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AGAINST IMPERIAL ARBITRATORS: THE BRILLIANCE OF CANADA'S NEW MODEL INVESTMENT TREATY

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ABSTRACT

Investment treaty arbitration has become politically "toxic" even in states that pioneered the development of investment treaties. There is consensus on the need for reform. But there is a dearth of historical research on what went wrong with investment treaties, when it happened, or how to find the way forward in light of the past. As a result, reform efforts have a stumbling quality. One can see this in multilateral fora, such as the United Nations Commission on International Trade Law (UNCITRAL), where over four years of study and negotiations have produced little consensus. One can also see it in the investment treaty practice of individual states, such as Canada, which has recently lurched across the spectrum from investment treaty arbitration to a permanent international investment court, to the abandonment of investor-state dispute settlement (ISDS), and back to investment treaty arbitration.

This article fills the gap in understanding by explaining what went wrong with investment treaty arbitration and when it happened. It demonstrates that the customary international law on state responsibility for injuries to aliens evolved during the 19th century to protect foreign investors against exceptional failures of the nightwatchman and rule-of-law states. As the consensus regarding customary international law standards of treatment unraveled during the 20th century due to the spread of communism, decolonization, and economic nationalism, capital-exporting states turned in bilateral investment treaties (BITs) to uphold traditional principles regarding the protection of foreign investment.

Starting in the late 1990s, however, an unexpected surge of claims brought under NAFTA's investment chapter fortuitously opened the door to the central problem of modern investment treaty practice: the rise of "imperial arbitrators" who do not merely police exceptional failures of the nightwatchman and rule-of-law states, but who choose to second-guess the normal operations of modern regulatory states without any meaningful

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checks or balances. Although the NAFTA Parties nipped that development in the bud, the rise of imperial arbitrators leapt to the broader universe of investment treaty arbitration, where it flourished until claims against developed states for measures such as the phaseout of nuclear power brought investment treaty arbitration to a crisis point.

Seeking a way forward in light of the past, the article examines Canada's recent experimentation with investment treaty reforms, including the development of a permanent international investment court in relations with the EU, the complete elimination of ISDS in relations with the United States, and a return to traditional investment treaty arbitration in a new model investment treaty coupled with substantive reforms that virtually eliminate opportunities to second-guess the normal operations of modern regulatory states. The article describes the last option as the most brilliant because it is the only one that substantively eliminates toeholds for imperial arbitrators while preserving arbitration as a safeguard against the exceptional failures of the nightwatchman and rule-of-law states.

Seeking a way forward in light of the past, the article examines Canada's recent experimentation with investment treaty reforms, including the development of a permanent international investment court in relations with the EU, the complete elimination of ISDS in relations with the United States, and a return to traditional investment treaty arbitration in a new model investment treaty coupled with substantive reforms that virtually eliminate opportunities to second-guess the normal operations of modern regulatory states. The article describes the last option as the most brilliant because it is the only one that substantively eliminates toeholds for imperial arbitrators while preserving arbitration as a safeguard against the exceptional failures of the nightwatchman and rule-of-law states.

I. INTRODUCTION

In recent years, Canada has lurched across the spectrum of investor-state dispute settlement (ISDS).[1] In 2016, Canada embraced a traditional version of investor-state arbitration in the Trans-Pacific Partnership (TPP).[2] Later

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1 *See* Martha Harrison et al., *Shifting Tides in Canada's Approach to Investor-State Dispute Settlement*, FINANCIER WORLDWIDE MAG. (June 2021), https://www.financierworldwide.com/shifting-tides-in-canadas-approach-to-investor-state-dispute-settlement#.YUYVvi1h3q1.

2 In October 2015, Canada and eleven other Pacific Rim states concluded negotiations for the Trans-Pacific Partnership. Charles H. Brower II, *Trans-Pacific Partnership: Continuity and Breakthroughs in U.S. Investment Treaty Practice*, 27 AM. REV. INT'L ARB. 145, 177 (2016). In February 2016, the same twelve states signed the agreement, which contains a traditional investment chapter that provides for investor-state arbitration on terms resembling analogous provisions in the NAFTA or the 2004 U.S. Model BIT, depending on one's perspective. *See About the CPTPP, View the Timeline*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/view_timeline-consultez_chronologie.aspx?lang=eng (Mar. 4, 2022) (reporting signature on February 4, 2016, in Auckland, New Zealand); Ai-Li Chiong-Martinson, Note, *Environmental Regulations and the Trans-Pacific Partnership: Using Investor-State Dispute Settlement to Strengthen Environmental Law*, 7 SEATTLE J. ENV'T L. 76, 88 (2017) (opining that the TPP's provisions on ISDS were modeled after analogous provisions in the NAFTA); Brower, *supra*, at 182 (explaining that the TPP's provisions on ISDS generally follow the 2004 U.S. Model BIT).

After the Trump administration definitively withdrew from participation in the TPP, the remaining states entered into a somewhat revised Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Jean Galbraith, *NAFTA Is Renegotiated and Signed by the United States*, 113 AM. J. INT'L L. 150, 155 n.47 (2019). The CPTPP largely incorporates the TPP but suspends application of certain provisions, including the TPP's provisions on investor-state arbitration of claims that state parties have violated investment authorizations and agreements entered into directly between investors and host states. *See About the CPTPP, View the Final Agreement, CPTPP & Annex*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng (Feb. 21, 2018); *CPTPP Suspensions Explained*, AUSTL. GOV'T DEPT. OF FOREIGN AFFS. & TRADE, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/outcomes-documents/Pages/cptpp-suspensions-explained (Jan. 2019). It continues to provide for investor-state arbitration of substantive treaty obligations. *CPTPP Suspensions Explained*, AUSTL. GOV'T DEPT. OF FOREIGN AFFS. & TRADE, *supra*. As of this writing, the CPTPP has entered into force among Canada and six other states parties, namely Australia, Japan, Mexico, New Zealand, Singapore, and Vietnam. *See About the CPTPP*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/about_cptpp-propos_ptpgp.aspx?lang=eng (Mar. 7, 2022).

that same year, Canada unexpectedly embraced the European Union's rollout of a permanent international investment court in the Comprehensive Economic and Trade Agreement (CETA).[3] In 2020, Canada abstained from submission to any form of ISDS in the context of the new U.S.-Mexico-Canada Agreement (USMCA).[4] Despite the apparent movement away from ISDS in general and investor-state arbitration in particular, in 2021 Canada released a new model Foreign Investment Protection Agreement (FIPA) that includes a "robust" commitment to investor-state arbitration.[5]

On the one hand, the choreography of Canada's divergent moves creates a sense of floundering. But it is also possible to "see value" in the flexibility

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[3] In October 2016, Canada and the European Union signed the Comprehensive Economic and Trade Agreement (CETA). *See About the CETA, Read the Agreement & View the Timeline*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/about_ceta-propos_aecg.aspx?lang=eng (Nov. 22, 2021).

