MEETING EXPECTATIONS: ASSESSING THE LONG-TERM LEGITIMACY AND STABILITY OF INTERNATIONAL INVESTMENT LAW

CHRISTOPHER M. RYAN*

1. INTRODUCTION

International investment law plays a unique role in the regulation of sovereign conduct. Although originating as a form of customary international law, today international investment law derives its authority and its legitimacy from the approximately 2500 bilateral investment treaties ("BITs") and several multilateral investment treaties currently in force. Through these treaties, more than 170 countries have consented to treat foreign investments according to standards established by international law. In addition, in almost all cases those states have consented to allow investors to submit investment-related disputes to international arbitration. Such uniformity of consent is rare and

* Christopher M. Ryan is an attorney in the International Arbitration and Litigation Groups at Shearman & Sterling, LLP. This Article was based on a presentation given at the Symposium entitled International Investment and Transnational Litigation: Challenges of Expanding Investor-State Disputes, held by the University of Pennsylvania Journal of International Economic Law in January 2007. The author would like to express his gratitude to the Journal for the opportunity to participate in the Symposium and to present this Article. The Author would also like to thank Professor Perry S. Bechky for his helpful comments. The Article is better for his efforts, although all errors and omissions are the sole responsibility of the Author. The Author also would like to thank Jill Sidford and Elanor Gonzalez for their invaluable research assistance. The views expressed herein are solely those of the Author and do not reflect the views or positions of Shearman & Sterling LLP, its partners, associates, or clients.

1 See Jeswald W. Salacuse, The Treatification of International Investment Law, 13 L. & BUS. REV. AM. 155, 156-57 (2007) (noting that "[b]y 2006, the nations of the world had concluded nearly 2,500 BITs affecting 170 countries and several other important investment treaties," and that "[f]or all practical purposes, treaties have become the fundamental source of international law in the area of foreign investment").
has been characterized as one of the “more remarkable developments in international law in the past 40 years.”

The reach of the international investment law system is broader today than at any other time in history. The system, however, has reached a crossroads. The proliferation of BITs and other investment treaties has created potentially significant problems for States and investors alike. International investment law developed rapidly over the past thirty years to meet the expectations of a diverse constituency—developed (i.e., capital-exporting) countries, developing (i.e., capital-importing) countries, and private investors. While aligned in their desire to create a stable framework for international investment, each of these groups brings unique expectations and demands to the system. Although there has long been criticism of international investment law, the system is now experiencing challenges that call into question its ability to meet the expectations of its constituents in a sustainable and predictable manner. For example, in an unprecedented move, Bolivia has withdrawn from the Washington Convention and has severed its ties with the International Centre for Settlement of Investment Disputes (“ICSID”). Similarly, Venezuela, Nicaragua, and Argentina have each publicly questioned their long-term commitment to international investment law. Even the United States has called into question the current system by redefining the scope of protections it provides to foreign investments in its bilateral investment treaties. Although isolated at the moment, these examples could foreshadow serious systemic challenges to the continued development of international investment law.

2. THE RISE OF INTERNATIONAL INVESTMENT LAW

2.1. The Development of International Investment Law

Foreign investment has existed for centuries. Nevertheless, despite the prominence of foreign investment in the political and economic relations of states, efforts to create a legal regime governing its treatment were slow in coming and were fraught with controversy. The International Court of Justice (“ICJ”) captured the frustration surrounding the early development of international investment law when it wrote:

Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.3

The difficulty in creating a system of international investment law reflected in the ICJ's opinion was subsequently echoed by Judge Stephen Schwebel when he commented, "For some two hundred years, the international community was divided over what law governed the treatment of foreign investment and over the content of that law." 4 That divide was largely between developed and developing countries.5 Developed countries advocated that international law, which already served as a constraint on sovereign conduct generally, should regulate treatment of foreign investment.6 Indeed, because international law had long regulated the treatment of aliens by states, developed countries believed it was entirely reasonable that international law

5 Id.
6 Id.
also govern the manner in which states treated the property of foreign nationals. 7

By contrast, developing countries rejected the notion that international law could regulate their conduct towards, and control of, foreign investments. 8 During this time, developing countries challenged the traditional views that international law could affect any aspect of a State’s domestic regulations. 9 Initially found in the statements and writings of Argentine foreign minister Carlos Calvo, many developing countries took the position—ultimately known as the Calvo Doctrine—that foreign investors were subject solely to the laws and remedies of the host government. 10 According to Calvo, foreign investors were entitled to no better treatment than that accorded to domestic investors of the host state. 11 Moreover, foreign investors should not have recourse to dispute resolution procedures that were not available to nationals of the host government. 12 The principles of the Calvo Doctrine were embodied in the constitutions and treaties of many Latin American countries. 13 Ultimately, the developing countries’ views

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7 Id.
8 Id.
9 Id.
10 See, e.g., Wenhua Shan, Is Calvo Dead?, 55 AM. J. COMP. L. 123, 127 (2007) (“Calvo Clauses typically can be found in constitutions, domestic legislation, international treaties and contracts signed between foreign investors and Latin American governments.”) (footnote omitted); see also DONALD SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY 21–32 (1956).
11 See Shan, supra note 10, at 124 (noting that the equality of foreign investors and nationals is the essence of the Calvo Doctrine); see also Denise Manning-Cabrol, The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors, 26 LAW & POL’Y INT’L BUS. 1169, 1195 (1995) (“[T]he second principle of the Calvo Doctrine, equality of the national and foreign investor, is the one remaining element of the Calvo Clause that lives unhindered and, indeed, has found new life.”).
12 See, e.g., Christoph Schreuer, Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration, 4 LAW & PRAC. INT’LCTS. & TRIBUNALS 1, 3 n.11, 4–5 (2005) (noting that “[u]nder this doctrine foreigners doing business in a country were to be treated in exactly the same way as local nationals. This meant that these foreigners were to be restricted to local means of dispute settlement, i.e., domestic courts,” and discussing the minimal extent to which domestic courts are actually relied upon to settle investment disputes).
13 See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DE VENEZUELA DE 1961, art. 127 (incorporating into every contract of public interest a clause that grants Venezuela courts sole jurisdiction over contractual disputes); Constitución Política de la República de Honduras de 1982 art. 33 (“Foreigners may not file claims nor demand indemnity of any kind from the State, except in the form and in the cases
regarding international law's role in regulating foreign investment were memorialized in the 1974 Charter of Economic Rights and Duties of States (the "Charter"), which provided, "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources, and economic activities." The Charter went on to state, "[e]ach State has the right . . . to nationalize, expropriate, or transfer ownership of foreign property . . . In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals . . ." Similarly, United Nations General Assembly Resolution 3171 declared a sovereign government that expropriates foreign property "is entitled to determine the amount of possible compensation and the mode of payment . . . [A]ny disputes which might arise should be settled in accordance with the national legislation of [that] State . . .".

Although neither the Charter nor General Assembly Resolution 3171 constitute formal statements of international law and, indeed, espouse views that are seemingly in direct conflict with international law, they reflect the differences between developed
and developing nations regarding the treatment of foreign investments. More significantly, they highlight the divide between those countries with respect to the role of international law in regulating and resolving foreign investment disputes. For example, 120 developing countries voted to adopt the Charter, six countries (including the United States and five Western European countries) voted against it, and ten countries abstained. Nevertheless, despite the rhetorical significance of these documents and the numerical superiority of the voting bloc supporting them, the standards of conduct established by international law emerged as the norm against which the treatment of foreign investments was measured.

In the early 1970's, there was a shift in the way that developing countries viewed foreign investment and the role international law should play in its regulation. Many developing countries saw foreign investment as a means of bolstering their economies and thus softened their resistance to the rule of international law. Although the international community was (and remains) unable to achieve consensus for an overarching agreement of the regulation of foreign investment, many developing countries believed it was in their self-interest to enter into bilateral relationships as a means of attracting foreign investment into their countries.

