanded manner with regard to both the home state and the foreign investor. By enforcing the terms of the treaties in question, the "firm offer" approach further permits the investor to take advantage of sunset provisions in BITs. These improvements are significant as compared to the offer-and-acceptance model because they facially fit a conception of offer-and-acceptance within the textual framework of the ICSID Convention.

2. The Firm Offer Model Incorrectly Assumes that IIAs Only Protect Investors if Investors "Accept" Their Protection

The "firm offer" model only apparently resolves the problem posed by the simple offer-and-acceptance model. The problem of the firm offer model is revealed in the context of the denunciation of BITs. The withdrawal from a BIT follows the same firm offer logic as the withdrawal from the ICSID Convention; for example, the withdrawal does revoke agreements to consent, but does not revoke unqualified consent.[269] One of the key distinctions between an agreement to consent and actual consent is the availability of several options, all of which would require party agreement.[270]

The distinction between unqualified consents and agreements to consent risks proving too much. Thus, a denunciation of a BIT that contains several options of investor-state dispute resolution is on its face inconsistent with an agreement to any form of dispute resolution.[271] A denunciation thus would frustrate each of these options in turn, and as such deprive the investor of any recourse immediately.[272] Such a result would be absurd—and is not intended by the "firm offer" approach which employs a BIT example that provides a non-ICSID default arbitration mechanism for the settlement of investor-state dispute resolution.[273]

267. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL] 42, as amended, § 145 (Ger.), *translation available at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0428 ("Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it.").

268. UNIDROIT PRINCIPLES OF INT'L COMMERCIAL CONTRACTS art. 2.1.4(2)(b) (Int'l Inst. for the Unification of Private Law 2010), *available at* http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf.

269. *See* Gaillard, *supra* note 257, at 7.

270. *See id.*

271. U.S.-Bolivia BIT, *supra* note 187, art. IX, ("(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b), and that three months have elapsed from the date on which the dispute arose, the national or company concerned may submit the dispute for settlement by binding arbitration: (i) to the Centre, if the Centre is available; or (ii) to the Additional Facility of the Centre, if the Centre is not available; or (iii) in accordance with the UNCITRAL Arbitration Rules; or (iv) if agreed by both parties to the dispute, to any other arbitration institution or in accordance with any other arbitration rules.").

272. *See* Gaillard, *supra* note 257, at 7.

273. *See id.* ("Article IX of the Bolivia-US BIT of April 17, 1998 provides for ICSID arbitration as one of the many options offered to the investors, Article IX(4) stating that '[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration' in accordance with

On the other hand, the distinction may well prove too little if it were reinterpreted to address this criticism. If an unqualified consent is understood to mean a consent to arbitration on the basis of which an investor could have commenced an arbitration irrespective of a denunciation, the model explains nothing at all. It is obvious that denunciation of a treaty instrument cannot grant investors *additional* rights. Consequently, on this conception, *all* BIT provisions permitting an investor to commence an ICSID arbitration would be an unqualified consent. The view that there is a division of firm offers and ordinary offers and inherent textual distinguishability would fail: there are only firm offers to arbitrate and statements that are not offers to arbitrate at all.

Treating all consents as firm offers is a potential minefield because it does not explain on what basis the treaty parties could modify their bargain through amendments or joint interpretations of the treaty. On its face, a firm offer would remain open until its original expiration date. It could not be revoked or modified prior to that date. This excludes any possibility of modification by the treaty parties—without any explanation of how or why the investor so constrained the traditional freedom of action of treaty parties in the law of treaties.[274]

Thus, while the "firm offer" model is certainly preferable to the simple offer-and-acceptance model, it ultimately, too, fails to account for the triangular international law relationship between investor, host state, and home state. To understand the consequence of the denunciation of international investment treaties, the international legal repercussions of this triangular relationship is key. The next Section will reconstruct the international law of consent and explain its repercussions on the effect of denunciation of international investment agreements.

III. Keep the Faith—The Limited Relevance of Termination of Investment Agreements

The approaches surveyed to withdrawal from international investment agreements so far have focused on the action of forming an arbitration agreement. These approaches have failed to provide a satisfactory account of the protection of foreign investments in large measure because they ignore the act of the state in granting rights, or rights of action, directly to foreign investors. This Section will provide an alternative conception of international investment law that, to paraphrase Ronald Dworkin, takes international legal rights seriously.[275] This conception of international legal rights is premised upon the appropriate

such choices and that such 'consent . . . shall satisfy the requirement of Chapter II of the ICSID Convention . . . for written consent of the parties to the dispute.' The expression of consent to the jurisdiction of the centre could hardly be clearer.").

274. *See* Vienna Convention on the Law of Treaties art. 25, *done* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; *see also* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 507–16, 681–795 (2009).

275. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Dworkin's approach reflects the orthodoxy of liberal international legal theory as refined by Professor (later judge) Hersch Lauterpacht. *See, e.g.*, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 53–56 (reprt. 2007). This Article does not subscribe to a "full" Lauterpachtian theory. *See also* Frédéric G. Sourgens, *By Equal Contest of Arms, Jurisdictional Proof in Investor-State*

contract law analogy—third-party beneficiaries—but adapts that premise to the context of public international law.[276]

The consent to arbitration with foreign investors is an independent international legal obligation of the host state. This obligation bestows definitive international legal rights on foreign investors. These obligations cannot be undercut by unilateral action of the host state. They further can only be modified without the consent of the investor to the extent that the rights have not fully vested. Subsection A lays out the law of consent and the effect of termination of bilateral investment treaties. Subsection B addresses the termination of the ICSID Convention.

A. Termination of Bilateral Investment Treaties

A key reason that termination of international investment agreements (whether the ICSID Convention or BITs) creates controversy and confusion is that these treaties create a system of international rights "without privity."[277] These international law agreements bestow direct rights of action upon actors that do not traditionally have standing as a matter of international law.[278] These treaties therefore appear to create an entirely new legal domain between the classic international law of diplomatic protection and the mundane contract law governing large transactions in which one party happens to be a state.

International law is the prevailing force in this domain. The clear trend from disputes predating the BIT paradigm was toward the *internationalization* of investment protection.[279] The inclusion of arbitration clauses and choice of law provisions in contracts between foreign investors and a foreign state or foreign state instrumentalities created international legal obligations owed by the state directly to the investor.[280] Bilateral and multilateral investment agreements granting direct rights to foreign investors against their host state accelerated the same trend.[281] The question of denunciation of BITs will thus have to be analyzed first and foremost through this prism.