In the supposedly final negotiated text, released in 2014, the agreement contemplated investor-state arbitration as the means for resolving disputes between investors and host states under the CETA's investment chapter; however, in a legal "scrub," released in February 2016, the parties agreed to replace arbitration with the establishment of a permanent investment court and appellate body. J.A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* 2–3 (C.D. Howe Inst., Comment. No. 459, 2016), https://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary%20459.pdf ; *see also* Brower, *supra* note 2, at 291, 157 n.93; Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1119 n.17 (2017); James Gathii & Cynthia Ho, *Regime Shifting of IP Lawmaking and Enforcement from the WTO to the International Investment Regime*, 18 MINN. J.L. SCI. & TECH. 427, 500–01 (2017). They also agreed to pursue establishment of a multilateral investment court in negotiations with other trading partners. Comprehensive Economic and Trade Agreement, Can.-EU., art 8.29, Oct. 30, 2016, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng [hereinafter Post-Scrub CETA].

CETA went into provisional effect in 2017, except for most of the provisions on investment, which will not enter into force until after ratification by all EU member states. *CETA Investment Court System Advances Toward Implementation While Irish Activists Launch Campaign Against Ratification*, INT'L INST. FOR SUSTAINABLE DEV., (Mar. 23, 2021), https://www.iisd.org/itn/en/2021/03/23/ceta-investment-court-system-advances-toward-implementation-while-irish-activists-launch-campaign-opposing-ratification/. So far, only 15 of 27 EU member states have crossed that threshold. *Id.*

[4] *See* Agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020, Ch. 14 & Annexes 14-D & 14-E [hereinafter USMCA], https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf (last visited Jun. 30, 2022); *see also* Galbraith, *supra* note 2, at 155–56; Daniel Gervais, *Intellectual Property: A Beacon for Reform of Investor-State Dispute Settlement*, 40 MICH. J. INT'L L. 289, 295 n.27 (2019); Zara Shafruddin, *Investor-State Dispute Settlement Between Developed Countries: Why One Size Does Not Fit All*, 29 AM. REV. INT'L ARB. 429, 450 (2019).

[5] *Canadian Model FIPA (2021)*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng (May 12, 2021); Global Affairs Canada, *Minister Ng Announces Launch of Canada's Foreign Investment Promotion and Protection Agreement Model*, GOV'T OF CAN. (May 13, 2021), https://www.canada.ca/en/global-affairs/news/2021/05/minister-ng-announces-launch-of-canadas-foreign-investment-promotion-and-protection-agreement-model.html; *see also* Crowell & Moring, *Canada Releases Updated FIPA Model: A Step Forward for the ISDS System* (May 19, 2021), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Canada-Releases-Updated-FIPA-Model-A-Step-Forward-for-the-ISDS-System.

associated with "evolutionary, experimental approaches . . . in turbulent fields characterized by diverse preferences."[6]

Thus, as Democratic strategist James Carville once remarked, "The only person who ever stumbles is a guy moving forward."[7] Viewed from that perspective, one can describe Canada's new model FIPA as the country's third and most brilliant step in addressing the central problem of modern investment treaty practice: the emergence of "imperial arbitrators" who aim not merely to discipline exceptional failures of host states to provide the security demanded from the nightwatchman and the rule-of-law states, but who have also created a form of international governance in which they second-guess (without checks or balances) the normal operations of modern regulatory states.

Seeking to elaborate the points just made, Part I recounts the evolution of the customary international law of state responsibility for injuries to aliens during the 19th century as a mechanism for disciplining exceptional failures of the nightwatchman and rule-of-law states. Part II describes the ways in which socialist revolution, decolonization, and economic nationalism challenged the customary international law of state responsibility during the 20th century. Part III discusses the emergence of bilateral investment treaties (BITs) as a means for neutralizing that challenge, codifying traditional principles of state responsibility, and eventually introducing direct rights of action by foreign investors against host states. Part IV breaks new ground by identifying the central problem of modern investment treaty practice: the transformation of investor-state arbitration from a mechanism for disciplining exceptional failures of the nightwatchman and rule-of-law states into a tool of governance by imperial arbitrators who routinely second-guess the operation of modern regulatory states. Part V views the perplexing choreography of Canada's recent practice with respect to ISDS through the lens of efforts to address the problem of imperial arbitrators. In so doing, it identifies the brilliance of Canada's new model FIPA, which preserves investor-state arbitration as a bulwark against exceptional lapses by the nightwatchman and rule-of-law states, while introducing the ultimate check and balance against imperial arbitrators: cutting off virtually every avenue for second-guessing the normal operations of modern regulatory states.

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6 Anthea Roberts & Taylor St. John, *Complex Designers* and *Emergent Design: Reforming the Investment Treaty System*, 116 AM. J. INT'L L. 96, 100 (2022).

7 *Interview with James Carville*, PBS FRONTLINE (June 2000), https://www.pbs.org/wgbh/pages/frontline/shows/clinton/interviews/carville.html.

II. CUSTOMARY INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS

For centuries, European powers relied on colonization as a primary driver of foreign investment.[8] In that context, international law had little role to play in protecting foreign investment because colonial powers directly controlled the relevant territory and could use their own laws, their own courts, and other coercive mechanisms to protect the investments of their nationals.[9] Also, before 1820, cross-border capital flows amounted to no more than a "trickle,"[10] meaning that there were fewer points of friction and lower stakes.

