STATE CONSENT, INVESTOR INTERESTS AND THE FUTURE OF INVESTMENT ARBITRATION: REANALYZING THE JURISDICTION OF INVESTOR-STATE TRIBUNALS IN HARD CASES

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by

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ABSTRACT

While the international investment regime has enjoyed an extended period of enthusiastic subscription, this euphoria has begun to recede in some quarters. Although sovereign consent to waive immunity is at the heart of investor-State arbitration, many states feel that this consent has been illegitimately expanded. In this regard, this thesis examines the degree to which the interpretive approach taken to state consent to arbitration can affect whether an investment tribunal will assert jurisdiction over an investment dispute. Investor-State tribunals often confront ‘hard cases’ where their authority to decide a dispute is vigorously contested by respondent host states. This thesis examines the degree to which investment tribunals have an obligation to adopt a cautious, state-centered approach to the interpretation of state consent to arbitration in such cases. It then considers the different means available to States to further impose such an obligation on investment tribunals as a matter of international law.

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INTRODUCTION

The proliferation of Bilateral Investment Treaties (BITs) has been called both a blight and a blessing. Whether included as part of Free-Trade Agreements (FTAs) or as independent treaties, proponents of BITs argue that they promote investment, development and good governance. Critics of BITs argue that investment protection regimes constitute an unjustifiable infringement on the sovereignty of states and place unreasonable constraints on their ability to act in the public interest. Debate between the opposing schools of thought has accompanied investment treaties since their genesis. It has grown particularly vociferous since the now continuous wave of modern investment disputes first began to crest in the years surrounding the millennium.

The debate is set to intensify. Many prominent States, scholars and non-governmental organizations are increasingly arguing that contemporary international investment agreements take insufficient steps to balance the rights and obligations of the parties involved. They argue that too much emphasis has been placed on granting foreign investors protective rights and that too little effort has been dedicated to preserving the rights of host states. They further argue that many decisions by investor-State tribunals perpetuate and aggravate this imbalance between investor and sovereign interests. The controversy is far from academic. While the international investment regime has enjoyed an extended period of enthusiastic subscription, this euphoria has begun to recede in some quarters. For the first

5 For a collection of criticisms of the investment arbitration regime, see LYUBA ZARSKY (ed.), BALANCING RIGHTS AND REWARDS: INTERNATIONAL INVESTMENT FOR SUSTAINABLE DEVELOPMENT (Nautilus Institute for Security and Sustainability, 2005).
time since the BIT explosion began, countries are starting to denounce their obligations under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) and various BITs. If this continues, we may be on the eve of an even more fragmented regime of international investment law than exists today.

Alarms have begun to ring in various corners of the international investment regime, and numerous remedies have been suggested. One of the most persuasive of these, though not necessarily the most common, is that a paradigm shift in the manner arbitral tribunals understand investment disputes and investment agreements is needed. Too frequently investor-State tribunals interpret their duties as ones owed first to foreign investors with standing under investment treaties. Too infrequently investor-State tribunals interpret their duties as ones owed first to the state signatories to those treaties. In this regard, it is arguable that investment tribunals should approach investment agreements primarily as instruments concluded between sovereigns detailing the extent to which they intend to waive sovereign immunity in exchange for the promise of increased investment, and by extension, increased economic growth. It is arguable that investment tribunals should interpret investment treaties in a manner which prioritizes preserving sovereign prerogatives over advancing investor interests and protection.

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This thesis will explore the details and merits of this argument in relation to the jurisdiction of investor-State tribunals. In particular, it will examine the degree to which the interpretive approach taken to state consent to arbitration can affect whether an investment tribunal will assert jurisdiction over an investment dispute. Investor-State tribunals often confront ‘hard cases’ where their authority to decide a dispute is vigorously contested by respondent host states. These include cases where an investor’s claim is fundamentally dependent on Most Favored Nation (MFN) clauses, so called ‘umbrella clauses’, and the willingness of tribunals to ignore conflicting forum selection clauses. These are complex scenarios, and they raise divergent concerns. However, in each case the different weight given by investment tribunals to state interests and investor interests will likely be determinative of whether a claim proceeds. This thesis will examine the degree to which investment tribunals have an obligation to adopt a cautious, state-centered approach to the interpretation of state consent to arbitration. It will then consider the different means available to states to further impose such an obligation on investment tribunals as a matter of international law.

Part I will survey the history of the proliferation of international investment agreements. It will examine the evolution of international investment dispute settlement from a State to State model to the currently popular investor-State model. It will discuss the creation of the International Centre for the Settlement of Investment Disputes (ICSID), the incorporation of its jurisdiction into the majority of investment protection agreements and its attempts to depoliticize investment dispute settlement. It then will discuss the difficulties encountered during the development of the international investment regime, including the differing opinions on, and motivations for, investment agreements by capital-importing and capital-exporting states. It will discuss the repeated attempts and failures to conclude a widely ratified Multilateral Agreement on Investment (MAI) between capital-importing and capital-exporting states. Finally, it will discuss the relationship between the resulting uncoordinated global BIT regime and relevant principles of customary international law.

Part II will discuss the divergent reception that investor-State arbitration has received. In particular, the differing reactions of capital-exporting and capital-importing states will be
discussed. It will highlight that, while capital-exporting states have been generally satisfied with the fruits of their BIT policies, capital-importing states have been less enthusiastic. The most common criticisms of contemporary investment arbitration practice and jurisprudence will be discussed. These include the aggressive use of investor-State arbitration by investors, the occurrence of conflicting decisions, and the conflicts of interest affecting investor-State arbitrators. Special attention will be paid to criticisms made of the broad interpretation of investment provisions often rendered by arbitral tribunals. Part II will then conclude with a survey of the recent backlash against the international investment regime these concerns have sparked.

Part III will discuss options available to mitigate a widespread regression of investor-State arbitration. It will examine two courses of action. First, it will argue that new investment treaties should expressly address those issues most important to aggrieved States, including the scope of MFN and ‘umbrella’ clauses and the ability of investors to contractually waive their rights under investment agreements. Secondly, it will argue that investment tribunals should reconsider the appropriate balance to be struck between investor interests and state interests in jurisdictional matters. It will argue that the limits of a state’s waiver of immunity and consent to arbitration are the foundational starting point from which tribunals should interpret and apply investment treaties to settle disputes. Specifically, it will argue that the limits of a state’s waiver of immunity and consent to arbitration must be concretely established with a high standard of certainty before a tribunal accepts jurisdiction over an investment dispute.

Part IV will discuss how an obligation for tribunals to adopt a cautious, state-centered approach to state consent to arbitration may remedy the grievances mentioned in Part II. It will also discuss the particularly significant impact this shift would have on the hard cases surveyed. It will then examine the ability of states to contest arbitral awards in which they believe a tribunal has illegitimately asserted jurisdiction over a dispute, including under Article 52 of the Washington Convention and Article V of the New York Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention). Part IV will also examine the degree to which states may be able to further impose an obligation on
investment tribunals to prioritize state interests over investor interests when interpreting a state’s consent to arbitration. While BITs are incapable of significantly contributing to customary international law, the arguments of States, both inside and outside of investment disputes, are not necessarily deficient in this manner. Rather, they may represent State Practice, and as such may constitute part of the wider, customary international law to which tribunals must often resort in deciding disputes before them. This section will consider the merits of this argument, and the degree to which consistent state practice could come to bear on the obligations of investor-State tribunals.

Determining the appropriate approach to state consent to arbitration is an important question to address. If the backlash against BITs continues to burgeon unchecked, international investment law will eventually divide into a complex set of sub-systems if not dissolve altogether. This is not an attractive result as the stability of the international economic order will suffer alongside disintegrating trade and investment relationships. Nonetheless, this appears to be the road along which we have begun, and for understandable reasons. Although sovereign consent to waive immunity is at the heart of investor-State arbitration, many states feel that this consent has been taken for granted, illegitimately expanded, and exploited. Should their objections go unaddressed, or should states become convinced that the limits of their consent will not be honored in good faith, it is only natural to assume that this consent will be withdrawn.

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13 See Cremades & Cairns, *supra* note 8, at 188.
PART I: THE INTERNATIONAL INVESTMENT REGIME

THE ORIGINS OF INVESTOR STATE ARBITRATION

The story of international investment law is a remarkable one. The first BIT was signed between Germany and Pakistan in 1959. By 1990 over 300 BITs had been concluded. By 2006 this figure had grown to over 2500. This growth in investment treaties has triggered a corresponding mushrooming in the number of investment disputes. Less than fifty investor-State arbitrations had been commenced before institutions such as the International Centre for the Settlement of Investment Disputes (ICSID) by the millennium. Since that time at least a further 250 claims have been lodged with this and other prominent international dispute settlement bodies. Where previously investment treaties and investment arbitration were the arcane business of a handful of bureaucrats, they have now attracted the attention of the world’s most influential law firms, political activists and governments.

Investment arbitration’s newfound importance results from its radical transformation of the mechanics of foreign investment dispute resolution. Prior to the BIT regime, disaffected investors were largely dependent on State to State action assumed on their behalf by their home governments. However, in most cases home state representation was difficult to secure. Home states were generally unreceptive to any but the most politically symbolic or economically important of disputes. Furthermore, home states were not often interested in

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18 Besides taking place under the auspices of the ICSID, investment arbitration may also take place under ICSID’s Additional Facility Rules, or before such bodies as the Stockholm Chamber of Commerce, the International Chamber of Commerce, or before an ad hoc tribunal constituted under the arbitration rules of the United Nations Commission on International Trade Law.
19 The absence of this filtration process, by which home states “screened” which disputes they would choose to sponsor, has become noticeably absent within contemporary investor-State arbitration. See Walde, infra note 93, at 16. It has not, however, been completely abandoned. Article 11.16 of the Free Trade Agreement concluded by Australia and the United States requires that aggrieved investors secure the approval of their home governments before they acquire standing to bring an arbitration claim. See Susan D. Franck, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L. J. 337, 359-361 (2007).
bringing claims on behalf of domestic actors against other states for fear of upsetting their relations with those states. Investor-State arbitration was technically possible where the host state had or was willing to agree to private dispute settlement, but this was rare.\textsuperscript{20}

Investor-State arbitration under investment treaties changed this. Where an investment falls under the protection of a BIT, state signatories are understood to have extended a unilateral offer to nationals of their co-signatories to institute arbitration proceedings where these investors allege their investments have been illegitimately treated.\textsuperscript{21} In other words, these investment treaties constitute an explicit waiver of the principles of ‘sovereign immunity’ and ‘act of state’ which would normally bar a private individual or entity from bringing suit against a host state.\textsuperscript{22} The result is an unprecedented body of law that “straddles the line between public and private law” as private commercial concerns intersect with principles of public international law.\textsuperscript{23} No matter how unique this burgeoning jurisprudence is, however, it does not exist in a vacuum. The new international law of foreign investment was, and continues to be, a product of the wider forces of international investment, geopolitics and theory in which it is set.

\textbf{MULTILATERAL AND BILATERAL EFFORTS}

The Second World War left developed, capital-exporting States even more reluctant to intervene in potentially politically sensitive investment disputes than they had previously been.\textsuperscript{24} Their priority was instead to rebuild and strengthen the international community in a

\textsuperscript{20} For a detailed analysis of the trials and tribulations faced by an English company attempting to enforce an arbitration clause concluded within the terms of a concession contract with the Soviet Union in the early part of the twentieth century see V.V. Veeder, \textit{The Lena Goldfields Arbitration: The Historical Roots of Three Ideas}, 47 INT’L & COMP. L.Q. 747 (1998).


\textsuperscript{22} The principle of sovereign immunity serves as a jurisdictional bar against private parties seeking to bring claims against sovereign states in municipal courts. The ‘act of state doctrine’ serves as a substantive bar against municipal courts ruling on the legality of actions taken by sovereign states even where jurisdiction is assumed. See PAUL B. STEPHEN ET AL., \textit{INTERNATIONAL BUSINESS AND ECONOMICS LAW AND POLICY} 187-213 (3d ed. 2004). See also MALCOLM M. SHAW, \textit{INTERNATIONAL LAW} 621-624 (5th ed. Cambridge University Press, 2003).

\textsuperscript{23} Leeks, \textit{supra} note 12, at 2.

\textsuperscript{24} Much of this was due to the Cold War which left western, capitalist states anxious of pursuing the cases of their nationals for fear of driving neutral or uncommitted states towards the Soviet Bloc, see LOUIS T. WELLS &
manner that would safeguard against renewed global conflict. However, as it was widely acknowledged that international investment and trade were central to increasing economic and political interdependence, a workable alternative to state supported investment dispute resolution was increasingly recognized as necessary. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (Washington Convention)\textsuperscript{25} was the first major manifestation of this determination.\textsuperscript{26} It envisioned a self contained, depoliticized forum\textsuperscript{27} in which investors could pursue claims against host states completely independently of their home state.\textsuperscript{28} The Convention was signed in 1965 and is now in force in 143 States, and dispute resolution before ICSID tribunals is a key component of the majority of BITs concluded to date.\textsuperscript{29}

The current popularity of the ICSID system does not mean that investment arbitration’s rise to prominence was universally embraced. BITs have been the backbone of the development of the international investment law regime, but this was not always intended to be the case. Since the creation of ICSID, it has been the goal of many developed, capital-exporting States to secure a multilateral agreement on investment that would create a uniform body of foreign investment law.\textsuperscript{30} However, this project has been consistently rejected by developing, capital-importing States and they have argued against both the formation of such an agreement as well as the principles on which it would be based. The first attempt at a multilateral agreement on investment issues was the 1948 Draft Charter for the International

\begin{itemize}
    \item \textsuperscript{25} See Washington Convention, supra note 7.
    \item \textsuperscript{26} Cremades & Cairns, supra note 8, at 175.
    \item \textsuperscript{27} The depoliticization of investment disputes is often hailed as the greatest achievement of the ICSID system. See I.F.I. SHIHATA, TOWARDS A GREATER DEPOLITICIZATION OF INVESTMENT DISPUTES: THE ROLES OF ICSID AND MIGA (ICSID Publication, 1992).
    \item \textsuperscript{28} LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 8 (Kluwer Law International, 2004).
    \item \textsuperscript{29} ICSID arbitration is only available where both the host state and the home state of the investor have ratified the Washington Convention and where arbitration before ICSID is made available by the relevant investment treaty. Where the treaty does not provide for ICSID arbitration, or where either the home state or host state has not yet ratified the Washington Convention, arbitration using the ICSID Additional Facility Rules may be available. Alternatively, the investment treaty may provide for ad hoc arbitration under UNCITRAL’s arbitrations rules or before an institution such as the ICC. To date, ICSID arbitration has proved to be the most popular forum for the resolution of investment disputes. Through 2007, of the 290 investment arbitration claims lodged by investors, 190 have taken place either before the ICSID or using the ICSID’s Additional Facility Rules. See IIA Monitor No.1 (2008), supra note 17.
\end{itemize}
Trade Organization.\textsuperscript{31} The late 60s saw the Organization for Economic Cooperation and Development’s (OECD) Draft Convention on the Protection of Foreign Property.\textsuperscript{32} The 1990’s saw a renewed push for a Multilateral Agreement on Investment (MAI) by the OECD but these negotiations again failed due to concerns by developing countries and non-governmental organizations that the agreement imposed unjustifiably strict conditions on host states.\textsuperscript{33}

The failure of the MAI was heralded as a major victory for ‘south’ over ‘north’, but the world’s capital-exporting economies were not seriously deterred. What could not be achieved through a single framework was instead accomplished through a comprehensive network of BITs which functionally approximate the MAI’s intended scope and application. In this regard, the heart of the BIT revolution lies in an uncoordinated ‘divide and conquer’ strategy employed by capital-exporting states. While developing states, buttressed by support from non-governmental organizations, were able to collectively resist the investment protection sought by the OECD, they were less capable of maintaining this resistance at the bilateral level due to their asymmetrical bargaining power.\textsuperscript{34} Different arguments are offered to explain this starkly contrasting behavior. Some posit that developing countries entered into BIT negotiations under the mistaken belief that their counterparty would take “affirmative measures to encourage its nationals to invest in their country.”\textsuperscript{35} Others argue that countries were partially induced by the promise of ancillary benefits, including “participation in the capital exporting country’s foreign investment insurance program or obtaining increased political and economic support.”\textsuperscript{36} Andrew Guzman persuasively argues that, in general,

\begin{flushleft}
\textsuperscript{31} See Tschofen, supra note 30. For a discussion of multilateral approaches to investment in the context of international trade, see MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE (3d ed.) (Routledge 2005).
\textsuperscript{32} See Tschofen, supra note 30.
\textsuperscript{34} Graham Mayeda, Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral investment Treaties, (2007) 41 J.W.T. 273, 291 (2007) argues that asymmetries in bargaining power “raise serious concerns about legitimacy and fairness.” A similar asymmetry of will and influence has been identified in the negotiations leading to the inclusion of the Trade Related Investment Measures (TRIMs) in the WTO. See Amit M. Sachdeva, International Investment: A Developing Country Perspective, 8 J.W.I.T. 533, 537-538 (2007).
\textsuperscript{36} See id.
\end{flushleft}
LDCs experienced a prisoner’s dilemma “in which it was optimal for them as a group to reject the developed nations’ views on investment protection but in which each was better off defecting from the group to gain advantages over other LDCs in competing to attract foreign investors.”