1. Consent to Arbitration as Treaty Obligation

State consent to international arbitration with foreign investors in a BIT is a treaty obligation of the state making it.[282] Just like any other treaty obligation, the consent

Arbitrations, 38 N.C. J. INT'L L. & COMM. REG. (forthcoming 2013). Rather, it takes the approach as a starting point only.

276. For a discussion of the importance of such adaptation, see Michael Nolan & Frédéric Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 WORLD ARB. & MEDIATION REV. 505 (2009).
277. *See* Paulsson, *supra* note 245, at 234.
278. *See supra* Part II.A.1.
279. *See supra* Part I.
280. *See supra* Part II.B.1.
281. *See supra* Part II.B.
282. For further discussion, see Michael D. Nolan & Frédéric G. Sourgens, *Limits of Consent: Arbitration without Privity and Beyond*, *in* LIBER AMICORUM BERNARDO CREMADES 873–911 (M.Á. Fernández-Ballestros & David Arias eds., 2010).

provisions in a BIT require good faith compliance.[283] A failure to comply with the consent obligation is a violation of the treaty akin to any other breach of an international treaty.[284]

Consents to dispute resolution by international bodies in treaties constitute free-standing international obligations.[285] The nature of consent to jurisdiction as an international obligation is reflected in the jurisprudence of the International Court of Justice. In the *Case Concerning Right of Passage over Indian Territory*, the Court explained that "every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory."[286] This holding has been applied through the jurisprudence of the International Court.[287]

That consent to dispute resolution is a true obligation rather than a discretionary choice on the part of the respondent state is a key premise of international law doctrine. Hersch Lauterpacht, first and foremost, convincingly defended a strong obligatory consent theory by reference to both a long practice of international courts and tribunals and as a matter of logic.[288] That is, Professor Lauterpacht submitted that dispute resolution is only a meaningful proposition if it is in fact obligatory, as any contrary position would push dispute resolution to the vanishing point.[289] The discretionary position would allow states to frustrate the obligation to submit to dispute resolution, courts and tribunals would fulfill a purely ministerial, allocative role to facilitate and execute an agreement already reached by the parties to a dispute rather than actually resolve the dispute.[290] The practice of the International Court of Justice, as well as international tribunals is consistent with this traditional position.[291]

The potential for confusion arises principally because breach of a consent obligation seeks to deprive others of a judicial or arbitral forum in which that very breach could be prosecuted. A potential violation, or breach, of any other treaty provision does not seek to frustrate the availability of a forum in which to hear claims, but invites resolution of the dispute whether a treaty breach occurs. This is precisely what a state violating its earlier consent to international dispute resolution would seek to avoid. Jurisprudence of the court and doctrine are firmly on the side of enforcing the consent due to the good faith obligation of the state to

283. *See* Vienna Convention, *supra* note 274, art. 25.
284. SCHREUER 2009, *supra* note 35, at 213 ("A State's attempt to withdraw its consent contained in a BIT would normally be a breach of the treaty and would presumably trigger some adverse reaction on the part of the other party to the treaty.").
285. Right of Passage over Indian Territory (Port. v. India), 1957 I.C.J. 125, 146 (Nov. 26). For a full discussion of International Court of Justice jurisprudence, including the *Right of Passage* decision, see Nolan & Sourgens, *supra* note 282.
286. *Right of Passage over Indian Territory*, 1957 I.C. J. at 146 .
287. Nolan & Sourgens, *supra* note 282.
288. LAUTERPACHT, *supra* note 159, at 71–77, 159–61, 359–90.
289. *Id.*
290. *Id.*
291. See Nolan & Sourgens, *supra* note 282, for a full discussion of this jurisprudence.

submit to dispute resolution.[292] Taking the right to dispute resolution seriously, state action seeking to frustrate it *ipso facto* cannot be successful.[293]

2. The Impregilo Challenge

An account focused on the treaty obligation itself is insufficient to explain why investors continue to benefit from the consent provision in investment treaties even after their denunciation. Oscar Garibaldi provided the principal account focused primarily upon the law of treaties.[294] That account agreed with the premise of the *Preliminary Comment* that only an international law model could explain the nature of state consent to arbitration.[295] It disagreed with the *Preliminary Comment* because it considered that the treaty analysis of *pacta sunt servanda* in its own right sufficed to explain why the denunciation of treaties could not affect investor rights of action until after expiry of the sunset period in the treaty.[296]

An account relying exclusively on the law of treaties fails to explain how an investor's rights, including the right to dispute resolution, are protected from state action. The most immediate practical problem for a purely treaty-based model is that the home state and the host state can agree to terminate the investor's right to arbitration by amendment or modification.[297]

The first challenge arises immediately out of the Vienna Convention on the Law of Treaties. Under the Vienna Convention, state parties to a treaty remain free to modify or amend their agreement. Article 54 of the Vienna Convention provides that the "termination of a treaty or the withdrawal of a party may take place" not only in conformity with its provisions governing denunciation, but also "at any time by consent of all the parties after consultation with the other contracting States."[298] Article 39 provides that a "treaty may be amended by agreement between the parties."[299]

Recent jurisprudence has shown a willingness to estop investors on the basis of actions relating to the treaty undertaken by their home state.[300] In one instance, this estoppel had jurisdictional implications, depriving an investor-state tribunal of jurisdiction over a claim.[301]

292. Right of Passage over Indian Territory (Port. v. India), 1957 I.C.J. 125, 146 (Nov. 26); *see also* Nolan & Sourgens, *supra* note 282.
293. LAUTERPACHT, *supra* note 159, at 71–77, 159–61, 359–90.
294. Oscar M. Garibaldi, *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 251–77 (Christina Binder et al., eds, 2009). *Cf.* Michael D. Nolan & Frédéric G. Sourgens, *A Preliminary Comment—The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study*, 5 TRANSNAT'L DISP. MGMT. 1 (2007), *available at* http://www.milbank.com/images/content/9/5/956/TDM_Nolan_Sourgens_Milbank.pdf.
295. Garibaldi, *supra* note 294.
296. *Id.* at 263, 268–70, n.55. *But cf.* Vienna Convention, *supra* note 274, art. 26 ("Article 26 '*Pacta sunt servanda*:' Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").
297. Vienna Convention, *supra* note 274, art. 39.
298. *Id.* art. 54(b).
299. *Id.* art. 39.
300. HICEE B.V. v. Slovak Republic (Neth.-Solvk.), PCA Case No. 2009-11, Partial Award (Perm. Ct. Arb. May 23, 2011), *available at* http://www.italaw.com/documents/HICEEv.SlovakRepublicPartialAwardandDissentingOpinion.pdf.
301. *See id.*

The ability of states to change the scope of their treaty undertakings thus is very much a live issue.[302] An account of the effect of denunciation of investment treaties must take account of this possibility.