During this period, at the behest of developed countries and investors, the international community shifted from reliance on customary international law to treaties as the basis for protecting foreign investments. This shift was caused principally by a belief that customary international law could not adequately protect foreign investments. For example, customary international law "failed to take account of contemporary investment practices and to address important issues of investor concern, such as their rights to make monetary transfers from the host country." Moreover, the scope of protections provided by international investment law

19 G.A. Res. 3281 (XXIX), U.N. Doc. A/9631 (Dec. 12, 1974). See Restatement (Third) of the Foreign Relations Law of the United States § 712 Reporters' Notes 1 (1987) ("The Charter was adopted 120 in favor, 6 against, and 10 abstentions, the vote reflecting the views of the majority as developing states, with the United States among the dissenters and other Western developed states either dissenting or abstaining.").

20 See Schwebel, supra note 4, at 28.

21 Salacuse, supra note 1, at 155.
was subject to debate within the international community. Most importantly, however, customary international law did not provide investors a direct right of action against host governments to pursue investment-related claims. Bilateral investment treaties were viewed as the most practical solution to these problems.

Between the early-1970s and today, over 170 countries entered into more than 2200 bilateral investment treaties ("BITs") and a handful of multilateral hybrid treaties (collectively "investment treaties")—such as the North American Free Trade Agreement, the Central American Free Trade Agreement, the Energy Charter Treaty, and APEC, that set forth a minimum standard of treatment for foreign investments. These treaties are truly universal in their reach and essential provisions and have become an integral part of international relations. Indeed, as the arbitral tribunal in Mondev International Ltd. v. United States wrote:

To understand the significance of investment treaties and their role in the international legal system it is important to understand what they do. First, they create a minimum standard of treatment

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22 See id. (noting that "the principles... were often vague and subject to varying interpretations").
23 See id. (stating that "existing international law offered foreign investors no effective enforcement mechanism to pursue their claims against host countries").
24 See Bishop, Crawford & Reisman, supra note 2, at 1.
25 See CME Final Award, supra note 14, para 497.
27 Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF) 99/2, Award, 6 ICSID Rep 181, para. 117 (October 11, 2002).
that governments commit to apply to foreign investments. One of the most striking aspects of investment treaties is their uniformity. In many respects, this uniformity is to be expected because the vast majority of BITs in force today were based on the model treaties developed by the United States and certain European countries. Although there are certainly substantive and procedural differences among the treaties currently in force, the vast majority of treaties define the scope of an investment and provide investors broad protection against uncompensated expropriation, discriminatory treatment by a host government and the inequitable or arbitrary application of the law. In addition,

28 See Schwebel, supra note 4, at 28.
29 See, e.g., Bishop, Crawford & Reisman, supra note 2, at 8 (“While differences in some standards may be found among [BITs], there is an astonishing similarity in the most important rules.”); U.N. Conf. on Trade & Dev. [UNCTAD], Geneva, Switz., June 12–14, 2002, Experiences With Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, Particularly Foreign Direct Investment, para. 5, TD/B/COM.2/EM.11/2 (May 8, 2002) [hereinafter UNCTAD—Experiences] (“A distinctive feature of BITs is that their overall format, substantive scope and content have remained largely unchanged over the past 40 years.”); Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 Fordham L. Rev. 1521, 1529 (2005) (“The provisions of investment treaties are remarkably similar.”); Maurits Lugard, Toward an Effective International Investment Regime, 91 Am. Soc’y Int’l L. Proc. 485, 485 (1997) (remarks by Kenneth J. Vandevelde) (noting the “emerging consensus” concerning international capital flows and prerequisite legal structures).
30 Although the model treaties developed by the United States and various European countries contained many similarities, they also contained significant differences. For example, European treaties generally did not protect the rights of investors to freely convert local currency, prohibit the imposition of performance requirements, or protect against uncompensated expropriation as well as the American treaties. Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harv. Int’l L.J. 67, 73 (2005).
31 The main differences among BITs currently in force include: the extent to which certain sectors are exempted from the protections provided by a BIT; the inclusion (or lack thereof) of a National Treatment provision; the treatment of performance requirements; and, in some cases, the inclusion of an exhaustion of local remedies requirement. UNCTAD—Experiences, supra note 29, para. 7.
32 See Lucy Reed, Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law, 96 Am. Soc’y Int’l L. Proc. 219, 226 (2002) (“Host state obligations under BITs typically include guarantees of fair and equitable treatment as determined by international law, national treatment and most-favored-nation treatment, guarantees of free repatriation of profits and liquidated proceeds; and most significantly, the duty to pay full economic value in the event of expropriation.”). Historically, the major differences among BITs centered around three areas: (a) the types of activities that
the vast majority of BITs guarantee foreign investors the right to convert local currencies and to repatriate profits. 33

Second, investment treaties almost universally give investors the right to submit disputes to international arbitration. Although many early BITs included an exhaustion of remedies requirement (a lingering vestige of the Calvo Doctrine), this began to change in the mid-1980s. From the mid-1980s onward, most BITs allow private investors to bring their disputes directly to international arbitration. 34 This is arguably the most significant right given by investment treaties. Under traditional international law, individuals and corporations did not have standing to bring claims directly against foreign governments. 35 Aside from bringing suit in the domestic courts of the host country (a thoroughly disfavored option), the only recourse available to investors was to request that their home government take up their cause and espouse their claim through either diplomatic negotiations or formal suit in the ICJ. 36 Espousal is an inefficient and ineffective means of resolving disputes, and one that was frequently overwhelmed by the political sensitivities of the day. 37 Thus, despite the fact that a

33 See UNCTAD—Experiences, supra note 29, para. 6 ("The great majority of BITs has a provision on the transfer of payments. Current BITs guarantee the free transfer of payments related to, or in connection with an investment.").

34 The bilateral investment treaty between the United States and Argentina was hailed as the first BIT in which a Latin American country retreated from its insistence that foreign investors submit disputes for resolution to domestic courts prior to pursuing international arbitration. Letter of Submittal to the President of the United States from the Secretary of State (Jan. 13, 1993), available at http://www.state.gov/e/eeb/ifd/43232.htm.


36 Id.

37 See The Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary, 103d Cong. 83-84 (1994) (statement of Abraham D. Sofaer, former Dep't of State Legal Advisor) ("[T]he Department [of state]'s decision with respect to espousal is likely to be influenced, not only by the merits of the case, but by the Department's concern for offending a foreign state and creating a potential irritant in its dealings with that state.");
private investor may have had a perfectly valid legal claim against a foreign government, that investor may very well have been unable to vindicate its rights and hold the host government accountable because politics precluded the investor's home government from espousing its case. By granting investors a private right of action against governments, investment treaties effectively depoliticized the dispute-resolution process and increased the legal accountability of states.

Third, investment treaties effectively give developing and other capital-importing countries an opportunity to display an "open for business" sign.\textsuperscript{38} By publicly affirming their respect for and commitment to the rule of law, these countries hope that investors will look favorably at them and will consider the risks of the past to have been mitigated.\textsuperscript{39}

There are a number of reasons why international investment law has developed so expansively and quickly during the BIT era.\textsuperscript{40} Most notably, however, increased globalization and a rise in the number of cross-border investments over the last quarter of a century have spurred the need for a legal regime that can mitigate risk, provide a measure of certainty, and ensure the continued

\textit{also} David J. Bederman, \textit{International Law Advocacy and its Discontents}, 2 CHI. J. INT'L L. 475, 483-84 (2001) ("Individual grievances have tended to be subordinated to the greater good of the nation in its pursuit of common foreign policy objectives."); Kenneth J. Vandeveld, \textit{United States Investment Treaties: Policy and Practice} 160-62 (1992) ("[T]he government may be reluctant to espouse because of a fear that the investment dispute could damages [sic] its relations with the expropriating country and interfere with other foreign policy objectives.").