Submission to the BIT regime by capital-importing States occurred in a piecemeal fashion. In this regard, it should not be implied that they were unaware of what they were getting themselves into. While traditionally capital-importing States have many criticisms of contemporary investment law and practice, the suggestion that they were ‘duped’ into participating in it is considered patronizing. Among the earliest capital-importing parties to BITs were Indonesia, Ecuador, Kuwait and Togo. Western European countries pioneered the BIT movement from the capital-exporting side, their negotiations facilitated by their former colonial ties to many of their treaty counterparties. Germany was the most active individual country, doubtless interested in protecting its overseas investments having lost all such previous assets as a result of the Second World War. The European experience in concluding investment treaties encouraged the United States and the Reagan administration launched its BIT program in the early 80s. China, after a period of resisting signing investment treaties, reversed its policy in the following decade. In this regard, the


42 J.W. Salacuse, supra note 35, at 657.

43 Id.


defeat of the latest attempted MAI in the late 1990’s was a more a symbolic victory than anything else. The foundations of the BIT regime were by then long firmly in place.46

ECONOMIC, POLITICAL AND LEGAL JUSTIFICATIONS FOR BITs

Although BITs are bilateral treaties with reciprocal obligations, they cannot be properly understood purely from this perspective. The vast majority of early BITs were signed between capital-exporting and capital-importing states, and the interests of the signatories reflected this duality. Investors from capital-exporting States were anxious about conducting foreign investment for a number of reasons.47 They were uncomfortable subjecting themselves to the unfamiliar laws of foreign jurisdictions. They were wary of facing discrimination before foreign courts. They were distrustful of foreign officials and regulators and feared that their investments might be subject to discriminatory treatment, expropriation or harmful exchange controls. Customary international law did little to assuage their concerns. Less consensus on the law of foreign investment existed in the first decades following the Second World War than is the case today.48 Neither did investors have access to a binding enforcement mechanism under which to pursue their claims under this vague law.49 BITs directly accounted for all of these concerns. They established a series of substantive obligations for host states regarding the treatment of foreign investment. They established a clear mechanism through which a disaffected investor may institute proceedings where they feel their investments have been treated in breach of those obligations. Lastly, they established that this dispute resolution mechanism is available to all investors who satisfy a BIT’s standing requirements without the need for any additional consent on the part of the host state.

47 Salacuse, supra note 35, at 659.
48 See Banco de Cuba v. Sabbatino 376 U.S. 398 (1964) for a thorough discussion by the United States’ Supreme Court on the diverging opinions on the customary law of expropriation held by different states in the late 1960’s. See also Barcelona Traction Company (Belgium v. Spain) 1970 I.C.J. 3, 46-47 for a discussion of the lack of consensus on whether shareholders in a corporation have standing to sue on their own behalf during roughly the same period.
49 Salacuse, supra note 35, at 659.
The motivations of capital-importing states in signing BITs were also numerous. Economic advantages attributed to BITs include their facilitation of further relationship building between the signatories, their facilitation of economic liberalization policies, their ability to encourage domestic investment and their ability to strengthen the rule of law and improve governance.\(^{50}\) In this regard, Kenneth Vandevelde posits that for many of these reasons BITs have a strong symbolic value in addition to their economic value, and “signify a state’s assumption of a particular philosophical stance toward foreign investment.”\(^{51}\) However, these reasons aside, it is little debated that the primary impetus behind the signing of BITs by capital-importing States was their promised ability to attract increased foreign capital by reducing the political and regulatory risk inherent to foreign investment.\(^{52}\) Developing countries sought access to capital which did not involve the assumption of debt. Foreign investment also included the additional promise of externalities or spill-over in human and technological capital.

**INVESTMENT PROTECTION PROVISIONS AND CUSTOMARY INTERNATIONAL LAW**

While the effectiveness of BITs in achieving the abovementioned objectives is not uniform,\(^{53}\) the manner in which they pursue their objectives generally is. Although thousands of BITs have been signed by a complex myriad of partners, the provisions contained in these different treaties are remarkably similar. The majority of BITs contain identical or slightly varied expressions of a handful of key substantive host state obligations, including fair and equitable treatment, ‘most-favored nation’ treatment and fair compensation in the event of expropriation or actions tantamount to expropriation.\(^{54}\) The consistency of BIT provisions is

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\(^{52}\) Vandevelde, *Economics*, supra note 51 at 488.

\(^{53}\) See Salacuse & Sullivan, *infra* note 58.

primarily due to the popularity of standard form BITs developed by international organizations such as the OECD.\textsuperscript{55} The protective provisions contained in these model treaties, in turn, originate primarily in disputed principles of international customary law on foreign investment.\textsuperscript{56}

The widespread ‘treatification’ of disputed principles of customary international law does not mean that they are no longer disputed, however. In other words, the ‘treatification’ of disputed principles of foreign investment law has not elevated them to newly minted principles of customary international law. Instead, what results is a two tiered system in which foreign investment is protected by both disciplines. In the first instance, foreign investment is protected by undisputed principles of customary law such as the international minimum standard of treatment, whatever the standard might be regarded to hold at any particular time.\textsuperscript{57} This protection is primarily symbolic however, as no reliable mechanism of enforcement is available to the investor. In the second instance, foreign investment is protected under the robust provisions of relevant BITs, including their investor-friendly dispute resolution provisions. Thus, whereas little more than thirty to forty years ago foreign investment was almost exclusively protected by principles of customary international law, BITs have now overtaken this function. Customary international law has not been replaced, but for many practical purposes it has been usurped.\textsuperscript{58}

Not all commentators agree with this view. Rather, some maintain that the universal proliferation of BITs has done much to advance the substantive content of the international law on foreign investment. Proponents of this view argue that BITs “establish and accept and thus enlarge the force of traditional conceptions of the law of state responsibility for foreign

\textsuperscript{55} See id; Salacuse, \textit{supra} note 35.
\textsuperscript{57} It is now well established that the international minimum standard is dynamic over time. See Mayeda, \textit{supra} note 34; Ian A. Laird, \textit{Betrayal, Shock and Outrage – Recent Developments in NAFTA Article 1105 in NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS} 49 (Todd Weiler ed., 2004).
Several investment tribunals have also adopted the position that BITs are doing much to define the customary international law of foreign investment. In Mondev v United States, for example, it was held that:

“On a remarkably wide basis, States have repeatedly obliged themselves to accord foreign investment [fair and equitable treatment and full protection and security]. In the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.”

The more credible position, however, is that irrespective of their popularity, BITs are not “sufficiently uniform to establish custom accepted by the international community.” Rather, they are *lex specialis* and as such only have effect between the parties. In other words, “because BITs are signed by developing countries in pursuit of their economic self-interest rather than out of a sense of legal obligation, they do not support rules of customary international law.” The continued failure of the international community to reach a multilateral agreement on foreign investment further supports this proposition. It strongly indicates the continued desire by States to discretely control *to whom*, and *in what circumstances*, they consent to grant investment protection. Customary international law, such as the international minimum standard, often informs laws established under particular BITs. However, BITs do not cross-fertilize customary international law in the same manner.

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61 Mondev v United States, *supra* note 60 ¶117.


64 Guzman, *supra* note 37 at 639, 643-644 and 684-687.

65 This point was specifically recognized by the tribunal in United Parcel Service v. Canada, UNCITRAL (NAFTA), Jurisdiction, 22 November 2002 ¶ 97.
PART II: STATE COMPLAINTS AND A NASCENT BACKLASH

CRITICISMS OF INVESTOR STATE ARBITRATION

As discussed, numerous explanations are given for the popularity of BITs among both capital-importing and capital-exporting states. In this regard, little doubt exists that developed, capital-exporting states have been largely satisfied with the fruits of their BIT policies. Various important economic players, including the United States and Canada, have modified their Model BITs to be slightly more conservative than they previously were – mostly due to debate sparked by a series of high profile NAFTA Chapter Eleven cases – but by and large they have both pressed forward in concluding new BITs with new partners. Canada even proceeded to ratify the Washington Convention on 13 March 2008, making arbitration before ICSID tribunals available to disputes under Chapter Eleven for the first time. The reason capital-exporting states are satisfied with the investment arbitration regime is readily explainable. The fact is, outside the NAFTA context, the majority of BIT disputes involve claims made by investors of developed nations against the governments of developing, capital-importing states. In other words, while BITs have been greatly successful in providing the investment protection originally intended by developed-world

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66 Critics in developed countries have become uncomfortable with the idea that BITs grant generous rights to foreign investors that are not available to their own nationals. Ironically, this sentiment has not been widely exposed as indirect support for the ‘Calvo Doctrine’, a theory furiously opposed by many developed countries until recently. See O.M. Garibaldi, Carlos Calvos Redividus: The Rediscovery of the Calvo Doctrine in the Era of Investment Treaties, 3 TRANS. DISP. MAN. (2006), available online at www.transnational-dispute-management.com, last accessed 22 August 2008.


68 The US ratified the ICSID Convention in 1966. As such, once Canada deposits its instrument of ratification with the Centre arbitration before ICSID tribunals will be available, but not mandatory, in disputes between Canadian investors and the United States, and vice-versa. As Mexico has yet to either sign or ratify the Washington Convention, arbitration before ICSID tribunals will remain unavailable in disputes involving a Mexican party.

69 Susan D. Franck, Empirically Evaluating Claims About Investment Treaty Arbitration, 86 N.C.L.Rev. 1, 29 (2007), stating that “investors making claims predominantly hail from developed states” and drawing particular attention to the large number of investors from the United States, Canada, Spain, France, the Netherlands and the United Kingdom making use of investment arbitration.
BIT negotiators, they have only infrequently been used as weapons against those same states.\textsuperscript{70}

Sentiment among developing, capital-importing states towards the BIT regime is less positive. As discussed, different explanations of why these states may have chosen to sign investment treaties have been made while no specific empirical research has explored the commonality of motivations of capital-importing States in this regard.\textsuperscript{71} Nonetheless, available evidence increasingly suggests that developing states do not feel that they have been enjoying their fair share of return on the ‘grand bargain’\textsuperscript{72} of the international investment protection regime. Numerous studies argue that BITs do not result in a marked increase in incoming FDI flows.\textsuperscript{73} Susan Rose-Ackerman and Jennifer Tobin paint a more nuanced picture. They find that, while BITs do have a positive impact on FDI flows to developing countries, this positive impact is greatly dependent “on the political and economic environment surrounding both FDI and BITs.”\textsuperscript{74} In other words, they establish that BITs cannot be viewed in isolation, but must be understood within “the political, economic and institutional features of host countries and between host country BITs and the worldwide BITs regime” in which they occur, and that, as such, BITs are not a panacea for countries with weak political and economic conditions.\textsuperscript{75}

\textsuperscript{70} Id., at 33-35, where the author finds that available data “appears to support Professor Dodge’s attributive hypothesis that [investment treaties] are ‘reciprocal in theory but not in fact’. ” The author is referring to an earlier article in which Dodge argued that investment treaties are “reciprocal in theory but not in fact, for it is generally only the less developed country that bears the risk of being sued.” See William S. Dodge, Investor-State Dispute Settlement Between Developed Countries: Reflection on the Australia-United States Free Trade Agreement, 39 Vand. J. Transnat’l L. 1, 3 (2006).
\textsuperscript{71} Salacuse, supra note 35, at 11.
\textsuperscript{72} Salacuse & Sullivan, supra note 38, at 111.
\textsuperscript{73} See Kevin P. Gallagher & Melissa B.L. Birch, Do Investment Agreements Attract Investment? – Evidence from Latin America, 7 J.W.I.T. 961 (2006); Eric Neumayer & Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?, 33 World Dev. 1567 (2005); Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a Bit... and They Could Bite, (World Bank, Working Paper No. 3121, June 2003); Jason Webb Jackee, Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm, 12 U.C. Davis J. Int’l L. & Pol. 195 (2005). But see also Salacuse & Sullivan, supra note 58, who discovered a positive correlation between the ratification of U.S. BITs and increased FDI flows into the relevant counterparts. Franck, supra note 19 at 340, 353-354, cites investment arbitration is one factor among many considered by investors when deciding where to invest overseas.
\textsuperscript{74} Jennifer Tobin & Susan Rose-Ackerman, When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties (April 25, 2007) (Working paper on file with the author) at 4.
\textsuperscript{75} Id.
Perhaps most importantly, Rose-Ackerman and Tobin establish that the “marginal impact of a country’s own BITs on its ability to attract FDI falls as the global coverage of BITs grows.” As the authors explain:

“Although the growing world total of BITs may stimulate overall FDI to the developing world, the pool of funds remains limited. Hence, the marginal value of BITs as a signal of a strong investment environment in a particular country is dampened by the greater availability of BITs... as the worldwide coverage of BITs increases, the benefit from one’s own BITs, although remaining positive, falls.”

This reveals that, while BITs are a signal of a host state’s desire to foster a safe investment climate in which the risks faced by investors is reduced, the relative strength of this signal is weakened as other signals multiply around it. In other words, the most valuable BITs were the first ones as they provided early signatories with a “first mover advantage.” This advantage has subsequently diminished over time, and while a country’s new BITs will allow it to remain competitive in the foreign investment marketplace, it is unlikely they will carry the same benefit they once would have.

Other studies have arrived at equally troubling evaluations of the effects of BITs on economic liberalization and the domestic promotion of good governance. It is argued that the availability of international investment arbitration can undermine the development of impartial and transparent domestic judiciaries. Furthermore, developing countries contend that, in general, they have been subject to a wide variety of arbitration claims that distort the original rationale of the investment protection regime. They argue that the BIT network “has

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76 Id.
77 Id.
79 Tom Ginsburg, International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance, 25 INT’L REV. L. & ECON. 107 (2005). See also Salacuse & Sullivan, supra note 58, at 92 where they find that the economies of many developing countries that entered into BITs have experienced economic liberalisation, but that “it is difficult to determine the precise role BITs have played in this liberalisation process.” But see also Franck, supra note 19, at 366, where the author argues that “investment treaty arbitration may actually benefit the rule of law, or at a minimum, does not affect a country’s adherence to the rule of law.”
gone from being a protective shield for defending investors against unfair and discriminatory treatment to a sword used by those investors to attack legitimate government regulation pursued in the public interest. “

They claim the result is the imposition of a regulatory freeze in which host States are reticent of pursuing normal policy objectives, including issues related public health and the environment, for fear of attracting liability under BITs.

This apprehension on the part of host states is aggravated by the inconsistent and often contradictory body of investment arbitration case law that has developed in recent years. Examples are bountiful, and lead to great uncertainty as to which situations, and which actions, may attract liability. Similar investment fact patterns have led to different decisions. Similar investment treaty provisions have been interpreted in conflicting ways. Investment disputes have shown the propensity to result in multiple proceedings undertaken by different investors related to the same investment disputes. Award claims have been so large at times as to impose severe burdens on the national reserves of respondent host states. These problems are well-acknowledged. Numerous calls have been made for the

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83 Brower II is not surprised by this. “Despite their sterling qualifications,” he explains, “which remain above question, and their professional disposition of individual cases, ad hoc tribunals share the institutional tendency of juries to produce clusters of decisions with a deficit of consistency and a surplus of arbitrary distinctions... When combined with the discretion granted to tribunals, the growing volume of disputes, and their importance to ever broader consistencies, the use of ad hoc tribunals without coordinating mechanisms seems likely to provoke crisis.” See Brower II, supra note 14, at 921 and 923.
84 Two cases instituted against the Czech Republic in relation to the same investment dispute, one conducted before an ICSID Tribunal and the other before the Stockholm Chamber of Commerce, came to opposite conclusions in 2004. See Franck, supra note 9.
86 The Lauder claims against the Czech Republic, mentioned in footnote 84 above, are again the most poignant example of this possibility under BITs.
87 No less than forty-three claims have been levied against Argentina in relation to the country’s response to its financial crisis in 2001-2002, and its potential liability from these cases alone surpass $8 billion. This sum exceeds the Argentine government’s entire 2002 financial reserves. The country also faces other investment claims not directly related to measures taken in response to the financial crisis. As a result, it has been speculated that “the total value of potential claims against Argentina could reach U.S. $80 billion”. See William W. Burke-White, The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System, (Research Paper No.08-01) University of Pennsylvania Law School – Institute for Law and Economics
establishment of an international investment appeals tribunal to develop a consistent approach to these controversial issues.\textsuperscript{89} However, to date no consensus can be reached as to whether such a forum is feasible.\textsuperscript{90}

Perhaps the greatest source of distress for developing, capital-importing states has been what is referred to as the ‘pro-investment bias’ of international investment arbitration. In other words, not only have capital importing states found that investment arbitration has been used by investors more aggressively than originally anticipated, but so too have they found investment tribunals overly eager to adopt broad interpretations of investment provisions that illegitimately expand their application in favor of investors and at the expense of host states. The list of grievances is long.\textsuperscript{91} From a procedural standpoint, it is argued that many Tribunals have adopted an impermissibly broad interpretation of Most Favored Nation (MFN) clauses to extend a claimant’s access to procedural rights as well as substantive rights contained in other investment treaties.\textsuperscript{92} It is argued that ‘umbrella clauses’ have been improperly interpreted to elevate mere breaches of contract in investment disputes to breaches of international law.\textsuperscript{93} The routine dismissal by tribunals of forum selection clauses