The modification-and-amendment issue is further exacerbated by the Vienna Convention's provisions regarding the rights and obligations of third states. The Vienna Convention broadly states that a "treaty does not create either obligations or rights for a third State without its consent."[303] Where consent is given, "it is the separate, 'collateral' agreement between the treaty parties and the third State rather than the treaty itself which provides the legal basis for the obligation."[304] The default rule with regard to such rights is that an obligation may be revoked or amended by treaty parties unless it can be "established that the right was intended not be revocable or subject to modification."[305] This requires interpretation of the collateral agreement between the third State and the treaty parties in the context of the original treaty provision.[306]

This regime is formally and functionally unfit to deal with the non-state rights that investors claim. Formally, investors are not states. To the extent they are covered by the Vienna Convention, it is by means of exclusion of its applicability.[307] A heavily negotiated compromise dealing with the relationship between treaty parties and third States therefore is not formally inapposite.[308] Functionally, it is highly unlikely that investors would conclude any collateral agreements under an international investment agreement, it being precisely an instrument operating *without privity*.[309] The function of international investment agreements is to create conditions for investment that do not require further negotiation between investors and host states through a fixed set of rules mitigating the political risk of investing.[310] The formal limitation of the Vienna Convention to state actors thus is functionally appropriate given the radically different mode of international intercourse of foreign investors when compared to states acquiring rights under treaties to which they are not parties.

The treaty perspective invites a second, related challenge, initially proposed by Professor Schreuer's offer-and-acceptance model. Professor Schreuer noted that treaty obligations of the host states were owed to the home state of the investor.[311] Withdrawal of an offer to arbitrate by denunciation of an international treaty may violate a commitment to the investor's home state.[312] But the investor would be powerless to resist it precisely because the investor was

302. Roberts, *supra* note 58. For a detailed discussion of the article, see *infra* notes 339–61.
303. Vienna Convention, *supra* note 274, art. 34.
304. VILLIGER, *supra* note 274, at 477.
305. *Id.* at 494.
306. *Id.*
307. *See id.* at 103 (including "multinational enterprises" in "international agreements concluded between States and other subjects of international law" not covered by the Vienna Convention"); *see also id.* at 52 ("[I]t may be questioned whether human rights should have been mentioned at all (see the *sixth* preambular para., N. 13) in the context of an instrument concerned with the relations between States.").
308. *See id.* at 491–92.
309. Paulsson, *supra* note 245.
310. *See supra* Part I.A.3.b.
311. SCHREUER 2009, *supra* note 35, at 213.
312. *Id.* at 213.

not the host state's counterparty.[313] As for the investor, the treaty remains an allocative mechanism to distribute a fixed pool of assets set aside by the state to qualified investors. The state would be at liberty to cancel this mechanism at its discretion, subject only to claims for damages by the home state under the state-to-state dispute resolution provisions of the treaties in question.

Professor Schreuer's privity-based treaty argument received support from the recent *Impregilo* dissent and other decisions like it. The principal submission of these opinions is to distinguish between investor rights and access to those rights by means of international dispute resolution. Importantly for current purposes, the *Impregilo* dissent noted that

> It does appear that on the international level no automatic assimilation can be made between substantive rights and jurisdictional means to enforce them, the qualifying conditions for access to the substantive rights and the qualifying conditions for access to the jurisdictional means being different.[314]

Denunciation of a treaty thus could leave intact the substantive rights of investors covered immediately by the sunset provision while simultaneously cancelling the qualifying conditions for access to jurisdiction *ratione voluntatis*.

The *Impregilo* dissent's conception would further withstand the argument that withdrawal of access to jurisdiction constitutes a violation of the treaty in its own right. Like the Schreuer analysis, this view implies that the substantive right to arbitration contained in the treaty cannot be assimilated to the availability of a forum in which the investor could advance a cause of action asserting the wrongful withdrawal of consent to arbitration. This substantive right ultimately could only be redeemed by the home state.[315] There is thus no investor right of access to arbitration in this conception of investor state arbitration.

The *Impregilo* challenge reveals that the law of treaties on its own does not justify why consents to arbitration survive the initial notice of termination of a treaty. In fact, as this analysis reveals, the law of treaties focuses on the relationship between the treaty parties at the exclusion of the investor.[316] The law of treaties therefore cannot alone determine the consequence of a treaty obligation for the rights of the investor. It either has to assume that there is no such consequence, per Professor Schreuer's model, or it has to assume that there is some consequence, per Mr. Garibaldi's model. But this assumption is not fundamentally borne of the law of treaties itself. An additional element is needed to complete the analysis.

3. The Nature of the Investor Right of Action

Unilateral acts form the link between the treaty obligation to consent to arbitration, on the one hand, and the investor, on the other hand. A unilateral act is a "[d]eclaration[] publicly made and manifesting the will to be bound" that creates a legal obligation.[317] The legal

313. *Id.* at 1280–82.
314. Impregilo S.p.A v. Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, ¶ 56 (June 21, 2011), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2172_En&caseId=C109.
315. SCHREUER 2009, *supra* note 35, at 213.
316. *See* Impregilo SpA., ICSID Case No. ARB/07/17, ¶ 56.
317. Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, princ. 1, *in* Rep. of the Int'l Law Comm'n [ILC], 58th sess, May 1–June 9, July 3–Aug.

obligation is premised upon good faith.[318] Unilateral acts addressed to investors can be relied upon by investors and directly create international legal obligations between the home state, the host state, and investors.[319]

The characterization of states' commitments to international investors has good pedigree. It is consistent with the early draft conventions of the 1960s, first considering the possibility of standing consent to arbitration.[320] These conventions expressly considered such standing consent to be a unilateral act of state.[321] It is similarly consistent with the drafting history of the ICSID Convention, which expressly subscribed to a unilateral act paradigm as a starting point for the remainder of the Convention.[322]

The commitments contained in investment treaties are clearly addressed to investors, and can therefore be relied upon by investors. The chief evidence to determine that investment treaties are addressed to investors is the dispute resolution mechanism included in these treaties.[323] This mechanism provides that investors can commence claims against the host state of their investment for violation of treaty provisions.[324] The dispute resolution mechanism thus unequivocally communicates that the investor is the intended beneficiary of the obligation incurred by the state.[325] By making investors the intended beneficiary of the investment treaty, the treaty contains a unilateral act of the treaty parties addressed to the investor that creates independent legal rights in the investor.

