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THE PLACE OF TREATIES IN INTERNATIONAL INVESTMENT

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INTRODUCTION

In the past, economic relations between a national of a State and a foreign State were subject to the general law regulating the protection of aliens, which was more of a form of international diplomacy than a statutory protection.¹ It was thought that a State had a right to protect its nationals in another State.² On its own, however, this duty did not confer an incidental right to the nationals. Thus, a basic feature of this era was the discretion of a State to choose whether or not to bring claims on behalf of its citizens.³ Even when a State did espouse such claims, there was no guarantee that whatever accrued from the claims belonged to or would go to the nationals, since there was a legal fiction that when a wrong was committed against the national of a State, it was actually

1. See Barnali Choudhury, *International Investment Law As a Global Public Good*, 4 (stating that; “[p]rior to the twentieth century, standards for the protection of foreign investors and foreign investments were developed primarily through the process of diplomatic protection.”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181414.

2. See A.M.H. VERMEER-KUNZLI, *THE PROTECTION OF INDIVIDUALS BY MEANS OF DIPLOMATIC PROTECTION*, 3 (2007); Craig Forcese, *Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law*, 37 *GEO. WASH. INT’L L. REV.* 469, 471- 472 (2005).

3. See Alberto Alvarez-Jimenez, *Foreign Investors, Diplomatic Protection and the International Court of Justice’s Decision on Preliminary Objections in the Diallo Case*, 33 *N.C. J. INT’L L. & COM. REG.* 437, 438 (2008).

committed against the State.⁴ The option aliens had was to persuade their home States to espouse their claims directly with the host States. This arrangement could not offer adequate protection to the investments of aliens in the host State, because it could leave the aliens with little or no avenue for the recovery of damages for injury.⁵

However, with the passage of time, and as economic transactions between States expanded, the time was ripe for States to conclude treaties that would regulate the investments of its nationals in another State. Treaties regulating foreign investment were all the more necessary because international law had not developed a generally acceptable norm governing foreign investments. This development, in brief, explains the history of international investment treaties. Presently, there is a proliferation of foreign investment treaties. This proliferation has caused treaties to assume much more significance in international investment law. This paper presents the significance of treaties to international investments. It contends that there is a hierarchy of sources of international law and that treaties occupy a central place among these sources. It also posits that increased certainty is needed to foster international investment, and use of multilateral treaties could go a long way in achieving this goal.

This paper is divided into seven parts. Part 1 traces the history of foreign investment treaties and provides the factors that led to the emergence of the current investment regime. Part 2 discusses the significance of treaties in the vexed question of whether or not there is a hierarchy of international law sources. Part 3 examines treaty-making in the current international investment regime – visiting the argument about whether or not the provisions of investment treaties have ripened into customary international law, highlighting the dominance of bilateral investment treaties over multilateral investment treaties, offering explanation for the near absence of multilateral investment treaties in the current investment treaty regime, and noting the legitimacy problem that arises from inconsistent decisions of arbitral tribunals. The general bindingness of treaties under international law is explored in Part 4, while Part 5 considers the exceptions to the rule that treaties are binding on the parties. Part 6 focuses on the benefits and criticisms of Investment Treaties. This paper concludes that international investment treaties have

4. Kate Miles, *International Investment Law: Origins, Imperialism and Conceptualizing the Environment*, 21 COLO. J. INT'L L. & POL'Y 1, 15 (2010); David J. Bederman, *State-to-State Espousal of Human Rights Claims*, 1 Va. J. Int'l L. Online 3, 4-5 (2011).

5. *Id.*, at 4-5.

brought some much-needed certainty to the terms regulating the investment relations between the foreign investor and the host State.

I. THE EVOLUTION OF INTERNATIONAL INVESTMENT TREATIES

The history of international investment⁶ does not coincide with the history of investment treaties,⁷ although both of them have links to general principles of international law.⁸ Prior to the Second World War, the protection of international investment was not a major concern of international law.⁹ Investments in the colonies that were taken over by the imperial powers had been given sufficient protection by the imperialists because of the stake the imperial powers had in them.¹⁰ Before this time and during the ancient era,¹¹ the status of aliens in the territory of another State and the protection afforded to their investments was at a very low ebb.¹² However, at present, the situation has witnessed some remarkable changes. This section explores the evolution of these changes.

International investment treaties were necessary for States to protect their nationals doing business in foreign States. At the most fundamental level of international law, there is no obligation of a State to admit the nationals of another State to its territory in the absence of any agreement to the contrary.¹³ However, when a national of a State is admitted by another State, the treatment given to the alien by the host State must conform to some recognized standard. Such a standard is neither better nor worse than that applicable to local nationals.¹⁴ Additionally, if an alien is injured by the actions of the host State, then the alien's State can

6. In this work “international investment” and “foreign investment” are used interchangeably.

7. See Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L. J. 491, 499 (2009) (stating that the history of the one dates back in time much further than the other). This is understandable since international investment treaties originated from international investment. But both of them are not mutually exclusive.

8. See Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 MIAMI INT'L & COMP. L. REV. 403, 409 (2006) (founding the origin of foreign investment treaty rules in general international law principles). The same should be applicable to rules of international investment. But see Christopher M. Ryan, *Discerning the Compliance Calculus: Why States Comply With International Investment Law*, 38 GA. J. INT'L & COMP. L. 63, 66 (2009) (arguing that “[i]nternational investment law fundamentally differs from traditional or customary forms of international law in several respects”).

9. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 19 (2010).

10. *Id.*

11. The “ancient era” refers to the period before the Second World War.

12. See ANDREW NEWCOMBE & LLUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 3 (2009).

13. See DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1051 (2009).

14. *Id.*

bring a claim on behalf of the alien against the host State responsible for the injury.¹⁵ It is against this backdrop that international investment treaties developed.

In the late nineteenth and early twentieth centuries, economic relations between States allowed the use of diplomatic protection by States to espouse the claims of their nationals in another State.¹⁶ When States were desirous of safeguarding the interests of their nationals' abroad, they could use all the means at their disposal.¹⁷ Thus, gunboat diplomacy was readily resorted to by more powerful States in order to exert favorable treatment from weaker States in their economic dealings¹⁸ or to recover debts being owed them or their nationals.¹⁹ Although this form of diplomatic protection was not generally prohibited under then-existing international law, its use soon became abused by States.²⁰ The abuse was evident in the forceful collection of debt from Latin American States by European naval forces where, for instance, there was naval intervention of Great Britain, Germany, and Italy in Venezuela in 1902.²¹ Similarly, on several occasions in the twentieth century, the United States forcefully intervened in Latin America.²² Thus, the need to get rid of gunboat diplomacy and its attendant problems was the impetus for the development of international investment treaties.²³

From the ancient era to the World War II era, there were no generally accepted or institutionalized rules regulating investment between States. Traditional international law was depended on to regulate international investment. Nonetheless, as the advent of gunboat diplomacy illustrates, traditional international law was not adequately tooled for this task.²⁴ Thus, the evolution of the modern form of investment law can be traced

15. *Id.*, at 1052.

16. NEWCOMBE & PARADELL, *supra* note 12, at 2, 9.

17. *Id.*, at 2, 9

18. Gunboat diplomacy is "the use or threat of limited naval force, otherwise than as an act of war, in order to secure advantage or to avert loss, either in furtherance of an international dispute or else against foreign nationals within the territory or the jurisdiction of their own state." JAMES CABLE, *GUNBOAT DIPLOMACY, 1919-1991: POLITICAL APPLICATIONS OF LIMITED NAVAL FORCE* 14 (3d ed. 1994).

19. See Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 *NW. J. INT'L L. & BUS.* 327, 329 (1994).

20. See NEWCOMBE & PARADELL, *supra* note 12, at 8, 9.

21. See Kishoiyian, *supra* note 19, at 329. It is recorded that "between 1820 and 1914, Great Britain intervened in Latin America at least forty times to enforce British claims for injuries to its nationals and to restore order and protect property". NEWCOMBE & PARADELL, *supra* note 12, at 9.

22. See Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 *U.C. DAVIS J. INT'L L. & POL'Y* 157, 160-161 (2005).

23. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1525 (2005).

24. See Ryan, *supra* note 8, at 68.

through the post World War II reconstruction era, which was caused by the economic depression.²⁵

At this point, customary international law still did not adequately regulate international investment. First, there was no consensus as to what law governed the treatment of foreign investment.²⁶ While developed States had largely embraced the role of international law in regulating how foreign nationals should be treated and accepted that international law should regulate the treatment of their foreign investments, developing States were averse to the expansion of international law into areas thought to be the exclusive province of domestic law.²⁷

Second, the principles that were in existence then were devoid of clarity and were thus subject to differing interpretations. Although there were indications that customary international law, as well as many friendship, commerce, and navigation treaties, required compensation for the nationalization or expropriation of foreign investments, there were no clear principles governing how compensation should be determined.²⁸ While it seemed customary international law required the payment of full compensation by the expropriating State,²⁹ developing States roundly disagreed with this standard. They saw it as a violation of their sovereignty³⁰ and argued for the standard of appropriate compensation.³¹

25. See DOAK BISHOP ET AL., *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 1-2 (2005).

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

27. *Id.*, at 27

28. See 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, 68-69 (2005).

29. Developed states consistently espoused a standard of "full compensation," also referred to as the Hull Formula, which is defined as prompt, adequate, and effective compensation. See *CME Czech Republic B.V. v. Czech Republic*, Final Award, at 115, UNCITRAL Arbitration (March 14, 2003), available at http://ita.law.uvic.ca/documents/CME-2003-Final_002.pdf. See also *Factory at Chorzow (Ger. v. Pol.)*, Claim for Indemnity, Merits, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), available at http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf, and 3 GREEN H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 658-59 (1942).

30. See Gloria Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 318 (1994).

31. Appropriate compensation seems to have no generally accepted definition. However, it is considered as an "attempt to bridge differences between developed and developing states." OECD Directorate Fin. & Enter. Affairs, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, at 2 n. 1, Working Papers Int'l Inv. No. 2004/4, (2004), available at <http://www.oecd.org/daf/inv/internationalinvestmentagreements/33776546.pdf>. Sornarajah argues that appropriate compensation is a flexible standard that could range from full compensation to even no compensation at all depending on the circumstances. See SORNARAJAH, *supra* note 9, at 446. While appropriate compensation may give states and arbitrators a wide latitude of discretion and flexibility, Sornarajah's incorporation of full compensation into appropriate compensation may raise some objection. Thus, according to Lauterpacht, appropriate compensation implied something less

Even though appropriate compensation does not have a generally accepted definition, it appears the developing States agitated for it, because it might involve only the payment of the market value of the foreign investment without regard to or addition of the future profits the investment would have generated. Full compensation, which the developing States would not accept, has sometimes included notions of future profits which the investment would have made as a going concern if the expropriation had not taken place.³²

The European States, which had carried out economic relations among themselves on a reciprocal basis, wanted to extend the standards under which those relations had thrived to their relations with the non-European States.³³ Thus, they attempted to introduce the minimum standards of treatment that reflected their notion of “civilized states standard,”³⁴ apparently to secure a better protection of their investment in non-European States. Not unexpectedly, such an attempt was not welcomed by these other States, as it was an imposition of Eurocentric ideology on them.³⁵ The disagreement between the developed and the developing States on the standard of protection of foreign investment led to the adoption of the United Nations Charter of Economic Rights and Duties of States in 1974, which provided for the right of every State to expropriate foreign investment and endorsed the payment of appropriate compensation.³⁶

than full compensation. See Eli Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investment*, 8 *JOURNAL OF ENERGY & NAT. RESOURCES L.* 241, 249 (1990).

32. See *Metalclad v. Mexico* (2001) 5 ICSID Reports, 209.

33. See Miles, *supra* note 4, at 3.

34. “Civilized states standard” seems to incorporate the full compensation standard advocated by the developed states. See Ahmad Ali Ghouri, *The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration and International Investment Law*, 14 *INT'L ARB. L. R.* (Issue 6) 191 (2011).

35. The developing countries had advocated that foreign investment should be subject to the regulation of the host state. This position was articulated in the Calvo Clause, which was popularized by an Argentine diplomat, Carlos Calvo. The Calvo Clause is a contractual stipulation that contracts between Latin American governments and foreigners doing business in Latin American states should be regulated by the laws of the host states, and that unless the legal remedies provided by the host states have been exhausted, the foreigners' home governments cannot offer them diplomatic protection. The Calvo Clause prescribes that foreigners be entitled only to the same standard of treatment that is given to nationals. See generally Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of National and Foreign Investors*, 26 *LAW & POL'Y INT'L BUS.* 1169 (1995) LUIS M. DRAGO, *LA REPUBLICA ARGENTINA Y EL CASO DE VENEZUELA* (1903) and Luis M. Drago, *State Loans in their Relation to International Policy*, 1 *AM. J. INT'L L.* 692 (1907). See also K. Lipstein, *The Place of the Calvo Clause in International Law*, 22 *B.Y. INT'L L.* (Royal Institute of International Affairs) 130 (1945).