\textsuperscript{88} See Brower et al., supra note 9.
\textsuperscript{89} See Franck, supra note 9; Brower et al., supra note 9.
\textsuperscript{90} See Franck, supra note 9.
\textsuperscript{91} Additional complaints exist that are not listed here. For example, the acceptance of treaty shopping, whereby foreign companies incorporate their investments in a State purely to attract standing under its BITs with other host nations, is criticised as undermining the bilateral nature of BITs; see M. Sornarajah, supra note 2, at 349, referring to Tokio Tokeles v. Ukraine, ICSID Case No. ARB/02/18.
\textsuperscript{93} T. Walde, \textit{The ‘Umbrella’ (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases}, 1 TRANS. DISP. MAN. (2004), available at www.transnational-dispute-management.com, last accessed 14 August 2008. For a contrary opinion see John P. Gaffney & James L. Loftis, \textit{The Effective and Ordinary Meaning of BITS and the Jurisdiction of Treaty-Based Tribunals to Contract Disputes}, 8 J.W.I.T. 5 (2007). Closely linked to the controversy surrounding umbrella clauses is that surrounding broadly drafted Disputes Resolution Clauses (DRCs) in investment treaties. While both ‘umbrella clauses’ and DRC clauses are capable of bringing ordinary contractual disputes before investment tribunals, they raise distinct issues and only the former will be dealt with in this thesis. For a discussion of DRCs and their attendant controversies, see Gaffney & Loftis.
contained in investment contracts stipulating litigation in the host state’s courts has also
drawn fire.\textsuperscript{94} From a substantive standpoint, it is argued that the fair and equitable standard
has been improperly extended beyond guarantees of procedural fairness and due diligence to
provide excessive protection for foreign investments.\textsuperscript{95} In a similar vein, it is argued that
tribunals have been too liberal in their examinations of whether compensable expropriations
have occurred without properly balancing the interests of investors with those of the host
state.\textsuperscript{96}

These criticisms are exacerbated by allegations that investment tribunals have vested
interests in taking this expansive approach to procedural and substantive issues. Critics are
suspicious of the impartiality and independence of the arbitrators composing investor-state
tribunals.\textsuperscript{97} They argue that the investment arbitration system has become monopolized “by a
group of developed country lawyers, trained largely in business arbitration, prone to a purely
contractual analysis of disputes, without having heed to the public and other interests that are
at stake.”\textsuperscript{98} They argue that arbitrators have a conflict of interest that weighs in favor of
interpreting investment protections provisions as widely as possible to promote future
investment arbitrations and thus further employment and other business opportunities.\textsuperscript{99} They
argue that ad hoc tribunals are ill-suited and ill-posed to determine complicated claims

\textsuperscript{94} For a number of investment arbitrations in which the respondent host state has sought to rely on forum
selection clauses as \textit{de facto} waivers by investors of their right to pursue arbitration, see Ole Spiermann,\
\textit{Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment
Treaties}, 20 ARB. INT’L 179 (2004). See also Christoph Schreuer, Calvo’s Grandchildren: The Return of Local
\textsuperscript{95} G. Mayeda, \textit{supra} note 34, at 275 and 288. See also Thomas J. Wesscott, \textit{Recent Practice on Fair and
\textsuperscript{96} See Ursula Kreibaum, \textit{Regulatory Takings: Balancing the Interests of the Investor and the State}, 8 J.W.I.T.
717 (2007).
\textsuperscript{97} See JAN PAULSSON, \textit{THE DENIAL OF JUSTICE IN INTERNATIONAL LAW} 228-262 (Cambridge University Press,
2005); G. Van Harten & M. Loughlin, \textit{Investment Treaty Arbitration as a Species of Global Administrative
REV. 455, 488 and 521 (1997). See generally Hong-Lin Yu & Lawrence Shore, \textit{Independence, Impartiality, and
\textsuperscript{98} Sornarajah, \textit{supra} note 2, at 341.
\textsuperscript{99} Id., at 348; Howard Mann, \textit{From a Law of Greed to a Law for Need: the underlying importance of professor
Sornarajah’s paper}, 6 INT’L ENVTL. AGREEMENTS 359, 360 (2006); Jacques Werner, \textit{The Global Arbitrators}, 8
J.W.I.T. 745, 748-750 (2007); T. Walde, \textit{Investment Arbitration and Sustainable Development: Good Intentions
or Effective Results?}, 6 INT’L ENVTL. AGREEMENTS 459, 462 (2006).
related to public measures, issues of public policy and welfare and responsible governance.\textsuperscript{100}

In total, critics posit that “international law has seemingly lost its way,” and that the traditionally sacrosanct notion of state sovereignty as the basis of international law has been the great victim of this development.\textsuperscript{101} A.F. M. Maniruzzaman, for one, laments that “the Westphalian notion of sovereignty of states has given in to market forces crowning multinational corporations, at least in the field of business and international economic relations, as the dominant players in both public and private spheres of international life.”\textsuperscript{102} Eduardo Savarese, provides another interpretation of the current state of international investment law.\textsuperscript{103} He highlights the tension between pro-investment and pro-sovereignty approaches as deriving from the difficulty in distinguishing between investment treaties as “traditional instruments aimed at regulating inter-State relationships so as to require full respect of the limits of the consent to arbitration negotiated by the state involved,” and as “instruments aimed at fostering the investor’s right to access to international arbitration.”\textsuperscript{104} The former approach is primarily concerned with precisely drawing the scope of a sovereign’s consent to arbitrate.\textsuperscript{105} The latter approach is concerned exclusively with the benefits conferred by treaties to investors regardless of how those benefits may impair state interests.\textsuperscript{106}

\textbf{The Beginning of a Backlash}

Regardless of the exact nature of the complaints levied against the current state of international investment law and arbitration, the consequences are the same. If BITs are not

\textsuperscript{102} Maniruzzaman, \textit{supra} note 101, at 365.
\textsuperscript{103} See Savarese, \textit{supra} note 10.
\textsuperscript{104} \textit{Id.}, at 420-421.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
considered to deliver on their promises, it is likely that developing, capital-importing nations will seriously reconsider their commitment to BIT regimes. Such a backlash has been feared since the beginning of the BIT regime. It is arguable that it has now begun.

In April 2007 Bolivia submitted a letter to ICSID under Article 71 announcing its decision to withdraw from the Washington Convention. It is the first of the 144 countries to ratify the ICSID Convention to exercise this right. Venezuela and Nicaragua have made similar representations but have yet to submit a notice. On 5 February 2008 Ecuador announced its intention to denounce at least 9 of its BITs. This followed Peru’s submission to ICSID on 5 December 2007 of a notice under Article 25(4) of the Washington Convention announcing the removal of its consent to investment arbitration for claims related to mining and energy. Argentina has toyed extensively with the possibility of requiring all foreign investors to exhaust all local remedies before being able to institute a claim before an international tribunal. The constitutionality of investor-State arbitration has been seriously challenged in Venezuela and its continued legality domestically is said to hinge greatly on the ideological inclinations of the country’s Supreme Court. Most recently, the renegotiation of NAFTA, including Chapter Eleven, has become a heated point of debate in the American presidential election campaign.

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107 For a thorough cost/benefit analysis of the adoption of bilateral investment treaties over other methods of regulating foreign investment, see K. Vandevelde, Economics, supra note 51.
108 See generally J. Paulsson – Privity, supra note 21, at 257; Cremades & Cairns, supra note 8, at 188.
111 See www.worldbank.org/icsid/.
112 Bernardo M. Cremades, Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues, 59 DISP. RESOL. J. 78, 81 (2004). Note, however, that such requirements could only be prospective in nature and would only be available in future treaties. They could not affect obligations assumed by Argentina in treaties already ratified by the country.
113 Id., at 81 and 83.
This revolt is at present concentrated in South America. This is not surprising. Historically, Latin America has been the strongest source of opposition to international investment protection. The Calvo Doctrine, which holds that international investors need only be afforded those rights and privileges enjoyed by nationals of a country, was championed by Carlos Calvo, a nineteenth century Argentine diplomat.\(^{114}\) The doctrine holds true regardless of the standard of rights and privileges afforded to a country’s nationals, and functions to prohibit access to any international dispute resolution forum geared toward the rights of aliens. Latin America was the last major geopolitical and cultural regime to acquiesce to participation in the international BIT regime.\(^{115}\) It has also recently become the first geopolitical region to show renewed interest in reviving the Calvo Doctrine, albeit in different forms.\(^{116}\) Furthermore, Argentina, the continent’s second largest economy, has faced more investor-State arbitrations than any other country.\(^{117}\)

However, there is no reason to assume that this tangible dissatisfaction with the BIT regime will remain limited to Latin America. As acknowledged by Christoph Schreuer, “the future of investment arbitration is by no means certain,” and the symbolic significance of Bolivia’s denunciation of the ICSID Convention “should not be underestimated.”\(^{118}\) Investment arbitration, as discussed above, has not fundamentally altered the state of customary international law. It remains a consent based system of bilateral treaties. Some of these treaties will terminate after a stipulated period of time. Most others may be terminated unilaterally by either party after a mandatory period of time has expired, normally ten to twenty years.\(^{119}\) Either way, states ultimately remain in control of the degree to which, if at all, they undertake obligations toward foreign investors.\(^{120}\) At present Latin America is the

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\(^{114}\) See Garibaldi, supra note 66. See also Schreuer, supra note 94; Cremades, supra note 112.


\(^{116}\) See Schreuer, supra note 94; See also Cremades, supra note 112.

\(^{117}\) The majority of the investment arbitrations instituted against Argentina arose as a result of drastic regulatory measures adopted by the country in response to its 2001 financial crisis; Burke-White, supra note 87.


\(^{119}\) Once a State exercises its right to terminate a BIT, termination most often goes into affect one year later. See, for example, Article XVII(2) of the Canada – Venezuela bilateral investment treaty.

\(^{120}\) As described by Hazel Fox, States and Undertakings to Arbitrate, (1988) 37 INT’L &COMP. L. Q. 1, 4 (1988): “There is not today and never has been any general method of compulsory adjudication at the international level. A state which makes the undertaking to enter into arbitration knows that nothing but good
exception, but it may prove to be the catalyst of a far broader regressive movement in the law of foreign investment. There is even reason to suspect that tears are beginning to surface within the fabric of the investment arbitration community itself. William Burke-White finds ICSID’s Annulment Committee’s critique of one tribunal’s award “so blatant and at times even confrontational that the Committee may have been attempting to call into question the legitimacy of the CMS Tribunal and, more generally, a system that lacks appellate review to reverse gross and outcome determinative errors of law.” He finds the decision “so remarkable that it seems difficult to interpret it as anything but an “attack on the ICSID system from within” and wonders whether it may forewarn of a coming “crisis of confidence” in the investor-State system.

PART 3: STATE CONSENT AND INVESTOR INTERESTS

THE ASYMMETRICAL STRUCTURE OF BITs

If investment arbitration instituted under BITs has largely overlooked State interests in favor of investor interests, it is partly because host state interests often go unaddressed in BITs themselves. In other words, most BITs are overwhelmingly preoccupied with the obligations host States owe investors and pay scant attention to the preservation of sovereign prerogatives. This asymmetry can be largely explained by the fact that the first capital-exporting states to conclude BITs did not expect to be respondents in future investor-State disputes. They understood BITs primarily as means to protect their nationals abroad, and as such sought to secure the widest protection possible without fear that the provisions might

faith and the general principle, pacta sunt servanda, holds it to the arbitration. There is generally no external authority which can make an order compelling the State to submit to the arbitration.”

121 Burke-White, supra note 87, at 29, referring to CMS Gas Transmission Co. v Argentine Republic, ICSID Case No. ARB/01/08, Decision of the ad hoc committee on the Application for Annulment (September 25, 2007).

122 Burke-White, supra note 87, at 26 and 30.

123 Sornarajah, supra note 2, at 342.

be used against their own interests.\textsuperscript{125} The result was lopsided documents that resembled laundry lists of protective provisions rather than balanced accounts of investor and sovereign interests. These pioneering BITs became the models upon which later BITs were based, and their asymmetrical structure was thus perpetuated.\textsuperscript{126}

In this regard, the best way to address the uneven nature of BITs is for the next generation of investment treaties to expressly preserve those sovereign prerogatives disaffected states believe have been illegitimately infringed. Tribunals turn first to the text of investment treaties to decide disputes.\textsuperscript{127} Where the treaty unequivocally expresses the intentions of the signatories, no room for discretion exists. The tribunal must give effect to the will of the parties. Therefore, more carefully crafted treaty provisions should remove much of the uncertainty that has plagued investment tribunals in the past. Problems associated with the interpretation and application of “Most Favored Nation” (MFN) clauses, so called ‘umbrella clauses’, and forum selection clauses contained in individual investment contracts exemplify the promise of this approach.

As discussed, the broad application of “Most Favored Nation” (MFN) clauses has caused great concern among numerous respondent states.\textsuperscript{128} At issue has been the willingness of investment tribunals to apply MFN clauses to grant investors access to dispute resolution provisions contained in a host State’s other investment treaties in addition to their substantive provisions. In \textit{Maffezini v Spain},\textsuperscript{129} for example, an Argentine investor bringing suit against Spain relied on an MFN provision in the \textit{Argentina – Spain} BIT to access the more favorable dispute resolution provisions contained in Spain’s BIT with Chile. Maffezini argued that he was entitled to the less restrictive waiting period contained in the \textit{Chile – Spain} BIT. Spain countered that as the MFN clause was intended to prevent discrimination arising in

\textsuperscript{126} Soloway, \textit{supra} note 51, at 4.
\textsuperscript{127} The primacy of the text in deciding investment disputes is enshrined in Article 31 of the Vienna Convention on the Law of Treaties. Article 31 provides that tribunals must first seek to interpret investment provisions by their ordinary meaning in light of the object and purpose of the agreements.
\textsuperscript{128} See \textit{supra} note 92.
\textsuperscript{129} Emilio Agustin Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, 5 ICSID Reports.
connection to “material economic treatment,” it could not apply to “procedural matters such as dispute resolution procedures.” The tribunal decided to grant Maffezini access to the more favorable procedural provisions contained in the Chile – Spain BIT. It did so for two main reasons. First, it felt that the less restrictive procedural provisions contained in the Chile – Spain BIT were clearly more ‘favorable’ in nature and that, as such, the MFN clause should extend to them. Secondly, it held that where a MFN clause is broadly worded, as it found the MFN clause in the Argentina – Spain BIT to be, a presumption is raised that it was intended to extend to dispute settlement provisions. Similar applications of MFN clauses have been made in subsequent investment disputes, including in Siemens v Argentina and Gas Natural v Argentina.

States have been similarly aggrieved by the interpretations rendered of ‘umbrella clauses’. These are investment protection provisions generally intended to provide additional protection to investors, but which arguably also purport to elevate ordinary breaches of contract to breaches of international law. They do this by requiring that host states honor or guarantee compliance with undertakings assumed. For example, Article II(2)(c) of the Romania – United States BIT provides that “each party shall observe any obligation it may have entered into with regard to investments.” Tribunals applying ‘umbrella clauses’ must navigate two opposing arguments. On the one hand, investors argue that tribunals must give substance and effect to a specific term incorporated into treaties by their signatories. On the other hand, States argue that umbrella clauses must not be allowed to operate to elevate mere breaches of contract to infractions of international law. A common compromise between these positions adopted by investment tribunals differentiates between action taken by the host State which is of a purely commercial nature and action by the host State which is

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130 Hsu, supra note 92, at 27.
131 Id., at 28.
134 See, for example, Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 29 November 2004 at para 126.
135 Romania – United States Bilateral Investment Treaty, Article II(2)(c).
136 See Noble Ventures Inc. v Romania, ICSID Case No. ARB/01/11, Award 12 October 2005, ¶ 52.
137 See SGS Societe Generale de Surveillance v Islamic Republic of Pakistan, ICSID Case No. ARB/02/6, Decision on Jurisdiction 6 August 2003, ¶ 97 and 166.
of a distinctly sovereign character. Actions of the former nature will generally not attract liability under the umbrella clause. Actions of the latter nature generally will. Some critics view this division as illusory, however, and its application has not completely quelled state dissatisfaction.

Attempts to pre-emptively oust the jurisdiction of investment arbitration tribunals raise comparable issues. The vast majority of BITs, if not all of them, do not address the possibility of investors waiving the protections granted to them. Nonetheless, various attempts have been made to exclude the application of BITs through reference to contractual clauses to that effect. Typically, such clauses are forum selection agreements that stipulate that investment disputes are subject to settlement before the host nation’s domestic courts. These are generally negotiated at the behest of the state party to an investment or concession contract. In this regard, unlike MFN clauses and ‘umbrella clauses’, they are clauses which states argue should be given wide effect. That said, to the frustration of state parties, to this point forum selection clauses have been routinely denied effect by investment tribunals. Critics of these clauses argue that they are ineffective in removing the authority of a panel whose jurisdiction is based on an international treaty. Respondent host states have typically attempted to draw an analogy with international commercial arbitration whereby the relevant treaty establishes a third party beneficiary system that is capable of waiver by

138 See Kunoy, supra note 85, at 288-293.
139 Id., at 291-293.
141 See, for example, Venezuela’s 2001 Hydrocarbons Law which calls for the following clause to be incorporated in future public-private energy contracts: “Any doubts and controversies of any nature that may arise from the agreement and that may not be amicably settled between the parties, including arbitration in cases permitted by the law on the matter, shall be settled by competent courts of the Republic of Venezuela pursuant to its laws, and may not give rise to any foreign claims for any reasons whatsoever.” For a discussion of the history and origins of such clauses, referred to generally as ‘Calvo Clauses’ after the 19th Century Argentine diplomat, see Garibaldi, supra note 66.
142 Because a specific investment contract with the host State or State-entity is required, this issue cannot arise where no specific agreement concerning the investment in question has been reached between an investor and a host state.
144 See Spiermann, supra note 94.
the investor. The general consensus is that, while a forum selection clause is effective in removing an investment tribunal’s jurisdiction to decide contractual claims, it is ineffective in attempting to remove the tribunal’s authority to hear claims based on substantive protections guaranteed by a treaty. However, no consensus exists regarding whether an investor is capable of waiving all recourse to investment treaties via an explicit clause to that effect.