The unilateral act of the state, having created an international legal right arising from the treaty, is the legal explanation for the triangular relationship between the home state, the host state, and the investor. It translates the legal obligation between the treaty parties into a legal right of the investor by permitting the investor to rely on the undertaking contained in the treaty.

This analysis so far is consistent with the third-party beneficiary analysis of contract law.[326] The principal relationship between the home state and the host state gives rights to the intended beneficiaries, that is, to the investors. The intended beneficiaries are identified by the dispute resolution clause. Once the third-party rights vest, they become permanent. But the vesting mechanism differs in important respects on the international legal plane.

By treating the consent as a unilateral act vis-à-vis the investor, it is possible to make sense as a matter of international law of how treaty rights vest in the investor as opposed to

11, 2006, U.N. Doc. A/61/1; GAOR, 61st Sess., Supp. No. 10 (2006), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/636/20/PDF/G0663620.pdf?OpenElement [hereinafter ILC Guidelines].

318. *Id.*

319. *See id.* princ. 6 ("Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities."); W. Michael Reisman & Mahnoush Arsanjiani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *in* VÖLKERRECHT ALS WERTORDNUNG—COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 409 (Pierre-Marie Dupuy et al., eds., 2006).

320. *See infra* Part III.B.2.

321. *See infra* Part III.B.2.

322. Broches, *supra* note 38, at 7

323. *See supra* Part I.B.3.b.2.

324. *See supra* Part I.B.3.b.2.

325. *See supra* Part I.B.3.b.2.

326. *See supra* Part II.B.2.

creating an obligation of the host state exclusively towards the investor's home state. The International Law Commission's (ILC) *Guiding Principles* looks to reasonable reliance for determining whether the act can be revoked or modified.[327] The test looks to an objective factor and a subjective factor to determine reasonable reliance.[328]

The objective factor principally looks to the specific terms of the declaration relating to revocation.[329] It also considers whether a reasonable addressee of the act would have relied upon it.[330] Treating BITs as unilateral acts of the treaty parties vis-à-vis investors, the objective test creates a presumption that the undertaking cannot be revoked prior to the sunset period, because a reasonable investor would have relied upon the terms of the sunset period in making an investment decision.[331] A revocation of the treaty, or a key part of the treaty such as the consent to investor-state dispute resolution provision, presumptively would not have effect within the sunset provision for existing investors by virtue of the law of unilateral acts.

The subjective factor looks to actual reliance.[332] In the context investment treaties, a factor in determining reliance is the choice by the investor of a specific investment structure.[333] This

327. ILC Guidelines, *supra* note 317, at 380.
328. *Id.*
329. *See* Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20). For a discussion, see THOMAS M. FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 67 (1993); Brigitte Bollecker-Stern, *L'Affaire des Essais Nucléaires Français Devant la Cour Internationale de Justice*, 20 ANN. FR. DR. INT'L 299 (1974).
330. *See* ILC Guidelines, *supra* note 317, princ. 10(b).
331. *Id.*
332. *Id.*
333. Investors have relied upon investment structures through third states in a significant number of cases. *See, e.g.*, ADC Affiliate Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award of the Tribunal, (Oct. 2, 2006), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231 (Cypriot holding structure for Canadian and BVI parents); Bureau Veritas, Inspection, Valuation, Assessment & Control, BIVAC B.V. v. Republic of Para., ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, (May 29, 2009) (Dutch holding structure for French parent); CEMEX Caracas Inv. B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction (Dec. 30, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1831_En&caseId=C420 (Dutch holding structure for Mexican parent); CME Czech Republic B.V. v. Czech Republic, Case No. 403/VERMERK/2001/CME, Partial Award, (Sept. 13, 2001), http://italaw.com/documents/CME-2001PartialAward.pdf (Dutch holding structure for U.S. parent); Eastern Sugar B.V. v. Czech Republic, SCC Case No. 088/2004, Partial Award, (Mar. 27, 2007), http://www.iisd.org/pdf/2007/itn_eastern_sugar.pdf (Dutch holding structure for French and British parents); Itera Int'l Energy LLC v. Georgia, ICSID Case No. ARB/08/7, Decision on Admissibility of Ancillary Claims, (Dec. 4, 2009), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1310_En&caseId=C302 (U.S. and Dutch holding company for Russian parent); Millicom Int'l Operations B.V. v. Republic of Senegal, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal, ¶ 71 (July 16, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2833_En&caseId=C500; Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Preliminary Objections on Jurisdiction and Admissibility, (Apr. 18, 2008), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC697_En&caseId=C72 (Dutch holding structure for Romanian parent against Romania); Saluka Investments B.V. v. Czech Republic, Partial Award, (Mar. 17, 2006) (Dutch holding structure for Japanese parent); Tidewater Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/5, Procedural Order No. 1 on Production of Documents, (Mar. 29, 2011),

choice would indicate that the investor relied upon the treaty in making the investment decision.[334] Other probative evidence may include due diligence materials or other documents outlining the reasons for the investment decision.[335] For a significant number of project investors, the fact of the investment provides additional evidence of reliance such that the investment treaty may not be substantially modified.

Both the objective and subjective elements are consistent with the third-party beneficiary analysis of the law of contracts.[336] It recognizes that rights once relied upon vest and thus no longer permits of material modification by the acts of one or both of the original contracting parties.[337]

But the contractual analysis is supplemented and adapted to the international law plane.[338] Rather than consider vesting to be an absolute bar to any and all discharge or modification of rights, it permits states reasonable room for policy adjustments to the extent that there has been a fundamental change in circumstances.[339] Further, the objective and subjective elements of reliance must be considered individually for each case on the basis of the state action involved as well as the merit of the investor's reliance.

International law thus does not adopt a bright line approach, but adopts a balancing test that is cognizant of the relative weight of the interests of the investor beneficiaries of international investment agreements and the treaty parties. In the context of the unilateral denunciation of investment agreements, this balancing test presumptively would err on the side of investor protection. Similarly, in the absence of compelling evidence of changed

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https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2071_En&caseId=C961 (Barbadian holding structure for U.S. parent); Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction and Dissent, (Apr. 29, 2004), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220 (Lithuanian holding structure for Ukrainian parent against Ukraine); Universal Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, (May 20, 2011), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2411_En&caseId=C1021 (according to news reports, Spanish holding structure for U.S. parent); Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, (Nov. 30, 2009) (U.K. holding structure for Russian parent).