36. See G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) (particularly Art. 2).

It was in view of these shortcomings that States, especially capital exporting States, began charting a new course to create rules for the protection of foreign investments on both bilateral and multilateral levels. On the multilateral level, there were efforts to establish the Havana Charter of 1948.³⁷ The purpose of the Havana Charter was to create a regulatory body, the International Trade Organization, which would regulate international trade and make rules on international investments.³⁸ However, the Havana Charter failed to receive general ratification by States, leading to its failure.³⁹ There were similar efforts to establish the International Chamber of Commerce's International Code of Fair Treatment for Foreign Investment (1949),⁴⁰ the Abs-Shawcross Convention (1959),⁴¹ and the Organization for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property (1967).⁴² While these efforts did not come to fruition, they gave impetus to the subsequent development of investment treaties.⁴³

The drive towards the creation of more beneficial international investment relationships achieved huge success in the late 1950s, especially on the European axis where Germany and Pakistan signed what is considered the first bilateral investment treaty in 1959.⁴⁴ This

37. See Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. Doc. E/CONF.2/78 (hereinafter Havana Charter) available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

38. There were few provisions on investment in the final draft of the Havana Charter, and states could not come to an agreement as to the standard of protection to be given to international investments. In the end, the Havana Charter failed as a result of the failure of the United States Senate to ratify it under Truman administration. See NEWCOMBE & PARADELL, *supra* note 12, at 19-20; Christoph T. Feddersen, Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, 7 MINN. J. GLOBAL TRADE 75, 80-81 (1998).

39. See generally ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2. ed. 1990) and JOHN JACKSON, *THE WORLD TRADING SYSTEM* (2d. ed. 1997) and William Diebold, Jr., The End of the ITO, Princeton Essays in International Finance, No. 16, (1952).

40. See generally Franziska Tschofen, Multilateral Approaches to the Treatment of Foreign Investment, 7 ICSID REV.—FOREIGN INV. L. J. (No. 2) 384, 385-386 (1992).

41. Herman Abs & Hartley Shawcross, Draft Convention of Investments Abroad (Abs-Shawcross Draft Convention), (Apr. 1959) in Note, The proposed convention to protect private foreign investment: a round table, 9 J. PUB. L. (presently EMORY LAW JOURNAL) 116 (1960).

42. OECD Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, 7 I.L.M. 117 (1962).

43. See NEWCOMBE & PARADELL, *supra* note 12, at 30 (noting that, "although the 1967 Draft OECD Convention failed to gain sufficient support among OECD countries for adoption as a multilateral convention, its substantive provisions have served as an important model for bilateral investment treaties").

44. See Treaty for the Promotion and Protection of Investments, F.R.G.-P, Nov. 25, 1959, 24 U.N.T.S. 1963, and Ryan, *supra* note 8, at 72. That the 1959 treaty between Germany and Pakistan was the first bilateral treaty is true to the extent that it was the first that exclusively dealt with investment-related issues independent of other commercial matters, as there were before the conclusion of that treaty other treaties, such as the Treaties of Friendship, Commerce and

bilateral investment treaty was followed by Switzerland in 1961, the Netherlands in 1963, Italy and the Belgo-Luxembourg Economic Union in 1964, Sweden and Denmark in 1965, Norway in 1966, France in 1972, the United Kingdom in 1975, Austria in 1976, and Japan in 1977.⁴⁵ By 1977, European countries had concluded approximately 130 bilateral investment treaties with many developing countries.⁴⁶ Following the European example, the United States initiated its own bilateral investment treaty program in 1981.⁴⁷ This program was so aggressive that within 25 years, it had concluded about 45 bilateral investment treaties with developing countries.⁴⁸

With the emergence of new economies and the end of communism, by the late 1980s, the new economies of Eastern and Central Europe, and some Latin American, African, and Asian countries needed sources of capital to finance their developmental projects.⁴⁹ This goal was achievable by means of bilateral investment treaties with developed countries. At the end of 1988, about 309 bilateral treaties had been concluded,⁵⁰ which rose to at least 1,700 by 1998.⁵¹ By 2002, no less than 2,181 treaties were in force.⁵² At present, there are about 3,000 bilateral investment treaties concluded between States.⁵³ Although those treaties are often between a developed country and a developing country,⁵⁴ in

Navigation, which, apart from their provisions on trade in goods and freedom of navigation, also provided for investment-related guarantees. See Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 *BROOK. J. INT'L L.* 405, 436-437 (2008).

45. See NEWCOMBE & PARADELL, *supra* note 12, at 42-43.

46. See INTERNATIONAL CHAMBER OF COMMERCE, *BILATERAL INVESTMENT TREATIES FOR INTERNATIONAL INVESTMENT* 13-16 (1977).

47. See Pamela Gann, *The U.S. Bilateral Investment Treaty Program*, 21 *STAN. J. INT'L L.* 373 (1985).

48. See U.S. Dep't of State, *U.S. Bilateral Investment Treaty Program Fact Sheet* (Sept. 15, 2004), <http://www.state.gov/e/eb/afd/bit/117402.htm>.

49. See Salacuse & Sullivan, *supra* note 28, at 74.

50. See Athena Pappas, *References on Bilateral Investment Treaties*, 4 *ICSID REV.—FOREIGN INV. L.J.* 189, 194-203 (1989).

51. See UNCTAD, *Trends in International Investment Agreements: An Overview* 22 fig. 2, U.N. Doc. No. UNCTAD/ITE/IIT/13 (1999); UNCTAD, *Bilateral Investment Treaties in the Mid 1990's* (1998). For more information on the development of bilateral investment treaties, see United Nations Center on Transnational Corporations (UNCTC), *Bilateral Investment Treaties* (1988); UNCTAD, *Bilateral Investment Treaties 1959-1999*, U.N. Doc. No. UNCTAD/ITE/IIA/2 (2000).

52. See UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, 89, U.N. Doc. No. UNCTAD/WIR/2003 (Sept. 2003).

53. See Jeswald Salacuse, *The Emerging Global Regime for Investment*, 51 *HARV. INT'L L.J.* 427, 428 (2010).

54. See Yackee, *supra* note 44, at 405.

recent times there have been bilateral investment treaties concluded between developing States.⁵⁵

The development of investment treaty law has taken some prominence in international law. Therefore, it is necessary to consider the place of treaties in the hierarchy of international law sources.

II. TREATIES AND THE HIERARCHY OF INTERNATIONAL LAW SOURCES

The hierarchy of law sources assumes great importance in most municipalities because it resolves conflicts between norms.⁵⁶ In many of the States that operate under a written constitution, not only are laws ordered in a hierarchy,⁵⁷ but there is also a provision stating that the constitution shall prevail over any other law in case of a conflict.⁵⁸ Usually, written law overrides unwritten law, while political norm trumps over legal norms.⁵⁹ This section will apply the concept of hierarchy to international law.

While the existence of hierarchy of laws in domestic legal systems may not be contested, there has been a long debate over hierarchy of sources of international law. Article 38 of the Statute of the International Court of Justice (ICJ) is considered as a provision on the sources of international law.⁶⁰ The order in which the sources are listed can be

55. See Franck, *supra* note 23, at 1527-28; Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L., 483, 488 (2001).

56. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

57. E.g., art. 11 of the Constitution of Ghana provides in part that: "[t]he laws of Ghana shall comprise (a) this Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law" See Constitution of the Republic of Ghana, May 8, 1992, art. 11, available at <http://www.politicsresources.net/docs/ghanconst.pdf>.

58. E.g., Article 1(2) of the Constitution of Ghana provides that: "[t]he Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution should, to the extent of the inconsistency, be void." *Id.*, art. 1(2). Also, Section 1 of the Constitution of Nigeria contains similar provision. See Constitution of the Federation Republic of Nigeria, 1999, § 1(3).

59. Judge Meron has observed that: "[n]ational legal systems are characterized by a well-established hierarchy of norms. Constitutional provisions prevail over ordinary statutes, the latter prevail over secondary legislation or administrative regulations, and so on. It is therefore only natural that international lawyers, trained in national legal systems, should seek hierarchical principles in the international legal system as well." See Francisco Forrest Martin, *Delineating a Hierarchical Outline of International Law Sources and Norms*, 65 SASK. L. REV. 333, at 333(2002) (citing Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 3(1986)).

60. Article 38 I.C.J., Statute provides that:

considered as a hierarchy,⁶¹ yet an argument has been made against this view. This argument contends that the itemization in Article 38 does not create a hierarchy because all international norms are of equal status as they all originate from the will of States.⁶² What Article 38 does show is that international law is premised on State consent.⁶³ This view echoes the voice of voluntarists—those who believe that international law is tied to the sovereign power of States.⁶⁴ The hierarchy of the sources of law should not be less important in international law than in domestic law, especially in a regime of international law that has witnessed a growth of “international instruments, tribunals, and quasi-judicative intergovernmental bodies that decide different issues of international law.”⁶⁵

In this debate, much attention has been given to the relations of treaties and custom.⁶⁶ This attention does not suggest that treaties have no relation to other sources of law, or that those other sources are not important in the determination of international law matters. In fact, all the sources of international law are interrelated. For example, a treaty may codify a custom.⁶⁷ It is contended that treaty provisions can give rise to custom operating between two countries⁶⁸ or among a host of

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1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.
See Statute of the I.C.J., art 38, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

61. See Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 77 (2007) (characterizing Article 38 ICJ Statute as a rough hierarchy, notwithstanding the fact that it does not elevate one source over any of the other sources).

62. See Shelton, *supra* note 56, at 291 (citing PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 14- 16 (1995)).

63. See Bing Bing Jia, *The Relations Between Treaties and Custom*, 9 Chinese Journal of International Law [CHINESE J. INT'L L.] 81, 84 (2010).

64. See DAMROSCH ET AL., *supra* note 13, at 57.

65. See Martin, *supra* note 59, at 335.

66. See generally Jia, *supra* note 63.

67. E.g., the Vienna Convention on the Law of Treaties is to a great extent considered as a codification of customary law. See DAMROSCH ET AL., *supra* note 13, at 124.

68. The ICJ has held that such custom would only constitute a “a local custom” binding only the parties, and not a general custom of international law. See *Right of Passage (Port. v. India)* 1960 I.C.J. 6 (Apr. 12).

countries.⁶⁹ Also, although the ICJ is not bound by its earlier decisions,⁷⁰ it does cite its previous judgments for statements on customary law and treaty law in the majority of the cases it decides. Notwithstanding these observations, the battle of supremacy between treaty and custom rages on.⁷¹ It underlies the view that treaties and custom are the two major sources of international law.⁷²

A remarkable thing about the struggle for supremacy between treaty and custom is that it also exposes the inherent flaw in the argument concerning the non-existence of a hierarchy of sources. In the early formations of international law, custom was assigned a primary place in the hierarchy of sources of international law while treaties were relegated to the background.⁷³ However, it remains doubtful whether custom has maintained that primacy in the current regime of international law. The fact that Article 38 of the ICJ Statute places treaties⁷⁴ first in the list of the sources may be an indication that treaties now have primacy over the other sources of law.

Further, the appeal of treaties lies in the certainty that they create in law. At a time when what constitutes custom gives rise to a big controversy between developed and developing States, for instance with regard to what standard of treatment is to be accorded foreign investment, the only way to resolve or avoid the controversy is for States to conclude treaties. In so doing, States would agree to, and clearly express in writing, the terms governing their relations. In acknowledging the advantage of certainty in treaties, the doyen of international law has noted that the proliferation of treaties has continued to make treaties one of the most

69. E.g., following the signing by many states of the Comprehensive Test Ban Treaty, U.S. President Clinton asserted that the combined signatures a majority of countries, including the nuclear powers of the world, would establish an international norm prohibiting nuclear testing. See DAMROSCH ET AL., *supra* note 13, at 89-90.

70. This is because there is no doctrine of binding precedent in international law. See NEWCOMBE & PARADELL, *supra* note 12, at 102- 103.

71. See Oscar Schachter, *Entangled Treaty and Custom*, in ED DINSTEIN, *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 717, 720-22 (1974).

72. See Lt. Col. Vincent A. Jordan, *Creation of Customary International Law by Way of Treaty*, 9 U.S.A.F. JAG L. Rev. 38, 39 (1967) (citing 1 GEORG SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 26 (4th ed. 1960)).

73. See Cohen, *supra* note 61, at 79. See also 1 L. Oppenheim, *International Law* 25-27 (8th ed. 1955) (considering custom as the older and original source of international law).