During the 19th century, a constellation of circumstances created an opening for the development of customary international law on state responsibility for injuries to aliens and their property.[11] These circumstances included: (1) the early escape of Latin America from colonial rule;[12] (2) the

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8 ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 10 (2009); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 19 (2d ed. 2004); KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES 19–20 (2010); Ryan J. Bubb & Susan Rose-Ackerman, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Investment Treaties*, 27 INT'L REV. L & ECON. 291, 294 (2007).

9 NEWCOMBE & PARADELL, *supra* note 8, at 10–11; SORNARAJAH, *supra* note 8, at 19; Bubb & Rose-Ackerman, *supra* note 8, at 294.

One can make an exception for situations in which European powers were competing for control or influence over territory, in which case international law had a role to play in resolving the competing interests. *See* OOONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS 3–30 (2017) (describing how Hugo Grotius relied on international law to justify the Dutch East India Company's use of armed force against a Portuguese vessel in the context of efforts to control the Asian spice trade); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW 59–63 (2013) (describing the *Delagoa Bay Railroad Arbitration* between the United Kingdom and the United States as joint claimants and Portugal, who expropriated an almost complete railroad constructed in Portuguese-controlled East Africa, which "had the potential to threaten Britain's economic interests, including the restriction of access to crucial trade routes . . . and the flow-on effects for extensive British investments in the gold mines of Africa").

10 VANDEVELDE, *supra* note 8, at 20 (quoting Jeffrey G. Williamson, *Winners and Losers Over Two Centuries of Globalization* (Nat'l Bureau Econ. Research, Working Paper 9161, 2002), http://www.nber.org/papers/w9161).

11 *See* BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 611 (8th ed., James Crawford ed., 2012) [hereinafter BROWNLIE'S PRINCIPLES]; FREDERICK SHERWOOD DUNN, THE PROTECTION OF NATIONALS 53 (1932); Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517 (1910); *see also* MILES, *supra* note 9, at 47; YANNICK RADI, RULES AND PRACTICES OF INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3 (2020); Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1, 2–3 (Richard B. Lillich ed., 1983).

12 *See* Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective,* 49 U. PITT. L. REV. 891, 896 (1988); Amy L. Chua, *The Privatization-Nationalization Cycle: The Links Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 227 (1995); Thomas C. Wright, *Human Rights in Latin America: History and Projections for the Twenty-First Century*, 30 CAL. W. INT'L L.J. 303, 304 (2000).

recurrent instability of governments in that region;[13] (3) the concentration of capital in Europe and North America, combined with the lack of sufficient investment opportunities in those regions;[14] (4) innovations in transportation and other communications that made it possible to grow, harvest, and distribute even perishable commodities on a global scale;[15] (5) the reorientation of Latin American immigration policies to attract skilled North American and European workers;[16] and (6) the dawn of a relatively peaceful period among great powers between the end of the Napoleonic Wars in 1815 and the outbreak of World War I in 1914.[17] As a result of these forces, British foreign investment grew from $500 million in 1825 to $12.1 billion in 1900.[18] Over the same period, French foreign investment grew from $100 million to $5.2 billion.[19]

When large numbers of foreigners with extensive property interests appeared in Latin America,[20] they initially encountered a governing elite of largely European descent,[21] dedicated to the ideals of economic liberalism, including laissez-faire economics and an openness to foreign investment.[22] However, the political and economic philosophies borrowed from Europe did not always map well onto the traditions and customs of largely indigenous populations.[23] Also, the newly formed governments often had not established

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13 EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 242–43 (1915); DUNN, *supra* note 11, at 54; *see also* HATHAWAY & SHAPIRO, *supra* note 9, at 33–34.

14 J.A. HOBSON, IMPERIALISM 79–83 (1902); Root, *supra* note 11, at 518–19.

15 *See* DUNN, *supra* note 11, at 53; Root, *supra* note 11, at 517; *see also* MARK WESTON JANIS ET AL., INTERNATIONAL LAW 990 (6th ed. 2020); Luis Bertola & Jeffrey G. Williamson, *Globalization in Latin America Before 1940*, at 3–7 (Nat'l Bureau Econ. Rsch., Working Paper 9687, 2003), http://www.nber.org/papers/w9687; Enrique R. Carrasco & Randall Thomas, *Encouraging Relational Investment and Discouraging Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis*, 34 COLUM. J. TRANSNAT'L L. 539, 547 (1996); John J. Moss, *The 1990 Mexican Technology Regulations*, 27 STAN. J. INT'L L. 215, 218 (1990). A case involving several of these phenomena and well known to U.S. students of international law involved U.S. investors in Central American banana plantations and railroads, allegations of anticompetitive practices, political instability, military intervention, and ultimately dispossession. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

16 SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 31 (2012); *see also* VANDEVELDE, *supra* note 8, at 20–21; Root, *supra* note 11, at 517–18.

17 VANDEVELDE, *supra* note 8, at 20.

18 Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 376 (1998).

19 *Id.*

20 *See* DUNN, *supra* note 11, at 53.

21 *Id*.

22 Chua, *supra* note 12, at 227; Jorge M. Guira, *MERCOSUR as an Instrument for Development*, 3 L. & BUS. REV. AM. 53, 61 (1997); *see also* DUNN, *supra* note 11, at 54, 66.

23 DUNN, *supra* note 11, at 53–54.

themselves with a sufficient degree of permanence.[24] During a transitional period, political disorder and revolution occurred frequently in Latin America,[25] inflicting losses on foreign workers and property owners.[26]

Unable to deploy the tools of colonialism against the independent states of Latin America,[27] capital-exporting states developed a new customary international law on diplomatic protection and state responsibility for injury to aliens.[28] In essence, that law drew on the definitional elements of independent states, including the existence of an independent government able to exercise effective jurisdiction over territory.[29] That element implied both rights and obligations. Recognizing the right to independence and sovereignty, capital-exporting states generally acknowledged that their nationals submitted to the jurisdiction of host states and had to accept the suitability of their political and legal institutions.[30] At the same time, host states had the obligation to satisfy the basic functions of states as generally understood by European and North American powers.[31] These included the obligations to protect life, liberty and property;[32] to protect the economic and commercial rights of all inhabitants without regard to nationality;[33] and to control arbitrary actions of the state.[34]

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24 *Id.* at 53.