\textsuperscript{38} See, e.g., Mary Hallward-Driemeier, \textit{Do Bilateral Investment Treaties Attract FDI? Only A Bit . . . and They Could Bite} 2 (The World Bank Dev. Research Group, Paper No. 3121, 2003) ("It is hypothesized that countries with weak domestic property rights can increase their attractiveness as a potential host by explicitly committing themselves to honoring property rights of foreign investors.").

\textsuperscript{39} See, e.g., Raúl Emilio Vinuesa, \textit{Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience}, 8 LAW & BUS. REV. AM. 501, 504 (2002) ("Credibility went hand in hand with the acceptance by states of their international liability in the promotion and protection of foreign investments.").

\textsuperscript{40} The number of BITs entered into on an annual basis increased between 1990 and 2004. In 1990, for example, approximately 50 BITs were signed worldwide. Between 1994 and 1996, that number peaked at roughly 200 BITs per year. Since then, the number of BITs signed each year has decreased, but still remains higher than 1990 levels. In 2004, 73 new BITs were concluded. U.N. Conf. on Trade & Dev. [UNCTAD], New York & Geneva, 2005, \textit{World Investment Report 2005: Transnational Corporations and the Internalization of R&D}, 24 U.N. Doc. UNCTAD/WIR/2005.
growth of the global economy. Stated more simply, international investment law has developed and expanded because of money. Statistics show that approximately $730 billion in foreign-direct investment ("FDI") was expended in 2004, with the vast majority of this money—approximately $500 billion—going to developing countries. During that same year approximately $11 trillion dollars in goods and services were traded around the world. In the mid-1990s, the amount of global FDI topped the amount of government aid given to developing countries. Over the past 25 years, foreign investment levels have increased from approximately $55 billion per year to the present levels—an increase of over 1300%.

2.2. The Expectations of the Participants in the International Investment Regime

Given the magnitude of FDI occurring each year, it is not surprising that investors and governments are striving to develop a stable legal regime to govern investment. Each group participating in the international investment process has a significant stake in the continued growth of the law. In addition, each group brings with it expectations and demands that occasionally overlap, but frequently diverge.

41 See, e.g., Lugard, supra note 29, at 486 ("[T]here has been a dramatic transformation in attitudes toward an international investment regime. The division between developed and developing countries has been replaced by a consensus, and that consensus has produced the emerging regime."); Jeswald W. Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 24 INT’L LAW. 655, 659–60 (1990) (considering the dramatic growth of BITs in light of the capital needs of developing countries).
44 See Foreign Direct Investment in Developing Countries: What Economists (Don’t) Know and What Policymakers Should (Not) Do!, Monographs on Investment and Competition Policy, CUTS Center for International Trade, Economics and Environment at i (2002).
45 UNCTAD, supra note 42.
2.2.1. Meeting the Expectations of Developing Countries: Balancing the Hope for Increased Investment against the Cost of Signing a BIT

Of the approximately 2800 BITs currently in force, most are between developed and developing countries. As of 2000, over 50 percent of the foreign investment made in developing countries was subject to the protections provided by BITs. The large number of BITs between developed and developing countries is not surprising given the reasons behind the international investment law system’s creation. The current system was created to persuade private investors to supplement, and eventually replace, the state aid that was given following World War II. Developing countries need foreign investment and the access to the hard currency that it brings. Although foreign investment cannot resolve all of a country’s problems, and indeed has the potential to create significant societal issues, it can stimulate faltering economies, expand trade opportunities, strengthen infrastructure, and lead to improved governance. Signing a BIT, therefore, allows developing countries to publicly affirm their commitment to foreign investment by binding themselves to international legal standards. By entering into BITs, developing

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47 See Bishop, Crawford & Reisman, supra note 2, at 4 (“Efforts to organize both international protection for foreign investment and methods of resolving disputes began in earnest after World War II.”).
48 See Salacuse & Sullivan, supra note 30, at 77 (“[D]eveloping countries sign BITs to promote foreign investment, thereby increasing the amount of capital and associated technology that flows to their territories.”) (emphasis in original); Swenson, supra note 46, at 131-32 (“Developing countries often compete for foreign investment with the hope that [it] will bring a wide range of economic benefits.”).
49 See, e.g., Bishop, Crawford & Reisman, supra note 2, at 7 (arguing that “[f]oreign investment is not a panacea for all that ails such societies, but in the absence of sufficient public funds, it can provide a way to jump start some economies, a short cut to higher wages, an improved infrastructure, and better schools and hospitals.”); Benjamin H. Sheppard, Jr. et al., International Commercial Dispute Resolution, 39 INT’L LAW. 235, 243–44 (2005) (“A BIT is intended to protect and encourage investment by investors of one country in the territory of the other country. BITs endeavor to mitigate the risks associated with investing abroad by providing investors with significant investment protections and access to international arbitration. On a macroeconomic level, BITs are intended to stimulate investment flows and result in the increase of exports, greater economic development, and economic integration between the two countries.”).
50 Such a public commitment is important because, as Professors Tobin and
countries may be able to circumvent systemic deficiencies that increase the perceived risk of investing in that country, such as the lack of an adequate legal system or other institutional structures capable of enforcing property protections. In many ways, signing a BIT may help legitimize a developing country in the international arena and, thus, attract increased levels of foreign direct investment.

Although BITs offer developing countries the prospect of increased foreign investment, they do so at a cost. Frequently, developing countries do not offer effective means of protecting property rights. Either their legal systems do not recognize such rights or, to the extent that property rights are recognized, the judicial infrastructure is incapable or unwilling to enforce those rights. Consequently, by entering into BITs, many developing countries create a two-tiered system—one that provides greater property rights to foreign investors than it does to domestic investors. A simple hypothetical scenario can illustrate the

Rose-Ackerman note, developing countries frequently "cannot make credible commitments not to violate their own country's rules." Tobin & Rose-Ackerman, supra note 32, at 5.

51 See Tobin & Rose-Ackerman, supra note 32, at 5 (noting that "most developing country governments do not have the legal systems and institutional structures in place to adequately enforce laws."). Interestingly, however, at least one empirical study has shown that "developing countries that have signed a BIT tend to be richer, larger, and more democratic" than developing countries that have not signed any BITs. Tom Ginsburg, International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance, 25 INT'L REV. L. & ECON. 107, 114 (2005).

52 See, e.g., Beth A. Simmons & Lisa L. Martin, International Organizations and Institutions, in HANDBOOK OF INTERNATIONAL RELATIONS 192 (Walter Carlsnaes et al. eds., 2001) (discussing the role of organizations in the legitimization of international affairs); Zachary Elkins et al., Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000 11 (Am. Law & Econ. Assoc. Annual Meetings, Working Paper No. 31, 2005) ("BITs give host governments a competitive edge in attracting capital if there are otherwise doubts about their willingness fairly to [sic] enforce contracts.").

53 See, e.g., Elkins et al., supra note 52, at 11 ("Governments with little inherent credibility are more likely to sign BITs than are governments known for their fair treatment of foreign capital.").