74. Art. 38 uses “conventions”, which is one of the terms that can be used synonymously with treaties. For other names by which treaties are called, see U. O. UMOZURIKE, *INTERNATIONAL LAW* 163 (3rd ed. 2005).

important sources of law, thus diminishing the status of custom as a source of international law.⁷⁵

The elevated position of treaty as a source of law has been brilliantly captured by a celebrated scholar, Christopher J. Borgen:

While other sources of law such as customary international law are no less juridically important than treaties, treaties occupy a place of privilege in any discussion of the state of international law. For example, the Treaty Handbook, published by the United Nations (UN), states that “[t]reaties are the primary source of international law.”⁷⁶

Borgen’s observation is apposite to the view of this paper.

Apart from the sources of law contained in Article 38, there are other sources from which international law may emanate. However, these sources are the subject of controversy. For instance, there has been a debate as to the law-creating power, and by implication the bindingness, of United Nations General Assembly resolutions. While some writers think that General Assembly resolutions are law-making acts, and that the principles contained in them represent international custom by virtue of their being evidence of *opinio juris*,⁷⁷ others have relegated them to the status of “soft law” that have no binding effect.⁷⁸ While General Assembly resolutions on their own are merely advisory and have no binding effect, their political importance should not be overlooked.⁷⁹ However, to this extent, it is doubtful that General Assembly resolutions constitute a real source of international law.

75. See UMOZURIKE, *supra* note 68, at 16. This point should not be taken to mean that customary international law has lost its relevance as a source of international law. Rather the position here is that treaties, as written products of long bargaining and negotiation between two or more states, which are at least in principle considered equal, they tend to present much clarity and reduce the doubt and uncertainty that sometimes attend customary international law.

76. See Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 *GEO. WASH. INT'L L. REV.* 573, n. 1 (2003).

77. See SORNORAJAH, *supra* note 9, at 82.

78. See Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 *TUL. J. INT'L & COMP. L.* 415, 431 (2007) (observing that, “[t]he language of the [UN] Charter, the travaux préparatoires of the San Francisco conference, and the practice of the United Nations and that of its member states lead the majority of authors to conclude that ‘the general powers granted to the [General] Assembly under those Articles do not involve binding decision-making except where it is specially so provided expressly or by implication.’”) (citing Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, in 137 *RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 419, 444-45 (1974)).

79. See Yoav Tadmor, *The Palestinian Refugees of 1948: The Right to Compensation and Return*, 8 *TEMP. INT'L & COMP. L.J.* 403, 415 (1994).

The weight given to the resolutions of the United Nations Security Council in terms of law-creation seems to vary from that accorded to General Assembly resolutions. Even though Security Council resolutions are not generally considered legislation,⁸⁰ some are considered to have legal effect.⁸¹ These are usually decisions as opposed to recommendations,⁸² and their binding nature must not be in conflict with the principles and purposes of the United Nations.⁸³ There is also an argument that the Security Council is clothed with law-creating power, giving its resolutions a binding character. This view is predicated on Article 24 of the UN Charter. Under Article 24, member States confer to the Security Council the power to act on their behalf in the maintenance of international peace and security.⁸⁴ This grant of power can be thought of as an indication that member States accept that Security Council resolutions are binding on them.⁸⁵ Security Council resolutions have acquired much potency over the years, to the extent that they may be considered a source of international law, though their character may differ from the other sources of law contained in Article 38 of the ICJ Statute.

This paper subscribes to the view that there is a hierarchy of international law sources. This position is fortified by the fact that even though States have the right to contract out of general international law, they cannot do so to jus cogens norms. This prohibition rests on the notion that jus cogens are so fundamental to the existence of international law that they limit the substance of valid treaties;⁸⁶ in fact, they cannot be usurped by treaties.⁸⁷ They are sacrosanct and non-derogable – permitting derogation only by a subsequent norm of general international law having the same

80. This does not overshadow the view that considers the Security Council as the world's legislator. See generally Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 *FORDHAM INT'L L.J.* 542 (2005).

81. See Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 *MAX PLANCK Y.B. U.N. L.* 73, 79 (1998).

82. See Marko Divac Oberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 *EUR. J. INT'L L.* 879, 884 (2006) available at <http://ejil.oxfordjournals.org/content/16/5/879.full.pdf+html>.

83. *Id.*, at 885.

84. See UN Charter, art. 24.

85. See Rosand, *supra* note 80, at 574.

86. See Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 *HASTINGS INT'L & COMP. L. REV.* 411, 415-16 (1989).

87. Jus Cogens norms have been described as "norms that command peremptory authority, superseding conflicting treaties and custom." See Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE J. INT'L L.* 331 (2009). Examples of jus cogens include the prohibition against torture, slavery, genocide, piracy, and the use of force. See Dean Adams, *The Prohibition of Widespread Rape As a Jus Cogens*, 6 *SAN DIEGO INT'L L.J.* 357, 360 (2004-2005).

character.⁸⁸ This prohibition reflects an indication that there is a form of hierarchy of sources of international law, of which *jus cogens* is the apex. This may be considered a hierarchy of two layers of law: *jus cogens* and the other sources. This hierarchy may not be read from the provision of Article 38 of the ICJ Statute, but it is deduced from state practice, which considers peremptory norm as non-derogable norm. It is only in respect of the foregoing discussion about *jus cogens* that custom trumps treaty as a source of law.

III. TREATY-MAKING IN CURRENT INTERNATIONAL INVESTMENT REGIME

An international regime is described as consisting of "...principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."⁸⁹ The relations arising from the conclusion of a treaty amount to international relations and thus, could be part of an international regime. To this end, the rules contained in international investment treaties do give rise to a regime. The present international investment regime is made up of about 3,000 bilateral investment treaties⁹⁰ and about 300 regional agreements that provide for both trade and investment promotion.⁹¹ The emergence of the current treaty regime has continued to provoke some issues and debate among writers. This section discusses some of those issues, namely 1) investment treaties as customary law constitutive or as special law, 2) bilateral investment treaties versus multilateral investment treaties/instruments, and 3) a seeming legitimacy crisis.

A. INVESTMENT TREATIES AS CUSTOMARY LAW CONSTITUTIVE OR AS SPECIAL LAW

The most debated issue in the current treaty regime is perhaps the characterization of investment treaties i.e. whether the provisions of investment treaties constitute customary international law or only have special application to the parties involved. Considering their applicability, investment treaties have been considered as constituting customary international law on the ground that their provisions manifest certain concepts like the treatment of investments and aliens. These concepts are representative of general principles of law and when states

88. See The Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 115 U.N.T.S. 331 [hereinafter VCLT].

89. See Stephen Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, in STEPHEN KRASNER, POWER, THE STATE, AND SOVEREIGNTY: ESSAYS ON INTERNATIONAL RELATIONS 113 (2009).

90. See Salacuse, *supra* note 53, at 427.

91. See Jose Alvarez, A BIT on Custom, 42 N.Y.U. J. INT'L L. & POL. 17, 20 (2009).

enter into investment treaties, they tend to incorporate them into their domestic laws.⁹²

Along this line of reasoning, at least two scholars have asserted that investment treaties have risen to a level of custom. F. A. Mann, a major commentator, asserted that investment treaties create customary principles of international law and that States which have claimed to reject these principles have come to embrace them when those States are in critical situations.⁹³ Professor Andreas Lowenfeld, while opining that general public international law is impacted upon by investment treaties, has asserted that although not all states are parties to the numerous investment treaties, the non-parties to these treaties may now be bound by some of the international investment principles arising from the treaties.⁹⁴ He maintains that the substantive investment protections espoused in bilateral investment treaties have attained the status of customary international law and therefore cannot be seen as *lex specialis*.⁹⁵ Much of the vigor of his argument derives from the decisions of investment arbitrators, which decisions, he claims, coincide with general international law and are therefore non-treaty based.⁹⁶ Moreover, he argues, when States conclude treaties, they do so on the understanding that they are reproducing the customary international law rule in the treaty and also recognizing its effect.⁹⁷

On the other hand, it has been vigorously posited that investment treaties contain special rules that are only applicable to the parties and that treaties only bind States that have consented to them as a general principle.⁹⁸ Thus, investment treaties are considered *lex specialis* in that they bind only the parties and operate on a *quid pro quo* basis. They do not give rise to customary law, even where they involve several States.⁹⁹ They therefore do not have a general acceptance.¹⁰⁰ Moreover, in many cases they involve unequal parties. For example, consider a situation where a poor State, in its desperation for capital for development and

92. See Salacuse and Sullivan, *supra* note 28, at 115.

93. See F.A. Mann, *British Treaties for the Promotion and Protection of Investment*, 52 *BRIT. Y.B. INT'L L.* 241, 249-51 (1981).

94. See generally Andreas Lowenfeld, *Investment Agreements and International Law*, 42 *COLUM. J. TRANSNAT'L L.* 123- 129 (2003).

95. *Id.* at 129.

96. *Id.* at 130.

97. See Davis Robinson, *Expropriation in the Restatement (Revised)*, 52 *BRIT. Y.B. INT'L L.* 241, 249 (1981).

98. See VCLT, *supra* note 88, art. 34.

99. See M. Sornarajah, *State Responsibility and Bilateral Investment Treaties*, 20 *J. WORLD TRADE* 79, 82 (1986).

100. See SUBEDI SURYA, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE* 103 (2008).

without sufficiently appreciating what impact a particular treaty would have on its economy, resignedly concludes a treaty with a developed country. In this scenario, such treaty—a product of unequal bargaining power—cannot reflect customary law.¹⁰¹ If the contents of investment treaties differ markedly, then it would be baseless to conclude that they produce generally acceptable rules.

The major problem in approaching this debate lies in identifying what principles qualify as international custom sufficient to constitute international law. A determination of what amounts to custom in international law lacks certainty. Although a number of approaches have been put forth,¹⁰² the issue still lacks much clarity. A number of treaties may make reference to general principles of international law in their provisions, but such reference in itself does not give a clue as to what principles the parties generally agree to be customary international law in their investment regulations. There has been a consistent disagreement between developed and developing States as to what standard of investment protection reflects an international law standard.

For instance, while the developed States have considered the Hull formula as the international minimum standard recognized by customary law for the protection of investments,¹⁰³ the developing States have consistently rejected this standard as representing general custom. As a result of this general rejection, developing States have secured the formation of the New International Economic Order within the United Nations.¹⁰⁴ Therefore, it cannot be said that the prompt, adequate, and effective compensation standard put forth in the Hull formula has the stamp of international custom.

101. See Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 *FORDHAM INT'L L. J.* 1550, 1552 (2009).

102. See the *Paquete Habana*, 175 U.S. 677 (1900) and the *Lotus* (Fr. v. Turk.) P.C.I.J. (Ser. A) No. 10 (1927). It has been suggested that the ability of a party to a treaty to show that the treaty leads to the formation of a customary rule or that such a rule predates the treaty, is a way of determining the existence of a custom. See Anthony D' Amato, *Treaties as a Source of General Rules of International Law*, 3 *HARV. INT'L BULL.* 1, 32 (1962). Kelsen sees custom as the acceptance by states of certain practice, through whatever form of consent. See HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW*, 311 (1952). It has also been suggested that customary law can be derived from "individual actions undertaken by the legal person and spontaneously repeated by other legal persons, until their repetition becomes so constant that they will also in similar circumstances, be repeated in the future." See TORSTEN GIHL, *INTERNATIONAL LEGISLATION*, 25 (1957).

103. The Hull formula embodies the "prompt, adequate, and effective compensation."

104. G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. 1, 2229th pln. mtg., at 3, U.N. Doc. A/9559 (1974). The New International Economic Order is a program that was adopted by the United Nations to improve the economic conditions of developing States relative to the developed States. It was a product of the demands of developing countries to effectively participate in the decision-making of international financial bodies. See Enrique R. Carrasco & M. Ayhan Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 11-12 (1996).

This is notwithstanding the fact that States can act upon certain provisions of treaties to the extent that a consistent practice is established between them which attains the status of a special custom. The ICJ has considered that special custom as “a local custom,” is binding as between the States and not a general custom of international law.¹⁰⁵ The position would appear that treaties may reflect general customary law, but not the detailed contents. For example, the rule that every act of expropriation by a State engages its responsibility to pay compensation is a custom that is recognized in all investment treaties. But, investment treaties do not provide a generally accepted standard for determining the amount of compensation.

Unlike other fields of international law, such as human rights where the prohibition of torture, slavery, and other acts has clearly been established to constitute international custom, in the area of investment treaty-making, a general consensus on what practice amounts to customary international law has been elusive in the field of international investment law.

B. BILATERAL INVESTMENT TREATIES VERSUS MULTILATERAL INVESTMENT TREATIES

One remarkable feature of the current investment regime is the dominance of bilateral investment treaties and the lack of multilateral investment treaties. As shown earlier in the evolution of international investment treaties, because of the uncertainty and disagreements among States as to what constitutes customary international law of investment, the various attempts to establish multilateral treaties did not materialize.¹⁰⁶ This section discusses the apparent preference for bilateral investment treaties in the status quo.