25 BORCHARD, *supra* note 13, at 242–43; DUNN, *supra* note 11, at 54, 55; *see also* Alejandro Alvarez, *Latin America and International* Law, 3 AM. J INT'L L. 269, 273 (1909).

26 DUNN, *supra* note 11, at 54, 57; MONTT, *supra* note 16, at 32. A case well known to U.S. students of international law involved allegations that a military commander of one faction in a civil conflict unlawfully detained, assaulted, and pressed into service the U.S. owner and operator of a machinery repair shop and waterworks in Bolivar, Venezuela. *See* Underhill v. Hernandez, 168 U.S. 250, 254 (1897).

27 Bubb & Rose-Ackerman, *supra* note 8, at 294.

28 *See supra* note 11 and accompanying text.

29 BORCHARD, *supra* note 13, at 26–27; *see also* Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19; MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 20 (2014).

30 BORCHARD, *supra* note 13, at 28, 349; 1 LASSA OPPENHEIM, INTERNATIONAL LAW 374 (1905); Root, *supra* note 11, at 526–27; *see also* MILES, *supra* note 9, at 48.

31 BORCHARD, *supra* note 13, at 27, 30–32.

32 *Id.* at 39, 349; *see also* OPPENHEIM, *supra* note 30, at 376.

33 *See* OPPENHEIM, *supra* note 30, at 376–77 (observing that "an alien must be afforded such protection of his person and property as is enjoyed by a citizen," and opining that "[a]part from protection of person and property, every state can treat foreigners at discretion," but recognizing that "there is a tendency within all the States which are members of the Family of Nations to treat admitted foreigners more and more on the same footing as citizens, political rights and duties, of course, excepted"); *see also* BORCHARD, *supra* note 13, at 38, 40 (noting that the "modern tendency is to bring about an approximation of the alien to the national in the enjoyment of civil rights"); Root, *supra* note 11, at 521 (asserting that "[e]ach country is bound to give to the nationals of another country the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens").

34 BORCHARD, *supra* note 13, at 39.

Elaborating these principles, states had to exercise due diligence in protecting aliens from crimes and civil disturbance,[35] and to provide judicial mechanisms for the administration of justice.[36] In general, host states bore no responsibility for damages caused by revolutionary movements, except in the case of frequent or prolonged political disorder.[37] Nor did they bear international responsibility for mere non-performance of their contractual relations with aliens, though they might bear responsibility for arbitrary annulment of contracts or confiscation of property without recourse to a judicial determination regarding the legality of state action.[38] Frequent and fundamental changes in the legal environment could also attract international responsibility.[39]

In other words, states had the obligation to provide a level of security consistent with performance of the functions of the nightwatchman state and the rule-of-law state, or *Rechtstaat*.[40] Occasional shortfalls would not attract liability.[41] But if the lapses reached the point where they disrupted the normal flow of trade and community life, capital exporting states had the right to

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35 *Id.* at 217, 220–22; DUNN, *supra* note 11, at 143–46.

36 *See* DUNN, *supra* note 11, at 146–56; PAPARINSKIS, *supra* note 29, at 194–95; *see also* BORCHARD, *supra* note 13, at 43, 335–36; OPPENHEIM, *supra* note 30, at 376.

37 DUNN, *supra* note 11, at 159–63; *see also* BORCHARD, *supra* note 13, at 229.

38 BORCHARD, *supra* note 13, at 284–85, 292–94, 336; DUNN, *supra* note 11, at 163–69; MILES, *supra* note 9, at 48; Bubb & Rose-Ackerman, *supra* note 8, at 293; *see also* J.E.S. Fawcett, *Some Foreign Effects of Nationalization of Property*, 27 BRIT. Y.B. INT'L L. 355, 355 (1950).

39 *See* PAPARINSKIS, *supra* note 29, at 220.

40 *See* MONTT, *supra* note 16, at 18 (explaining that "in this earlier era, international law was essentially concerned with the proper administration of justice and adequate maintenance of the *order publique*, both central functions of the nineteenth century 'night-watchman' state"). Borchard tied the parameters of diplomatic protection to the "true function of the state," which he described in the following terms:

> The Kantian theory of the *Rechstaat* considered the sole duty of the state the maintenance of the legal security of each individual. The attempt to narrow the sphere of governmental activity was adopted by the orthodox political economy which reduced the function of the state to the minimum of maintaining security.

BORCHARD, *supra* note 13, at 30; *see also* DUNN, *supra* note 11, at 66 (opining that the usages relating to diplomatic protection "embody in large measure the capitalistic economy of the European civilization of the nineteenth century"); MONTT, *supra* note 16, at 21 (quoting Kennedy v. United Mexican States, 4 RIAA 194, 198 (1927)) (indicating that states should only be liable for the "failure to maintain the *usual order* which it is the duty of every state to maintain within its territory"). In his insightful work on the concept of "full protection and security" in international investment law, Sebastián Mantilla Blanco observes that the Hobbesian security (or nightwatchman) state aims to protect individuals from the harmful conduct of third parties, while the *Rechtsstaat* aims to protect individuals from the harmful exercise of *public* (i.e., governmental) power by upholding the rule of law. SEBASTIÁN MANTILLA BLANCO, FULL PROTECTION AND SECURITY IN INTERNATIONAL INVESTMENT LAW 571–76 (2019).

41 DUNN, *supra* note 11, at 145, 154.

engage in the diplomatic protection of their nationals,[42] which might include diplomatic protest,[43] forcible intervention,[44] or the assertion of legal claims through inter-state arbitration.[45] In the event of legal claims, the law required full compensation for losses.[46] Theoretically, international law did not contemplate punitive damages,[47] but in practice some tribunals considered the extent of delinquency in establishing monetary compensation.[48]

In theory, the same principles applied to all states, and one can cite examples of claims directed at European and North American states.[49] In practice, however, Latin American states experienced the most frequent and sustained periods of political and social unrest,[50] and so became the most frequent targets of claims during the transitional period of the nineteenth century.[51] With some justification, the perception arose that stronger states disproportionately sought recourse against weaker states,[52] and that this

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42 *Id.* at 145–46, 154–55; *see also* BORCHARD, supra note 13, at 25.