54 See, e.g., Ginsburg, supra note 51, at 122 (warning that "BITs and the expanding regime of international substitutes may have other negative effects on the development of domestic institutions. Besides offering a favorable dispute resolution regime to foreigners, BITs facilitate substantive advantages to investors. Most BITs restrict performance requirements imposed by the host government, but allow positive performance incentives such as tax breaks and simplified regulatory procedures. This means that in fact, domestic investors face both competitive and institutional disadvantages in the investment climate.").
consequences of this two-tiered system. Assume that two identical enterprises, one that is owned by a national of the host country and one that is owned by a U.S. investor, are opened in a country that has a BIT with the United States. The BIT provides that “investment disputes” may be brought to international arbitration. Now assume that the host government enacts a series of laws and regulations that effectively destroy the economic value of both enterprises. The domestic investor’s sole recourse is to sue its government in its own courts and argue that, as a matter of domestic law, the government’s actions entitle him to compensation. By contrast, the U.S. investor may bring his claim to international arbitration and argue that the host government breached the express protections set forth in the relevant BIT. It is conceivable that a U.S. investor could be compensated for actions taken by a host government while a domestic investor goes uncompensated simply because the U.S. investor can benefit from the higher standards created by international law. This disparity creates the potential for many different problems, not the least of which is a backlash against foreign investments and unrest among domestic business ventures.

In addition to creating a two-tiered system, BITs also constrain the extent to which governments can govern. Although international investment law does not prohibit governments from passing laws, enacting regulations, or taking other lawful measures, it may require those governments to pay compensation when their actions adversely affect a foreign investment. For example, in Metalclad Corp. v. Mexico, an ICSID tribunal held that the Mexican government breached its obligation to provide fair-and-equitable treatment to a foreign investor by failing to “ensure a transparent and predictable framework for [the investor’s] business planning and investment.” The tribunal further held Mexico liable because it did not provide Metalclad with an “orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly.”

In Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States, an ICSID tribunal held that the Mexican government breached its obligation to treat the claimant “fairly and equitably”
when it refused to renew the claimant’s license to operate a hazardous waste landfill. According to the tribunal, the government’s actions undermined the expectations held by investors at the time that they made their investments. The tribunal further stated that the fair-and-equitable treatment requirement, found in virtually all BITs, compels governments to:

provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.

Although the Tecmed formulation does not constitute black-letter law, it reflects an expansive view of fair-and-equitable treatment that has been espoused by foreign investors and a number of tribunals. At a minimum, the fair-and-equitable treatment requirement compels governments to act with vigilance to ensure the protection (both physical and economic) of foreign investments. Under this formulation, the fact that a government’s actions may be wholly consistent with its domestic laws, serve the broad interests of the country, are in good faith and are

57 Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, para. 154 (May 29, 2003), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186.
58 Id.
59 See, e.g., Occidental Exploration & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN 3467, Final Award in the Matter of an UNCITRAL Arbitration, para. 183 (July 1, 2004), available at http://ita.law.uvic.ca/documents/Oxy-Ecuador_FinalAward_001.pdf; Metalcloid, supra note 55, para. 99 (Aug. 30, 2000) (“Mexico failed to ensure a transparent and predictable framework for Metalcloid’s business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.”).
60 See, e.g., Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 372 (July 14, 2006) available at http://icsid.worldbank.org/ICSID/
implemented in a non-discriminatory manner does not absolve it from liability if those actions injure or impair a foreign investment.\(^\text{61}\)

Critics of the current system of international investment law argue that the Tecmed "rule" and other broad standards established by tribunals make it difficult for governments to govern.\(^\text{62}\) Under a strict reading of the Tecmed rule, governments would be obligated to consult with foreign investors in advance of taking any regulatory action. Mere notice of a new regulation, however, would not be sufficient to avoid liability. Rather, the government would be required to ensure that new regulations did not undermine the basic expectations held by the foreign investors at the time their investments were made regarding the legal and business environment in the host country. Even if every foreign investment in a country was made at the same time, it would be extraordinarily difficult to meet the expectations of every foreign

\(^{61}\) See, e.g., EnCana Corp. v. Republic of Ecuador, LCIA Case UN 3481, Partial Dissenting Opinion (Feb. 3, 2006), para. 72, reprinted in 45 I.L.M. 901, 960 (making the distinction that "[w]hat may not be wrongful under local Ecuadorian law or an interpretation thereof may be wrongful under the Treaty or international law no matter what the Ecuadorian courts say or fail to say. State conduct found to be licit under national law—for example, because the State in breach complies with the decisions of its own courts—may however constitute a public international law infringement, particularly when the State's international obligations at stake are set out in a treaty (to which such State is a party) vesting an international arbitral tribunal with the power to adjudicate on such infringement.").

\(^{62}\) For example, in Occidental Exploration and Prod. Corp. v. Ecuador, a tribunal held that the "stability of the legal and business framework is thus an essential element of fair and equitable treatment" and held Ecuador liable for changing its tax laws "without providing any clarity about [the change's] meaning." LCIA Case UN 3467, Award, paras. 183–84. See also LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, para. 124 (Oct. 3, 2006) available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseld=C208 ("[T]his Tribunal must conclude that stability of the legal and business framework is an essential element of fair and equitable treatment in this case . . . .").
investor. It becomes even more difficult to meet these expectations when investments are made over time and investors enter the market under different business, economic, social, and legal conditions.63

Although the principal goal of developing countries in signing a BIT is to attract FDI, empirical studies have found mixed results regarding the link between the BITs and FDI. Indeed, “[t]he most sophisticated analyses to date have found that BITs have had little effect on increasing FDI.”64 For example, a 1998 UNCTAD study found only a marginal positive relationship between signing a BIT and increased foreign direct investment.65 In a leading study, Professors Salacuse and Sullivan determined that although the presence of a U.S. BIT has a “large, positive, and significant association” with a country’s overall FDI inflows, the presence of BITs with other developed countries had a very weak positive effect on the level of FDI.66 Surprisingly, the existence of BITs between developing countries actually had a negative effect on FDI inflows.67 The Salacuse and Sullivan study also showed that factors such as a country’s GDP and its adherence to the rule of law both had “positive significance” in determining the level of FDI inflows.68 The work of Jennifer Tobin and Susan Rose-Ackerman also found that, although the presence of a BIT contributed to an

63 Notably, not all tribunals have held governments to the same broad standards set forth in Metalclad and Tecmed. For example, in Waste Mgmt., Inc. v. United Mexican States, the tribunal held:

"[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.

ICSID Case No. ARB(AF)/00/3, Award, para. 98 (Apr. 30, 2004), reprinted in 43 I.L.M. 967, 986 (2004).

64 Ginsburg, supra note 51, at 117.


66 Salacuse & Sullivan, supra note 30, at 105.

67 But see id. (finding that adding a new OECD BIT or a BIT with a developing country only has a weak statistical effect).

68 See id. at 106 (finding as expected).
increase in FDI, rates of economic growth, population, inflation levels, and market size each had statistically significant effects on FDI inflows.69

In their study, Professors Salacuse and Sullivan wrote that “a BIT between a developed and a developing country is founded on a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future.”70 The data, however, seem to show that the ability of a developing country to achieve the benefit of this bargain depends on much more than the mere existence of a BIT. BITs do not work in isolation and, therefore, do not (and cannot) guarantee access to increased foreign investment.

2.2.2. Meeting the Expectations of Developed Countries: Protecting Investments and Promoting the Rule of Law in Developing Countries

Developed countries bring to the international investment law system three basic expectations. First, and most basic, they wanted to provide their citizens with property rights protections that rivaled those available in their domestic legal systems.71 As Professor Michael Reisman commented, the international investment law system “consciously seek[s] to approximate in the developing... state the minimal legal, administrative, and regulatory framework that fosters and sustains investment in industrialized capital-exporting states.”72 In many respects, this goal has been met. More countries have bound themselves to international investment law through BITs or regional investment treaties than at any other time in history. Although the mere fact that a developing country has signed a BIT cannot guarantee that a

69 See Tobin & Rose-Ackerman, supra note 32, at 22 (describing results of the study generally and stating that “BITs by themselves do not determine the [FDI] flows.”).