While there is a legal framework at the multilateral level to regulate trade, no multilateral treaty has been developed to address international investment.¹⁰⁷ The lack of consensus on international investment law has hindered the adoption of multilateral investment treaties. During the World Trade Organization WTO Doha Round of negotiation, a proposal made by the developed States to reach an agreement on a multilateral

105. On this note, the ICJ, in the Right of Passage Case, observed that: “It is difficult to see why the number of states between which a local custom may be established on the basis of long practice must necessarily be larger than two. The court sees no reason why long continued practice between two states accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states.” See Right of Passage, *supra*, note 68.

106. See M. SORNORAJAH, *supra* note 9, at 236.

107. See Efraim Chalamish, *The Future of Bilateral Investment Treaties: A De facto Multilateral Agreement?*, 34 BROOK. J. INT'L L. 303, 307 (2009).

investment treaty was rejected by the developing States on the premise that the conclusion of such a multilateral treaty would impinge on the sovereign powers of the developing States.¹⁰⁸ The progress that has been achieved in international investment law consists in bilateral investment treaties and regional agreements and instruments on investment.¹⁰⁹

While States have shown an unwillingness to form multilateral treaties on investment, they have consistently adhered to bilateral investment treaties. The result is that bilateral investment treaties continue to enjoy more popularity than multilateral investment treaties.¹¹⁰ One reason for this disparity is the fact that the negotiation and conclusion of a bilateral treaty is far easier to achieve than that of a multilateral treaty. While a bilateral treaty caters to the interests of only two States, a multilateral treaty deals with the interests of many countries.¹¹¹ Moreover, developed States, considering their superior economic power over developing States, are more eager to conclude bilateral treaties with the latter than to enter into multilateral treaties where other developed States may challenge their primacy. However, developed States are willing to conclude bilateral treaties with developing States so that they can obtain investment liberalization.¹¹² This willingness seems to arise from developed States' knowledge that the developing States would undertake little to no investment in the developed States. Developed States have been hesitant to conclude bilateral treaties with other developed States because of their apprehension that these other developed States may pose strong competition to the host countries.¹¹³

Bilateral investment treaties have not been balanced in the way they benefit the parties, that is, developed States and developing States. Perhaps the conclusion of multilateral treaties will offer balanced investment relations among the parties since such treaties will involve

108. See Fiona MacMillan, *If Not This World Trade Organization, Then What?*, 2 INT'L CO. & COM. L. REV. 75, 76-79 (2004).

109. E.g., the ASEAN Treaty on the Protection and Promotion of Investments, Dec. 14, 1987, 27 I.L.M. 612 (1987) and the European Energy Charter Treaty, 1995, 34 I.L.M. 360 (1995) and the North American Free Trade Agreement, Dec 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) (hereinafter NAFTA).

110. It has been asked rhetorically: "...why is it that multilateral agreements concerning international investment or multinational enterprises are impossible to achieve, while bilateral investment agreements multiply like fruit flies?" See Lowenfeld, *supra* note 94, at 123.

111. See Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 28 (2005); FEN OSLER HAMPSON, *MULTILATERAL NEGOTIATIONS: LESSONS FROM ARMS CONTROL, TRADE AND THE ENVIRONMENT* 1-51, 345-60 (1995).

112. See generally, Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, Hauser Global Law School Program, Global Law Working Paper 01/05.

113. See Kelley, *supra* note 55, at 494-98.

many actors in the investment arena who may constitute a check on the excesses of the more powerful States. However, these balanced investments relations would exist only if similar occurrences under the international trade regime – where developed States would not let go of some of their dominating tendencies – would not be replicated under multilateral investment treaties.

C. A SEEMING LEGITIMACY CRISIS

Another feature of the present international investment regime in terms of treaty-making is the institution of arbitration as a means of settling investment disputes. There is a general assumption that like cases will be treated the same way and should produce the same outcome as similar cases previously decided. In other words, it is expected that the tribunals that decide investment disputes brought to them by parties to treaties should interpret treaty provisions that have similar content consistently. This reflects the practice of precedent which is not uncommon in international law and which has been observed by the ICJ and arbitral bodies.¹¹⁴ However, contrary to this expectation, inconsistent decisions have continued to spring up from the tribunals.¹¹⁵ This section discusses the concern that is generated by inconsistent arbitral decisions.

The explosion in the number of treaties has resulted in a comparable surge in investment disputes. Arbitral tribunals, in a bid to deal with these disputes, do make inconsistent decisions. These awards, when given, provoke reactions from both the States which are affected by the awards and academics. The result is that a sort of legitimacy crisis is created in the current international investment law regime.¹¹⁶ Notably, “[s]cholars have argued that inconsistent decisions by arbitral tribunals threaten the legitimacy of the system.”¹¹⁷ This observation leaves the meaning of the legitimacy crisis at large. If it implies that the tribunals, by virtue of their inconsistent awards, lose the legitimacy reposed on them by the treaty parties, then this may not be correct.

114. See NEWCOMBE & PARADELL, *supra* note 12, at 102.

115. See Eric Gottwald, *Leveling the Playing Field: Is It Time for A Legal Assistance Center for Developing Nations in Investment Treaty Arbitration*, 22 AM. U. INT’L L. REV. 237, 256-59 (2007) (arguing that “in several instances investment treaty tribunals have come to different conclusions over the meaning and application of” the major investment treaty standards “even when confronted with the same set of facts,” and that this is not unconnected to the open-ended language used in drafting these key provisions).

116. See Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 875, 894-96 (2011).

117. See Yackee, *supra* note 101, at 1556.

Given the fact that the tribunals presiding over investment disputes derive their authority from the provisions of the treaty itself, it is questionable whether the international investment regime suffers a legitimacy problem as a result of inconsistent decisions of the tribunals. To this extent, the use of the expression “legitimacy crisis” may be a misnomer, because legitimacy is derived from the terms of a treaty consented to by the sovereign authority of the contracting States. At most, inconsistent decisions may affect the competence of the tribunals, not the legitimacy of the investment regime. The problem of inconsistent decisions may not be peculiar to investment tribunals; rather, it seems to affect other dispute settlement mechanisms.

For instance, under municipal systems adjudicatory bodies may render inconsistent decisions, and several reasonable explanations for inconsistent awards exist. Inconsistent awards can occur in different ways. A scholar, Franck, identifies three major ways inconsistent arbitral awards arise. First, different tribunals can arrive at different conclusions when ruling on the same standard in the same treaty.¹¹⁸ Second, different tribunals selected under different treaties can give different rulings in respect of disputes with the same facts, related parties, and similar investment rights.¹¹⁹ Third, different tribunals selected under different treaties may arrive at opposing conclusions in respect of disputes with similar facts and similar investment rights.¹²⁰ In the *Launder Arbitrations*, two arbitral tribunals arrived at different decisions regarding two cases that were constituted essentially of the same merits.¹²¹ Inconsistent decisions make it difficult for host States to clearly understand the nature and extent of their commitments under investment treaties.¹²² They also reveal the problem of treaty interpretation in international investment.

To address this problem of consistency, tribunals should always be guided by the rules of treaty interpretation. Article 31 of the Vienna Convention on the Law of Treaties describes the central tenet to these rules: “[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 the light of its object and purpose.”¹²³ When the “ordinary meaning” is not helpful enough, one should resort to interpretation aides,

118. See Franck, *supra* note 23, at 1545- 1546.

119. *Id.*

120. *Id.* at 1546.

121. *Id.* at 1559-68 for the facts of the cases and the rulings in these cases.

122. See Kelley Connolly, *Say What You Mean: Improved Drafting Resources As A Means for Increasing the Consistency of Interpretation of Bilateral Investment Treaties*, 40 *VAND. J. TRANSNAT'L L.* 1579, 1595 (2007).

123. See VCLT, *supra* note 88, art. 31(1) and *id.* at 1579, 1589.

including presumptions and travaux preparatoires¹²⁴ because they offer some insight into a treaty's background. Aside from the foregoing points, the problem of inconsistent arbitral awards can be addressed by adding more transparency to treaty arbitration¹²⁵ and by establishing a system that would enable a dissatisfied party to challenge an arbitral award – appealing the award so that another tribunal may review the award.¹²⁶ Such an appellate system can be created by the prior agreement of the parties under the foreign investment treaty. A system similar to what is suggested here is contemplated under the investment related provisions of the United States – Chile Free Trade Agreement which under Annex 10-H permits the parties to consider whether to establish a bilateral appellate body to review certain arbitration awards.¹²⁷ Arbitral awards can also be reviewed by domestic courts,¹²⁸ but such judicial exercise of appellate power has been criticized for placing issues of investment disputes within the realm of national sovereignty rather than within international law.¹²⁹ It has been suggested that there be an appellate mechanism similar to the Appellate Body of the WTO Dispute Settlement Understanding that would be responsible for reviewing arbitral decisions arising from investment disputes.¹³⁰ However, the call for an increased transparency to treaty arbitration should be mindful of the confidentiality requirement of arbitration, otherwise the parties' willingness to enter into arbitration may be eroded.¹³¹ In any case, minor structural changes could provide a means of better consistency in arbitral awards.

124. See NEWCOMBE & PARADELL, *supra* note 12, at 111-13. Travaux preparatoires are “a record of negotiations preceding the conclusion of a treaty...”. They are the drafting history of a treaty. See Marilyn J. Raisch, *Travaux Preparatoires and United Nations Treaties or Conventions: Using the Web Wisely*, 30 INT'L J. LEGAL INFO 324, 325-26 (2002).

125. See Connolly, *supra* note 122, at 1596.

126. See *id.*, at 1596 and Franck, *supra* note 23, at 1546-55. Also, see generally Erin E. Gleason, *International Arbitral Appeals: What are We Afraid of?*, 7 PEPP. DISP. RESOL. L.J. 269 (2007) (arguing for arbitral appeals in investor-state arbitration).

127. See David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States- Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 762 (2004) (quoting Annex 10-H, United States- Chile Free Trade Agreement, Jun. 6, 2003: “within three years after the date of entry into force of this Agreement, parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 10.25 in arbitrations commenced after they establish the appellate body or similar mechanism”).

128. For instance, in *United Mexican States v. Metalclad Corporation*, after losing an arbitral case filed against it by a United States Investor, Metalclad, Mexico appealed to the Supreme Court of British Columbia against the award by the tribunal established under NAFTA. See J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433,434 (2002) (citing *United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359; [2001] B.C.J. 950).

129. *Id.* (citing Charles H. Brower II, *Investor-State Disputes under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 46 (2001)).

130. See, generally, David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, (2006).

131. See Connolly, *supra* note 122, at 1597.

As this section has shown, there is need for investment tribunals to yield consistent decisions in disputes that essentially share similar facts since “[a]ny system where diametrically opposed decisions can legally coexist cannot last long.”¹³² This consistency will solve the seeming legitimacy crisis identifiable in the current international investment regime.

IV. THE GENERAL BINDINGNESS OF TREATIES UNDER INTERNATIONAL LAW

One of the cornerstone rules of international law is that the provisions of a treaty are legally binding on the parties to it, and such parties are required to fulfill their treaty obligation in good faith. This rule is known as the principle of *pacta sunt servanda*¹³³ which has been described by the International Law Commission as “the fundamental principle of the law of treaties.”¹³⁴ This section will examine the *pacta sunt servanda* principle.

The underlying philosophy behind *pacta sunt servanda* is the idea that “it is proper for individuals to be bound by their promises.”¹³⁵ Accordingly, the continuity of contractual relations is achieved.¹³⁶ Additionally, international relations are enhanced when States, in their dealings with each other, have the comfort and assurance that whatever agreement they enter into will be respected by each party. Thus, *pacta sunt servanda* is trust-constitutive.¹³⁷

The history of the principle of *pacta sunt servanda* spans a long period of time. In fact, the principle had been featured in the writings of ancient

132. See Franck, *supra* note 23, at 1583.

133. This is codified in Article 26 of the VCLT, which provides that “[e]very treaty in force is binding on the parties to it and must be performed by them in good faith.” See VCLT, *supra* note 88, art. 26.

134. See U.N. Int’l L. Comm’n, Report of the International Law Commission on the Work of its Eightieth Session, UN Doc A/6309/Rev.1, (reprinted in U.N., 2 Y.B. Int’l L. Comm’n 172, 211 (1965) (cited in Alicia Triche Naumik, International Law and Detention of US Asylum Seekers: Contrasting Matter of D-J- with the United Nations Refugee Convention, 19 Int’l J. Refugee L. 661, 666 (2007))).

135. See Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405, 406 (1994) (quoting RENE DAVID, *LES CONTRATS EN DROIT ANGLAIS*, ¶ 101, (2d. ed. 1985)). The obligation to keep promises, in turn, is founded on the maintenance of confidence and bonds of trust. See C. Scott Pryor, Consideration in the Common Law of Contracts: A Biblical-Theological Critique, 18 REGENT U. L. REV. 1, 27 (2006).