43 BORCHARD, *supra* note 13, at 313; DUNN, *supra* note 11, at 55; C.L. LIM ET AL., INTERNATIONAL INVESTMENT LAW AND ARBITRATION 1 (2018); OPPENHEIM, *supra* note 30, at 375.

44 BORCHARD, *supra* note 13, at 312–14; DUNN, *supra* note 11, at 55, 57; HATHAWAY & SHAPIRO, *supra* note 9, at 33–35; MILES, *supra* note 9, at 57–58, 68; MONTT, *supra* note 16, at 32, 37; OPPENHEIM, *supra* note 30, at 375; RADI, *supra* note 11, at 7; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 465 (5th ed. 2009) [hereinafter REDFERN & HUNTER]; SORNARAJAH, *supra* note 8, at 20; VANDEVELDE, *supra* note 8, at 29–30; Root, *supra* note 11, at 521; Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 160–61 (2005) [hereinafter Vandevelde, *Brief History*]; Vandevelde, *supra* note 18, at 378–79.

45 BORCHARD, *supra* note 13, at 296–302, 322–25; BROWNLIE'S PRINCIPLES, *supra* note 11, at 611 & n.25; DUNN, *supra* note 11, at 58–59; HATHAWAY & SHAPIRO, *supra* note 9, at 33–34; LIM ET AL., *supra* note 43, at 1; MILES, *supra* note 9, at 56–69; Fawcett, *supra* note 38, at 357; Vandevelde, *Brief History*, *supra* note 44, at 160; Vandevelde, *supra* note 18, at 379.

46 DUNN, *supra* note 11, at 172–74. *But see* BORCHARD, *supra* note 13, at 413–14, 416–19, 422–23 (indicating that international arbitral decisions do not hold states responsible for indirect losses to the same extent as private individuals under domestic law).

47 BORCHARD, *supra* note 13, at 419; DUNN, *supra* note 11, at 172.

48 BORCHARD, *supra* note 13, at 419; DUNN, *supra* note 11, at 175–78, 181–82.

49 *See* MILES, *supra* note 9, at 59–67 (describing British claims against Greece, Portugal, and the Kingdom of the Two Sicilies during the nineteenth and early twentieth centuries); Root, *supra* note 11, at 525 (indicating that the United States became the target of diplomatic claims, and paid indemnities, for incidents involving mob violence directed at Chinese nationals in Colorado (1880) and Wyoming (1885); lynchings of Mexican nationals in California (1895); and lynchings of Italians in Louisiana (1891 and 1899), Colorado (1895) and Mississippi (1901)). *But see* BORCHARD, *supra* note 13, at 346 ("In states of the European type there is less occasion for the employment of this protective right than in states of less stable organization.").

50 BORCHARD, *supra* note 13, at 242–43; DUNN, *supra* note 11, at 55, 161.

51 BORCHARD, *supra* note 13, at 242–43; DUNN, *supra* note 11, at 55–57; *see also* MONTT, *supra* note 16, at 32–33.

52 BORCHARD, *supra* note 13, at 347; DUNN, *supra* note 11, at 55–56; Root, *supra* note 11, at 520; *see also* PAPARINSKIS, *supra* note 29, at 23.

created opportunities for abuse of the legal process.[53] Under the banner of the Calvo Doctrine, Latin American states pushed back, claiming that international law only required host states to treat foreigners as well as they treated their own nationals, however good or bad that might be.[54] The proposition failed to attract support among the more powerful states of Europe and North America.[55] As a result, the customary international law of state responsibility for injuries to aliens remained a tool for policing exceptional lapses of the nightwatchman and rule-of-law states. At this stage, it addressed the protection of aliens in general and did not focus specifically on the protection of foreign investment.[56] Also, international law did not aspire to control the normal operations of the modern regulatory state, which was neither debated as a legitimate phenomenon until the 1920s,[57] nor widely recognized until the 1930s.[58]

III. THE UNRAVELING OF CONSENSUS

As mentioned above, during the nineteenth century, customary international law did not treat the protection of foreign investment as a discrete topic.[59] On the contrary, the protection of foreign investment formed part of a broader customary international law of state responsibility for injuries to aliens and their property.[60] Even in that broader context, the law played a comparatively minor role.[61] The reasons should be obvious. The great powers shared a consensus regarding the protection of private

53 BORCHARD, *supra* note 13, at 347; DUNN, *supra* note 11, at 56–57; Lillich, *supra* note 11, at 3; Root, *supra* note 11, at 521.

54 DUNN, *supra* note 11, at 56; MILES, *supra* note 9, at 49–51; NEWCOMBE & PARADELL, *supra* note 8, at 13; PAPARINSKIS, *supra* note 29, at 23–24; JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 49 (2010); Lillich, *supra* note 11, at 4.

55 MILES, *supra* note 9, at 51; NEWCOMBE & PARADELL, *supra* note 8, at 13; SALACUSE, *supra* note 54, at 49; Lillich, *supra* note 11, at 4.

56 *See* NEWCOMBE & PARADELL, *supra* note 8, at 12; PAPARINSKIS, *supra* note 29, at 43, 46, 64; RADI, *supra* note 11, at 3; Bubb & Rose-Ackerman, *supra* note 8, at 293.

57 *See* Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992).

58 *See* Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531, 539 (2002) ("The last great era of international jurisprudence concerning States' treatment of foreign investors and investments in their territory was in the late nineteenth and early twentieth centuries—before the rise of the modern regulatory state. Beginning in the 1930s, the United States and many other countries shifted toward a model of government that increasingly regulated daily economic life.").

59 *See supra* note 56 and accompanying text.