**ADDRESSING JURISDICTIONAL ISSUES THROUGH EXPRESS REFERENCE**

Amendments to investment treaties can ameliorate each of the above ambiguities. Numerous tribunals have stated that MFN clauses can expressly address whether they are intended to extend to procedural provisions as well as substantive provisions. Academics clearly support this position, and there is no reason why the same treatment cannot be applied to both umbrella clauses and investor waivers. Umbrella clauses could elaborate the precise function they are intended to serve. For example, they could definitively establish whether they are meant to give investor-State tribunals jurisdiction over claims based on mere contractual breaches and, if so, what law is to be applied to these disputes. Alternatively, they could specify that they are meant to apply solely to breaches of contract founded upon state action of a distinctly public nature, and provide criteria indicative of such action. Investment treaties could also specifically acknowledge whether the signatories intend investor rights to arbitration to be subject to express waiver by individual investors.

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145 Id.
147 Spiermann argues that such waiver is possible, supra note 94, at 207-210.
148 See, for example, Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 8 February 2005, 20 ICSID Review – FILJ 262 (2005), ¶ 223; Emilio Agustin Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, 5 ICSID Reports ¶ 52.
149 Hsu, supra note 92, at 35-36. Hsu mentions the use of the floating footnote which expressly explains whether a MFN clause is intended to include or exclude dispute resolution procedures before “disappearing from the final treaty text and receding into the travaux preparatoires of the treaty for future reference.”
151 See Spiermann, supra note 94.
This would be an overwhelmingly positive development. Greater clarity of drafting will result in improved transparency and predictability in the scope and application of investment treaties.\footnote{152} This will reduce risk and enhance the efficiency of foreign investment for both investors and host states.\footnote{153} In the case of MFN clauses, the express exclusion of access to third party treaties can provide host states with certainty as to which investment protection provisions will be applicable in a given dispute.\footnote{154} It can also prohibit treaty shopping and other potentially abusive practices by investors.\footnote{155} Provisions addressing the scope and application of umbrella clauses and investor waivers will also clarify which claims have standing under investment treaties and which causes of action must be pursued before the courts of the host state. This will significantly clarify the rights and obligations of the parties and reduce the possibility of costly and inefficient parallel proceedings before multiple forums.\footnote{156}

**REBALANCING INVESTOR AND HOST STATE INTERESTS**

**Correcting the Interpretative Lens through which BITS are Viewed**

Such renegotiation of BITs will do much to resolve currently contentious issues. However, this will be a drawn out process that is likely to occur in a piecemeal fashion. Current BITs are set to expire at different times and different national BIT policies are generally not coordinated.\footnote{157} Therefore, it remains imperative to explore how investment tribunals may

\footnote{152} Brower II, supra note 14, at 917-918, makes the argument that more detailed drafting of substantive provisions in investment treaties may not necessarily be in the best interests of respondent states. Rather, he argues that the optimal solution may be to grant wider discretion to tribunals with an accompanying obligation to give the benefit of the doubt to states in close cases.

\footnote{153} See McIlroy, supra note 67, at 644.

\footnote{154} Hsu, supra note 92, at 29.

\footnote{155} Id.

\footnote{156} See Gilles Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID Rev. – FILJ 381 (2006). See also C. McLACHLAN ET AL., supra note 146, at Chapter 4.

\footnote{157} As mentioned, most BITs were signed for durations of ten to fifteen to twenty years, after which they would either cease or extend indefinitely until terminated by a party. However, standard terms of termination provide that termination only becomes effective a year from the date the declaration of termination takes place. Furthermore, most BITs provide that investments made previous to termination will still enjoy protection.
better resolve the controversies plaguing BITs currently in place. As mentioned, this can be best accomplished by reanalyzing the means by which investment agreements are commonly understood.

To date BITs have too frequently been interpreted primarily as instruments intended to grant rights to third party investors. This approach involves an inaccurate assessment of the origins and intended function of BITs. It is also liable to lead tribunals towards asserting jurisdiction over disputes states may not have intended them to have. First and foremost, BITs must be appreciated as instruments intended to outline the circumstances in which sovereign states agree to waive immunity and submit disputes to binding arbitration. Furthermore, these instruments must be interpreted with an eye to definitively establishing state consent to arbitration in the circumstances before a tribunal will assert jurisdiction over a dispute. This correction does not involve setting an unusual course. One the one hand, it requires dismissing erroneous assessments of investor-State arbitration. On the other hand, it requires revisiting the nature of the arbitration agreement fundamental to investment arbitration.

Dismissing Erroneous Assessments

International law has been experiencing a profound transformation in recent decades. Whereas international legal norms traditionally operated to regulate the exercise and limits of the sovereign acts of states, to this dynamic has been added “a number of ill-defined and often vague relationships between classical subjects of international law, such as States or international organizations on the one side, and individuals, enterprises, non-governmental organizations and civil society on the other.” These developments have inspired much interesting analysis, and in the context of investment arbitration many now question whether BITs vest individual rights in investors as subjects of international law. The debate is a popular one. Investment rights guaranteed under investment treaties are routinely compared throughout their lifetime. This could make older BITs applicable for years if not decades after they have ceased to apply to new transactions.

158 Savarese, supra note 10, at 418.
to human rights accorded under treaties such as the European Convention of Human Rights or the American Convention of Human Rights.\textsuperscript{160} The comparison flows from the tendency of investment agreements to entitle investors, like private individuals, to “a process for the resolution of their disputes which respects the basic elements of procedural fairness, including the recognition of the rights of all parties to be heard, to have due deliberation by a duly constituted tribunal, and to have a reasoned judgment free from fraud and corruption.”\textsuperscript{161}

Other illustrations of the investor-State model are offered. Van Harten & Loughlin, for example, argue that investment arbitration can best be understood as a novel species of global administrative law.\textsuperscript{162} They distinguish investor-State arbitration from both human rights proceedings and traditional international commercial arbitration by focusing on its authorization by the state of arbitration of disputes arising from the state’s exercise of public authority as opposed to private acts of the state. In this regard, they argue that investment arbitration is most closely analogous to “domestic judicial review of state conduct.”\textsuperscript{163} “Like the members of any administrative tribunal or court”, the authors argue, “in reviewing executive acts, arbitrators rule on the legality of state conduct, evaluate the fairness of government decision-making, determine the appropriate scope and content of property rights, and allocate risks and costs between business and society.”\textsuperscript{164} As the authors conclude, more so than human rights disputes or commercial arbitration, “this is the stuff of administrative law.”\textsuperscript{165}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{161}] See J.E. Alvarez – Ripples, supra note 160 at xxx, where the author states that some commentators argue that certain investment guarantees, “such as the right not to be discriminated against on the basis of nationality and the right to compensation when personal property is seized by the state,” have human rights antecedents.
\item[\textsuperscript{162}] Van Harten & Loughlin, supra note 97. See also Kingsbury, Kirsch & Stewart, \textit{The Emergence of Global Administrative Law}, 68 LAW & CONTEMPORARY PROBLEMS 15 (2005).
\item[\textsuperscript{163}] Van Harten & Loughlin, supra note 97 at 144-148, referring to Cremades & Cairns, supra note 8.
\item[\textsuperscript{164}] \textit{Id.}, at 147.
\item[\textsuperscript{165}] \textit{Id.}
\end{itemize}
\end{footnotesize}
While these explanations are very informative, they are also potentially misleading. The unique associations created by investment arbitration allow for many interesting comparisons, but it cannot be forgotten that the investor-State dynamic created by investment treaties is secondary to the inter-State dynamic at the heart of the investment treaty itself. In the words of Stephen Toope:

“The ‘capacity of a private individual or a corporation to proceed directly against a State’ remains a limited exception to the first principles of international law. It is only because states agreed in a multilateral convention [referring to ICSID] to subrogate certain of their rights of action that non-state parties can ‘proceed directly against a State’.”

In other words, while investment treaties create investor rights, these will nonetheless always remain derivative rights. Investors are not party to investment treaties. They are merely third party beneficiaries of such treaties. Furthermore, States are not abdicating their sovereign rights by consenting to investment arbitration: they are exercising “their sovereign rights in an environment where the interests they seek to protect are many and diffuse.” As such, the novel dynamics created by investment arbitration should not be allowed to distract tribunals from the fundamental legal relationships at issue. They should not be allowed to persuade tribunals to consider investor interests before first respecting sovereign prerogatives. To take any other approach skews the application of investment provisions and turns the treaties on their heads.

The Centrality of State Consent and the Agreement to Arbitrate

It is equally important to understand that the uniqueness of the investor-State system does nothing to diminish the centrality of state consent to arbitration within that system. As discussed, prior to the BIT regime investment disputes were limited to State to State action.

166 S.J. TOOPE – MIXED ARBITRATION, supra note 160, at 251.
168 Others are less quick to decree state sovereignty as sacrosanct. See, for example, Louis Henkin, The Mythology of Sovereignty, AM. SOC’Y INT’L L. NEWSLETTER 1 (March 1993).
Aggrieved investors were required to exhaust all local remedies before petitioning their home state to assume a claim on their behalf. Whether or not to sponsor an investor’s claim remained at the discretion of the host state. Afterwards, the International Court of Justice would only assume jurisdiction in an inter-State investment dispute where both parties had clearly indicated their consent to such proceedings. States had no obligation to give such consent. Where they withheld this consent, no foreign forum would typically agree to assert jurisdiction over the acts of sovereign states within their own territory in the interests of international comity.

State consent to arbitration and the express waiver of sovereign immunity that accompanies it is equally important in the investor-State system. It merely takes a different form. Whereas under traditional State to State dispute settlement a host State consents to the jurisdiction of a forum after a dispute has arisen, under BIT arbitration the requisite state consent generally begins prior to the dispute in the BIT itself. In other words, the BIT’s arbitration provisions constitute a waiver of sovereign immunity and invitation to binding arbitration extended by the host state to all investors who satisfy the treaty’s standing requirements. They represent a standing offer of arbitration by the host state to eligible foreign investors who can accept the offer by instituting arbitration in the prescribed manner. When this is done, an informal arbitration agreement between the foreign investor and host state is perfected.

169 As described by Fox, supra note 120, at 7; “there is not today and never has been any general method of compulsory adjudication at the international level. A state which makes the undertaking to enter into arbitration knows that nothing but good faith and the general principle, pacta sunt servanda, holds it to the arbitration. There is generally no external authority which can make an order compelling the State to submit to the arbitration.”


171 As described by J.C. Thomas, Investor-State Arbitration under NAFTA Chapter 11, 37 CAN.Y.B. INT’L L. 99, 112 (1939), “a cornerstone of the law of arbitration is the requirement that the parties consent to the arbitration of their differences” and this is no less the case in regards to the jurisdiction of ICSID. Consent by state parties is expressly require by ICSID Convention Article 25, and has been described as the “cornerstone of the jurisdiction of the centre”; see Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of Other States, 1 ICSID REP. 23 (1965).

172 Paulsson, supra note 21, at 232. See also Levesque, supra note 10, at 322.

173 Paulsson, supra note 21, at 232.
This ‘de-coupled’ approach to State consent to arbitration does much to disguise its importance. It does much to take State consent for granted and shift attention to the rights of investors. However, the unilateral nature of a State’s consent to arbitration contained in a BIT does not diminish the fundamental importance of that consent. It remains the key to the legitimacy of all procedures that follow and is not made without limitations. Waiver of sovereign immunity is a “potentially costly political” act that is not undertaken lightly.\textsuperscript{174} It is a conscious and strategic decision made in the attempt to attract constructive assets flows intended to advance national economic interests. It is a “loss of liberty” and an “acceptance of constraints from which the state is otherwise free.”\textsuperscript{175} Furthermore, it is an inherently public act that can only be undertaken by a sovereign state rather than any ordinary private entity party to an arbitration agreement.\textsuperscript{176} As such, waiver of immunity must be approached with the scrutiny normally accorded to State consent to binding dispute resolution.\textsuperscript{177} Waiver of immunity and state consent to arbitration must be considered the foundational starting point from which tribunals interpret and apply investment treaties to settle disputes. Most importantly, as is customary in traditional arbitration proceedings, waiver of immunity and state consent to arbitration must be concretely established with a high standard of certainty before an investor-State tribunal accepts jurisdiction over an investment dispute.\textsuperscript{178}

\textit{Comparing Investor-Centered and State-Centered Arbitral Decisions}

A survey of investment arbitration awards suggests that these points are often overlooked, and that the primacy of state consent to arbitration is often underemphasized by tribunals.\textsuperscript{179}

\begin{footnotes}
\item[174] Rubins, \textit{supra} note 67, at 873.
\item[175] Fox, \textit{supra} note 120, at 4. Because private parties choose arbitration as an escape form litigation while States are rarely bound to any effective third party adjudication, Fox explains that consent to arbitration is more of a sacrifice for a state than it is for a private party.
\item[177] Bjorklund, \textit{supra} note 10, at 184, suggests that the interpretation of state consent to arbitration should involve consideration of “the historic reluctance of states to waive sovereign immunity”.
\item[178] See Paulsson, \textit{supra} note 21.
\end{footnotes}
As Savarese explains, two separate actions may be at work. On the one hand, tribunals may interpret investor rights broadly to infringe upon sovereign prerogatives. On the other hand, a State’s intention to retain sovereign immunity may be interpreted narrowly or otherwise overlooked by a tribunal. Where this is done the intended neutrality of investment arbitration meant to balance the interests of investors and state parties in an objective and depoliticized manner is damaged. The basis of investment arbitration is distorted by the decision of tribunals to interpret their duty as one owed to investors rather than to the treaty’s State signatories.

One issue before the tribunal in AAP Ltd v Sri Lanka, for example, was the effect of the MFN clause in the Sri-Lanka – United Kingdom BIT. As in Maffezini, AAP sought to use the clause to “borrow” dispute settlement provisions in the Sri-Lanka – Switzerland treaty. Also as in Maffezini, the tribunal in AAP Ltd v Sri Lanka decided to consider this argument. However, rather than approach the question by examining whether it was likely that Sri Lanka and the UK had intended the MFN clause to apply to procedural provisions in addition to substantive provisions, the tribunal was instead solely concerned with identifying whether or not the Switzerland treaty did in fact provide for treatment that was more favorable. It found that it did not, and thus found that the MFN clause did not apply. However, this approach suggests that, had more favorable treatment been identified, no other issue, including the intentions of the state parties, need be addressed. This is an investor-centered perspective. It puts the interests of the investor at the center of the investigation and disregards the primacy of state consent. It evidences a presumption that protective provisions should be interpreted broadly in favor of investor rights with the onus of rebutting that presumption lying with respondent host States.

The Maffezini tribunal followed the example set by the AAP Ltd v Sri Lanka tribunal. Interpreting MFN clauses broadly to catch all relevant procedural provisions, the tribunal

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180 Savarese, supra note 10, at 408.
183 Hsu, supra note 92, at 27.
opined, would improve the “harmonization and enlargement of the scope of such arrangements.”¹⁸⁴ This is also an investor-centered approach as it equates the vitality of the international investment regime with the increase in protection afforded to investors. It suggests that unifying all dispute resolution procedures available to foreign investors by eliminating the application of all but the most favorable terms would be a positive development. The tribunal in Siemens A.G. v Argentina concurred with and advanced this approach. “The purpose of the MFN clause,” it held, “is to eliminate the effect of specially negotiated provisions unless they have been exempted.”¹⁸⁵ It is, in other words, to create a novel treaty composed of the most favorable provisions included in the rest of a host state’s investment treaties accessible through the application of the MFN clause. This argument totally disregards the primacy of state consent to arbitration. It grounds investor interests as the cornerstone from which sovereign rights and obligations must then be built rather than the opposite. It is a teleological approach to treaty interpretation that assumes that the sole purpose of BITs is the advancement of investor rights at the expense of sovereign rights rather than carefully negotiated waivers of immunity intended to improve governance, attract investment and promote development.¹⁸⁶

Generally speaking, those decisions which have not expressly supported AAP v Sri Lanka, Maffezini and Siemens A.G. have not attempted to discredit them.¹⁸⁷ The Tribunal’s decision in Plama Consortium Ltd v Republic of Bulgaria¹⁸⁸ is an exception to this trend, however. It is a case where sovereign interests were placed before investor interests, and where this resulted in a narrow application of an MFN clause. Rather than focus on whether more preferential terms were available in other treaties, the tribunal in Plama v Bulgaria focused on the “requirement in arbitration law that an agreement to arbitrate must be clear; and that it

¹⁸⁴ Emilio Agustin Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, 5 ICSID Reports, ¶ 62.
¹⁸⁷ Hsu, supra note 92, at 29. See, for example, Gas Natural v The Argentine Republic, ICSID Case No. ARB/03/10, 17 June 2005.
¹⁸⁸ Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 8 February 2005.
is for the claimant to show that there is such agreement.”¹⁸⁹ It found that the MFN clause in the Bulgaria – Cyprus BIT was lacking in this regard and that it did not clearly indicate that Bulgaria had intended the provision to extend to dispute resolution procedures contained in other treaties.¹⁹⁰ The Tribunal found that:

“dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context... It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as in the case of the Bulgaria – Cyprus BIT (ad hoc arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ISCID Arbitration). It is one thing to add to the treatment provided in one treaty more favourable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by the parties with an entirely different mechanism.”¹⁹¹

It is clear that the Tribunal in Plama v Bulgaria was disturbed by the implications of Maffezini.¹⁹² On the one hand, the Tribunal seized on the point that, where MFN provisions are extended to procedural issues in other treaties, the effect is the nullification of a carefully determined set of rights and obligations negotiated between two state parties. On the other hand, the Tribunal realized that to give the broadest possible effect to MFN clauses is to undermine the essentially bilateral nature of investment treaties by extending their application to agreements negotiated with other States in potentially very different contexts.