136. See Kevin H. Anderson, International Law and State Succession: A Solution to the Iraqi Debt Crisis?, 2005 UTAH L. REV. 401, 402 (2005).

137. See Emily K. Penney, Is that Legal? The United States’ Unilateral Withdrawal from the Anti-Ballistic Missile Treaty, 51 CATH. U. L. REV. 1287, 1305 (2002).

scholars like Hobbes, Aquinas, and Von Martens.¹³⁸ More recently, other scholars like Ancilotti, Kelsen, and Verdross have given some consideration to *pacta sunt servanda* which they view with some unanimity as the basic norm of international law.¹³⁹ The principle has also been recognized by some Christian writers who have viewed it from a theological prism.¹⁴⁰ For example, Calamiri and Perillo link the history of *pacta sunt servanda* to Christian thinking.¹⁴¹ *Pacta sunt servanda* is also reflected in religious texts. The Bible contains an admonishment, “thou shall keep thy word”¹⁴² – a command that captures the essence of the *pacta sunt servanda* rule. Likewise, the Qu’ran contains a similar order, which commands all believers to fulfill obligations.¹⁴³ This rule is so important in international law that it has attained the status of *jus cogens*.¹⁴⁴ It is considered to be an international constitutional law upon which the international legal system is built¹⁴⁵ and a “subject of unsurpassed international consensus.”¹⁴⁶ The *pacta sunt servanda* principle has a great implication on domestic law in that a State may not invoke the provisions of its municipal law to justify its failure to perform a treaty obligation.¹⁴⁷

Not only does it exist as a legal norm, but *pacta sunt servanda* is also a requirement of ethics.¹⁴⁸ The principle applies to all treaties, whether concluded under public international law or private international law.¹⁴⁹

138. See J. Logan Murphy, *Law Triangle: Arbitrating International Reinsurance Disputes under the New York Convention, the McCarran—Ferguson Act, and Antagonistic State Law*, 41 *VAND. J. TRANSNAT’L L.* 1535, 1557 (2008).

139. See Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 *DICK. J. INT’L L.* 287, 402-03 (1999). Similarly, it has been noted that “international law and treaties derive their legitimacy from the international norms of sovereign equality and the rule of *pacta sunt servanda*.” Jason D. Flemma, *The Case for the Repeal of Congressional Legislation That Places Conditions on Sovereign States Participation in International Organizations*, 2 *J. INT’L BUS. & L.* 174, 180 (2003).

140. See Henricus de Segusia (Cardinal Hostiensis), *Lectura in quinque libros decretalium gregorianarum*, 1, de arbitris 9.6 Venice (1581); Samuel Pufendorf, *De jure naturae et gentium libri octo* (James Brown Scott ed., C. & W. Oldfather trans., photo. Reprint, 1934) (1688) (cited in Pryor, *supra* note 135, at 20-21, (notes 78, 79).

141. See Pryor, *supra* note 135, at 23.

142. Numbers 30: 2 (King James). See also K.M. Sharma, *From “Sanctity” to “Fairness”: An Uneasy Transition in the Law of Contracts?* 18 *N.Y.L. SCH. J. INT’L & COMP. L.* 95, 97 (1999).

143. Sura Al-Maida 5:1. See also Sharma, *supra* note 142, at 98.

144. See Shen, *supra* note 127, at 341-42.

145. See Dinesh D. Banani, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, 26 *B.C. INT’L & COMP. L. REV.* 355, 369 (2003).

146. *Id.*, at 374. According to the Third Restatement, *pacta sunt servanda* is perhaps the most important principle of international law. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW*, § 321, cmt. a (1987).

147. See VCLT, *supra* note 88, art. 27.

148. See Hyland, *supra* note 135, at 406.

149. Although the VCLT applies to only states, and also makes the conclusion of treaties the exclusive preserve of states, the capacity to enter into treaties is no longer reserved to states alone. For example there is currently an instrument on the conclusion of treaties between states and

Thus, the contention that the principle has traditionally been applied in public international law, but not in private commercial law,¹⁵⁰ may be greeted with some objection. This push back is because the principle of *pacta sunt servanda* is also recognized under domestic law,¹⁵¹ and it has been applied to ordinary contracts and concession agreements.¹⁵²

Underlying the principle of *pacta sunt servanda* is the concept of consent. Thus, when a State has expressed its consent to be bound under a treaty relation, it may not do anything that would compromise that obligation. However, it is not merely the consent that binds the State but the legal system that makes it mandatory for a State not to dishonor its consensual obligation.¹⁵³ Thus, Professor Shen asserts that without such a legal system, every agreement a State concludes would be meaningless and non-binding.¹⁵⁴

Pacta sunt servanda has also been recognized in many cases by adjudicatory bodies. In a case between the United States and Great Britain, the Permanent Court of Arbitration expressed the view that the obligation to observe the provisions of a treaty precludes a state from enacting a law that conflicts with a provision of a treaty to which it is a party.¹⁵⁵ The ICJ, in determining the binding nature of unilateral declarations in the Nuclear Tests case, observed that good faith constitutes one of the primary principles governing the creation and performance of legal obligations.¹⁵⁶ Similarly, is the principle featured in

international organizations or between two or more international organizations. See generally U.N., Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, vol. II, Mar. 21, 1986, (U.N. publication, Sales No. E.94.V.5) available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf.

150. Banani, *supra* note 145, at 374.

151. See John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 160 (1996).

152. See *Libyan American Oil Company v Government of the Libyan Arab Republic*, 62 I.L.R., 140 (1977) (Liamco arbitration). In this case it was noted that the bindingness applies to not only individuals, but governments as well. (cited in Michael E. Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 Int'l Tax & Bus. Law. 54, 72 (1988)).

153. See Shen, *supra* note 139, at 325.

154. *Id.*

155. See *the North Atlantic Fisheries (Gr. Brit. v. U.S.)*, 11 R.I.A.A. 167, 188 (Perm. Ct. Arb., Sept. 7, 1910).

156. See *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 268 (Dec. 20); also available at <http://www.unhcr.org/refworld/docid/4023a57c7.html>. In an earlier case—*Gabcikovo-Nagymaros Project*, the ICJ, in holding that a bilateral treaty concluded in 1977 between the parties was still in force and that both parties were under a legal obligation to observe its provisions, further observed as follows: "What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that 'Every treaty in force is binding on the parties to it and must be performed by them in good faith.' This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty and the intentions of the parties in concluding it, which

the judgment of the ICJ in a territorial dispute case between Libya and Chad.¹⁵⁷

The principle of *pacta sunt servanda* has given rise to some issues, among which is what a State should do when it finds itself in two treaties with conflicting provisions, each calling for observance. This situation may be caused by a lack of foresight by the State authorities responsible for concluding treaties on behalf of the State. It could also be a product of a deliberate act or bad draftsmanship. Although the Vienna Convention on the Law of Treaties contains a provision for resolving conflicts in treaties in Article 30,¹⁵⁸ the provision is not so elaborate as to apply to or resolve all cases of treaty conflict. For example, its application is limited to conflicts with respect to treaties of the same subject matter.

Also, Article 30 fails to recognize the implication of the bilateral-multilateral treaty dichotomy on the issue of treaty conflicts.¹⁵⁹ To

should prevail over its literal interpretation. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized". See *Gabcikovo-Nagymaros Project (Hung./Slovak.)*, 1997, I.C.J. 7, ¶ 139.

157. See *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* (Territorial Dispute Case) (Judgment), 1994 I.C.J. Repts 6. After Libya's independence in 1951, the Treaty of Friendship and Good Neighborliness between France and Libya was concluded in August 1955 which inter alia, purported to recognize the frontier between Libya and French Equatorial Africa, the predecessor to Chad, which became independent in 1960. Article 3 of the treaty inter alia, provided that the parties "recognize that the frontiers" between the territories of French Equatorial Africa and the territory of Libya "are those that result from the international instruments in force on the date of the constitution" of Libya. Libya argued that the treaty was not a boundary treaty. The I.C.J. held that Article 3 of the treaty gave rise to a legal obligation, which the parties must honor. See generally Malcolm D. Evans, *International Court of Justice: Recent Cases*, 44 *Int'l & Comp. L. Q.* 683, (1995).

158. See VCLT, *supra* note 88, art. 30, which provides that:

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
 - a. as between States Parties to both treaties the same rule applies as in paragraph 3;
 - b. as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

159. See *Borgen*, *supra* note 76, at 580- 581.

illustrate this dichotomy, in some situations parties may conclude a treaty without including a provision that would determine what would happen if that treaty conflicted with a preexisting or a future treaty to which any of the parties is or may become a party. Therefore, when a conflict results at least one of the parties would be breaching its obligation in at least one of the treaties.¹⁶⁰ It would be prudent for each State to not conclude a treaty that conflicts with its existing treaty obligations¹⁶¹ and for States to adopt drafting techniques that would adequately address cases of conflicting treaties.¹⁶² These precautionary measures would help bring harmony in the relations of States.

Another issue borders on the extent to which *pacta sunt servanda* applies when there is State succession. This dilemma brings to limelight the continuity-tabula rasa debate in matters of State succession.¹⁶³ Supporters of the two sides of the debate have resorted to their respective grounds to back their positions,¹⁶⁴ thus leaving the debate vexed. The Vienna Convention on Succession of States in Respect of Treaties has stepped in to offer some resolution to the issue,¹⁶⁵ yet the much-desired resolution

160. *Id.* at 575 (observing that a conflict situation arises “when a state is party to two or more treaty regimes and either the mere existence of, or the actual performance under, one treaty will frustrate the purpose of another treaty”).

161. Recently, Nigeria signed a Bilateral Immunity Agreement with the United States under which it agreed not to hand over any citizen of the United States to the International Criminal Court or any authority for prosecution without reference to the United States. See Agreement Between the Government of the United States of America and the Federal Republic of Nigeria Regarding the Surrender of Persons to the International Criminal Court, done at Abuja, June 30, 2003, art. 4, available at <http://www.ll.georgetown.edu/guides/documents/Nigeria03-138.pdf>. It is noteworthy that Nigeria is currently a party to the Rome Statute which establishes the International Criminal Court. Consequently, the Agreement between the United States and Nigeria violates Nigeria's obligation under the Rome Statute. The United States has signed agreements of similar nature with other states.

162. See Borgen, *supra* note 76, at 634-37.

163. Under the theory of continuity, otherwise known as universal succession, a state is considered as having a continuous legal personality and existence, and so does not change even if it separates into one or more parts. In relation to the principle of *pacta sunt servanda*, this doctrine implies that a successor state automatically inherits, and continues with, the treaty obligations of the predecessor state. See Andrew M. Beato, *Newly Independent and Separating State's Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 *AM. U. J. INT'L L. & POL'Y* 525, 537 (1994). On the other hand, the *tabula rasa* doctrine absolves a new state of the treaty obligation of the predecessor state. This is founded on the view that state succession is an attribute of sovereignty. To this extent, the *tabula rasa* theory appears to be antithetical to the *pacta sunt servanda* principle. See Anderson, *supra* note 136, at 407 and UMOZURIKE, *supra* note 75, at 177.

164. See International Law Association, *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Successors*, in *International Law Association Report of the Fifty Second Conference*, 584 (1966). See also Note and Comment, *Revolutions, Treaties, and State Succession*, 76 *YALE L.J.* 1669, 1678 (1967).

165. Some of the major provisions are Arts. 8, 9, 15, 16, 17, 28, 34. See *Vienna Convention on Succession of States in Respect of Treaties*, Aug. 23, 1978, 1946 U.N.T.S. 3.

seems to have remained at large. This lack of a resolution has continued to affect the application of the principle of *pacta sunt servanda*.

International investments are governed by general international law. Thus, *pacta sunt servanda*, being a principle of international law, equally applies to investment treaties. States, when concluding an investment treaty, do so with the understanding that the treaty is legally binding on them. Even without the treaty expressly stating so, the general assumption is that except in certain circumstances, the provisions of an investment treaty are legally binding on the host State and the international investor.

Traditionally, and ever since foreign investors acquired the capacity to institute cases against sovereign States before international tribunals,¹⁶⁶ the principle of *pacta sunt servanda* has grown to receive considerable recognition and enforcement with regard to international investment.¹⁶⁷ However, there is a claim to the contrary, though not well supported by current events in the investment arena. The principle of *pacta sunt servanda* received some external challenges in the era of the New International Economic Order from the movement for the establishment of Permanent Sovereignty over Natural Resources¹⁶⁸ which led to the adoption of the 1974 Charter of Economic Rights and Duties of States.¹⁶⁹ During this movement, developing States challenged the principle of *pacta sunt servanda* when espousing the economic sovereign rights contained in the 1974 Charter.¹⁷⁰ But it would not be incorrect to state that, despite this alleged antagonism toward the *pacta sunt servanda* principle by developing States, the bindingness of treaties has continued to endure, and tribunals have always espoused it.