60 Bubb & Rose-Ackerman, *supra* note 8, at 293.

61 NEWCOMBE & PARADELL, *supra* note 8, at 12.

property.[62] Competing centers of power with contrary values did not yet exist.[63] As a result, expropriations of foreign investments did not occur on any significant scale.[64] As explained below however, during the twentieth century, three political movements challenged the traditional distribution of property rights as incompatible with "the well-being of [the] nation as a whole."[65] These movements included communist and socialist revolutions, decolonization, and the rise of economic nationalism. Expropriations became a widespread phenomenon. The duty to provide compensation, the modalities for compensation, and the measure of compensation for expropriation became contested topics in bilateral relations and in the United Nations. By the 1960s and 1970s, divisions had become so intense that even the United States Supreme Court and the International Court of Justice expressed doubts regarding the existence of any customary international law regarding minimum standards for the protection of foreign investment.

By any measure, 1917 marks the onset of challenges to traditional principles of customary international law regarding the protection of aliens and their property.[66] Following the Soviet Revolution in October 1917, Russia became the first major power to reject the concept of private property and, thus, the legal protection of privately held property.[67] Starting in February 1918, the new regime abolished private ownership of land, minerals, forest and other natural resources, agricultural holdings and equipment, the banking and financial sector, as well as the merchant fleet and foreign trade companies.[68] By 1920, the state had nationalized most

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62 Peter Muchlinkski, *A Brief History of Business Regulation*, *in* REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION 47, 48 (Sol Picciotto & Ruth Mayne eds., 1999).

63 As already discussed, in that period, foreign investment often occurred in the context of colonization by the great powers. *See supra* note 8 and accompanying text. The coercive structures of colonization left indigenous peoples few avenues for dissent. *See supra* note 9 and accompanying text; *see also* FONKEM ACHANKENG, NATIONALISM AND INTRA-STATE CONFLICTS IN THE POSTCOLONIAL WORLD 10 (2015). In the newly independent states of Latin America, the governing elite were of European extraction and shared the great powers' commitment to economic liberalism. *See supra* notes 21–22 and accompanying text.

64 LEG. REF. SERV., LIBRARY OF CONGRESS, 88TH CONG., REP. TO THE COMM. FOR. AFF. ON EXPROPRIATION OF AMERICAN OWNED PROPERTY BY FOREIGN GOVERNMENTS IN THE TWENTIETH CENTURY 5 (Comm. Print 1963) [hereinafter REP. ON EXPROPRIATION]; Miles, *supra* note 9, at 52; VANDEVELDE, *supra* note 8, at 29; Fawcett, *supra* note 38, at 356.

65 *Cf.* Oscar Morineau, *The Expropriation of Foreign Owned Property in Mexico*, 29 VA. L. REV. 1077 (1943) (book review) (describing the problem of foreign-owned property in Mexico in terms of "the struggle between private ownership of land and the well-being of a nation as a whole").

66 REP. ON EXPROPRIATION, *supra* note 64, at 8; *see also* PAPARINSKIS, *supra* note 29, at 67; VANDEVELDE, *supra* note 8, at 34.

67 *See* NEWCOMBE & PARADELL, *supra* note 8, at 14; VANDEVELDE, *supra* note 8, at 34; Fawcett, *supra* note 38, at 357.

68 REP. ON EXPROPRIATION, *supra* note 64, at 8; *see also* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 471 (2d ed. 2008).

industrial concerns.[69] In the process, the new regime expropriated virtually all foreign investments.[70] It also refused to provide any compensation for the seizure of foreign property.[71]

Just as the Russian Revolution was getting underway, Mexico initiated a series of social, political, and legal reforms that blended aspects of socialist revolution and economic nationalism. While not as breathtaking as the position taken by the new Soviet regime, the Mexican government significantly challenged customary international law regarding the protection of aliens as understood by the great powers. For example, the Mexican Revolution of 1910 resulted in the adoption of a new constitution in 1917, which expressed a commitment to land reform.[72] In particular, the new constitution sought to end Mexico's highly concentrated system of land ownership and to redistribute land to the peasantry in order to promote economic development and the formation of a stable middle class.[73] Although the reforms mostly affected Mexican landowners,[74] they resulted in the expropriation of lands belonging to foreigners,[75] including some 161 U.S. owners of modest estates up to 1927.[76]

Unlike their Soviet counterparts, Mexican officials recognized an obligation to compensate dispossessed landowners.[77] However, disagreements arose regarding the modalities for compensation.[78] In correspondence with his Mexican counterpart, Secretary of State Cordell Hull took the position that international law required "prompt adequate and effective" compensation,[79] meaning something like cash payment of market

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69 REP. ON EXPROPRIATION, *supra* note 64, at 8.

70 *Id.* at 9.

71 *Id.*; RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2 (2d ed. 2012); LOWENFELD, *supra* note 68, at 470–71; NOAH RUBINS & M. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 160–61 (2005); Vandevelde, *supra* note 18, at 380–81.

72 REP. ON EXPROPRIATION, *supra* note 64, at 10.

73 *See id.*; Morineau, *supra* note 65, at 1077; *see also* Letter from Eduardo Hay, Mexican Minister of Foreign Affs., to Josephus Daniels, American Ambassador (Aug. 3, 1938), *reprinted in* 32 AM. J. INT'L L. 186, 187 [hereinafter Minister of Foreign Affs. Letter of Aug. 3, 1938]; David Hamilton, *The Veblen-Commons Award: Wendell Gordon*, 19 J. ECON. ISSUES 301, 301–02 (1985).

74 *See* Morineau, *supra* note 65, at 1078.

75 *See id.*

76 Letter from Cordell Hull, Sec'y of State, to Castillo Najera, Mexican Ambassador (July 21, 1938), *reprinted in* 32 AM. J. INT'L L. SUPP. OFFICIAL DOCS. 181, 183 (1938) [hereinafter Hull Letter of July 21, 1938].

77 REP. ON EXPROPRIATION, *supra* note 64, at 10; Minister of Foreign Affairs Letter of Aug. 3, 1938, *supra* note 73, at 187, 190.

78 *See* REP. ON EXPROPRIATION, *supra* note 64, at 10; Morineau, *supra* note 65, at 1079.