Most importantly, the Tribunal neutralized these dangers simply by interpreting the MFN clause from the standpoint of ensuring that the limits of state consent were respected. It did

¹⁸⁹ Hsu, supra note 92, at 32, referring to Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 8 February 2005, ¶198.
¹⁹⁰ Note that, while many commentators agree with the result reached in Plama v. Bulgaria, the reasoning of the tribunal has been criticized as being slightly heavy-handed. See Hsu, supra note 92, at 34.
¹⁹¹ Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 8 February 2005, ¶ 207 and 209.
¹⁹² See Hsu, supra note 92, at 32.
this by concentrating on the requirement that a state’s consent to arbitration and waiver of immunity must be unambiguous and unmistakeable.\footnote{Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 8 February 2005, ¶ 198.} In direct contrast to the ruling in \textit{Siemens A.G. v Argentina}, it found that prudence must be taken in protecting sovereign interests at the expense of investor interests rather than vice-versa. In direct contrast to the ruling in \textit{Siemens A.G. v Argentina}, it found that the appropriate presumption to be applied is one which favors the state rather than the investor. This evidences a guarded approach to treaty interpretation that recognizes that, “even though the traditional diplomatic protection mechanism by home states for their nationals investing abroad has been largely replaced by direct access by investors to arbitration against homes states,” this development “does not take away from the basic prerequisite for arbitration: an agreement of the parties to arbitrate.”\footnote{Id.} As such it is a more appropriate approach to the interpretation of the jurisdiction of investor-State tribunals than is the approach adopted in \textit{Maffezini} and \textit{Siemens}. It is the approach which best respects the hierarchy inherent in investment treaties by acknowledging that investor rights are merely derivative rights that should only be considered once the limits of state consent have been delimited and respected. It is the approach that best acknowledges that states are the sole parties to investment treaties by emphasizing that an agreement to arbitrate must be clearly established and that the burden to do so lies with the investor.

\section*{PART 4: INTERNATIONAL LAW AND STATE PRACTICE}

Clearly identifying the dimension of State consent to arbitration will be easier in certain contexts than in others. Some treaties simply pay more attention to these concerns and take better care to accurately address the intentions of the State parties involved.\footnote{For example, Celine Levesque argues that NAFTA Chapter Eleven does more than most bilateral investment treaties to balance investor and state interests. See Levesque, supra note 10 at, 360-362.} Furthermore, the possibility remains that a cautious, state-centered approach to consent to arbitration may lead to as broad a reading of investor rights as might a liberal, investor-centered approach.\footnote{Note that a state-centered approach must consider the interests of the home state as well as the host state.} However, such a result will be neither illegitimate nor otherwise undesirable where it derives from consideration of the state parties’ consent to arbitration. Its not broad investor rights...
that are to be avoided: it is broad investor rights that are not derived from compliance with the will of the state parties. Where states have purposely negotiated asymmetrical investment agreements, only they can be faulted for having done so. Furthermore, according to the internationally recognized doctrine of *pacta sunt servanda*, they are bound to accept the consequences of their commitments.\(^{197}\) However, this does not mean that ambiguities or gaps in investment agreements cannot be and should not be interpreted in a manner that prioritizes clearly establishing and respecting the limits of a state’s consent to arbitration over extending protection to investors.

This begs the following two questions. First, to what degree are investor-State tribunals under an obligation to adopt a state-centered approach when determining their jurisdiction to decide investment disputes? Secondly, to what degree are states capable of imposing, or further imposing, such an obligation on investor-State tribunals moving forward? As mentioned, these questions are of more than academic interest. They are of great practical importance to the future of international investment arbitration. If states lose confidence that waivers of sovereign immunity contained in investment treaties will be strictly respected they will likely reconsider renegotiating such agreements or concluding new ones. This will represent a regression of generally positive developments in international investment law and could do much to destabilize international economic relations in the long term. However, if state’s concerns are assuaged, international investment law could face a more stable and less controversial future.

**ARE TRIBUNALS BOUND TO ADOPT A STATE-CENTERED APPROACH TO CONSENT?**

Article 31 of the Vienna Convention on the Law of Treaties (VCLT) mandates that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”\(^{198}\) This is a textual

\(^{197}\) See the decision of the tribunal in Amco v. Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 393, at 395. Note that the principle of *pacta sunt servanda* is also enshrined in Article 26 of the ICSID Convention.

approach to treaty interpretation and, as the approach endorsed in the VCLT, it is the approach tribunals are required to adopt as a matter of international law. Other interpretive approaches may be adopted, but only as long as those approaches remain subordinate to the textual approach. In other words, reference may be made to the “subjective intentions” of the parties to a treaty, but only so long as reference to those intentions is firmly confined by the relevant text. Such caution is necessary to prevent ‘judicial legislation’ and the illegitimate extension or nullification of treaty provisions by the tribunals applying them.

In this regard, investor-State tribunals are not, strictly speaking, obligated to adopt a state-centered approach to the interpretation of state consent to arbitration. Pursuant to the VCLT they are merely obligated to adopt a textual approach. In many cases this will be sufficient to decide the issue and no other investigation will be required. The will of the state parties will necessarily be satisfied as it is the plain meaning of their agreement that is being honored. However, in ‘hard cases’ where the textual approach is insufficient to resolve ambiguities or gaps in a treaty’s text, reference may be had to further interpretive tools or principles to resolve those ambiguities or gaps. In fact, reference to further interpretive tools or principles will likely be necessary to resolve uncertainties in a treaty’s application. Tribunals confronted by hard cases will not resort to arbitrary decision-making free from precedent. They will seek reliance on the most appropriate secondary sources of authority available to them with due regard to fostering a consistent, principled and fair corpus of international investment law.

In such circumstances, it is arguable that tribunals faced with difficult jurisdictional issues related to the application of MFN clauses, ‘umbrella’ clauses and investor waivers of treaty protection have a duty to approach these issues cautiously in a manner which prioritizes preserving sovereign prerogatives over advancing investor interests. It is arguable that, for

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199 The VCLT applies to treaties ratified by participating states after its entry into force. However, even when these conditions are not met, the scriptures of the VCLT must nonetheless be closely followed as it is considered a codification of the relevant customary international law on the interpretation of treaties.

200 Note other possible interpretive approaches, including the teleological approach. See Fitzmaurice, supra note 186; Garcia-Bolivar, supra note 186.

201 See Levesque, supra note 10, at 338-339.

the reasons cited in Part III, the state-centered approach to the interpretation of a state’s waiver of immunity and consent to arbitration is the appropriate approach to adopt because it best respects the fundamental requirement in arbitration law that the arbitration agreement be clearly established. Broad support can be found for this argument. In the words of Charles N. Brower II:

“To compensate states for the uncertainty that accompanies the conferral of discretion on arbitrators, states should have the right to claim the benefit of all doubt in close cases. At first glance, this statement may seem incompatible with a fundamental tenet of procedural justice common to international law and international arbitration: equal treatment of the parties. Nevertheless, one may justify the proposed allocation of deference to states on procedural, substantive, and practical grounds.”

Brower makes his argument in relation to investment disputes in general, including both procedural and substantive issues. However, he emphasizes that this argument can be most easily extended to placing the burden of proof on claimants in investor-State disputes. Like Toope, he highlights that “private investors and host state’s do not posses equivalent rights and obligations under international law.” Like numerous other notable publicists, he highlights the relevance of a concept attracting increased attention in investment law: “caveat investor.” With these justifications in mind, it is reasonable to suggest that where substantial doubt can be cast on the existence of an arbitration agreement, investor-State tribunals should respond by refusing to assert jurisdiction over a claim.

Nonetheless, this proposition is likely to attract vigorous criticism. First, it will be accused of being a covert attempt to impose an obligation on tribunals to adopt a restrictive approach to

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203 Brower II, supra note 14, at 918.
205 Brower II, supra note 14, at 919, referring to Toope, supra note 160, at 262.
treaty interpretation. Numerous previous host states have argued that tribunals must adhere to “a presumption against the limitation of a State’s sovereignty” only to be firmly rebuked in each case. Tribunals have found that they should neither adopt a restrictive or liberal approach to state consent, but one that seeks to discover and respect the common will of the parties. They have found that “investment treaties must be interpreted in good faith,” taking into account “the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from their undertakings.” In this regard, critics would argue that requiring claimants to establish the existence of the state’s consent to arbitration with reasonable certainty has a practical effect akin to that of restrictive interpretation. They would argue that it would do much to frustrate the legitimate expectations of investors and the home states that specifically negotiated BITs with the desire to provide a stable and secure dispute settlement system for those investors.

Imposing a requirement on claimants to identify arbitration agreements with a reasonable degree of certainty would also be attacked for failing to acknowledge what has been called the VCLT’s lingering preference for teleological interpretation. While it is well-accepted that the VCLT firmly enshrines a textual approach to treaty interpretation, it is also regularly argued that the VCLT maintains a preference for teleological or ‘effective’ interpretations through its Article 31 requirement that the “ordinary meaning to be given to the terms of a treaty shall be in the light of the treaty’s object and purpose.” In other words, it is suggested that the construction of Article 31 “is intended to ensure that all provisions of a

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209 See Amco v. Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 394.
210 Id.
212 See Hersch Lauterpact, Restrictive Interpretation and the Principle of the Effectiveness in the Interpretation of Treaties, 26 BRIT. Y.B. INT’L L. 48, 52 (1949), where the author states: “The view which is gaining increasing acceptance seems to be that some of the current rules of construction of treaties... instead of aiding what has been regarded as the principle aim of interpretation, namely, the discovery of the intention of the parties, may end up by impeding that purpose.” See also the opinion of the International Court of Justice in its 1950 Advisory Opinion in Competence of the General Assembly For The Admission Of A State To The United Nations, [1950] I.C.J. Rep. 4 at 8 where it declares “[t]he Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter.”
213 Gaffney & Loftis, supra note 93, at 8.
given treaty and related agreements and instruments be given meaning and effect, and that none be left without effect.”

In the context of BITs, critics would argue that this emphasis on “effective interpretation” demands that treaty provisions be interpreted and applied to provide the investor protection BITs are intended to promote. They would argue that this emphasis on “effective interpretation” should, if anything, “lean towards a result that upholds jurisdiction and will create a presumption in favour of the validity or applicability of consent.”

While both of these arguments are in part valid, they are also incomplete. Requiring that investment tribunals identify a clear intention to arbitrate on the part of a respondent host state before asserting jurisdiction is not equivalent to imposing a restrictive approach to treaty interpretation. Nor does it necessitate employing a restrictive approach to treaty interpretation. It merely asks that a certain standard of probability be met in relation to a fundamental jurisdictional question. Furthermore, the imposition of this standard involves an application of an impartial, textual approach to treaty interpretation and not a rejection of it. This is because, while the standard sets a mark to be met, it is an impartial, textual approach to the treaty and any other available evidence that will decide whether the mark has in fact been met. This subtle distinction between means and ends was recognized by the tribunal in Southern Pacific Properties (SPP) v Egypt when it found that, while “jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith,” jurisdiction will only be found to exist if the “force of the arguments militating in favour of it is preponderant.”

Neither does this logic violate any lingering inclination on the part of the VCLT for effective interpretation. Rather, it simply requires acknowledging that any such bent in favor of effective interpretation is incapable of diminishing the standard of certainty to be met regarding the State’s consent to arbitration.

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214 Id.
215 SCHREUER, supra note 208, at Article 25 ¶ 381.
216 Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, Decision on Jurisdiction, 14 April 1988, 3 ICSID Reports 131, 143.
The Standard in Practice

A return to specific hard cases will demonstrate how a requirement to identify a state’s consent to arbitration with a reasonable degree of certainty would function in practice. Before doing so, however, it is important to note that these cases need not necessarily arise frequently. Nor would the requirement function to make investment arbitration inaccessible to a majority of investors. While the requirement to identify a state’s consent to arbitration with a reasonable degree of certainty would function to exclude certain investors who might have enjoyed standing under a BIT in its absence, it must be remembered that most BITs have otherwise broad and inclusive standing provisions. In other words, while a stricter approach to state consent would curtail the number of a BIT’s beneficiaries, most BITs already make investment arbitration very accessible. On the one hand, they often define “investment” so broadly as to include almost any conceivable economic enterprise. On the other hand, they often take an equally broad approach to the definition of eligible investors. These provisions are not cryptic. Their application is straightforward and predictable when approached reasonably, and particularly if approached conservatively. Therefore, relatively speaking, the number of investors excluded by a heightened standard of state consent would not be high. Rather, it would consist only of those investors who chose to embrace ambitious interpretations of a treaty’s standing prerequisites.

MFN Clauses

Requiring investors to identify state consent to arbitration with a reasonable degree of certainty would make it more difficult for them to establish the jurisdiction of a tribunal by relying on an MFN clause. As per Plama Consortium v Bulgaria, it would generally prohibit investors without access to investment arbitration under a BIT from gaining access to investment arbitration provided for in a second BIT via an MFN clause in the immediately applicable BIT. This is because a simple MFN clause is unlikely to constitute an implied

218 See McLACHLAN ET AL., supra note 146 Chapter 5.
waiver of sovereign immunity and consent to binding arbitration, particularly when a state had the opportunity to explicitly agree to such binding arbitration in the same instrument. The state would argue, quite persuasively, that had it intended to offer investors access to arbitration under the BIT, it would have done so directly. It would argue that, as it chose not to do so, its desire to expressly withhold an offer of arbitration from the particular class of investors is clearly evident.

In contrast to *Maffezini* and *Siemens*, the need for investors to identify a clear and unambiguous arbitration agreement would also likely preclude investors from relying on an MFN clause to access more favorable arbitration provisions in a second BIT than those immediately available to them. Each of the tribunals in these cases interpreted an MFN clause’s silence or ambiguity on the issue of dispute settlement as an opportunity to include dispute settlement within the scope of the clause. They “interpreted the absence of an explicit reference to dispute settlement in the MFN clause as a legitimate basis for concluding that dispute settlement procedures do fall within the concept of MFN ‘treatment.’” This is analogous to giving the benefit of the doubt to investors and imposing a presumption that MFN clauses do encompass dispute resolution provisions on the state to rebut. However, giving the benefit of the doubt to the respondent host state and placing the burden on the claimant inverts this logic. It prohibits the incorporation of dispute settlement provisions into an MFN clause until clear evidence is found that the State parties intended to do so.