334. *See* CME Czech Republic B.V. v. Czech Republic, Case No. 403/VERMERK/2001/CME, Partial Award, ¶ 426 (Sept. 13, 2001), http://italaw.com/documents/CME-2001PartialAward.pdf (Dutch holding structure for U.S. parent); Mobil Corp. Venezuela Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 198 (June 10, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1510_En&caseId=C256; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction and Dissent, (Apr. 29, 2004), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220 (Lithuanian holding structure for Ukrainian parent against Ukraine).

335. On the scope and importance of due diligence for treaty claims, see, for example, Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 333–38 (Sept. 11, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC682_En&caseId=C252.

336. *See supra* Part II.B.2.

337. *See supra* Part II.B.2.

338. Reisman, *supra* note 30, at 41 ("Public international arbitration has evolved so differently from its private counterpart that analogies between the two forms of dispute resolution, while tempting, are perilous.").

339. ILC Guidelines, *supra* note 317, princ. 10(c).

circumstances, it would hold the treaty parties to their bargain, even in the context of collective action, when faced with claims of investors having made a substantial capital investment in the host state economy.

4. Survival of Investor Rights

The "unilateral act" analysis explains not only why states generally cannot frustrate investor rights completely through withdrawal from investment treaties but also has broader significance for the question of how state parties to investment treaties can interpret, or modify, the investor rights contained in international investment agreements. Anthea Roberts's landmark article *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States* has laid the groundwork for the conclusion that state parties to international investment agreements do have the ability to jointly engage in a dialogue with international investment tribunals about the scope of the obligations in their own investment treaties.[340] The unilateral act analysis is broadly consistent with Professor Roberts's analysis, but differs in limiting the ability of states to alter their commitments to a greater extent than Professor Roberts suggests.[341]

Professor Roberts's article assumes that international investment agreements bestow substantive and procedural rights upon covered investors.[342] She explains that through international investment agreements, states delegate interpretive powers to international investment tribunals.[343] By virtue of this delegation, tribunals maintain a "trustee-like status" for the state parties in resolving international disputes and as such have to interpret, and in the case of vague norms, create international norms.[344] But "[a]s states remain the primary creators of international law, and are capable of modifying and interpreting their own treaties, they presumptively retain any lawmaking powers not expressly or impliedly delegated."[345]

Power and Persuasion proposes a middle ground approach between states being forced to exit or permitted to re-contract or delegitimize their investment treaty commitments.[346] This middle ground is taken up by dialogue, "[g]iving both treaty parties and tribunals a voice . . . but neither a mandate to dictate."[347] In this dialogue, the treaty parties' reasonableness in asserting a certain position in the context of a given dispute is a key guiding factor. This reasonableness is measured both by reference to the textual basis of the proffered

340. Roberts, *supra* note 58.
341. Centrally, the unilateral act basis disagrees with her statement, premised in the law of treaties, that "the assumption that, once given, investor rights cannot be withdrawn or changed . . . . is incorrect. Investor rights can be altered through various means, including interpretation, amendment, withdrawal, and termination." *Id.* at 210. While all of these acts may have an impact on investor rights, as discussed above they certainly do not have such an impact immediately but must be assessed through the lens of reasonable reliance and changed circumstances critical to the unilateral act analysis.
342. *Id.* at 185.
343. *Id.* at 185–91.
344. *Id.*
345. *Id.* at 191.
346. *Id. at* 192–93.
347. *Id.* at 194.

interpretation and the timing at which it is raised.[348] In cases of a reasonable interpretation asserted before the dispute arose, but potentially after the investment was made, the dialogue should lead to the adoption of the position espoused by the treaty parties even if it is not the most reasonable interpretation available. Unreasonable interpretations proffered prior to the dispute but after the investment was made would be presumptively valid because "[t]reaty parties have not represented that investor rights will never be revoked, amended, or interpreted."[349]

Power and Persuasion is fundamentally correct in rejecting the wholesale import of third-party beneficiary law that would deprive treaty parties of any ability to modify investor rights set out in BITs prior to the expiry of the sunset period in the treaty. Such deprivation would completely handcuff state parties to the vagaries of investor-state tribunals without any prospective ability to course-correct their bargain and would transform these treaties into "suicide pacts."[350] Requiring such a result defies common sense. Where the investor's reliance interest is small, and the interpretation adopted by the treaty parties is reasonable, modification of treaty rights must be possible for a sustainable system of investor protection to develop. Any other approach risks needlessly disenfranchising the treaty party that originally created the investor rights in the first place—and thus risks an entirely avoidable political backlash against the IIA treaty network as a whole.

But *Power and Persuasion* falls prey to the allure of the law of treaties when it denies investors the benefit of reliance interests against unreasonable interpretations of investment treaties by the treaty parties so long as the interpretation is adopted prior to the outbreak of the dispute. As was the case with Venezuela, investors structured their investments in strategic sectors through BIT jurisdictions precisely to hedge against rising political risk.[351] In many instances, investors continue to make long-term capital expenditures and intensive investments precisely because of the availability of such a hedge.[352] For example, an investor in Venezuela making a $200 million investment in the oil sector in 2000 employing a BIT structure would have seen nationalization of some projects in 2004, been faced with BIT treaty parties changing the scope of their undertaking to exclude oil sector investments in 2005, and been completely expropriated in 2006. Is this forfeiture contemplated by *Power and Persuasion* consistent with the advertised purpose of BITs to enhance capital flows?[353] Is this consistent with the principle of good faith? Hardly.

Similarly, the framework of *Power and Persuasion* cannot account for the role of changed circumstances requiring a modification of the underlying bargain. Article 37 of the Vienna Convention, on which the article chiefly relies, "does not cover the suspension of obligations

348. *See id.* at 214.
349. *Id.* at 214.
350. *See id.* at 179.
351. *See, e.g.*, Mobil Corp. Venezuela Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1510_En&caseId=C256.
352. *See* Elisabeth Eljuri & Clovis Treviño, *Political Risk Management in Light of Venezuela's Partial Nationalisation of the Oilfield Services Sector*, 28 No. 3 J. ENERGY & NAT. RESOURCES L. 375, 394–95 (2010).
353. Compare *Mobil Corp. Venezuela Holdings B.V.*, ICSID Case No. ARB/07/27.

and rights afforded to third States or the situation where there is a change in circumstances."[354] It is not hard to imagine how the 2008 financial crisis could bring about modifications of exceptions to treaties jointly by the treaty parties—even in treaties currently excluding non-precluded measures clauses.[355] These modifications would be necessary precisely because the earlier drafting plainly did not anticipate their need. For these circumstances, a textual reasonableness analysis will simply not suffice.