166. See Yackee, *supra* note 101, at 1574-75 (citing the 1930 arbitration between Lena Goldfields, Ltd. (a British concessionaire) and the Soviet Union as one of the earliest cases involving foreign investors and foreign states. In that case Lena successfully challenged the Soviet Union's unilateral repudiation of the concession of agreement between the two parties.).

167. See *id.* at 1578-83.

168. See G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (Dec. 14, 1962).

169. G.A. Res. 3281, *supra* note 36, art. 2 (granting every state the right to regulate and exercise authority over foreign investment within its territory, and to nationalize such foreign investment).

170. See generally Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998). Daniel E. Vieilleville & Baiju Simal Vasani, *Sovereignty over Natural Resources Versus Rights under Investment Contracts: Which One Prevails?*, 3, available at http://www.crowell.com/documents/Sovereignty-Over-Natural-Resources-Versus-Rights-Under-Investment-Contracts_Transnational-Dispute-Management.pdf, (noting that developing states argued that their sovereignty over natural resources prevailed over any contractual agreement entered into by them).

V. EXCEPTIONS TO THE GENERAL BINDINGNESS OF
TREATIES UNDER INTERNATIONAL LAW

Just like many other international law rules, the rule requiring States to perform their treaty obligations in good faith is not sacrosanct. In other words, there are circumstances under which treaties may be invalidated or terminated, thereby excusing a party from performing its obligations arising from the treaty.¹⁷¹ Any analysis of treaty obligation must therefore proceed from the presumption of the enforceability of treaties, until a rebuttal is established.¹⁷² This section presents *rebus sic stantibus*, conflicts between treaty and *jus cogens*, and odious debt as some of the possible rebuttals to the *pacta sunt servanda* principle.

A. REBUS SIC STANTIBUS

The principle law governing treaties, the Vienna Convention on the Law of Treaties, has a number of provisions concerning when parties to a treaty may not be bound by its provisions.¹⁷³ Central to these exceptions is what has come to be known as the doctrine of *rebus sic stantibus*. Even before the coming into effect of the Vienna Convention, *rebus sic stantibus* was already part of then existing international law.¹⁷⁴ The doctrine envisions a fundamental change in circumstances underlying the treaty that makes it impossible for the treaty objectives to be pursued. However, for such a change of circumstances to be validly invoked, the underlying circumstances must have been essential to the parties' consent under the treaty and their effect must be so weighty as to transform the future performance of the treaty obligation.¹⁷⁵ Therefore, mere economic hardship is not sufficient to found a change of circumstances as envisaged by the exception.¹⁷⁶ The operation of the doctrine seems to be dependent on the parties' actual or subjective non-foreseeability of the occurrence of those circumstances changing.¹⁷⁷ The question here is not whether the parties ought to have foreseen the occurrence of those changed circumstances, but whether they did in fact foresee them.¹⁷⁸ The

171. See VCLT, *supra* note 88, part V.

172. See R. Y. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 177 (1961).

173. See generally VCLT, *supra* note 88, part V.

174. See Detlev F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 COLUM. J. TRANSNAT'L L. 459, 466-69 (2005) (tracing state practice on *rebus sic stantibus* to 1969).

175. See VCLT, *supra* note 88, art. 62(1).

176. See Dickstein, *supra* note 152, at 76.

177. See Damien M. Schiff, *Rollin', Rollin', Rollin' on the River: A Story of Drought, Treaty Interpretation, and Other Rio Grande Problems*, 14 IND. INT'L & COMP. L. REV. 113, 140 (2003).

178. *Id.*, at 140.

successful invocation of the exception leads to a termination or suspension, rather than a revision of the treaty.¹⁷⁹

The doctrine of *rebus sic stantibus* may be vague¹⁸⁰ and it may prove problematic to determine what circumstances are fundamental to trigger the successful application of the exception.¹⁸¹ Because of these vulnerabilities, there is risk of abuse of the doctrine or of its use in bad faith. It is because of this risk that some writers have viewed *rebus sic stantibus* with much distrust, and there is a looming controversy over the approach to the doctrine.¹⁸² One school of thought is that the exception is subjective in nature, implying that it applies on a treaty-to-treaty basis. In other words, it takes into cognizance the express and implied conditions of a treaty that certain circumstances are to remain unchanged.¹⁸³ The other school of thought takes an objective position, arguing that *rebus sic stantibus* is resident in every treaty and can be invoked once there is a fundamental change of circumstance.¹⁸⁴ By this postulate, *rebus sic stantibus* need not be expressed in the terms of the treaty.¹⁸⁵ There seems to be yet another view that takes a middle ground – mixing the subjective and the objective approaches. Draetta and others have stated that *rebus sic stantibus* is to be considered objectively, taking into consideration the intent of the parties.¹⁸⁶

Unfortunately, Article 62 of the Vienna Convention, which contains a provision on *rebus sic stantibus*, fails to clearly state what the effects of the changing circumstances would be on the performance of the treaty in terms of “impracticability” or “impossibility”¹⁸⁷—two terms that are used in contract law to refer to possible but exceptionally burdensome

179. See UGO DRAETTA, RALPH B. LAKE, & VED P. NANDA, *Changed Circumstances and Contract Adaptation*, TRANSNATIONAL BUSINESS TRANSACTIONS, § 4:64 (2011).

180. See Setear, *supra* note 151, at 172.

181. In recognition of this problem, Schiff notes that “[t]he challenge lies in keeping states from reducing an implied escape clause to a mere diplomatic cover for the abandonment of inconvenient promises.” See Schiff, *supra* note 177, at 139.

182. *Id.*, at 141 (mentioning some of the writers who view the doctrine with some objection).

183. See Malcolm E. Wheeler, *Toward the Peaceful Modification of Treaties: The Panama Canal Proposals*, 21 STAN. L. REV. 938, 950-951 (1969).

184. *Id.*, at 951.

185. *Id.*, at 951. Even though it is generally difficult to determine what amounts to a fundamental change of circumstances, the application of this objective approach may make it more difficult to make such determination. One question that may be asked, even if hypothetical is, what would be the effect on this objective view of *rebus sic stantibus* if parties to a treaty include an express term in the treaty that the treaty would be enforceable in every situation? In other words, will this objective view prevail over the express intention of the parties?

186. See DRAETTA, LAKE, & NANDA, *supra* note 165, at § 4:64 (citing A. VAMVOUKOS, *TERMINATION OF TREATIES IN INTERNATIONAL LAW—THE DOCTRINES OF REBUS SIC STANTIBUS AND DESUETUDE* 214-16 (1985)).

187. Article 62 merely talks of the effect as “...radically to transform the extent of obligations still to be performed” under the treaty. See VCLT, *supra* note 88, art. 62.

performance and clearly impossible performance respectively.¹⁸⁸ However, the effect of Article 61 of the Vienna Convention is that the occurrence of a supervening event can discharge a party from its obligation under a treaty only if the event makes it impossible for the treaty to be performed.¹⁸⁹ Therefore, this interpretation of Article 61 implies that an impracticability of performance is not a defense under the Vienna Convention.

It should also be noted that that *rebus sic stantibus* may not avail a party pleading it if the fundamental change is occasioned by a breach by that party of an obligation under the treaty or of any other international obligation.¹⁹⁰ In other words, a party may not hide behind the *rebus sic stantibus* exception when that party breaches its treaty obligation and then turns around to contend that the circumstances upon which the treaty was concluded have changed, thereby relieving it of its treaty obligation. Furthermore, the exception may not be invoked where the treaty establishes a boundary.¹⁹¹ In other words, when parties establish a boundary by treaty, the agreed upon boundary has a "degree of

188. See Schiff, *supra* note 177, at 149. *Rebus sic stantibus* has been considered similar to doctrines of frustration, hardship, and imprevision, in domestic law. See DRAETTA, LAKE, & NANDA, *supra* note 179, at § 4:64. ("Imprevision prevails as an efficient legal instrument in solving legal situations having contractual origins, determined by a drastic and unpredictable change of the economic circumstances at the moment of executing the contract as compared to the date of its conclusion by the contracting parties. As for its domain of application, imprevision occurs in contracts with pecuniary obligations. The conditions of imprevision are the following: the obligation becomes excessively onerous as a result of a change in contractual circumstances, the moment of the changes in circumstances must be ulterior to the conclusion of the contract, the unpredictability of the change of circumstances at the moment of concluding the contract, the risk determined by a situation of imprevision shall not be within the category of risks that the debtor has undertaken at the moment of concluding the contract or that arise from the nature of the contract." (available at <http://fiatiustitia.ro/ojs/index.php/fi/article/view/14>)). However, it should be noted that there is a divergence in the application of these doctrines. Vagts has noted some of the differences between the application of the treaty doctrine of *rebus sic stantibus* in international law and the application of frustration in domestic law with respect to contracts. See Vagts, *supra* note 174, at 465- 466. One of such differences is that, since treaties are a product of long and deliberate bargaining- a feature that may be lacking in the conclusion of commercial contracts under municipal law, it is less common for treaty parties to contend that they did not contemplate the happening of a contingency when concluding the treaty. Secondly, while the performance of a contract can be frustrated by a new legislation, no similar occurrence may be witnessed under international law with respect to treaties, except when the Security Council of the United Nations slams a sanction on a state and calls on other states to suspend relations with that state; or when there is an emergence of a *jus cogens* rendering a treaty illegal, which emergence tends to be highly improbable. See Schiff, *supra* note 177, at 149.

189. See VCLT, *supra* note 88, art. 61.

190. *Id.*, art. 62(2)(b).

191. *Id.*, art. 62(2)(a).

permanence and outlives the treaty.”¹⁹² In the words of the ICJ, the object of such treaty is to secure “stability and finality.”¹⁹³

Even though *rebus sic stantibus* is considered an appropriate exception to *pacta sunt servanda*,¹⁹⁴ in recent years its application has met little or no success. Michael Dickstein, an international law scholar, has noted, “... no international tribunal up through 1981 had ever relied on [the exception] either in cases involving treaties or concession agreements.”¹⁹⁵ This fact is despite the recognition of the exception as a major principle of international law¹⁹⁶ and as representing customary law.¹⁹⁷ While there have been a handful of cases where the exception was invoked and was rejected,¹⁹⁸ tribunals show more inclination toward applying the doctrine as a mitigation of damage than to exonerate parties from breach.¹⁹⁹ The paucity of cases upholding the defense of *rebus sic stantibus* could be an indication that courts and tribunals show deference to the bindingness of treaties. This deference ensures that a party does not renege on its promise under a treaty and guards against a party's use of the exception in bad faith. In addition, the deference seems to refute the concerns of some writers that the exception would be abused. In the interpretation and application of *rebus sic stantibus*, an overriding consideration should be given to the ultimate object of the treaty.

B. CONFLICT WITH JUS COGENS NORM

Another circumstance that can constitute an exception to the general bindingness of treaties is when a treaty is in conflict with a *jus cogens* norm.²⁰⁰ The conflict may either be in respect of an existing norm or a new norm.²⁰¹ In the case of conflict with an already existing peremptory norm, the situation may be considered as involving a rule of invalidity. This is because such treaty, *ab initio*, would be considered void, perhaps

192. See Evans, *supra* note 157, at 688.

193. *Id.*, at 687.

194. See Anderson, *supra* note 136, at 403.

195. See Dickstein, *supra* note 152, at 78.

196. Kuo-tung Yang, A Study of Treaty Abrogation and the Principle of *Rebus Sic Stantibus* in International Law, 2 CHINESE (Taiwan) Y.B. INT'L L. & AFF. 308, 309 (1982).

197. See Fisheries Jurisdiction Case (U.K. v. Ice.) 1973 I.C.J. 3 and UMOZURIKE, *supra* note 75, at 171.

198. E.g., Free Zones of Upper Savoy and the District of Gex, 1932 P.C.I.J., Ser. A/B, No. 46 and Oscar Chinn (U.K. v. Belg.) 1934 P.C.I.J., Ser. A/B, No. 63 and Fisheries Jurisdiction (U.K. v. Ice.), *supra* note 197, and Gabcikovo-Nagymaros Project (Hung./Slovak.), *supra* note 156.