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223 As discussed by Locknie Hsu, this will not necessarily require that the MFN provision in the immediate treaty explicitly state that it incorporates dispute resolution contained in other treaties as was put forth in Plama Consortium Ltd v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 8 February 2005, 20 ICSID Review–FILJ 262 (2005), ¶ 223. See Hsu, *supra* note 92, at 33-34. See also Freyer & Herlihy, *supra* note 92, at 77, 83.
In each case the investigation must begin with the specific wording of a treaty’s MFN clause and any other provisions that give context to that clause.224 This investigation should include consideration of any subsequent practice by the state parties pursuant to Article 31(3) of the VCLT. Furthermore, this investigation should adopt neither a restrictive nor expansive approach to the terms and actions under investigation. However, in most cases the requirement that an agreement to arbitrate be clearly established will prevent a general MFN clause from overruling specifically negotiated dispute resolution procedures in the same treaty.225

**Umbrella Clauses**

Thomas Walde explains that “the discussion in the 1950s and 1960s giving birth to the umbrella clause envisaged not a commercial law breach, but rather governmental action abrogating a long-term – mostly concession-like – agreement.”226 It was recognized that “contracts entered into between States and foreign investors are entitled to special protection, especially in light of the host State’s municipal law-making competence, which can subsequently affect the parties’ contractual bargain.”227 In this regard, the type of action the umbrella clause was intended to protect investors from was not that which could be undertaken by any ordinary private party, but rather that which involved the exercise of a state’s sovereign authority or ‘puissance public,’ including, but not limited to, expropriation.228 This understanding played out in practice under the State to State dispute settlement system which preceded investor-state arbitration where home states would

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224 Freyer & Herlihy, *supra* note 92, at 82.
225 This exercise should also include consideration of the doctrine of *lex specialis derogat legi generali*, which holds that where two applicable laws conflict, the more specific of the two takes precedence over the more general of the two. Generally speaking, this doctrine supports the notion that a general MFN clause should not override specific dispute resolution clauses contained in the same treaty.
226 Walde, *supra* note 93, at 16.
228 Impregilo SpA v. Islamic Republic of Pakistan (Jurisdiction) ICSID Case No ARB/03/3, 12 ICSID Reports 242 (2005), at 260. See also Joy Mining Machinery Ltd v. Arab Republic of Egypt (Jurisdiction) (2004) 19 ICSID Rev. – F.I.L.J. 486 (2004). As Walde further explains, evidence suggests that “the framers of the original ‘pacta sunt servanda’ clause assumed as evident that the state conduct targeted by the clause had to be qualified as governmental. The idea that any commercial contract concluded by state entities in their ‘fisc’, i.e. private-law role, did not occur to them – and was therefore not debated. There is no evidence that the fathers of this clause ever intended to create a treaty-based forum for adjudicating all contractual disputes between state entities and foreigners.” See Walde, *supra* note 93, at 36.
categorically refuse to sponsor investor disputes with foreign sovereigns that were purely commercial in nature.\textsuperscript{229} For these reasons, nobody expected that the umbrella clause, when paired with investment arbitration and freed from the supervision of the host state, would suddenly make private commercial contract claims arguably actionable under international law.\textsuperscript{230}

Requiring that investors establish a host state’s consent to arbitrate purely contractual claims under an umbrella clause with reasonable certainty would do much to restore the clause’s function to the scope originally intended by its framers. It would reinforce the contemporary consensus that purely contractual disputes between states and foreign investors are not elevated to matters of international law by umbrella clauses and place the burden of refuting this presumption with the investor. Common sense supports this approach. When a state makes a commitment in a BIT to honor commitments it enters into with investors, it makes this commitment as a state and not as a private party. Therefore, it is logical to assume that it is referring to breaches of contract which are sovereign in nature rather than purely commercial in nature. This inference is not absolute, however, and could be vulnerable in the context of the wider treaty housing the umbrella clause. As discussed by Gaffney & Loftis, the investor may be able to clearly establish that “the State intended to extend an offer of something more than would otherwise be available to the investor as a matter of international law... as an inducement to invest in its territory.”\textsuperscript{231} Making this determination will not be a simple exercise. Due to the overlapping nature of jurisdictional and substantive issues in ‘umbrella clause’ claims it may be necessary for the tribunal to consider the two simultaneously in a mixed jurisdiction and awards hearing.\textsuperscript{232} This may require consideration first of whether the investor’s claim is purely commercial in nature and secondly, if so, whether the umbrella clause was intended to extend to such claims. Difficult questions of

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\textsuperscript{229} T. Walde, \textit{supra} note 93, at 16-17.
\textsuperscript{230} \textit{Id.}, at 18 and 21.
\textsuperscript{231} Gaffney & Loftis, \textit{supra} note 93, at 12.
attribution may also arise, including whether the conduct of a sub-state entity or state enterprise may be attributable to the state.233

**Investor Waiver**

No investment arbitration case to date has had to wrestle directly with the question of whether international law permits investors to waive their rights under a BIT.234 The tribunal in *Aguas del Tunari S.A. v The Republic of Bolivia*235 considered this possibility, as did the tribunal in *SGS v Philippines*.236 The former found that, in principle, no rule operated to bar such a waiver so long as it was explicit and did not contravene any other related provisions included in the BIT.237 The latter disagreed, finding that “it is doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the State parties to those treaties under international law.”238 However, in both the discussion was *obiter* as no such attempt to expressly waive all recourse to a treaty was found to have been made.

As discussed, at issue in these cases was whether mere forum selection clauses included in the relevant investment contracts were sufficient to remove the jurisdiction of an investor-state tribunal over contractual claims. Other interesting arguments have been made in either direction.

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234 To the knowledge of the author.


236 *SGS v. Philippines* (Jurisdiction), 29 January 2004, 8 ICSID Reports 515.


238 *SGS v. Philippines* (Jurisdiction), 29 January 2004, 8 ICSID Reports 515, ¶ 154. Interestingly, the tribunal also argued that, if a party is looking to claim under a contract, that party must comply with the contract in doing so. This argument would seem to support the notion that, if an investor has contractually waived its right of access to a BIT, it must honour that waiver when seeking to claim on the contract.
Critics of the suggestion that investors can waive their rights under a BIT argue that investment protection provisions represent an *irrevocable* offer by the state.\(^\text{239}\) They argue that to allow access to such offers to be terminated via individual contracts would be to ignore “the practical realities of bargaining with a state” and the asymmetrical power inherent in such a dynamic.\(^\text{240}\) Critics also argue that allowing such exclusion of access to investment treaties would be to do considerable “harm to the goals of universal investment protection envisaged by such treaties,” based as they are not so much on the conferral of private individual rights on investors but on the imposition of general obligations on host countries in a manner intended to create favorable investment conditions.\(^\text{241}\) Therefore, they argue, governments which attempted to evade investment arbitration through such clauses would be acting “*contra factum proprium* and in bad faith by attempting to reap the general benefits of signing investment treaties (in terms of reciprocity and reputation) without having to face up to the regulation and potential scrutiny that such treaties entail.”\(^\text{242}\)

Advocates of the notion that investors can waive their rights under a BIT, on the other hand, draw an analogy with international commercial arbitration whereby the relevant treaty establishes a third party beneficiary system that is capable of waiver by the investor. They argue that, where an investor concludes an agreement to waive its rights under a treaty, they are estopped from acting contrary to this representation in the future by seeking to initiate an investment claim by accepting the unilateral offer.\(^\text{243}\) According to this view the investor rights created by BITs, although creatures of international law, are not sacrosanct and are capable of being surrendered by individual investors through private contractual agreements.\(^\text{244}\) The principle of party autonomy takes precedence over any suggestion that BITs, absent an express clause to that effect contained therein, are intended to overrule conflicting clauses in otherwise lawful contracts. Therefore, as discussed by the Tribunal in


\(^{240}\) Weiler & Walde, *supra* note 239. See also Spiermann, *supra* note 94, at 208.

\(^{241}\) Weiler & Walde, *supra* note 239.

\(^{242}\) Id.

\(^{243}\) Id.

\(^{244}\) Id.
*Agua del Tunari*, complete investor waiver is possible so long as it relates to the same parties as the dispute, the same matters as the dispute, and makes explicitly clear the investor’s intention to waive all rights to arbitration under the treaty.\(^{245}\)

Where the investor is required to establish an arbitration agreement with a reasonable degree of certainty, however, many of these issues are circumvented. This is because, while the above-described investigations concentrate primarily on whether the investor is capable of waiving their right to consent to arbitration in the event of a future dispute, they ignore the fact that such a waiver simultaneously represents the state’s removal of its consent to the same proceedings. In other words, the operative question is not necessarily whether an investor is capable of waiving their rights under a BIT, but whether, with an investor’s consent, a state is capable of revoking its offer of arbitration.\(^{246}\) From this perspective the state’s offer of arbitration advanced in a BIT is not an irrevocable one, but merely a unilateral one, and as such is capable of retraction via a explicit waiver clause without a resulting breach of the BIT by the host state.\(^{247}\) Furthermore, where this is done an investor will be unable to meet any requirement to positively establish a clear and unambiguous arbitration agreement between the parties. The investor may, however contrary to the waiver clause, express a renewed desire in binding investment arbitration.\(^{248}\) However, the investor will be incapable of establishing such a renewed desire on the part of the state.

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\(^{245}\) *Agua del Tunari S.A. v. The Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on the Respondent’s Objection to Jurisdiction, 21 October 2005, 20 ICSID Review – FILJ 450 (2005), ¶ 111-119. Note that the requirement that the parties to the waiver be the same as the parties to the dispute will raise significant barriers in certain situations. This is because concession contracts are often signed between investors and either sub-state entities or state enterprises rather than with the state itself. However, the state must be a party to the waiver if it is to be effective as it will be the state, rather than the sub-state entity or state enterprise, which will be the respondent in any subsequent investment arbitration. See also Gaffney & Loftis, *supra* note 93, at 28-30; Spiermann, *supra* note 94, at 207-210.

\(^{246}\) Spiermann, *supra* note 94, at 208 where the author decides that “relying on a forum or arbitration clause is not normally a breach of the bilateral investment treaty on the part of the host state.”

\(^{247}\) Critics of this proposition would argue that where a state retracted any offer of arbitration advanced under a BIT it would in fact be in breach of its treaty obligations. However, this is likely to depend on the wording and terms of the specific BIT in question. Furthermore, any breach by a state of its treaty obligations would not necessarily render the retraction of its consent ineffective. Rather, it may instead give rise to a cause of action in favour of the investor’s home state under international law.

\(^{248}\) Whether or not a tribunal would accept such a reversal in the investor’s position would depend on the arguments canvassed above.
Annulment and Judicial Review

Washington Convention Article 52

Imposing an obligation on claimants to establish a state’s consent to arbitration with a reasonable degree of certainty will do much to decide jurisdictional issues where the application of MFN clauses, umbrella clauses, and purported investor waivers of access to BITs is involved. However, regardless of the particular approach to state consent adopted by an investment tribunal, recourse remains available to states who believe the limits of that consent have been illegitimately extended. Article 52(1)(b) of the Washington Convention provides that an ad hoc committee established by the ICSID secretariat can annul an award where the tribunal in question has “manifestly exceeded its powers.” The provision was specifically included in the Washington Convention to provide redress where tribunals have exceeded their authority in deciding a dispute. In this regard, “the most important form of excess of powers occurs when a tribunal exceeds the limits of its jurisdiction.”

Disagreements exist concerning the standard that has to be met by such an application. Some argue that the tribunal’s abuse of its authority must be so manifest as to be “discernable with little effort and without deeper analysis.” This position is grounded in that fact that the Washington Convention was designed to favor predictability and the finality of awards over other concerns and that, as a result, any lower standard would risk the widespread “frustration of awards.” Others argue that “to limit excess of powers... to manifest cases does not make sense where the tribunal’s jurisdiction is at issue.”

249 SCHREUER, supra note 208, at Article 52 ¶135-136, 147. Stated differently, it is acknowledged that “a decision on the merits by a tribunal that lacks competence is the most obvious example of an excess of powers.” As described by Schreuer, “an arbitral tribunal derives its power from the parties’ agreement. The agreement to arbitrate constitutes both the basis and the outer limit of the tribunal’s power.” See Klockner v Cameron, Decision on Annulment, 3 May 1985, 2 ICSID Reports 95, 98 (1994).
250 SCHREUER, supra note 208, at Article 52 ¶ 138. See the reasoning of the tribunal in MINE v Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports at 85-87.
251 See SCHREUER, supra note 208, at Article 52 ¶ 3 where he states that “Article 52 constitutes a limited exception to the principle of the finality of awards as embodied in Article 53.” See also Ross P. Buckley, Now we have come to the ICSID Party: Are its Awards Final and Enforceable?, 14 SYDNEY L. REV. 358, 362 (1992).
252 SCHREUER, supra note 208, at Article 52 ¶137. See, for example, the reasoning of the Annulment Committee in Klockner v Cameron, Decision on Annulment, 3 May 1985, 2 ICSID Reports 171.
253 SCHREUER, supra note 208, at Article 52 ¶143.
decided in degrees,” and that, either a tribunal has jurisdiction or it does not.\textsuperscript{254} In other words, the standard applied in an Article 52(1)(b) annulment hearing is irrelevant where the tribunal’s jurisdiction is at issue because any excess of powers will necessarily have been manifest as the tribunal did not have any powers at all.\textsuperscript{255}

Therefore, where a state believes that an ICSID tribunal erred by finding jurisdiction where no such jurisdiction was intended to exist, it may apply to have an award made by that tribunal rendered null and void.\textsuperscript{256} In each case the host state could argue that the scope of review applied need not be limited as any improper assertion of jurisdiction is necessarily a manifest excess of power. In each case the host state could argue that the tribunal in question had an obligation to refuse jurisdiction where a clear and unambiguous agreement to arbitrate the type of dispute at hand could not be located with a reasonable degree of certainty.

Furthermore, in each case the annulment committee would be required to make an original decision on the matter without deferring to the contested decision of the tribunal, as is allowed in other investigations made under Article 52.\textsuperscript{257} While Article 52 balances the competing interests of correctness and finality with precedence given to the latter,\textsuperscript{258} there occurs no corresponding presumption in favour of an award’s correctness in the interests of


\textsuperscript{255} Philippe Pinsolle, Jurisdictional Review of ICSID Awards, 5 J.W.I.T. 613, 620 (2004), referring to C. Schreuer who states that, in the context of jurisdiction, the proper wording of Article 52 might include “absence of powers.”

\textsuperscript{256} Note that positive decisions on jurisdiction made by a tribunal can only be challenged under Article 52 once the tribunal has rendered an award rather than immediately after a tribunal has decided to accept jurisdiction. This is in contrast with a decision to refuse jurisdiction, which can be challenged immediately. This is a peculiarity of the ICSID system, and one that has been strongly criticised; see Pinsolle, supra note 255, at 614-616. Note also that there is some debate on the adequacy of Article 52 for challenging jurisdictional review; see Pinsolle supra note 255, at 618. Note also that annulled awards may be resubmitted to arbitration pursuant to Article 52(6).

\textsuperscript{257} Pinsolle, supra note 255, at 617.

finality.

This is particularly the case when jurisdiction is at issue and where any error of legal reasoning, no matter how ‘tenable’, is necessarily absolute.

**New York Convention Article V**

The situation would be similar where arbitration is conducted under the UNCITRAL Model Arbitration Law, under the ICSID Additional Facility Rules or under any other comparable set of institutional rules. In such circumstances the Washington Convention would not apply and the arbitral award would be vulnerable to judicial review both in the jurisdiction in which enforcement was sought as well as at the seat of arbitration. At the place of enforcement, it is likely that the New York Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention) would apply. At the seat of arbitration, the award would be subject to judicial review in accordance with the law of the jurisdiction. However, it is common for such national laws to closely mirror the provisions of the New York Convention or the UNCITRAL Model Law, particularly in those jurisdictions

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259 **MINE v Guinea, Decision on Annulment, 22 December 1989, 4 ICSID Reports 85, ¶ 4.11-4.12.**

260 **Pinsolle, supra note 255, at 617.**

261 As discussed, BITs frequently provide a range of choices to investors in terms of arbitral forums. Where both signatories have ratified the ICSID Convention this choice is normally listed first. The investor is usually also given the choice to institute *ad hoc* proceedings under the UNCITRAL Model Law or before a well known arbitral institution such as the International Chamber of Commerce in Paris or the Stockholm Chamber of Commerce. See Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards,* 19 ICSID REV. – F.I.L.J. 1 (2004). See also Noah Rubins, *Judicial Review of Investment Arbitration Awards,* in *NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS* 359-363 (Todd Weiler ed., 2004).

262 Under the ICSID Convention, awards are immune from such proceedings. This results from the ICSID Convention’s ‘self-contained’ system under which the local courts of contracting states are obliged to enforce ICSID awards as a matter of international law. See L. REED ET AL., *supra* note 28, at 8.

263 **New York Convention on the Recognition and Enforcement of Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38, No. 4739 (entry into force 7 June 1959).** The New York Convention has been ratified by over 140 countries and is considered one of the most successful international agreements in history. Note that there is no duty under customary international law which compels state to enforce foreign arbitral awards. See TOOPE, *supra* note 160, at 102.

264 Note that, while vacation at the seat precludes enforcement in that jurisdiction, the discretionary language employed by the New York Convention does not mean that vacation at the seat precludes enforcement in other jurisdictions. See Article V(1)(e), which states that “recognition and enforcement of the award may be refused” where the “award has... been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made” (emphasis added).

265 The UNCITRAL Model Law closely follows the NY Convention; SCHREUER, *supra* note 208, at Article 52 ¶ 6.
typically chosen by disputing parties to serve as the seat.\textsuperscript{266} In this regard, both the New York Convention and the Model Law provide that local courts may refuse enforcement or vacate an award where it “deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.”\textsuperscript{267}

These provisions serve the same purpose as Article 52(1)(b) of the Washington Convention in functioning to provide redress where the terms of any purported agreement to arbitrate have been exceeded. However, their application may vary significantly from that of Article 52, and not always in ways that favor respondent states. The current trend is, and has been for some time, for national courts to show significant deference to foreign arbitral awards and to enforce them without re-examination or alteration.\textsuperscript{268} The same can generally be said of national courts asked to review awards at the seat. Unfortunately for disaffected respondent host states, this reduces the possibility that national courts will be sympathetic to their objections, even in matters where the jurisdiction of the original tribunal is contested. In \textit{S.D. Myers v Canada}, for example, the Canadian government argued that NAFTA awards “do not attract extensive judicial deference where the issue is whether the award under review falls within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.”\textsuperscript{269} The Federal Court of Canada disagreed, and decided not to impose “its own interpretation of the relevant provisions on which the tribunal had relied to affirm its jurisdiction \textit{ratione personae}.”\textsuperscript{270} This is an even stricter standard of review than that mandated by Article 52(1)(b) of the Washington Convention.\textsuperscript{271} However, such uncontested deference to arbitral awards has not always been popular and a return to a lower standard of review of investment awards by national courts

\textsuperscript{266} It is common for national law regarding the judicial review of arbitral awards to incorporate by reference the UNCITRAL Model Law. This, in turn, closely resembles the content of the New York Convention.
\textsuperscript{270} Sacerdoti, \textit{supra} note 261, at 41.
\textsuperscript{271} Note that this decision is not binding on similar cases brought in foreign jurisdictions.
remains possible. Furthermore, such a reversal of judicial discretion could only be hastened by a widespread regression of state support for investor-state arbitration of the type now being witnessed in Latin America.