70 Salacuse & Sullivan, supra note 30, at 77.

71 Kenneth Vandevelde has stated that the principal goal of the BIT system was to (a) “build a network of treaties adopting the principle that the expropriation of foreign investment was unlawful unless accompanied by prompt, adequate and effective compensation,” (b) by establishing certain minimum standards of protection to which American investment was entitled, (c) ensure transparency in the host state’s laws, and (d) create binding dispute-resolution procedure available to enforce the minimum standards of protection guaranteed by the treaties. Kenneth J. Vandevelde, The BIT Program: A Fifteen-Year Appraisal, 86 AM. SOC’Y INT’L L. PROC. 532, 534-35 (1992).

foreign investment will not be subject to adverse government action, it does ensure investors from developed countries access to procedural and substantive rights that closely mirror those of their home states.

Second, developed countries (in particular, the United States) wanted to remove themselves from resolving investment disputes. As stated, by creating a private right of action for investors, governments effectively depoliticized investment disputes and transferred the responsibility and cost of enforcement to investors. In doing so, developed countries can avoid the delicate balance between protecting their citizens' interests abroad and maintaining positive relations within the international community.

Third, developed countries hoped that the BIT regime would increase the global respect for property rights and lead to an improvement in the domestic legal systems of developing countries that participated in the regime. This is a corollary to the expectation that BITs would give foreign investors access to property rights protections that were similar to those available in developed countries. Whereas BITs principally serve as a substitute for domestic institutions, not all government actions give rise to international liability. Foreign investors, therefore, may need to resolve certain disputes through a host country's domestic courts. To the extent that BITs can raise the level of property rights recognized by those courts, foreign investors will be better protected.

This expectation should be consistent with the goals of developing countries as they try to ensure their long-term development. As the conflicting data as to whether signing a BIT results in increased FDI show, the developing world's long-term growth is not tied exclusively to the existence of BITs. Developing

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73 See id. (describing how BIT regimes transfer responsibility from industrialized to developing countries in ensuring an optimal legal, administrative, and political framework for investment).

74 See, e.g., Franck, supra note 29, at 1525–26 ("In order to avoid the historical difficulties associated with 'gunboat diplomacy,' countries have promulgated treaties to promote foreign investment and instill confidence in the stability of the investment environment.").

75 For example, BITs do not allow foreign investors to bring ordinary commercial, tort, or contract disputes to international arbitration. Rather, BITs create distinct causes of action (e.g., fair-and-equitable treatment, expropriation, discriminatory, or arbitrary treatment) that are intended to protect against governments acting in their capacity as governments.
countries must create conditions favorable to sustainable growth, such as impartial courts, an efficient and effective bureaucracy, and regulatory transparency.76 "[A] host state must do far more than open its doors to foreign investment and refrain from overt expropriation" to benefit from the international investment system.77 Indeed, host states must "establish and maintain an appropriate legal, administrative, and regulatory framework, the legal environment that modern investment theory has come to recognize as a conditio sine qua non of the success of private enterprise."78

It is difficult to determine the effect that BITs have on domestic legal systems and institutions. A 2005 study, however, suggests that the effect is limited. After reviewing several years worth of data, and applying well-established governance models, this study applied a series of mathematical regressions to determine the effect of BITs on "subsequent institutional quality."79 According to the study's author, "the results are intriguing":

Of eight regressions with results at the 90% confidence level, three have negative signs. New BITs adopted in 1995 or 1996 were associated with declines in levels of government effectiveness, regulatory quality, the rule of law, and corruption control in the year 2000. On the other hand, they were associated with statistically significant improvements in government effectiveness, regulatory quality, and corruption control in 1998, and improvements in the rule of law in 2002. Finding any negative relation between BIT adoption and institutional quality is counterintuitive, given the manner in which the

76 See Reisman & Sloane, supra note 72, at 117 ("The ‘favourable conditions’ established by BITs consist, not merely of natural phenomena such as climate, resources, and access to the sea, nor even an educated population in the host state receptive to and eager to participate in the benefits of foreign investment; they also contemplate, more significantly and innovatively, an effective normative framework: impartial courts, an efficient and legally restrained bureaucracy, and the measure of transparency in decision that has increasingly been recognized as a control mechanism over governments and as a vital component of the international standard of governance.").

77 Id.

78 Id.

79 See Ginsburg, supra note 51, at 120-21 (showing that under some circumstances, international devices may be substitutes for local institutions and lead to reductions in governance quality).
MEETING EXPECTATIONS

2.2.3. Meeting the Expectations of Private Investors:
Mitigating the Risk Associated with Foreign Investment

It is generally recognized that "[p]rudent investors will not risk substantial capital in a foreign enterprise unless the financial prospects are promising and the legal structure is sufficient to protect the investment." Private actors, therefore, expect that the international investment law system will provide them with greater protections against the unilateral actions of governments, thereby minimizing the risks to their investments. The ICSID system was intended to meet that expectation. The system is working. More investment disputes are pending before ICSID and in UNCITRAL or other ad hoc forums than at any time in history. Although the presence of a BIT is not determinative of where an investor will invest, the presence of a BIT is a significant factor in the investment decision. Of all the constituencies, the expectations of private investors have been most successfully met.

3. EMERGING CHALLENGES TO INTERNATIONAL INVESTMENT LAW

3.1. Challenges to the Arbitral System

3.1.1. Latin America

Despite the international investment law system's apparent successes, there is some concern that the system has not (and, perhaps, cannot) meet the expectations of developing countries in a predictable and sustainable manner. Many of the emerging challenges to the system in general, and to ICSID in particular,

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80 Id.
81 BISHOP, CRAWFORD & REISMAN, supra note 2, at 8.
82 See, e.g., Vincent O. Orlu Nmehielle, Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention), 7 ANN. SURV. INT'L & COMP. L. 21, 23 (2001) ("The key purpose in establishing ICSID was to assure foreign investors of protection under international law from unilateral actions of host countries which could jeopardize their investments.").
come from Latin America. There has been a significant increase in the numbers of cases filed against Latin American countries over the past several years. Indeed, statistics show that as of November 2005, over 200 investment-treaty-based arbitrations had been filed. Of those arbitrations, approximately 75 percent were brought against developing countries, the vast majority of which were in Latin America.

Whether these statistics reflect a change in attitude by investors who are now willing to challenge conduct that they previously accepted, or a change in the way certain Latin American governments are treating foreign investments, is unclear. Historically, Latin America appears to move in trends—during the 1990s the majority of Latin American countries favored economic liberalization. It was during this period that Latin American countries entered into the majority of their BITs. In this decade, however, Latin America appears to be reacting to its perceived over-liberalization by attempting to gain more control over foreign investments. These governments, however, are constrained in their ability to impose more conservative economic measures by binding commitments they made when signing BITs. Regardless of the reason for the increase in investment disputes, many Latin American (and other developing) countries are unhappy with the size and number of cases brought against them.

Although a number of Latin American countries have expressed their dissatisfaction with the current international investment law system, Argentina and Bolivia have led the way in voicing their frustration. Argentina is not alone in Latin America in expressing frustration with the current system of international investment law. Between 1994 and 1999, the Brazilian legislature refused to ratify fourteen BITs signed by their government. Similarly, in Venezuela, President Hugo Chavez has publicly condemned international arbitration of investment disputes as being unconstitutional.

This Section briefly explores the steps taken by Argentina and Bolivia.

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84 See id. at 3 (showing that forty-seven of sixty-one respondents in these arbitrations were developing countries; the most cases were brought against Argentina (forty-two cases, or approximately 20 percent of the total cases)).