199. See Dickstein, *supra* note 152, at 79.

200. See VCLT, *supra* note 88, art. 53 (defining a peremptory norm of general international law (*jus cogens*) as “...a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

201. See UMOZURIKE, *supra* note 75, at 171.

implying that the treaty never had a binding force in the first place. However, characterizing a treaty that conflicts with an existing peremptory norm as void *ab initio* may not be entirely correct in view that “acts performed in good faith before the invalidity was invoked are not rendered unlawful only by reason of the invalidity.”²⁰²

The jus cogens exception appears to be external to the intention or conduct of the parties, in that it brings to an end the treaty relations of the parties even if the parties have been cooperating with regard to their obligation under the treaty or are willing to continue their treaty relations.²⁰³ The willingness of such parties to continue with their treaty obligation is of no consequence since the treaty has become contrary to international law.²⁰⁴ Jus cogens norm has been identified as safeguarding the interest of the international community, rather than the interests of the individual states.²⁰⁵ It is therefore expected of States to not derogate from them when entering into treaties. In fact jus cogens are not capable of being set aside by treaty or acquiescence of parties.²⁰⁶ With the controversy surrounding the concept of jus cogens, it may be problematic to determine when this exception applies.²⁰⁷

C. ODIOUS DEBT

Another possible exception to *pacta sunt servanda* is odious debt. Issues of State debts form an important aspect of *pacta sunt servanda*,²⁰⁸ especially with regard to State succession. The question is whether, and to what extent, a successor State has an obligation to assume the debts of its predecessor State. Although discussions on State succession with regard to State debts tend to adopt a general position of automatic succession as a starting point, the weight of this view is reduced by the contrary arguments of many writers.²⁰⁹ The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts

202. *Id.*, at 171.

203. See Setear, *supra* note 151, at 210.

204. See L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 555 (1909) (remarking that : “Just as treaties have no binding force when concluded with reference to an illegal object, so they lose their binding force when through the progressive development of International Law they become inconsistent with the latter”).

205. See Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 *EUR. J. INT'L L.* 59, 62 (2005).

206. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 513 (3d. ed. 1979).

207. See Setear, *supra* note 151, at 168.

208. State debts are debts that are not attributable to private individuals or entities, and which a state may owe another state, an international organization, a publicly owned or privately owned financial institution, or a private person. See DAMROSCH ET AL., *supra* note 13, at 1541.

209. See Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 *N.C. J. INT'L L. & COM. REG.* 605, 609-14 (2007) (presenting the opposing views).

has some provisions governing the obligation or otherwise of a successor State to repay the debts incurred by the predecessor State.²¹⁰ However, these provisions may not reflect customary international law, because the Convention itself does not enjoy a general acceptance by States²¹¹ and is not in force presently.²¹²

State debts presuppose that a State incurs a financial obligation for the general benefit of the State or its citizens.²¹³ Thus, central to State debt is the “public benefit” element. Where this objective is lacking, such debts may amount to what is known as odious debts and may constitute an exception to *pacta sunt servanda*. Thus, Nahum Sack, who has been described as the world's pre-eminent legal scholar on public debts,²¹⁴ pungently stated that:

When a despotic regime contracts a debt, not for the needs or in the interests of the state, but rather to strengthen itself, to suppress a popular insurrection, etc, this debt is odious for the people of the entire state. This debt does not bind the nation; it is a debt of the regime, a personal debt contracted by the ruler, and consequently it falls with the demise of the regime.²¹⁵

210. E.g., Article 37 provides that in the case of a transfer of part of the territory of a state by that state to another state, the public debt of the predecessor state shall pass to the successor state by agreement. In the absence of an agreement, such public debt shall pass in equitable proportions. Article 38 is to the effect that a newly independent successor state has no obligation to repay the public debt of the predecessor state unless there is a special agreement between them, and such agreement shall be in accordance with peoples' right over their wealth and natural resources. Article 39 provides that when two or more states unite to form a successor state, the debt of the predecessor states is borne by the successor state. According to Article 40, when there is separation of part or parts of a state, in the absence of an agreement, debt shall pass in equitable proportions. By the provision of Article 41, when a state dissolves and ceases to exist, absent an agreement, debt of the predecessor state shall pass to the successor states in equitable proportions. See Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, adopted in Vienna, Apr. 6, 1983. See also U.N. Doc. A/CONF. 117/14, 22 I.L.M. 306 (1983).

211. See Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L. J. 355, 360 (2001) (citing Eli Nathan, The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, in DINSTEN, supra note 71, at 493).

212. For the status of the Convention, visit <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20III/III-12.en.pdf>.

213. See Williams & Harris, supra note 211, at 360-61 (stating that state debts are divided into: national state, territorial debt, and local debt).

214. See Emily F. Mancina, *Sinners in the Hands of an Angry God: Resurrecting the Odious Debt Doctrine in International Law*, 36 GEO. WASH. INT'L L. REV. 1239, 1246 (2004).

215. See A.N. Sack, *Les Effets de Transformations des Etats sur Leur Dettes Publiques et Autres Obligations Financieres* (Paris: Recueil Sirey, 1927) (quoted in Rachel Ordu, *Debt and the Realization of Economic and Social Rights in Sub-Saharan Africa: Beyond Debt Relief to Solutions in the Common Interest*, 3 Intercultural Hum. Rts. L. Rev. 229, 251 (2008)).

Even though the Vienna Convention is silent on odious debt, the concept has come a long way in the history of state relations.²¹⁶ The odiousness of a debt is established when three basic elements are present, namely: (1) an absence of popular consent; (2) an absence of benefit; and (3) creditor awareness of these two elements.²¹⁷ Odious debts are capable of interfering with developing countries' ability to provide the basic human rights of their citizens. When a State incurs a private debt that is not in the interest of the citizens and then uses the State resources to service such debt, there is a likelihood that this will deplete the means available to cater to the basic needs of the populace.²¹⁸ Part of the debts owed by poor countries has been considered as odious.²¹⁹ Applied to *pacta sunt servanda*, the implication is that when odious debts form an obligation under a treaty, the *pacta sunt servanda* principle becomes inapplicable because the new State is thought not to be bound by the debt incurred for the private benefit of the predecessor State.

A review of the international precedents does not show that a definite position has been taken in respect to the doctrine of odious debts. In the dispute between the United States and Spain²²⁰ - which took place after the former wrestled from the latter the task of administering Cuba - Spain demanded that the United States be responsible for the repayment of Cuba's debt to Spain.²²¹ The United States countered this demand on the basis that, although the debt was borrowed on behalf of Cuba, neither was the debt in the interest of the Cuban people nor was it with their authorization.²²² Rather, the debt was for the benefit of Spain²²³ and imposed upon the Cuban people by force of arm.²²⁴ In such circumstances, the United States argued, "the creditors, from the beginning, took the chances of the investment."²²⁵ It seems no mention was made of odious debt.

216. For the history of the doctrine, see Christoph G. Paulus, *Odious Debts vs. Debt Trap: A Realistic Help?*, 31 *BROOK. J. INT'L L.* 83, 84-85 (2005).

217. See King, *supra* note 209, at 608.

218. See Chris N. Okeke, *The Debt Burden: An African Perspective*, 35 *INT'L LAW* 1489, 1495 (2001).

219. *Id.*, at 1505.

220. For brief facts on the dispute, see Joseph Hanlon, 'Illegitimate' Loans: Lenders, Not Borrowers, Are Responsible, 27 *Third World Quarterly*, (No. 2) 211, 213 (2006), available at http://www.open.ac.uk/personalpages/j.hanlon/3WQ_illegitimate_debt.pdf.

221. *Id.*, at 213.

222. See Anderson, *supra* note 136, at 409.

223. *Id.* at 409.

224. See Hanlon, *supra* note 220, at 213.

225. *Id.* at 213.

Similarly, in *Tinoco Claims Arbitration*,²²⁶ the Arbitrator did not make any pronouncement on the status of odious debt or whether the doctrine applied in that case.²²⁷ Great Britain had brought claims against Costa Rica for acts of a previous regime in Costa Rica – the Frederico Tinoco regime. The Arbitrator, United States Chief Justice William H. Taft, ruled that a new regime inherits the debt of a past recognized government.²²⁸ However, the tribunal set aside the debt that was incurred by the Tinoco government on the ground that it was for the personal use of Tinoco and the creditor bank was aware of this fact.²²⁹ Thus, it can be argued that the concept of odious debt could be inferred from the reason in support of the ruling.²³⁰

The problem with the concept of odious debts as an advocated exception to *pacta sunt servanda* is that it does not seem to have a widespread acceptance on the international plane. Unlike *pacta sunt servanda*, *rebus sic stantibus* and other doctrines that have been codified, odious debts as a concept has yet to earn a codification in international law.²³¹ Further, considering the fact that the majority of the debts that are considered odious are owed by developing States to developed States, the issue seems to assume a South-North controversy.

However, the arguments that are offered in the academic literature in support of the non-bindingness of odious debts are sound arguments with both moral and legal foundations. From a moral perspective, as has been observed, perceiving odious debts as non-binding on the borrower, and requiring the lender to be responsible for such debts can be a veritable tool to discipline lenders and guard against future lending to oppressive dictators.²³² This will in turn cause creditors to ensure that money loaned is used for the interests and needs of the State.²³³ In some jurisdictions,

226. See *Tinoco Claims Arbitration* (Gr. Brit. v. Costa Rica), (Opinion and Award of Williams H. Taft, Sole Arbitrator), 1 U.N. Rep. Int'l Arb. Awards 369 (1923), as reproduced in DAMROSCH ET AL., *supra* note 13, at 367-68.

227. See Mancina, *supra* note 214, at 1248.

228. An irony in this case was that the same Great Britain that brought the claims against Costa Rica had not recognized the Tinoco Regime; yet Great Britain went ahead and concluded an oil concession agreement with the Tinoco government. In fact, part of the argument of Costa Rica was that Great Britain was estopped from bringing the claims given Great Britain's own non-recognition of the Tinoco government. See *Tinoco Claims Arbitration*, *supra* note 226.

229. See Mancina, *supra* note 214, at 1247-48.

230. But the doctrine of odious debts appeared in Iran's argument before the Iran- United States Claims Tribunal. The Tribunal did not make any definite pronouncement on the status of the doctrine. *Id.*, at 1247-48.

231. See Anderson, *supra* note 136, at 401.

232. See Hanlon, *supra* note 220, at 211.

233. See Joseph Hanlon, *Defining Illegitimate Debt and Linking Its Cancellation to Economic Justice*, 6, available at <http://www.kirkensnodhjelp.no/Documents/Kirkens%20N%C3%B8dhjelp/>

for instance under United States and English contract law, a creditor is required to apply prudence when a making loan to some categories of persons. Thus, when a loan is made to someone who lacks the capacity to borrow, for instance, a severe drug addict or an insane person, the lender loses the right to be repaid.²³⁴ This position has been extended to apply to a very corrupt or inept regime to the extent that such a regime is considered incompetent to borrow.²³⁵ In addition, the fiduciary relationship between government and the people does not apply when a corrupt regime is securing a loan for its own use. The government, for purposes of such a loan, is not considered as a trustee of the people.²³⁶ Odious debt should therefore be universally accepted as an exception to the bindingness of treaties.

VI. BENEFITS AND CRITICISMS OF INVESTMENT TREATIES

Investment treaties do come with some perceived advantages. On the other hand, they have been subjected to criticisms. This section discusses the benefits and criticisms of investment treaties.

A. BENEFITS OF INVESTMENT TREATIES

Many benefits have been associated with the conclusion of investment treaties. This section will consider three of those benefits: (1) the promotion of investment; (2) investment protection; and (3) economic liberalization.

Regarding the promotion of investment, it has been argued that by the grant of national and reciprocal treatments and the elimination of restrictions of capital and repatriation of profits, bilateral investment treaties promote investment between the two countries.²³⁷ Developed States, through the instrumentality of treaty-making, tend to facilitate the entry and operation of investments by inducing the developing host States to remove obstacles in their regulatory systems.²³⁸ Furthermore, in the event that a developing State enacts a law that interferes with the

Publikasjoner/Temahefter/Defining%20illegitimate%20debt.pdf. (hereinafter Hanlon, *Illegitimate Debt*).

234. See James W. Child, *The Limits of Creditors' Rights: The Case of Third World Debt*, 9 SOC. PHIL. & POL'Y 114, 119 (1992) (cited in Joseph Hanlon, *Illegitimate Debt*, supra, note 234, at 10).

235. See Hanlon, *Illegitimate Debt*, supra note 233, 10-11.

236. *Id.*

237. See A.E.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. TRANSNAT'L L. & POL'Y 57, 71 (1998).

238. See Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 160 (2007).

investment of the foreign investor, the foreign investor will force the host State into arbitration.²³⁹ When investment is allowed to thrive without unnecessary obstacles, development is achieved, improving the quality of life of the nationals of the host State.

There seems to be an assumption that investment treaties require the host State to create an enabling environment that is conducive to foreign investment.²⁴⁰ But it seems government policies and local economic conditions exert more influence on the decision of the investor to invest in the host State than investment treaties. Thus, developed States tend to conclude investment treaties only with those developing States whose laws and policies offer sufficient protection, and are favorable to, international investment.²⁴¹ It has been the position of developed countries that investment treaties enable developing countries to liberalize their economies by allowing the entry of foreign investment and the creation of conditions favorable to the operation of those investments.²⁴² This liberalization of developing States' economies will arguably lead to more economic successes – a first benefit of investment treaties.