ARE STATES CAPABLE OF IMPOSING INTERPRETIVE OBLIGATIONS ON TRIBUNALS?

The preceding discussion reveals that the question of whether tribunals have a duty to take a state-centered approach to the interpretation of consent to arbitration is debatable. This thesis has argued that, due to the requirement that an agreement to arbitrate be clear and unambiguous, investor-State tribunals do have such an obligation. However, as evidenced by many of the cases surveyed, many tribunals have not subscribed to this view. Therefore, it is reasonable to investigate whether states are capable of clearly imposing such an obligation on investment tribunals moving forward. If this could be done, any debate to the point would be rendered moot. States themselves would be in the position to ensure that their consent to investment arbitration was interpreted in a consistent and principled manner. This could do much to quell many of the most common criticisms of the investment arbitration regime. It could also do much to ensure the continued stability and prosperity of foreign investment law.

The question is a difficult one to answer. Generally speaking, no such attempt by states to influence the greater investment arbitration regime has been made. Nor has such an attempt been widely considered in the relevant literature. However, different mechanisms are available to States interested in pursuing such a course of action, and thus merit consideration. States may consider negotiating additional agreements which supplement investment treaties and specifically prescribe the interpretive techniques to be adopted by their tribunals. States may consider establishing interpretive committees empowered to resolve disputes concerning the interpretation and application of investment treaties. Finally, States may consider resorting to arguments based on wider principles of international law, including customary international law and State Practice. Each presents different challenges, while none provides a comprehensive solution.
Subsequent Agreements and Interpretive Committees

Articles 31(2)(a) and (2)(b) of the VCLT state that, “for the purpose of the interpretation of a treaty”, its context shall comprise agreements relating to the treaty made between or accepted by all the parties to the treaty. Articles 31(3)(a) and 31(3)(b) add to this “subsequent agreements between the parties regarding the treaty’s interpretation or application” and “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Therefore, should parties to a bilateral or multilateral investment treaty seek to impose an obligation on tribunals to adopt a state-centered approach to the interpretation of the consent to arbitration contained therein, the simplest way to do so would be to conclude a new agreement to that effect. For example, following the annulment decision in CMS v Argentina, the Argentine government has “indicated a desire to reach an agreement with the U.S. publically clarifying” the hotly contested provisions leading to divergent interpretations and three awards against the country. 272

This may not be a realistic proposition, however. First, it would require all contracting state parties to come to an agreement on this point. On the one hand, States which believe that their interests, as well as those of their investors, are well served by the status quo may be reluctant to conclude such agreements. These may be capital-exporting states that prefer to view investment treaties primarily as instruments geared toward advancing the interests of their overseas investors at the expense of the sovereign prerogatives of those capital-importing states who host them. On the other hand, states may not have resources available to dedicate to the renegotiation of investment treaties. They may decide that it is more important to concentrate on negotiating new treaties with new trading partners than returning to previously concluded treaties. They may also be hesitant to endorse a relatively unproven and novel approach to managing investment relations and disputes. Investment treaties are complicated and politically sensitive agreements and take significant human resources and political capital to negotiate. Although one party to an investment treaty may be interested in

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272 Burke-White, supra note 87, at 5, referring to the Statement of Osvaldo Guglielmino, Procurador del Tesoro de la Naci Argentina, American University, Washington College of Law, 24 October 2007. As Burke-White notes, Argentina may be aided in this cause by the fact that the ad hoc Committee in the CMS annulment decision strongly criticized much of the legal analysis that composed the foundation for the tribunal’s divergent findings.
rewriting treaties already in force, there is no guarantee that their co-signatories will have either the time or inclination to return the favor.

Some investment treaties will not require that a novel agreement between the parties be negotiated. These are those agreements that include provisions empowering special committees comprised of representatives of the parties to oversee the operation of investor-State tribunals. This may include supervising the implementation of an investment treaty or “resolving any disputes that may arise regarding its interpretation and application.”\textsuperscript{273} The NAFTA Free Trade Commission (FTC), established under NAFTA Article 2001, is one example of such a commission, and one which has been given much work. In July 2001 the FTC issued a statement curtailing the parties’ substantive obligation to provide ‘fair and equitable treatment’ under Article 1105.\textsuperscript{274} The interpretive note mandated that Chapter Eleven tribunals interpret the provision, contrary to a literal reading of the text,\textsuperscript{275} to require no treatment beyond that demanded by the customary international law minimum standard.\textsuperscript{276} This was followed by the FTC’s release of guidelines allowing non-disputing parties to make submissions to Chapter Eleven tribunals. Also known as \textit{amicus} submissions, this innovation allows NGOs and other interested non-parties to submit arguments in relation to disputes dealing with matters of significant public concern.\textsuperscript{277}

Implementation commissions such as the FCT would greatly facilitate any endeavor by the parties to an investment treaty to closely prescribe the fashion in which tribunals interpret and apply the treaty. They institute the mechanism by which interpretive notes are devised


\textsuperscript{274} See Laird, supra note 57.

\textsuperscript{275} It has been argued that, because of its direct contradiction of the plain meaning of the text of Article 1105, the interpretive note in fact constitutes an amendment of the provision and thus an \textit{ultra vires} act by the FTC Commission. See Charles H. Brower, \textit{Why the FTC Notes of Interpretation Constitutes a Partial Amendment of NAFTA Article 1105}, 46 VA. J.INT’L L. 347 (2006).

\textsuperscript{276} This standard can be traced to the 1926 Neer Claims Case, see United States (L.F. Neer) v United Mexican States, 4 R.I.A.A. 60, Mexico-U.S. General Claims Commission (1926). The standard is dynamic rather than static and is said to have experienced an expansion in scope since the Neer Claims Case.

and the procedures by which they are implemented. As such, the process is streamlined and requires the dedication of fewer resources than does the negotiation of a novel agreement. However, as with the negotiation of a novel agreement, any decision by an implementation commission would still be dependent on the concurrence of the representatives of the state parties. As described above, this may be difficult to secure where one or more parties feels their investors benefit from the status quo. The FTC’s interpretive note curtailing the meaning of fair and equitable treatment under NAFTA Article 1105 is an interesting event in that represents an instance in which capital-exporting states have curbed investor rights. However, it is important to note that the decision to do so was largely the result of concern on the part of the United States and Canada regarding the expansive treatment given to Article 1105 by a number of Chapter Eleven tribunals in claims made against them. As alluded to, it was not originally foreseen that the United States (or Canada) would find themselves as respondent host States in investor-State arbitrations. Chapter Eleven was principally intended to safeguard the interests of American and Canadian enterprises expanding their operations in Mexico. As such, when American and Canadian investors began aiming Chapter Eleven’s arsenal of protective provisions across either side of the 49th parallel, the NAFTA parties sought different means to limit the firepower available to them. Of chief concern was Article 1105’s incorporation of the vague and indeterminate standard of fair and equitable treatment under international law.

Not all co-signatories to investment treaties are likely to be as galvanized as were the NAFTA parties following the first wave of Chapter Eleven claims. This is particularly the case where public interest is at stake. A number of architects to the General Agreement on Tariffs and Trade (GATT) originally anticipated that only a small number of cases would arise from these agreements. However, as Chapter Eleven’s arsenal of protective provisions was increasingly applied across the borders of NAFTA member states, the NAFTA parties sought to limit the effect of this guarantee in the Annexes of their 2004 Model Foreign Investment Treaties in stating that “except in rare circumstances, non-discriminatory regulatory actions of a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation.” See U.S. Model Treaty, note 273, at Annex B(4)(b).

Some of the political reaction sparked by the first NAFTA Chapter 11 disputes were quite extreme. For instance, in reaction to the the filing of Loewen v United States, Congressman Shows of Mississippi exclaimed: “This is nuts! … We must stand together to protect the sovereignty of American laws. We should not allow [that] American taxpayer dollars pay American lawyers to help a foreign corporation fight American
case where an investment treaty has been signed between a capital-exporting state and a capital-importing state, as the majority still are. While principally capital-importing states may well be interested in devising an interpretive note which instructs tribunals to read state consent to arbitration cautiously, principally capital-exporting states are unlikely to share their enthusiasm. NAFTA Chapter Eleven’s short but rich history provides many interesting examples, but it cannot be forgotten that, as multilateral investment agreement involving two major capital-exporting states as well as a prominent capital-importing state, it remains the exception rather than the rule. All states would do well to learn from the NAFTA experience and negotiate the frameworks for incorporating interpretive commissions into their investment treaties. However, they should not do so under the assumption that such a commission will be capable of solving all controversies that may arise. Providing a mechanism to guide the implementation of an investment treaty does not guarantee the deployment of that mechanism.

It is ironic that, had a Multilateral Agreement on Investment been successfully negotiated in the 1990s, the complexity of these endeavors would be greatly reduced. In other words, addressing the jurisdiction of investment tribunals through treaty amendment or the work of an interpretive commission would be greatly facilitated in the context of a widely ratified multilateral treaty. First, rather than the many multitudes of bilateral treaties that compose the current BIT regime, there would be a single multilateral treaty of wide-ranging application that could be addressed in one fell swoop. Secondly, and most importantly, capital-importing states would enjoy a far stronger bargaining position. Amid a diffuse set of bilateral treaties, each capital-importing state enters into renegotiation discussions facing the same power imbalance present at the treaty’s conclusion. They may demand that the treaty be amended, but if their counterparty refuses, they are left without further recourse. In the context of a multilateral treaty, on the other hand, capital-importing states would have the ability to work in concert. They would be in a position to form a united front that could outnumber disagreeable capital-exporting states. They would be in a position to pool their state laws in court.” See Shows (Mississippi), 145 Congressional Record H7368 (5 August 1999). In Canada, Pierre Pettigrew, Canadian Trade Minister in 2001, repeatedly affirmed his intention to remove investment protection provisions from all the country’s future free trade agreements. See, for example, Terence Corcoran, “Ottawa’s Campaign to Sabotage NAFTA” National Post (Canada) C14 (February 23, 2001).

282 See UNCTAD IIA Monitor No. 3 (2007), supra note 16.
resources in renegotiation efforts. Due to the magnitude and importance of the treaty at stake, they would also be in a far better position to command the attention of capital-exporting states. Capital-exporting states could continue to refuse to capital-importing states’ calls renegotiate, but it would likely come at a greater political cost.

State Arguments and State Practice

A last option for States to consider involves wider principles of international law, including customary international law and state practice. In particular, states may consider seeking to impose an obligation on tribunals under international law to interpret state consent to arbitration in a fashion which prioritizes sovereign prerogatives over promoting investor interests. They may do this by releasing clear statements to this effect to the rest of the international community. They may also do this by arguing to this effect in those instances in which they are the respondents in investor-State arbitrations. This is an uncertain process which would not necessarily produce concrete results. Nor could it necessarily produce immediate results. The success of this enterprise would depend not on the actions of any one state but on the collective actions of many states. It would depend on a communal response by states over time to issues relating to state consent to arbitration and the means by which that consent is to be interpreted by investment tribunals.

Article 42 of the Washington Convention states that “in the absence of an agreement on the rules to be applied, the arbitral tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”283 NAFTA Article 1131(1) makes a similar direction, reading: “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.” These articles have been the subject of some academic discussion, and slightly different assessments of their effect have been made.284 However, the end result of these applicable law provisions is relatively uncontroversial: where states have not expressly outlined all law applicable to a dispute,
tribunals are free, in fact required, to consult wider sources of law, including wider principles of international law. This is a fact of fundamental importance to investment disputes. Most BITs do not specify which law should be consulted where the treaty proves deficient in addressing all issues in dispute. In this regard, customary international law can affect the operation of international investment treaties in a number of ways. It informs those treaties that refer to its principles. It may complete treaties by filling lacunae in their coverage. Lastly, though rarely, treaty provisions may be modified by subsequent inconsistent customary international norms.

The examples of investment tribunals that have referred to law beyond the immediate BIT to resolve the issues before them are numerous. In *ADF v United States* the tribunal had to consider the scope of the obligations owed by states to aliens under customary international law. In *Methanex Corp v United States* the Tribunal investigated customary rules relating to the ability of States to lawfully differentiate their treatment of aliens and nationals. In *Santa Elena v Costa Rica* the tribunal needed to consider international norms relating to the use of compound interest in the calculation of award damages. At the heart of the tribunal’s decision to deny remedies to an aggrieved investor in *Loewen v United States* were international norms regarding continuous nationality requirements. In *Noble Ventures Inc. v Romania* recourse to international law was necessary to decide whether the actions of a state enterprise were attributable to the host state. In *Enron v Argentina* the tribunal referred to international law to decide whether Argentina could legitimately invoke the principle of necessity to avoid liability under the treaty.

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286 Gazzini, *supra* note 11, at 714-715.
287 *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award 9 January 2003, para 179. Numerous NAFTA Chapter Eleven Tribunals have had to make similar inquiries under claims invoking NAFTA Article 1105 guaranteeing the minimum standard of treatment required by customary international law.
288 Methanex Corp. v. United States, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, Chapter C, para 25.
289 Compania del Desarrollo de Santa Ellena S.A. v. Costa Rica, ICSID Case No. ARB/96/1, Final Award, 17 February 2000.
290 Loewen Group Inc. and R.L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3, Award 26 June 2003, ¶ 223.
291 Noble Ventures Inc. v Romania, ICSID Case No. ARB/01/11, Award 12 October 2005, ¶ 69.
Customary international law also plays an important part in the interpretation of investment treaties. This flows from Article 31(3)(c) of the VCLT and its requirement that interpretation of a treaty take into account “any relevant rules of international law applicable in the relations between the parties.” This rule of interpretation has been affirmed in North Sea Continental Shelf, Amoco v Iran, Case Concerning Oil Platforms, and, most recently, in Saluka Investments v Czech Republic. Importantly, it “reflects a ‘principle of integration’ [and] emphasizes both the “unity of international law” and the sense in which rules should not be considered in isolation of general international law.” It requires that customary international law be used not only to fill in possible lacunae in a treaty, but also to “aid in the interpretation and implementation of its provisions.” It has also largely been overlooked by both investment tribunals and respondent host states. Therefore, while at present there is no principle of customary international law mandating that investment tribunals approach state consent to arbitration cautiously rather than liberally, this does not preclude the possibility of such a principle developing over time. Furthermore, were such a principle to develop, tribunals would be obligated to respect it pursuant to Article 31(3)(c) of the VCLT.

How Customary International Law Develops

It cannot be said whether the development of a rule mandating a state-centered approach to the interpretation of state consent is a realistic possibility. Its fate lies entirely in the hands of the international community. It can be said, however, that much would have to transpire before one could credibly argue that such a principle of interpretation exists. Customary international law sets a high standard for induction. First, a sufficient number of states must

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293 Saluka Investments BV (the Netherlands) v. Czech Republic, Partial Award, UNCITRAL, 17 March 2006, ¶ 254.
294 North Sea Continental Shelf Cases, Judgment, ICJ Reports 1969, ¶ 75.
296 Case Concerning Oil Platforms, Judgment, 6 November 2003, ICJ Reports 2003, at ¶¶ 23 and 41.
297 Saluka Investments BV (The Netherlands) v Czech Republic, Partial Award, UNCITRAL, 17 March 2006, ¶ 254.
300 Gazzini, supra note 11, at 710.
behave in a way sufficient to delineate the contours of a novel principle of law.\textsuperscript{301} Secondly, these states must act in this manner with the subjective belief that such state activity is obligatory.\textsuperscript{302} The first limb requires consideration of the duration, consistency, uniformity, repetition and generality of the particular state practice.\textsuperscript{303} The second limb requires identification of \textit{opinion juris}: that the relevant states have chosen to act in the specified manner because they believe they have a duty to act in that fashion rather than for some other reason.\textsuperscript{304} The ultimate threshold required before the new custom is created cannot be accurately predicted. It would depend in part on the strength of any prior rule which it purports to replace as well as the strength of any opposition it may arouse.\textsuperscript{305}

State Practice as required to fashion principles of customary international law can derive from a wide array of governmental behaviour.\textsuperscript{306} It may include “executive acts, legislation and regulations, judicial decisions, international treaties, as well as verbal acts, such as official declarations or protests, public and diplomatic statements, especially when taken during multilateral conferences of before the organs of international organisations.”\textsuperscript{307} It must be extensive, uniform and representative, but it need not necessarily be unanimous.\textsuperscript{308} Neither must it be a positive act, as omissions by states are equally capable of contributing to the formation of customary law.\textsuperscript{309} In the context of a purported obligation for investor-State tribunals to interpret investment treaties in a manner which prioritizes strictly respecting the limits of state consent to arbitration over promoting investor protection, it may include clear statements made by the international community. As contemplated by the International Law Commission, it may also include arguments made by respondent host states in their arguments to investor-State tribunals.\textsuperscript{310}

\textsuperscript{301} SHAW, \textit{supra} note 22, at 70.
\textsuperscript{302} \textit{Id.}
\textsuperscript{303} \textit{Id.}, at 72. See, for example, the Asylum Case, I.C.J. Reports, 150 at p.266; 17 I.L.R., 280; The Anglo-Norwegian Fisheries Case, ICJ Reports, 195, 116-138; 18 ILR, 86.
\textsuperscript{304} SHAW, \textit{supra} note 22, at 80. See, for example, the \textit{Lotus Case}, P.C.I.J., Series A, No.10, 28 (1927); the North Sea, \textit{supra} note 294 at p.3.
\textsuperscript{305} SHAW, \textit{supra} note 22, at 74.
\textsuperscript{306} \textit{Id.}, at 78.
\textsuperscript{307} Gazzini, \textit{supra} note 11, at 692, referring to the ILA, Final Report, \textit{supra} note 11.
\textsuperscript{308} Gazzini, \textit{supra} note 11, at 692.
\textsuperscript{309} SHAW, \textit{supra} note 22, at 76.
\textsuperscript{310} ILA, Final Report, \textit{supra} note 11, at 19 note 42.
The least complicated of these avenues is the first: clear statements made by states to the rest of the international community. If states believe that it is appropriate for investor-State tribunals to interpret state consent to arbitration cautiously, they can voice this belief in a number of forums. They can make unilateral statements to the rest of the international community. They can instruct their representatives at international law conferences and related events to make this case and seek support for it. Perhaps most importantly, they can also make amicus submission in disputes before ICSID to which they are not a party. On the other hand, states will only have the opportunity to argue this point before investor-state tribunals in those instances where an investment arbitration claim has been made against them. Depending on the circumstances, this is not a situation likely to arise frequently for many countries. It is not a situation they would welcome. Nor is it one that would allow them to broadcast their position as widely as would public statements. However, arguments made by states to investor-State tribunals may ultimately be more meaningful than public statements to the same effect. As explained by Malcolm Shaw, statements are not necessarily accurate predictions of what a state will really do when distinct interests are actually at stake. Nor do statements carry the same force as concrete actions taken when distinct interests are actually at stake.