85 Argentina is not alone in Latin America in expressing frustration with the current system of international investment law. Between 1994 and 1999, the Brazilian legislature refused to ratify fourteen BITs signed by their government. See U.N. Conference on Trade and Dev., Total Number of Bilateral Investment Agreements Concluded, (June 1, 2005), available at http://www.unctad.org/sections/dite_pcbb/docs/brazil.pdf (showing that Brazil has signed fourteen BITs). To date, the Brazilian legislature has refused to ratify any of these treaties. Similarly, in Venezuela, President Hugo Chavez has publicly condemned international arbitration of investment disputes as being unconstitutional. See, e.g., Instructivo Para la Revisión de los Proyectos de Contratos de Interés Público
3.1.1.1. Argentina

Argentina has led the way in voicing its frustration with the current system of law. Its actions are notable because of the significant amount of foreign investment in Argentina at the time. Nevertheless, beginning in 2004, Argentina began to consider a number of domestic measures that would have limited Argentina’s participation in the international investment law system and effectively revived the Calvo Doctrine. In September 2004, the Argentine legislature introduced a bill that would subject all disputes involving the Argentine government to the exclusive jurisdiction of the Argentine courts. The proposed bill also would have required Argentina to denounce all treaties and international agreements in which it consented to the jurisdiction of a foreign judicial or arbitral tribunal. In May 2005, the Argentine legislature introduced another bill that would have voided all waivers of sovereign immunity made by the Argentine government and would have granted Argentine courts jurisdiction over all disputes involving the Argentine federal, state, or local governments. In addition, the law would have overturned the Argentine law approving Argentina’s ratification of the Washington Convention. Finally, a bill introduced by the Argentine legislature in August 2005 would have barred international review of any matter related to the government’s
economic policy or any determination by the Argentine courts regarding claims of direct or indirect expropriation. The proposed law also required that a clause expressly barring international review of such decisions be inserted into all investment treaties as a condition of approval. The Argentine judiciary has also taken steps to revive the Calvo Clause. In *José Cartellone Construcciones Civiles S.A. v. Hidroelectrica Norpatagónica S.A.*, the Federal Supreme Court of Argentina ruled that international arbitral awards may be subject to judicial review by Argentina's courts to determine their fairness, reasonableness, and constitutionality. According to the Court, the Argentine judiciary must serve as the "guardian of [Argentina's] Constitution and of public policy."

### 3.1.1.2. Bolivia

Perhaps the most striking example of frustration with the current system is Bolivia's unprecedented withdrawal from the Washington Convention. On May 2, 2007, the Government of Bolivia formally notified the ICSID Secretariat that it would withdraw from the Washington Convention effective November 3, 2007. It further announced a systematic process of renegotiating concession and foreign investment agreements with the goal of restoring the purported economic equilibrium of the agreements and creating terms more favorable to Bolivia.

The short-term effects of Bolivia's actions are unclear. At a minimum, new investors should be wary of entering Bolivia and existing investors should expect changes to the current investment environment. In addition, and arguably more pressing, it is unclear how Bolivia's actions will affect the ability of investors to submit disputes to ICSID arbitration. Article 72 of the Washington Convention provides:

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*Proyecto de Ley S-2577/05, Mar. 23, 2007.*

*Id.*


*Id.*

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.96

On the face of this provision, absent some other jurisdictional defect, investors who submitted disputes to ICSID arbitration prior to May 2, 2007 should be able to have their dispute heard by an ICSID tribunal notwithstanding Bolivia’s withdrawal from the Washington Convention.

Existing investors who were injured by the Bolivian government before May 2, 2007 but who did not formally submit a notice of arbitration (or otherwise submit to ICSID’s jurisdiction) may be in a different position. Credible arguments can be made that this class of investors should be able to submit disputes to ICSID well into the future. On its face, Article 72 refers solely to the government’s consent to arbitrate. As such, foreign investors protected under any of Bolivia’s twenty-two BITs in force prior to May 2, 2007 should continue to be able to access ICSID. Bolivia’s consent to ICSID arbitration is grounded in the relevant bilateral investment treaties,97 and foreign investors can continue to take advantage of that consent notwithstanding Bolivia’s withdrawal from the ICSID Convention.98

Others have argued that Bolivia’s withdrawal from the ICSID Convention likely will preclude investors who do not already have pending arbitrations from submitting disputes to ICSID.99 Not

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97 Arbitral tribunals have consistently held that such treaty provisions constitute consent to ICSID jurisdiction. See, e.g., Lanco Int’l Inc. v. Argentine Republic, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 5 ICSID Rep. 367 (Dec. 8, 1998) (holding that claims alleging a cause of action under the bilateral investment treaties are not subject to the jurisdiction of administrative courts).
98 See Vis-Dunbar et al., supra note 95, at 3 (quoting Fernando Mantilla-Serrano, advisor to foreign investors, as saying, “[a]t least from the plain meaning of the text of the Convention, you don’t need any other party to have acted on that consent”).
99 See id. (quoting Professor Christoph H. Schreuer, Professor of International Law at the University of Vienna, as saying, “[i]f you look closer . . . the six month notice period offers very little comfort to investors and potential litigants”).
surprisingly, there are no awards specifically addressing the affect that withdrawing from the Washington Convention has on existing, but un-filed disputes. Tribunals and scholars, however, have addressed the issue in the context of domestic investment statutes and those cases may shed light on how a tribunal might address the issue.

The system of international investment law is based on consent—the consent of governments to be bound by certain substantive obligations and the consent of both governments and private investors to submit disputes to international arbitration. Governments consent to ICSID jurisdiction by allowing for ICSID arbitration either in a BIT, multilateral investment treaty, or national legislation. Some scholars and tribunals have argued, however, that the government’s consent is not automatically perfected. Rather, the consent given by governments to submit disputes to ICSID has been analogized to a contractual offer that can be perfected only upon the express acceptance of the investor—typically either through the submission of a dispute to arbitration or by serving the government a notice of the investor’s intent to arbitrate. Proponents of this view argue that the right to submit disputes to ICSID, therefore, is conditional and does not vest at the time the investment is made. In cases where a government has given its consent in a domestic investment law, tribunals and commentators have clearly stated that “[a]n offer of consent contained in national legislation ... that has not been taken up by the investor will lapse when the legislation is repealed.”

Indeed, “until the consent to arbitration becomes mutual, that is,
until the investor consents, the State may, by repeal or amendment of the investment law, withdraw its consent to arbitration."  

The legal issues raised by Bolivia's actions are complex. It is not possible to predict how a tribunal would rule in a case where the government offers its consent to ICSID jurisdiction in a BIT and then subsequently revokes the condition predicate for ICSID jurisdiction—participation in the Washington Convention. Cases in which a government's consent to arbitrate is contained in a domestic investment statute are materially different from the situation involving Bolivia. In the former, repeal of the domestic investment statute revokes the contractual offer made to an investor. In the case of Bolivia, the contractual offer still exists in Bolivia's BITs. Withdrawal from the ICSID Convention did not per se void that offer. The question remains, however, whether an investor can accept that offer when the condition precedent to ICSID jurisdiction—participation in the ICSID Convention—has been withdrawn. That question will ultimately be decided by the ICSID Secretariat, in the first instance, and perhaps ultimately by a tribunal.  

The long-term consequences of Bolivia's actions are even more uncertain. From a business perspective, potential and existing investors may begin to rethink their commitments to Bolivia. At a minimum, the cost of investing in Bolivia will increase because of the increased risks that are attendant to Bolivia's actions. Ultimately, however, the economic and financial consequences of Bolivia's actions will depend on how the market reacts. Other developing countries have consciously elected not to enter into the international investment law system. For example, Brazil opened its borders to foreign investment without entering into any BITs or ratifying the Washington Convention. To date, Brazil has only assumed regional investment obligations under the Protocol of Colonia for the Promotion and Reciprocal Protection of

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104 As a practical matter, this issue may be of little importance to many investors. The majority of Bolivia's BITs provide investors with the option of submitting investment disputes either to ICSID, another arbitral institution, or to ad hoc arbitration under the UNCITRAL rules. For the collection of BITs signed by Bolivia, see http://www.unctad.org/templates/DocSearch.aspx?id=779. As a result, investors will be able to submit investment disputes to international arbitration regardless of whether Bolivia is a party to the ICSID Convention.
Investments in MERCUSUR. Nevertheless, Brazil is one of the largest recipients of foreign direct investment in Latin America. While recognizing that Brazil is a unique case because the size of its economy and relative strength of its legal system offset many of the risks that frequently dissuade investors from investing in developing countries absent a BIT, if Bolivia is able to attract investment after withdrawing from the Washington Convention, other developing countries may follow in its wake.