79 *See* Letter from Cordell Hull, Sec'y of State, to Castillo Najera, Mexican Ambassador (Aug. 22, 1938), *reprinted in* 32 AM. J. INT'L L. SUPP. OFFICIAL DOCS. 191, 193 (1938) [hereinafter Hull Letter of Aug. 22, 1938]; Hull Letter of July 21, 1938, *supra* note 76, at 184–85.

value at the time of dispossession.[80] By contrast, the Mexican government proposed to compensate landowners with agrarian bonds having long maturities,[81] with the result that over a decade could pass without any payments whatsoever.[82] While the U.S. government claimed that the measures were tantamount to confiscation,[83] Mexican officials opined that international law established no rules regarding the timing or form of compensation.[84]

Although Mexico's agrarian reforms sounded more in socialism than in economic nationalism, the reverse holds true for the country's oil expropriations of 1938.[85] At the beginning of the 20th century, foreign interests owned virtually all oil producing assets in Mexico.[86] They also exported virtually all of the oil they produced.[87] Although the constitution of 1917 provided for state ownership of the subsoil, the Mexican government initially allowed foreign oil companies to continue operating fields under concessions with terms of up to 50 years.[88]

Over time, a perception developed that foreign oil companies severely underpaid Mexican labor,[89] used transfer-pricing to conceal the vast majority of profits,[90] and repatriated virtually all profits to their home markets.[91] According to this view, the Mexican state could put an end to those inequities

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80 *See* José E. Alvarez, *Political Protectionism and U.S. International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 34 n.174 (1989); Scott N. Carlson, *Foreign Investment Laws and Foreign Direct Investment in Developing Countries: Albania's Experiment*, 29 INT'L LAW. 577, 585 (1985); Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 234–36 (1988).

81 Minister of Foreign Affairs Letter of Aug. 3, 1938, *supra* note 73, at 187; *see also* REP. ON EXPROPRIATION, *supra* note 64, at 10.

82 *See* Hull Letter of July 21, 1938, *supra* note 76, at 183 (emphasizing that no claims had been paid as of 1938); *see also* Hull Letter of Aug. 22, 1938, *supra* note 79, at 196.

83 Hull Letter of July 21, 1938, *supra* note 76, at 184.

84 Minister of Foreign Affairs Letter of Aug. 3, 1938, *supra* note 73, at 186–87.

85 *See* Clayton R. Koppes, *The Good Neighbor Policy and the Nationalization of Mexican Oil: A Reinterpretation*, 69 J. AM. HIST. 62, 62 (1982); Noel Maurer, *The Empire Struck Back* 1 (Harv. Bus. Sch., Working Paper No. 10-108, 2010).

86 Office of the Historian, *Mexican Expropriation of Foreign Oil, 1938*, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1937-1945/mexican-oil [hereinafter *Mexican Expropriation of Foreign Oil*].

87 *Id.*

88 REP. ON EXPROPRIATION, *supra* note 64, at 11; *see also Mexican Expropriation of Foreign Oil*, *supra* note 86.

89 *Mexican Expropriation of Foreign Oil*, *supra* note 86; *see also* Maurer, *supra* note 85, at 7 (indicating that the overall wage rates for Mexican oil workers were USD 0.06 per hour in 1913 and USD 0.16 per hour in 1934).

90 Maurer, *supra* note 85, at 9.

91 *Mexican Expropriation of Foreign Oil*, *supra* note 86.

and secure an important source of revenue by nationalizing the oil industry.[92] The underlying assumptions probably were false, given that Mexican oil production consistently declined between 1921 and 1933, every foreign oil company had already begun the process of disinvestment by 1931, and the Mexican oil industry was in a state of financial distress.[93] Although the Mexican state made "creeping" inroads against the interests of foreign oil companies during this period,[94] the issue came to a head in 1938 when a Mexican labor board ordered foreign oil companies to implement extremely large and retroactive wage increases for Mexican oil workers.[95] Foreign oil companies defied both the award of Mexican labor board and the Mexican Supreme Court's judgment mandating compliance with the award.[96] Although the Mexican president appeared willing to mediate a compromise,[97] a personal insult by oil executives during negotiations provided the last straw.[98] The president promptly ordered expropriation and nationalization of their investment property.[99]

As with the agrarian reforms, Mexican officials conceded the obligation to provide compensation, but disputed the measure and timing of compensation.[100] Foreign oil companies estimated their losses at $450 million, with American interests accounting for $200 million of that total.[101] Mexico replied that total losses came only to $262 million, with American interests accounting for less than $50 million of that total, a number that more closely corresponded to figures published by the U.S. Department of Commerce and reported by the oil companies on their own books.[102]

For companies that had not already settled with the government, Mexico and the United States agreed to submit the issue of compensation to a mixed commission, which awarded the United States a total of $23,995,991, gave

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92 *See* Maurer, *supra* note 85, at 20.

93 *Id.* at 2–4.

94 REP. ON EXPROPRIATION, *supra* note 64, at 10–11.

95 *Id.* at 12.

96 *Mexican Expropriation of Foreign Oil*, *supra* note 86.

97 *Id.*

98 *See* Arthur W. Macmahon & W.R. Dittmar, *The Mexican Oil Industry Since Expropriation*, 57 POL. SCI. Q. 28, 33 (1942) ("But in the end, perhaps, it was the way the representatives of the companies expressed doubt in the President's word during the negotiations that was the decisive factor in galvanizing national pride.").

99 *Id.*; *see also* REP. ON EXPROPRIATION, *supra* note 64, at 12.

100 *Mexican Expropriation of Foreign Oil*, *supra* note 86.

101 REP. ON EXPROPRIATION, *supra* note 64, at 12.

102 *Id.* In 1938, the Department of Commerce listed the value of U.S. direct investments in Mexico's oil industry at $69 million. *Id.*; Macmahon & Dittmar, *supra* note 98, at 43. In their books, U.S. oil companies listed the value at just over $60 million. REP. ON EXPROPRIATION, *supra* note 64, at 12; Macmahon & Dittmar, *supra* note 98, at 44. Today, at least, the U.S. State Department describes the oil companies' demands as "extravagant." *Mexican Expropriation of Foreign Oil*, *supra* note 86.