Opinio Juris and the Requirement that States Argue Responsibly

The project would not be impossible, but the challenge is great. First, State Practice under customary international law does not normally encompass rules relating to the interpretation of treaties. This is a procedural matter given extensive treatment by the VCLT, one of the most successful and widely ratified international agreements of modern times. Therefore,


312 As discussed, outside the NAFTA context, the majority of respondent host states have to date been primarily capital-importing, less developed or “southern” countries. See Franck, supra note 69.

313 Not all submissions to and decisions by arbitration tribunals are made available to the general public. Whether or not this happens depends on the investment treaty in question as well as the forum in which the dispute is heard. For example, ICSID will not publish arbitral awards unless consent is given by both parties to the dispute. Where this does not occur, ICSID will publish select excerpts of the legal reasoning employed by tribunals in the interest of further developing international investment law.

314 Shaw, supra note 22, at 79.

315 Id.
states are unaccustomed to raising points on this issue, particularly outside of dispute resolution proceedings. Furthermore, investor-State tribunals may be hesitant to accept that they may be bound by a rule of interpretation imposed from outside the institutional rules under which they are established. State Practice under customary international law normally functions to impose substantial or procedural obligations on states themselves, not tribunals established under the authority of international treaties. Investor-State tribunals may feel they are obliged solely to respect the procedural rules under which they have been formed, whether this is the ICSID Arbitration Rules or UNCITRAL Arbitration rules, and not procedural guidelines advocated by large groups of states. However, Article 31(3)(c) of the VCLT and its mandate that treaties be interpreted with regard to “any relevant rules of international law applicable in the relations between the parties” appears to invalidate this position. So too does the mandate of Washington Convention Article 42(1) that disputes be decided with regard to “such rules of international law as may be applicable.” Secondly, as stated by the ICJ in the North Sea Continental Shelf Cases, the state practice would have to be “both extensive and virtually uniform in the sense of the provision invoked.” Stated differently, it would require that states consistently argue that investment tribunals strictly respect the limits of state consent to arbitration whenever they are in a reasonable position to do so, both inside and outside of investor-State proceedings.

Such consensus would be difficult to build and express. It would have to occur collectively. States would first have to seize on the fact that state consent to arbitration is often interpreted over-generously. They would then have to reject this practice and conclude that the only appropriate approach to state consent is a cautious one that requires clear identification of the agreement to arbitrate, and argue this point convincingly. This may not always be likely. Not all states will agree with this proposal in all circumstances. For the reasons discussed above in the context of treaty negotiation and interpretive committees, this is particularly likely to be the case with principally capital-exporting states. The example of SGS v Pakistan is illustrative. There the tribunal held that the umbrella clause included in the Switzerland – Pakistan BIT did not reflect an intention on the part of the contracting parties to

internationalize contractual breaches. Similar to the decision in Plama v Bulgaria, this interpretation prioritised establishing the limits of state consent over protecting investor interests. It held that where the provisions of a treaty term were ambiguous, it was appropriate to read that term conservatively so as not to grant jurisdiction to a tribunal where it was unclear that the state parties had intended to create such jurisdiction. However, following this interpretation Switzerland sent a letter to the ICSID Secretariat strongly protesting the decision and advocating its investor’s case.

Such state consensus would also require that nations express their support for a cautious approach to state consent in a responsible and consistent manner. This is a multifaceted endeavor. Depending on the circumstances, it may not be necessary or convenient for a state to maintain such an argument, even if the state is a dedicated advocate of this position. However, the principle of opinion juris would require that the state argue for such an interpretive approach regardless of its convenience and out of a perceived duty to do so. In this regard, states would have to understand that they are more than normal litigants in a dispute resolution proceeding. In the words of Thomas:

“As the principal subjects of international law, states must seek to promote it in good faith, paying particular attention to the merits of the claims that they advance. They must be concerned about the implications of the arguments that may be advanced in once case for future cases.”

It other words, it would be of the utmost importance that states maintain a firm line and never contradict themselves in the interest of defending particular claims. They must, in the words of Price, “guard against letting the exigencies of defending a particular case cause the sacrifice of important principles.” They must not think of themselves as private individual parties whose sole concern is securing the best possible results in the immediate

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317 Kunoy, supra note 85, at 283.
318 Note, however, that decision by the Tribunal in SGS v. Pakistan has been criticized for taking an illegitimately conservative approach to umbrella clauses by interpreting the relevant provision in the Switzerland – Pakistan BIT in a manner that effectively removes it of all practical effect. See, for example, Emmanuel Gaillard, Investment Treaty Arbitration and Jurisdiction over Contract Claims – The SGS Cases Considered, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 336 (Todd Weiler ed., 2005).
319 Kunoy, supra note 85, at 283.
320 Thomas, supra note 171, at 115.
321 Price, supra note 56, at 113.
circumstances of the dispute. This has not always been the case, and in different instances states have advanced less than credible arguments in pursuit of defending arbitration claims. For example, when making a third party submission in *GAMI v Mexico*, the United States denied that Article 1116 of the NAFTA “departs from the existing customary rules according to which shareholders could not assert claims for loss or damage suffered by a company.” This in spite of the fact that this is partly what Article 1116 was drafted to do.

**CONCLUSION**

Although it has been said that both capital-exporting and capital-importing states were well aware of the implications of bilateral investment treaties, it might still be fair to say that international investment law did not develop as they might have expected. Many hundreds of BITs were concluded before the current surge in investment arbitration claims began in the late 1990s. This extensive first generation of treaties did not have the benefit of learning from anything more than a handful of early disputes. They multiplied rather blindly, and rather quickly. The result is a large body of treaties with wide ranging investor protection provisions with often vague terms. These, in turn, have been interpreted in divergent fashions, and in ways often unfair to host states. It is a remarkable development potentially unparalleled in the history of international law. Foreign investment law looks very different today than it did even as few as ten years ago. Since the rise of the modern nation-state it has been a rarity to see a sovereign entity as a respondent to a commercial claim, whether before the ICJ or otherwise. It is now, perhaps distressingly, commonplace. It is also commonplace to see states on the losing end of tribunal awards. The law codified in much of the first

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322 Thomas, * supra* note 171, at 115.
323 *Gazzini, supra* note 11, at 709, referring to *GAMI v Mexico*, UNCITRAL (NAFTA), Submission of the United States, 30 June 2003, ¶ 9.
325 It is argued that investment protection treaties were intended by states “to provide an extraordinary means of redress against governmental action that is truly in breach of the conventional international law protection set out” in them. As this thesis has described, they have turned out to be far more potent. See Thomas, * supra* note 171, at 136.
326 Franck, * supra* note 69, at 48-55.
This is less the case with the second generation of BITs. This is the wave of BITs that had the benefit of learning from the explosion of investment arbitrations claims and the lessons they provided into how various popular treaties terms could be applied and interpreted in practice. As a result, several trends are identifiable. First, recent investment treaties tend to be longer and more detailed than their predecessors. America’s 2005 Investment Treaty with Uruguay, for example, is 96 pages long. This is approximately 50 pages longer than its 2003 Investment agreement with Chile and 63 pages longer than its 1998 Investment Treaty with Mozambique.\(^{327}\) A good part of the added text is extensive annexes specifically detailing the character of investor rights and host state obligations. The goal of these additions is to avoid the surprises born from the unexpected interpretations rendered of NAFTA Chapter Eleven.\(^{328}\) Secondly, some recent investment treaties tend to be more conservative in the protection they extend to investors. America’s practice is again illustrative.\(^{329}\) Article 5 of its 2004 Model Investment Treaty replicates the FTC’s interpretive note limiting the fair and equitable treatment standard to that required by customary international law. Annex B(4)(b) of the Model Treaty applies a similar treatment to the obligation of host states to compensate investors in the event of actions tantamount to expropriation by stipulating that, “except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation.”\(^{330}\)

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\(^{327}\) It is difficult to determine the exact length of the U.S. – Chile investment agreement as it occurs within the larger U.S. – Chile Free trade Agreement.


\(^{329}\) For a discussion of similar adjustments made in the foreign investment policy of Canada, see McIlroy, supra note 67.

\(^{330}\) As discussed, Article 1110 of the NAFTA guarantees foreign investors of compensation where their investment has been “indirectly expropriated” by the actions, cumulative or otherwise, of a host state. This guarantee, and those similar to it in other BITs, has proved one of the most controversial in investment arbitration law.
These are positive developments. States are right to learn from the mistakes of unsophisticated treaty-drafting and to improve on their efforts in the new treaties they conclude. They are right to more clearly outline the nature and extent of the protective provisions granted to foreign investors. But these improvements should not concentrate solely on tailoring the different substantive provisions included in BITs. They should be equally concerned with the different procedural and jurisdictional components of BITs. States should take greater care to clearly outline the circumstances in which they intend investment tribunals to have jurisdiction and the circumstances in which they do not intend that jurisdiction to arise. They must clarify the effect and application of MFN clauses, the effect and application of “umbrella clauses”, and whether investors may waive the guarantees extended to them through forum selection clauses. They must also be careful to specify how they intend investment treaties to be interpreted by the tribunals empowered under them. They must specify whether they intend investment treaties to be viewed first and foremost as documents concluded to grant wide protection to third party investors or as limited waivers of sovereign immunity. They must do more to specify the intended purpose of BITs, whether the promotion of development, bilateral relations or otherwise.

States must also take greater account of the role they play in the continued development of investment law in the bigger picture. The frequency with which investment treaties have brought nations to arbitration has done much to tarnish the special status of sovereign states as the principal subjects of international law. It has done much to make them appear as typical private parties engaged in private commercial disputes. It may even have done much to convince government officials of these things. However, any such assertions are untrue. Regardless of their selective waiver of sovereign immunity to arbitration proceedings, states remain the primary subjects of international law. As such, they must always be conscious of the fact that they remain the primary source of international investment law as well as the primary defenders of that law. They must remember this when discussing developments in

331 For example, BITs concluded by the United Kingdom are particularly careful to address the scope and application of MFN clauses contained therein. See Article 3(3) of the United Kingdom – Albania investment treaty.

332 BITs are designed to attract foreign investment and the externalities that investment brings. Surprisingly, this policy objective goes unmentioned in the majority of investment treaties. See Garcia-Bolivar, supra note 186, at 759.
foreign investment law in international forums. They must also remember this when defending themselves before investment tribunals and when making amicus submissions. Unlike investors, who do not have any long-term interest in particular BITs, states cannot “aggressively advance claims uninhibited by any discipline.” To counteract this imbalance, they should make full use of the privileges afforded to them. If sufficient states act in concert they are capable of affecting the manner in which most investment tribunals are obligated to perform their duties. While at times new principles of customary international law may be slow to develop it can also develop ‘near instantly’ and without a long period of gestation. All that is required is a sufficient number of influential states with a significant relationship with the relevant subject matter to consistently argue a point with the conviction that it is their duty to do so. Bad decisions by tribunals will always be an unfortunate fact of life. What is of prime importance is how States decide to respond to those decisions.

In the meantime, the safekeeping of international investment law lies in the hand of investment tribunals. Second generation BITs may be improving on their predecessors, but first generation BITs will still be with us for some time. Furthermore, fresh sets of controversies regarding the jurisdiction of tribunals are still likely to arise regardless of a BIT’s age. The international BIT regime is likely only to grow more fragmented and heterogeneous than it presently is and no agreement is ever perfectly drafted: each will inevitably be incomplete. For example, a critically important controversy has recently erupted surrounding the ability of states to withdraw from the ICSID Convention. The disagreement centers on the effect of Article 25 of the Convention and its instruction that once parties have consented to arbitration, that consent cannot be unilaterally withdrawn. On the one hand it is argued that this makes any denunciation of the ICSID Convention ineffective vis-a-vis specific investment treaties until those treaties themselves have become terminated. On the other hand it is argued that investment treaties only constitute “offers”

333 Thomas, supra note 171, at 102-103.
334 SHAW, supra note 22, at 70.
335 Id., at 75, referring to DE VISSCHER, THEORY AND REALITY 149.
336 Thomas, supra note 171, at 136.
337 This argument sees arbitration provisions in BITs are composing the “consent to arbitration” referred to in Article 25. Therefore, so long as an investor has standing under a treaty that grants jurisdiction to ICSID
to arbitrate and that, as such, denunciations of the ICSID Convention are effective vis-a-vis all BITs immediately. This controversy is a further manifestation of the ability of analysts to take widely divergent approaches to state consent to arbitration contained in BITs. The former approach illegitimately disregards the primacy of state consent in finding that a state’s commitment to ICSID proceedings in a BIT can overrule its subsequent express denunciation of the ICSID Convention. The former takes the far fairer approach by recognizing that once state consent is withdrawn, it cannot be subsequently reconstructed by reference to other agreements.

In this regard, investment arbitrators are not to be envied. Although well-remunerated, they have a tremendous responsibility to bear. Investment arbitrators are both “developing a new branch of law impacting on cross-border transactions” and “clarifying principles of international law relating to foreign investment.” They must walk a fine line between competing interests, philosophies and ideologies, and they know their decisions will be subject to intense scrutiny. On the one hand, their decisions must be convincing enough “to overcome the suspicion that investment arbitration is nothing but a plot to derail the political will of legitimate governments.” On the other hand, their decisions must not be “too timid to redress the wrongs suffered by an investor for fear of confronting a powerful host country.” Either way, they know that their decisions can create “powerful political ripples” capable of affecting more than the investment relations between the state parties to a treaty. For this reason it is not uncommon to find arbitrators adopting an apprehensive,

tribunals, than the ICSID Convention is applicable to the dispute even if the host country has previously denounced the ICSID Convention. See EmmanuelGaillard, *The Denunciation of the ICSID Convention*, N.Y.L.J. 3 (Tuesday, June 26 2007); Christian Tietje, Karsten Nowrot & Clemens Wackernagel, *Once and Forever?: The Legal Effects of a Denunciation of ICSID*, TRANSNAT’L DISP. MAN. (March 2008), available online at www.transnational-dispute-management.com, last accessed 16 August 2008.


341 Id., at 746.

342 Alvarez, *supra* note 160 at xxv.
cautious approach and “reserving their most innovative suggestions for dicta for fear of the
corollaries they may inspire.” Investment arbitration may have been
partially intended to depoliticize investment disputes, but this has hardly been the case.

There is evidence that “international arbitration institutions are realizing the wisdom of
taking a more balanced approach” to weighing investor and host state interests. This is
partly attributable to increasing criticism of the current paradigm by host states, academics
and activists. It is also attributable to the increasing number of arbitrators appointed from
developing countries. However, much more remains to be done. Investment tribunals must
take care to disregard the erroneous and misleading descriptions made of investor rights and
investment arbitration. They must take care to dismiss frivolous arguments brought by
overaggressive claimants. They must take care not to forget by whose authority they are
empowered. It cannot be forgotten that investor rights under BITs remain no more than
derivative rights and that it is only from the consent of the state parties to a treaty that
tribunals derive their authority. As such, it must be remembered that, strictly speaking,
tribunals do not owe a duty directly to investors. Rather, their duty is first and foremost to the
state parties to a treaty and that, as such, their first concern must be strictly respecting the
consent to arbitration contained in those treaties.

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343 Id.
344 Maniruzzaman, supra note 101, at 367.
345 Id.