From a legal perspective, the reasons for Bolivia’s withdrawal from the Washington Convention arguably are more important than the act itself. Most notably, Bolivia is critical of what it sees as the disparity in the current international investment law system between states and investors. This criticism is not unique to Bolivia. Indeed, there is growing concern among developing countries that tribunals have expanded the scope of investment protections beyond what they intended when they entered into BITs. In doing so, governments frequently believe that their ability to govern has been constrained.

By their very nature, BITs require governments to cede a portion of their sovereign authority. Governments voluntarily do so in return for the possibility of increased foreign direct investment. Governments do not, however, expect to surrender their ability to govern. As a result, developing countries brought before an ICSID tribunal frequently defend their actions as merely an exercise of sovereign authority. For example, Argentina has consistently argued that its actions were a necessary exercise of its sovereign right to govern. With one exception, that argument has been rejected. Similarly, in ADC Affiliate Ltd. v. Republic of

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106 See, e.g., ADC Affiliate Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal, paras. 400-04 (Oct. 2, 2006), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caselId=C231 (including arguments of the Hungarian government to the effect that their ability to govern has been limited).

107 See supra Section 2.1 (discussing how best to balance the hope for increased investment against the cost of signing a BIT).

108 See LG&E Energy Corp. v. Republic of Argentina, ICSID Case No. ARB/02/1, Decision on Liability, para. 245 (Oct. 3, 2006), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caselId=C208 (discussing how “the Tribunal has determined that the conditions in Argentina from 1 December 2001 until 26
Hungary, the Hungarian government argued that it was merely exercising its sovereign right to govern when it passed certain decrees and regulations purportedly stripping a private investor of its investment.\textsuperscript{109} The tribunal rejected Hungary’s argument, holding:

The Tribunal cannot accept the Respondent’s position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal’s understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State’s right to regulate.\textsuperscript{110}

Although neither the Argentine cases nor the ADC tribunal’s holding bar governments from regulating, they serve as the basis for a belief that governments are at a distinct disadvantage against investors in the present international investment law system.\textsuperscript{111} Proponents of the international investment law system argue that those cases simply reinforce the notion that governments must act within the boundaries of international law and that, while they are free to act, they may be required to pay compensation if their April 2003 were such that Argentina is excused from liability for the alleged violation of its Treaty obligations due to the responsive measures it enacted”).


\textsuperscript{110} Id. para. 423.

\textsuperscript{111} Although this is a problem that principally affects developing countries, developed countries are also concerned that tribunals have expanded the scope of international law in a way that has constrained their ability to govern. As is discussed below, this belief led the United States to change its model BIT in 2004 to more clearly define the scope of protections it was providing to foreign investors.
actions exceed those boundaries. In a system based on consent, however, the perception of reality may be as important as reality itself. If developing countries continue to believe that their right to govern is unduly constrained by participation in the international investment law system, other countries could follow Bolivia’s lead.

3.1.2. Outside of Latin America

Countries in Latin America are not the only ones that seemingly are frustrated with the current international investment law system. Outside of Latin America, one of the more notable examples of the emerging reluctance to participate in the international arbitral system is the Japan-Philippines Economic Partnership Agreement.112 Signed on September 9, 2006, the Agreement is a joint trade-investment treaty that is intended to promote “stronger economic linkages” between Japan and the Philippines and to “create a legal framework” for enhanced trade and investment.113 The Agreement grants investors from each state a broad range of protections, including provisions on uncompensated expropriation, national treatment, denial of justice, most-favored nation treatment, and performance requirement prohibitions.114 The Agreement further provides for increased transparency for investments.115 Despite the breadth of protections, however, the Agreement does not provide investors a right to international arbitration. Rather, the Agreement provides that the parties shall continue to negotiate for a mutually acceptable dispute resolution procedure and that, in the absence of an agreement, an investor may submit a dispute to “international

112 See Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, Japan-Phil., Sept. 9, 2006, http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/index.html [hereinafter JPEPA] (recognizing the agreement between Japan and the Philippines encouraging innovation and competition). Although the Agreement has been ratified by Japan, it is facing significant resistance among Philippine opponents. See, e.g., Veronica Uy, Senators Slam ‘Fuzzy’ Gov’t Presentation of JPEPA, INQUIRER.NET, Sept. 14, 2007, http://archive.inquirer.net/view.php?db=1&story-id=88592 (quoting Senator Manuel Roxas II as saying, “I am under-whelmed by the presentation of the government which in my estimate alone, based on their presentation, if the voting were held today, JPEPA will lose”).

113 JPEPA, supra note 112, at 10–11.
114 Id. arts. 89–92, 95.
115 See id. art. 3 (calling for, among other things, prompt publishing of member laws, names of authorities responsible for laws, and responses to further questions from members regarding paragraph 1 matters).
conciliation or arbitration” only after receiving the express consent of the state-parties to the Agreement. The Philippines’ reluctance to allow for international arbitration is not surprising in light of its experience with prior investment-related disputes. The fact that this reluctance has led to the signing of an investment treaty that does not provide investors with access to any international dispute-resolution forum, however, is quite remarkable. As mentioned above, the international investment law system was predicated on the idea of giving investors access to international arbitration, thus allowing developing countries to attract foreign investment. There was concern that merely granting rights without simultaneously giving investors means to enforce those rights would result in a hollow and ineffective system. At present, Japanese and Philippine investors theoretically are little better off than they were before the signing of the Agreement. Although entitled to express investment protections, they are limited either to the host-country’s local courts or to their own government’s diplomatic protection as a means of resolving investment-related disputes. As discussed above, neither of those options is particularly attractive to foreign investors.

116 See id. art. 107 (stating that “[i]n the absence of a mechanism for the settlement of an investment dispute between a party and an investor of the other party, the resort to international conciliation or arbitral tribunal is subject to mutual consent of the parties to the dispute. This means that the disputing party, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved.”).

117 See SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC657_En&caseId=C6 (bringing the Philippines to arbitration in June 2002 by the French company SGS Société Générale de Surveillance S.A. regarding the provision of certain customs and export-related services). As of the date of this article, the case against the Philippines is still pending.

118 “[T]he rationale for the 1965 Washington ICSID Convention was to assure potential prospective investors that disputes arising out of investments, primarily in developing countries, could be adjudicated before an international tribunal, rather than before the courts of the country concerned. The existence of such a facility and the assurance of impartiality and predictability also works to the benefit of the country concerned, which has an interest in attracting foreign investment for its economic development.” Reed, supra note 32, at 234 (referring to comments by Andrew Jacovides).
3.2. Challenges to the Substantive Rights Accrued to Investors

The vast majority of BITs in existence today are based on models created by the United States and some European countries. These models provide investors with broad, open-ended protections, such as the prohibition against discriminatory treatment and the requirement that governments treat investors fairly and equitably. The breadth of investor protections found in these models reflects the fact that most bilateral investment treaties are between developed and developing states. Although BITs impose obligations on both signatories, at the time most of the U.S. BITs were signed, there was little investment flowing from developing countries into the United States. Thus, the United States did not enter into its BITs expecting to be a respondent in an investment dispute.