Treating investor rights arising out of bilateral investment treaties as unilateral acts of state made pursuant to an international treaty can overcome these difficulties. The core of investor rights vest when the investment is made.[356] In all situations except for exceptional changes in circumstances, the investor will be protected against a radical departure from treaty rights, such as the removal of the right to receive compensation for expropriation or the right to commence international arbitration proceedings.[357] Any reasonable interpretation of the international commitments in light of the circumstances as they exist when an interpretation was proffered would prevail at this point.[358] As there is greater reliance interest due to the acts of the investor, the scope of discretion of the host state to modify investor rights without investor consent shrinks considerably.[359] The state acts from this point forward would be evidence to consider as part of an independent analysis of the most reasonable interpretation of the state's undertaking in light of current circumstances at the time the dispute arose, but could no longer displace it.

The optic of unilateral acts does not require that investor rights be interpreted restrictively. The ILC *Guiding Principles* set up a scheme of restrictive interpretation for non-conventional unilateral acts.[360] As the tribunal in *Mobil v. Venezuela* explained, the ILC regime is displaced when "unilateral acts are formulated in the framework and on the basis of a treaty."[361] In that case, the language of the undertaking itself, viewed in context and in light of its object and purpose and overall attending circumstances, reveals an interpretation that is most reasonable given the record of evidence.[362] This most reasonable interpretation is the one to which the investor, vested with a direct right, is entitled.

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354. VILLIGER, *supra* note 274, at 495. For a discussion of the application of *rebus sic stantibus* (fundamental change of circumstances) between the treaty parties themselves, see Vienna Convention, *supra* note 274, art. 62; VILLIGER, *supra* note 274, at 762–81.
355. Such modifications would be subject to a good faith analysis. For a fuller discussion, see Nolan & Sourgens, *supra* note 136.
356. It is at this point that the investor in most instances incurs a risk. This risk increases with every new asset invested by the investor in the host state. For a discussion of reliance as a trigger to vest rights under unilateral acts, see *supra* Parts II.B.2, III.A.3.
357. ILC Guidelines, *supra* note 317, princ. 10(c).
358. *See supra* Part III.A.3.
359. *See supra* Part III.A.3.
360. ILC Guidelines, *supra* note 317, princ. 7 cmt. (2).
361. Mobil Corp. Venezuela Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction (June 10, 2010), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1510_En&caseId=C256.
362. *See, e.g.*, *id.* ¶¶ 91–94. For a full discussion, see David D. Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 655 (Mahnoush H. Arsanjani et al., eds., 2011).

This approach again takes the rights of investors seriously. International investment agreements are a tool to reduce political risk for investors but they are not suicide pacts.[363] They thus do not perfectly fit the mold of either the law of third-party beneficiaries in the law of contracts or the law of treaties. Rather, by treating investor rights as arising out of unilateral declarations under BITs, the law treats investors as falling at a mid-point between both, protecting investor reliance and state freedom of action to address changed circumstances.

B. Termination of the ICSID Convention

Understanding consents to investors as unilateral declarations sheds light not only on the potential consequences of the termination of BITs, but also upon the termination by a state of the ICSID Convention. To the extent that rights have vested in investors due to the termination provision in the consent instrument of submitting claims to ICSID or due to reliance by the investor, termination of the ICSID Convention does not deprive those investors of the ability to commence arbitral claims at ICSID. To the extent an investor's rights have not vested, for example because an investment was only ever made after termination of the ICSID Convention, good faith requires the denouncing host state to continue to permit recourse to ICSID arbitration insofar it has consented to it in an investment treaty if the host state has not received the consent of the home state to withdraw its consent for future investors.

1. The ICSID Convention on Its Face Does Not Allow Frustration of Treaty Consent Instruments

Articles 71 and 72 govern denunciation of the ICSID Convention.[364] These articles are incompatible with an offer-and-acceptance model of consent.[365] Neither provision textually supports the proposition that a denunciation of the ICSID Convention by itself withdraws or voids outstanding unilateral consent instruments.

On their face, both provisions support the "unilateral act" model of consent. Under the "unilateral act" model, the state cannot arbitrarily withdraw its consent to arbitration.[366] As discussed above, a host state can no longer withdraw its consent once it has vested rights in investors either by its terms or by reliance as considered in light of all relevant circumstances.[367] Per force, a state's withdrawal of a unilateral act must be arbitrary if the state remains under an independent treaty obligation to extend that unilateral act to qualifying investors. The withdrawal from the ICSID Convention, if conceived of as a means to withdraw existing consents to arbitration, is precisely the kind of arbitrary act to which international principles of good faith will not give effect.

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363. *See supra* Part III.A.3.
364. ICSID Convention, *supra* note 35, arts. 71, 72.
365. *See supra* Part II.B.4.
366. ILC Guidelines, *supra* note 317, princ. 10.
367. *See supra* Part III.A.

Article 72 most clearly supports this conception. It states that denunciation

> *shall not affect* the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of the *consent to the jurisdiction of the Centre given by one of them* before such notice was received by the depositary.[368]

The natural reading of Article 72 is that consent is given independently by the State (or any of its constituent subdivisions or agencies) and that this independent consent remains unaffected by denunciation of the ICSID Convention.[369]

In the second edition of his influential commentary of the ICSID Convention, Professor Schreuer rejects this reading of Article 72, proffered in the *Preliminary Comment*, because

> the phrase 'given by one of them' relates to the denouncing State, its constituent subdivisions or agencies and its nationals. It does not relate to the relationship between the host State and the investor. This phrase would not support a theory that consent offered by the host State but not accepted by the investor shall remain unaffected by the denunciation.[370]

He further explains that the "phrase 'given by one of them' ensures that a national of a denouncing state who accepts the offer of consent in a BIT before the notice of denunciation will continue to enjoy the rights and obligations resulting from the consent."[371]

Professor Schreuer's construction of Article 72 does not rebut the reasonable, common sense reading of Article 72 that the consent given by the State is not affected by denunciation irrespective of what the investor has or has not yet done. Assuming that "given by one of them" relates "to the denouncing state, its constituent subdivisions or agencies and its nationals," as Professor Schreuer submits, it still remains the unilateral act of consenting by "one of them" to which Article 72 applies.[372] Had the drafters intended what Professor Schreuer submits, Article 72 would have had to read "given by one of them and a national of another Contracting State or another Contracting State."