The second benefit of investment treaties is that they guarantee investment protection. This is achievable by the provision of the standard of treatment that the host country is expected to accord to the foreign investment. Investment treaties serve as a means through which States establish mechanisms for protecting the foreign investments of their nationals against the adverse actions of the host States' governments.²⁴³ Developed countries perceive investment treaties as an avenue to foster

239. See Calvin Hamilton & Paula I. Rochwerger, *supra* note 111, at 21.

240. See Salacuse, *supra* note 53, at 450 (stating that “[t]he general premise of investment treaties is that investment promotion is to be achieved by the host country’s creation of a stable legal environment that favors foreign investment”).

241. See Kenneth Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT’L L. 501, 523 (1998).

242. See Salacuse, *supra* note 238, at 160.

243. See K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes and General Treatment Standards*, 4 INT’L TAX & BUS. L., 105, 105 (1986). Thus, in most bilateral investment treaties, there are, *inter alia*, provisions requiring the payment of compensation by the host state in the event of expropriation, and obligating the host state to accord the foreign investment “fair and equitable treatment,” or “full protection and security,” or “treatment no less favorable than that required by international law.” There are also provisions against unreasonable discrimination. See Treaty Between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, May 28, 1992, Art. III(1), S. Treaty Doc. No. 102-136 (1992). See also Mohammed Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID REV.-FOREIGN INV. L. J. 339, 351 (1992) and Treaty Between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investment, Sept. 26, 1994, S. Treaty Doc. No. 104-114 (1995).

increased protection of their property around the world.²⁴⁴ Another way investment treaties protect foreign investment is by allowing the parties to resort to an international legal framework, like arbitration, to resolve any disputes arising from the investment relations.²⁴⁵ This dispute resolution mechanism derived from the international legal framework saves the investor from the precarious situation of solely relying on the domestic law of the host state, which may offer little or no protection to the foreign investor because the government of the host country may have prejudice towards the investment or may interfere with the judicial process.²⁴⁶ These increased protections encourage investment because there is less risk to the investor.

A third benefit is that it is equally claimed that investment treaties ensure economic liberalization by facilitating, as well as protecting the flow of international investment, which would in turn yield economic development.²⁴⁷ It is upon this premise that developing countries, by the 1980's, began to relax their hitherto restrictions on their economic models and embraced a more liberal economic system, concluding bilateral treaties with developed countries.²⁴⁸ These claims appear bloated, considering that investment treaties take into account the special laws of the host State regulating the entry of foreign investments,²⁴⁹ yet may result in an investment treaty that may not guarantee an investor a

244. See Salacuse & Sullivan, *supra* note 28, at 76. The United States Trade Representative's office recognized the goals of the United States Bilateral Investment Treaties Program to be the protection of United States investment abroad, the encouragement and adoption in foreign countries of policies that treat private investment fairly; and supporting the development of international law standards that are consistent with the stated goals. See also Jeffrey Lang, Keynote Address, 31 *CORNELL INT'L L. J.* 455, 457 (1998).

245. See Matthews Saunders, *Bilateral Investment Treaties Oil the Wheels of Commerce*, in *LLOYD'S LIST INTERNATIONAL* 6 (June 23, 2004).

246. The treaty practice that affords the private investor the right to take out an action against a sovereign state before an international arbitration has been hailed as revolutionary, as such procedure is absent in international trade law. See Salacuse & Sullivan, *supra* note 28, at 88.

247. See Vandeveld, *supra* note 241, at 503-04.

248. See Jeswald Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 *INT'L L.* 875, 882-886 (1999). Economic principles claim that production of goods and services will be at its peak when the market is fully entrusted in the hands of demand and supply without any regulatory intervention by the government. See also GEORGE CRANE & AMAL AMAWI, *THE THEORETICAL EVOLUTION OF INTERNATIONAL POLITICAL ECONOMY*, 6-7, 55-58 (1997). However, this position is absolutist, and in reality, it is doubtful if there is any state that adopts this extreme approach to economic liberalization. The principle of sovereignty (which embraces economic sovereignty) still holds so much appeal in international law and relations, to the extent that states have a latitude of powers to regulate, and in fact do regulate, the operation of foreign investments within their territories. See ROGER CUMMINGS, *UNITED STATES REGULATION OF FOREIGN JOINT VENTURES AND INVESTMENT, IN INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD* 137, 139 (David Goldsweig & Roger Cummings, eds., 1990).

249. See e.g., Agreement for the Promotion and Reciprocal Protection of Investments, Hung.-U.K., Art. 2.1, Mar. 9, 1987, 1990 U.K.T.S. 44, reprinted in 4 *ICSID Rev.-Foreign Inv. L. J.*, 159, 160 (1989).

right of access to the host country's market.²⁵⁰ The guarantees found in most investment treaties do not apply at the pre-investment stage, but after the establishment of the investment. At best, what is found in investment treaties is an aspiration to attain economic liberalization. However, if economic liberalization does yield economic benefit, then the expressed aspirations in investment treaties is a benefit.

B. CRITICISMS OF INVESTMENT TREATIES

Despite the benefits accruing from investment treaties, there are three criticisms directed at investment treaties. One centers on the inequality that exists between developed and developing States, especially in terms of bargaining power. The second criticism concerns the high expenses incurred by developing States in defending investment arbitration cases. The third criticism is the coercion within which developing States are forced into giving up concessions to the investor. These criticisms are explored in this section.

Owing to economic inequality between developed and developing States, the claimed benefits derivable from investment treaties tend to lean in favor of the developed States.²⁵¹ In fact, developing countries are often compelled by developed countries into concluding bilateral investment treaties.²⁵² Investment treaties have also been criticized on the ground of their cost implications on the host States in defending claims brought against them by the foreign investors.²⁵³ Most foreign investors comprise multinational corporations whose annual profits may be more than the annual income of the host States. The host States are often developing States with poor financial standing, resulting in arbitration claims that may render the host States highly impoverished.²⁵⁴ There is the argument that bilateral investment treaties engender competition that is unfair to domestic investors but advantageous to the foreign investors²⁵⁵ and that

250. See Vandeveld, *supra* note 241, at 511.

251. See Duncan Williams, Policy Perspectives on the Use of Capital Controls in Emerging Nations: Lessons From the Asian Financial Crisis and a Look at the International Legal Regime, 70 *FORDHAM L. REV.* 561, 614 (2001) and Horacio Grigera Naon, Sovereignty and Regionalism, 27 *LAW & POL'Y INT'L BUS.* 1073, 1077-78 (1996).

252. See Ryan, *supra* note 8, at 79.

253. See Salacuse, *supra* note 238, at 160.

254. For example, the arbitration case between Big Food Group (BFG), a United Kingdom corporation, and the South American country, Guyana, arising from a 1989 bilateral investment treaty between United Kingdom and Guyana. See Magnus Saxegaard, Creditor Participation in the HIPC Debt Relief Initiatives: The Case of Guyana, 32 *GA. J. INT'L & COMP. L.* 725, 729-31 (2004). See also Nick Mathiason, Business & Media: After 26 Years, UK Food Group Squeezes Poverty-Stricken Guyana for Pounds 12 Million, *THE OBSERVER* (London), Mar. 16, 2003, at 1.

255. See Vicki Been & Joel Beauvais, "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine, 78 *N.Y.U. L. REV.* 30, 129 (2003).

the international arbitration created under investment treaties is biased against the host State.²⁵⁶

Another identifiable shortcoming with investment treaties is the reality that, due to the desperation of the developing countries to attract investment to their territories, with its claimed attendant economic development, they tend to give up many concessions to the foreign investors—the developed States. Thus, as a result of giving up concessions, the general purposes of the treaties are defeated.²⁵⁷ Moreover, when compared with other types of agreements, the negotiation, conclusion, maintenance, and renegotiation of investment treaties can be more burdensome, especially on the poor, developing countries.²⁵⁸

If the expenses developing States have to incur in order to conclude and maintain investment treaties with developed States far exceed the benefits they derive from such treaties, then it makes no economic sense for developing States to maintain investment relations with developed States. Considering the downsides of investment treaties, especially as they impact developing States, the current investment regime should be restructured to offer more benefits to the host States, which most times are developing States.

CONCLUSION

The proliferation of investment treaties is evidence of advancement in international investment. It also underlines society's efforts at getting around its economic challenges. Investment treaties have to a large extent reduced the uncertainties that were at the center of international investment relations of the foreign investor and the host State in the past. By negotiating and agreeing to the terms that would govern their business relations, the parties to an investment treaty know from the onset what obligations they owe each other, thereby reducing the incidence of investment disputes.

256. See Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 *VAND. J. INT'L L.* 958, 960 (2007).

257. See Sandrino, *supra* note 30, at 278, 297. See also Inaamul Haque & Ruxandra Burdescu, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 *B.C. INT'L & COMP. L. REV.* 219, 252-53 (2004).

258. See Cheryl Gray & William Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 *COLUM. J. TRANSNAT'L L.* 1, 12- 13 (1995). There is yet another criticism leveled against bilateral investment treaties, namely, that their dispute settlement clauses do not permit the outcome of the arbitration to be accessible to the public. See Scott Jablonski, *Comment, !Si, PO! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Contemporary Look at Chapter 10 of the United States-Chile Free Trade Agreement*, 35 *U. MIAMI INTER-AM. L. REV.* 627, 654 (2004).

In the absence of generally accepted rules of international law regulating foreign investment, it becomes crucial that the foreign investor and the host State come together and negotiate terms upon which their transaction would be based. Under that arrangement, since States are equal under international law in principle, they could bargain on terms that would favor both parties. However, in reality, the so-called equality of States does not operate in international investment, and in many circumstances there is an asymmetry of bargaining power between States that conclude treaties. This inequality affects the expectations of the weaker party under the treaty. Assessing the current investment regime, especially considering the number of investment disputes coming before tribunals, yields an irresistible urge to doubt whether the evolution of treaties has really solved the indeterminacy in the norms regulating international investment. It would seem that the certainty guaranteed by treaties is limited in scope because parties, in many situations, do not really understand the provisions of the treaties they conclude. Moreover, the conflicting decisions held by tribunals reflect that those tribunals too do not really grasp the intricate provisions of the investment treaties.

Investment relations under international investment treaties are quite complex, with clashes of interests between foreign investors and host States. The rule that parties to treaties should observe their treaty obligations in good faith seems to be a veritable means of addressing these clashes. As is evident in State practice, tribunals strive to observe the *pacta sunt servanda* principle, thereby ensuring that parties to investment treaties do not act in a way that would defeat the objectives of the treaties they conclude. The preparedness with which adjudicatory bodies oppose attempts by parties to derogate from their treaty obligations displays the commitment of such bodies to the bindingness of treaties. However, in appropriate circumstances – especially when the economic, environmental, health, and other concerns of the citizens of the host State are adversely threatened – there is a need for tribunals to apply the *pacta sunt servanda* rule with some flexibility as a State exists for the welfare of its citizens. The example of Argentina is quite illustrative here, where Argentina was subjected to several arbitrations arising from a failure on its part to fully observe its treaty obligations due to the country's financial crisis.²⁵⁹ South Africa faced a similar fate by enacting the Black Economic Empowerment law to challenge the effect of the apartheid policy that was in operation in the past.²⁶⁰ The

259. See M. SORNORAJAH, *supra* note 9, at 207.

260. For more information on the Black Economic Empowerment Law, see L.P. Krüger *The Impact of Black Economic Empowerment (BEE) on South African Business: Focusing on Ten*

application of such flexibility would be done in a way that would recognize the interests of the international investor. Resort by the host State to conditions that have no basis as justifications for its derogation from the treaty is deprecated and does not help in the development of international investment.

As a primary source of international law, treaties occupy a principle place among the sources of international law and international investment. There is a hierarchy of international law sources, and treaty seems to be second to none, apart from peremptory norms. Arguing that there is an absence of hierarchy of international law appears to ignore the trend of State practice. Numerous aspects of the interaction between States are regulated by treaties. This development is not accidental, but rather underscores the seeming ineffectiveness of other sources of law to regulate the relations of States.

The current investment regime has not fared well. The dominance of bilateral treaties over multilateral treaties implies that there is no strong platform upon which multilateral states can pull their investment potentials together for their mutual benefits. With developing States' growing suspicion of developed States and the desire of the latter to mainly enter into treaty relations with States they can dominate, the future of multilateral investment treaties may remain bleak.

Investment treaties are of significant importance in the regulation of foreign investment between the investor and the host State. However, the negotiations of investment treaties as well as their provisions are grossly in favor of the investor, to the disadvantage of the host, developing State. Thus, the claimed benefits of international investment treaties are exaggerated, and there is a need to offer more real benefits to the host State under investment treaties.

Dimensions of Business Performance, available at www.ajol.info/index.php/sabr/article/download/76415/66874.