Times have changed. Over the past several years, the United States has been the respondent in multiple investment disputes. As such, it is subject to the same broad scope of investor protections that led Bolivia to withdraw from ICSID. In 2004, in response to its new-found role as a respondent, the United States created a new model BIT that contains far more detailed provisions on certain procedural matters and certain substantive protections accorded to investors. In particular, the 2004 Model BIT amended the provisions governing the minimum standard of treatment (Article 5 and Annex A) and the applicable standard for expropriation (Article 6 and Annex B).

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119 See, e.g., Catherine Brown & Christine Manolakas, Trade in Technology Within the Free Trade Zone: The Impact of the WTO Agreement, NAFTA, and Tax Treaties on the NAFTA Signatories, 21 NW. J. INT'L L. & BUS. 71, 97 n.176 (2000) (noting that “capital investment flows primarily from the developed country to the developing country”).

120 To date, the United States has been a respondent in thirteen investment disputes, all of which were brought under the auspices of NAFTA Chapter 11. See U.S. Department of State, Cases Filed Against the United States, http://www.state.gov/s/l/c3741.htm (last visited Mar. 7, 2008) (listing NAFTA Investor-State Arbitrations).


122 For a fuller discussion of these new standards, see also Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 97 AM. J.

https://scholarship.law.upenn.edu/jil/vol29/iss3/5
The effect of these amendments arguably was to weaken the protections accorded to U.S. investors. For example, the 1994 Model BIT contained a prohibition against uncompensated expropriations. The prohibition was drafted broadly and applied to direct, indirect, creeping, consequential, and regulatory expropriations. The 2004 Model BIT, however, severely limits the possibility of regulatory and certain indirect or creeping expropriations by providing that, "[e]xcept in rare circumstances, nondiscriminatory 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."\footnote{2004 Model BIT, supra note 121, at Annex B, para. 4(b).} The 2004 Model BIT further limits existing protections against uncompensated expropriation in that its provisions on uncompensated expropriation are "intended to reflect customary international law concerning the obligation of States with respect to expropriation."\footnote{Id., at Annex B, para. 1.} Although seemingly straightforward, this standard may lead to significant confusion since it was the uncertainty of customary international law that, at least in part, fostered the growth of the BIT regime.\footnote{See Bernard Kishoiyian, The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law, 14 NW. J. INT'L L. & BUS. 327, 332 (1994) (arguing that "it is the uncertainty relating to the law on state responsibility that has given an impetus to the negotiation of bilateral investment treaties").} Indeed, as Judge Stephen Schwebel has noted, "[t]here is no agreement within the international community on the content of customary international law on which the 2004 Model BIT relies."\footnote{See Stephen Schwebel, The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law, 3 TRANSNAT’L DISP. MGMT. 1, 4 (2006) (describing the deficiencies of the 2004 Model BIT).} In addition, the 2004 Model BIT amends provisions dealing discriminatory, and fair and equitable treatment. The 1994 U.S. model BIT provided that a host government "shall at all times accord to covered investments fair and equitable treatment and full protection and security, and in no case shall accord treatment less favorable than that required by international law."\footnote{U.S. DEPT OF STATE & USTR, U.S. MODEL BILATERAL INVESTMENT TREATY 1 (1994) [hereinafter 1994 Model BIT].} In addition, the prior model BIT provided that host governments may not "in
any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments." 128 By contrast, the 2004 Model BIT provides that a host government "shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."129 The 2004 Model BIT defines what is meant by that provision:

For greater certainty, paragraph 1 prescribed the customary international law minimum standard of treatment of aliens as the minimum standard to be afforded to covered investments. The concepts of 'fair and equitable' treatment and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create any additional substantive rights.130

The seemingly innocuous change in language between these two treaties has led to a material change in the substantive protection given to foreign investors. For example, the 2004 Model BIT has eliminated the prohibition against "unreasonable and discriminatory treatment." Moreover, it has reduced the level of protection provided by the treaty. Arbitral tribunals have held that language such as that used in the 1994 Model BIT required states to provide better treatment to foreign investments than was required by the minimum standards international law. In Azurix, the arbitral tribunal held:

Turning now to Article II.2(a), this paragraph provides: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law." The paragraph consists of three full statements, each listing in sequence a standard of treatment to be accorded to investments: fair and equitable, full protection and security, not less than required by international law. Fair and equitable treatment is listed

128 Id. art. 2, para. 3(b).
129 Id. art. 5, para. 1.
130 Id. art. 5, para. 2.
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separately. The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment will be no less than required by international law. The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. 131

Thus, the purpose of the fair and equitable treatment provision in the 1994 Model BIT (and each of the BITs containing such language) was "to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law." 132 The 2004 Model BIT, however, reverses the situation by establishing that customary international law sets the upper limit of protection that a state must provide to foreign investments.

When drafting the 2004 Model BIT, the United States encountered significant resistance to the proposed changes described above. The U.S. State Department requested that its Advisory Committee on International Economic Policy review and comment on the draft model BIT. 133 The Advisory Committee's Subcommittee on Investment issued a report outlining the views of its members, which it summarized as follows:

[T]he Members who represent investors do not believe that the 1994 model BIT needs to be or should be changed. The 1994 model BIT offers strong protections against the substantial risks that face U.S. investors abroad, as demonstrated by ten years of case law, and it continues to reflect modern international law and investment practice. These Members believe that the draft model BIT circulated in December [2003], by contrast, represents a substantial weakening of investor protections that in large part are not compelled by the TPA legislation nor justified by any reasonable assessment of risk to the United States as a

132 Id.
133 The Advisory Committee on International Economic Policy is a committee of nongovernmental experts representing a wide range of interests.
defendant against potential claims. These Members believe that foreign investors already enjoy under U.S. law protections comparable to those found in the 1994 model BIT. By contrast, U.S. investors abroad often confront undeveloped legal systems without independent judiciaries. These Members therefore believe that adapting the model BIT to the investment chapters of the recent FTAs serves only to perpetuate a downward trend in protection for U.S. investors, while their European competitors continue to benefit from BITs that now set the standard for investor protection. 134

The long-term effect of the 2004 Model BITs substantive changes cannot be predicted. Some argue that the new model BIT simply "reconcile[s] the objectives of strong investor protection with the possibility for governments to enact regulations without fear of compensatory claims." 135 As such, the changes merely clarify substantive provisions and on procedural safeguard mechanisms but do not undermine fundamental investor protections. 136 By contrast, others, including Judge Schwebel, have argued that the provisions of the 2004 Model BIT reflect a substantial retreat from the investor protections of the 1994 Model BIT. 137 At a minimum, the new provisions will put the international investment law system to yet another test as arbitral tribunals are forced to interpret its meaning and define the scope of protections accorded to foreign investors.

4. CONCLUSION

The international investment law system plays a unique role in the regulation of sovereign conduct. It developed quickly as a means of stimulating private investment and conferring upon private actors a direct right of action against governments. In 1992,

136 Id.
137 See Schwebel, supra note 126, at 4 (describing the weakening of investor protections in the 2004 Model BIT as compared to the 1994 Model BIT).
Jose Alvarez commented that “[c]ountries are now turning to BITs in hope of economic benefits; if the benefits fail to materialize, there is the danger of a potent backlash.”138 Indeed, according to Professor Alvarez, “[i]t remains to be seen . . . what will happen . . . if the investments fail to come or . . . if the investors cause more problems . . . than the investment is worth.”139 Today, some governments are beginning to shed light on what could happen under those circumstances. Governments are pushing back against the system in large and small ways. The long-term legitimacy and credibility of the system will depend on how well and how quickly it can respond to those challenges. That means that all participants will be required to adjust their expectations if the system is to flourish. The United States is attempting to more clearly define the scope of protections accorded to investors through changes to its Model BIT. In doing so, it has arguably narrowed the scope of protections available to investors. Investors, in turn, may be required to adjust their expectations in such a way that will allow them to operate in the changing legal environment.

139 Id.