This interpretation is confirmed contextually in the last sentence of Article 25(1), which states, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally."[373] "Consent" precisely is not the term used for an accepted offer of arbitration, but the term used for the *unilateral* act of consenting.[374] In Article 72, "consent" is this unilateral act of consenting that is addressed.[375] By contextual analysis, the Convention could not be clearer: if a state wishes to withdraw its consent to arbitration, it must do so according to the terms of the consent instrument, not through denunciation of the ICSID Convention. Put differently, consent remains an obligation of the state that can only be withdrawn on its terms.

This contextual analysis fits hand-in-glove with the unilateral act analysis of how investor rights vest. The *ILC Guidelines* provide that such acts "cannot be revoked arbitrarily," and

368. ICSID Convention, *supra* note 35, art. 72 (emphasis added).
369. *See* Garibaldi, *supra* note 294; Christian Tietje et al., *supra* note 259.
370. SCHREUER 2009, *supra* note 35, at 1281.
371. *Id.* at 367.
372. ICSID Convention, *supra* note 35, art. 72.
373. *Id.* art. 25(1).
374. *Id.*
375. *Id.* arts. 25(1), 72.

premises this obligation on the principle of good faith.[376] Article 25(1) of the ICSID Convention precisely foresees the possibility of a unilateral withdrawal of consent by a host state prior to the investor giving its consent.[377] The principle of good faith requires, as the ILC guiding principles elucidate, that the revocation or withdrawal of consent "cannot be [done] *arbitrarily*."[378] The unilateral withdrawal from ICSID as a means to revoke investor rights either when the rights of the investor have already vested or when the home state of potential investors has not consented to it is "arbitrary" as discussed above. Article 72 thus spells out what is implicit in Article 25(1): such an arbitrary act will not be given effect.

2. The Drafting History of the ICSID Convention Confirms that Standing Consent to Arbitration Cannot Be Frustrated by Termination of the Convention

The drafting history of the ICSID Convention confirms the textual interpretation of Articles 71 and 72 that termination of the ICSID Convention does not affect the rights and obligations arising out of consents to arbitration in BITs or investment legislation. The drafting intent is particularly apparent in discussions led by the German and Austrian delegates who expressly sought to protect their BIT programs from a host state's potential unilateral withdrawal from the ICSID Convention. It is not undercut by the exchange between Mr. Broches and Mr. Gutirrez Cano relied upon by proponents of the offer-and-acceptance model.

The key difference between the offer-and-acceptance model and the unilateral act model concerns whether consent referenced in Article 72 of the ICSID Convention is the unilateral act of the state consenting to ICSID jurisdiction, or whether it refers to a specific agreement to arbitrate between the host state and an investor. The drafting history of the ICSID Convention does not support the offer-and-acceptance approach but rather confirms that the consent in question referenced in both the last sentence of Article 25(1) and Article 72 of the ICSID Convention was in fact the unilateral act of the host state.

Because of the extremely short discussion of the denunciation provisions proper during the negotiations of the ICSID Convention, the first step is to look to the extensive drafting history of Article 25(1).[379] The consent provision of the ICSID Convention was drafted at a time when contractual consents to investor state arbitration were still the norm, but after the first BIT had entered into force.[380] An early note to the Executive Directors of the Bank already anticipated this potential development, stating that "once a State had voluntarily agreed to

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376. ILC Guidelines, *supra* note 317, princ. 10.
377. ICSID Convention, *supra* note 35, art. 25(1).
378. ILC Guidelines, *supra* note 317, princ. 10 (emphasis added).
379. *See* Christoph Schreuer, *The Denunciation of the ICSID Convention and Consent to Arbitration*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 365 (Michael Waibel et al., eds., 2010) ("The text of what eventually became Article 72 (still numbered 73 at the time) was discussed only once, at an advanced stage of the Convention's drafting.").
380. *See* Treaty for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23. The agreement was the starting gun for the development of bilateral investment agreements more broadly. For a discussion of the proliferation of bilateral investment treaties, see *supra* Part I.B.

submit a specific dispute or group of disputes to the jurisdiction of the Centre this agreement would be a binding international obligation."[381]

The importance attached to an international obligation to arbitrate through a standing state consent is apparent throughout the drafting history of the Convention. In response to a preliminary working draft of the Convention describing consent as "an undertaking in writing to have recourse to conciliation and arbitration," the German delegate inquired about how this language might apply to consent through investment treaties.[382] The first draft of the Convention reflected the comment.[383] It stated that the consent of any party to a dispute to the jurisdiction of the Center may be evidenced by:

> (i) a prior written undertaking of such party which provides that there shall be recourse, pursuant to the terms on this Convention, to conciliation or arbitration (hereinafter referred to as an undertaking);
>
> (ii) submission of a dispute by such party to the Center;
>
> or
>
> (iii) acceptance by such party of jurisdiction in respect of a dispute submitted to the Center by another party.[384]

Due to a concern regarding subpart (iii), the drafting language was later changed to a formulation closer to the current Article 25, which no longer expressly refers to "a prior written undertaking of such party."[385] Within months of circulation of the second draft, the Austrian delegation noted that the change now obscured the fact that states consent to ICSID jurisdiction through general submission.[386] The remaining drafting history of the ICSID Convention reflects the fact that the comment of the Austrian delegation was taken into account and that the agreement reflected in Article 25 was that each party could indeed submit an independent consent to ICSID arbitration.[387] This common understanding is reflected in the last sentence of Article 25 discussed in the previous section.[388]

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381. Broches, *supra* note 38, at 5.
382. Draft Convention, *supra* note 52, at 22; Remark of Mr. Donner, *supra* note 53, at 91 (discussing Germany's nascent BIT program).
383. *See* First Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article II(2), (Aug. 9, 1963), *in* 2-1 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 148. All following drafts discussed in this Article are numbered by reference to the official preliminary draft rather than the Working Paper. *See also* Broches Memorandum May 28, 1963, *supra* note 53, at 93 ("Mr. Donner's point regarding avoidance of interference with existing bilateral agreements on foreign investment would be met in the next draft.").
384. First Preliminary Draft, *supra* note 53, at 148.
385. Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 26, (Sept. 11, 1964), *in* 2-1 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 621–22 ("(1) The jurisdiction of the Center shall extend to all legal disputes between a Contracting State (or one of its political subdivisions or agencies) and a national of another Contracting State, arising out of or in connection with any investment, which the parties to such disputes have consented to submit to it. (2) Consent to the submission of any dispute to the Center shall be in writing. It may be given either before or after the dispute has arisen. Consent by a political subdivision or agency of a Contracting State shall require approval of the State.").
386. Letter addressed to the Bank from the Federal Ministry of Finance of the Republic of Austria, (Nov. 13, 1963), *in* 2-2 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 670.
387. Preliminary Draft, *supra* note 256, at 203; Broches Memorandum Jan. 19, 1965, *supra* note 53, at 956.
388. *See supra* Part III.B.1.

It is against this background that the drafters of the ICSID Convention discussed the implications that termination of the ICSID Convention had upon consent to ICSID arbitration. The discussions took place a mere sixteen days prior to the opening for signature of the draft Convention.[389] The first exchange confirmed that a under a contractual agreement between a host state and the investor for a twenty-year period, "that State would still be bound to submit its disputes with that company under that agreement to the Centre."[390] The next exchange concerned a contractual "arbitration clause which could be terminated by one of the parties" with an undefined duration.[391] In such a case, "the jurisdiction of the Centre would come to an end on termination of the clause."[392] So far, the discussion is completely consistent with the unilateral act interpretation.

Immediately following this exchange, Mr. Broches and Mr. Gutierrez Cano interjected with what is critically relied upon by proponents of the offer-and-acceptance model:

> Mr. Gutierrez Cano said that Article 73 in the new text was lacking a time limit beyond which the Convention would cease to apply. Unless time limit was introduced States would be bound indefinitely. He had in mind the case in which there was no agreement between the State and the foreign investor but only a general declaration on the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre. Would the Convention still compel the State to accept the jurisdiction of the Centre?
>
> Mr. Broches replied that a general statement of the kind mentioned by Mr. Gutierrez Cano would not be binding on the State which made it until it had been accepted by an investor. If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.[393]

The call of the question reveals the problem with relying upon Mr. Broches's answer as a full endorsement of the offer-and-acceptance model. Mr. Gutierrez Cano inquired whether the Convention could compel the state to accept jurisdiction of the Centre.[394] As the exchange immediately preceding it had made clear, the question about whether the consent instrument was in force principally had to be determined by interpretation of that consent instrument.[395] Mr. Broches's answer proceeds on the assumption of the immediately preceding discussion that the "general statement" did not contain a defined duration and was in fact terminable at will.[396] This is not the case in the context of treaty consents to arbitration, which are subject to sunset periods as a matter of the treaty itself.[397]

389. *See* Mr. Broches's Remark of March 3, 1965, *in* 2-2 HISTORY OF THE ICSID CONVENTION, *supra* note 38, at 1009–10 [hereinafter Broches's Remark].
390. *Id.*
391. *Id.* at 1010.
392. *Id.*
393. Broches's Remark, *supra note* 389, at 1009–10 (paragraph numbering omitted).
394. Broches's Remark, *supra note* 389, at 1010.
395. *Id.*
396. *Id.* at 1009–10.
397. *See supra* Part III.A.2.

In any event, Mr. Broches' statement expressly endorses rather than contradicts the "unilateral-act" model: "if the State withdraws its *unilateral statement*."[398] The choice of words was no accident, as consent was expressly and continuously considered akin to a unilateral act submitting to the jurisdiction of the International Court of Justice.[399] Mr. Broches's comment contemplates that the issue be addressed under the law of unilateral acts, which permits revocation of unilateral acts unless the revocation is arbitrary. This is precisely the conception of the unilateral act model and not that of the offer-and-acceptance model. The key difference is that the unilateral act model requires the revocation to occur in good faith. The offer-and-acceptance excuses, and in fact invites, bad faith. This preference is not borne textually or contextually—and, inviting bad faith, is hardly a desirable incentive.

IV. Conclusion

The current investment protection infrastructure was set up to be a lasting part of the new public international legal architecture following the end of the Cold War.[400] It was created in part to repel the state from its position of hegemony over international economic law.[401] Its creators endowed it with resilience against short-term global policy shifts such that the international legal mechanism to provide political risk protection does not itself fall prey to political risk.[402]

The key premise of this new system has been to provide rights to international investors without entering states into privity with them. Investment treaties providing a standing consent to international arbitration are at heart of this project. As conclusively evidenced by the consent provision, these treaties bestow rights on international investors.

The termination of investment treaties presents hard questions. On the one hand, it is the classic weapon of the state wishing to escape the regulation of international law. It is a key element of the voluntarist conception of international law, reducing international law to the "will" of the state against which that international law is invoked.[403] On the other hand, investment protection treaties were precisely set up to create a stable and quasi-permanent system of protection for international investors.

Existing scholarship has erred on the side of withdrawal rights. It has done so by reintroducing privity analysis into the international investment system. This reintroduction of privity allows scholars to posit that without the investors' affirmative act to consent to arbitration under a BIT in writing, the state retains its full rights of action. This analysis does not take into account the crucial role of the lack of privity for investment law in general and as such fails to explain the lack of immediate consequence, or lack thereof, of termination of investment agreements.

398. Broches's Remark, *supra note* 389, at 1009–10 (emphasis added).
399. Broches, *supra* note 38, at 3–7.
400. *See supra* Part I.B.
401. *See supra* Part I.B.
402. *See supra* Part I.B.
403. *See, e.g.*, LAUTERPACHT, *supra* note 159, at 417–20. For a further discussion of various legal theory approaches to international law and their impact on the role of international law in the resolution of political risk disputes, see Sourgens, *supra* note 3.

This Article has shown that the most appropriate conception of investment law treats the commitments of host states as unilateral acts made directly vis-à-vis the investor. This approach takes investor rights seriously. It further takes seriously that the relationship is not one of privity, but one of unilateral action. This paradigm has allowed a more nuanced picture to develop that places premium on proof of reliance of the investment protection infrastructure. This position has ultimately placed investment law between the contractual model of third-party beneficiaries and the offer-and-acceptance approach. By doing so, it has demonstrated that investment law has built in a fail-safe against a momentary change of heart without binding state participants to (economic) suicide pacts.