Mexico a credit for $9 million already placed on deposit, ordered payment of one-third of the balance as of July 1, 1942, and provided for payment of the remaining balance in five equal annual installments.[103] On paper, the outcome seemed unfavorable to U.S. oil companies.[104] In fact, the U.S. government essentially forced the settlement because it did not want the dispute to linger as an irritant during the Second World War.[105] Also, U.S. oil companies had only a secondary interest in compensation for Mexican properties known to have a declining value.[106] Their primary interest had been to set a precedent that would discourage oil expropriations by other countries.[107] In that context, one might see the efforts of U.S. oil companies as successful because the U.S. government intervened on their behalf and ultimately secured an amount of compensation described by some observers as greater than the market value of their already depleted oil fields.[108]

Although the Soviet and Mexican expropriations did not inflict decisive blows on customary international law regarding the protection of foreign investment, they marked the opening stages of a shift in views about the relationship between property rights and national welfare, and the appearance of serious resistance to traditional notions of state responsibility for injuries to aliens in both communist and non-communist states.[109] In other words, they mark the breakdown of a "silent consensus" on the protection of property rights and the advent of contentious debates.[110] As explained below, those forces grew in the decades following World War II. By the 1960s and 1970s, they posed an existential threat to the customary international law of state responsibility for injures to aliens and their property.

After World War II, communism expanded and posed new threats to the protection of foreign investment.[111] During that period, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Romania all became

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103 REP. ON EXPROPRIATION, *supra* note 64, at 12.

104 Koppes, *supra* note 85, at 62.

105 *Mexican Expropriation of Foreign Oil*, *supra* note 86; Koppes, *supra* note 85, at 62, 72. Following the expropriations, Nazi Germany had become the primary customer for Mexican oil. *Mexican Expropriation of Foreign Oil*, *supra* note 86.

106 Maurer, *supra* note 85, at 14.

107 *Id.* at 14–15.

108 *Id.* at 20; *see also* Koppes, *supra* note 85, at 71–72 (indicating that the compensation was adequate, "even generous" because the relevant fields had already been depleted).

109 *See* PAPARINSKIS, *supra* note 29, at 67; *see also* DOLZER & SCHREUER, *supra* note 71, at 2; Maurer, *supra* note 85, at 20; Hull Letter of Aug. 22, 1938, *supra* note 79, at 192.

110 *See* PAPARINSKIS, *supra* note 29, at 54.

111 LOWENFELD, *supra* note 68, at 483; NEWCOMBE & PARADELL, *supra* note 8, at 18–19; VANDEVELDE, *supra* note 8, at 41–42; Brower, *supra* note 2, 147–48; Vandevelde, *Brief History*, *supra* note 44, at 167.

part of the Soviet Bloc.[112] Contemporaneously, communist governments came to power in Albania, China, and Yugoslavia.[113] Beginning with Cuba in 1959,[114] and continuing for the next generation, communist and socialist movements worked actively,[115] and sometimes successfully to achieve political control in Latin American jurisdictions such as Chile and Nicaragua.[116] As they advanced, many socialist revolutions produced takings of foreign investments and repudiation of the obligation to compensate under international law.[117]

On a parallel track, decolonization and a retreat from imperialism in Africa, Asia and the Middle East further undermined the protection of foreign investment under international law.[118] Having achieved or enhanced their political independence, many countries sought to reinforce the effectiveness of sovereignty by eliminating foreign control over key sectors of the economy.[119] Mixed with nationalist fervor,[120] and in some cases racial or ethnic tensions,[121] this process led to waves of uncompensated takings in

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112 *See* NAT'L SEC. COUNCIL, REPORT TO THE PRESIDENT: UNITED STATES POLICY TOWARD THE SOVIET SATELLITE STATES IN EASTERN EUROPE NSC 58/2 para. 5 (1949), https://history.state.gov/historicaldocuments/frus1949v05/d17; Mark Kramer, *The Soviet Bloc*, *in* A DICTIONARY OF 20TH-CENTURY COMMUNISM 744, 744 (Silvio Pons & Robert Service eds., 2012).

113 Kramer, *supra* note 112, at 744.

114 *See* Zamel v. Rusk, 381 U.S. 1, 14 (1963); Larry C. Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 337, 404 (2004).

115 *See* Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT'L ENV'T L. & POL'Y 295, 303 (2005).

116 *See* Marjorie Cohn, *Teaching Torture at the School of the Americas*, 35 T. JEFFERSON L. REV. 1, 3 (2012); Luz E. Nagle, *On Armed Conflict, Human Rights, and Preserving the Rule of Law in Latin America*, 27 PENN ST. INT'L L. REV. 1, 30 (2008). During a similar period, powerful communist and socialist movements were active in Colombia, El Salvador, and Peru. *See* Lisa Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 53–54 (2006) (Colom.); Peter C. Diamond, *Temporary Protected Status Under the Immigration Act of 1990*, 28 WILLAMETTE L. REV. 857, 862 (1992) (El Salvador); Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289, 320 (1995) (Peru).

117 *See* VANDEVELDE, *supra* note 8, at 41; *see also* LOWENFELD, *supra* note 68, at 483; NEWCOMBE & PARADELL, *supra* note 8, at 18–19.

118 NEWCOMBE & PARADELL, *supra* note 8, at 18–19; SALACUSE, *supra* note 54, at 68; SORNARAJAH, *supra* note 8, at 22; VANDEVELDE, *supra* note 8, at 42; Vandevelde, *Brief History*, *supra* note 44, at 166.

119 SORNARAJAH, *supra* note 8, at 22; *see also* VANDEVELDE, *supra* note 8, at 42; Eileen Denza & Shelagh Brooks, *Investment Protection Treaties: United Kingdom Experience*, 36 INT'L & COMP. L.Q. 908, 909 (1987).

120 SORNARAJAH, *supra* note 8, at 22; Vandevelde, *supra* note 18, at 383.

121 *See* Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 324–25 (2000); *see also* Est. of Charania v. Shulman, 608 F.3d 67, 69 (1st Cir. 2010); Nemariam v. Fed. Dem. Repub. of Ethiopia, 315 F.3d 390, 391–92 (D.C. Cir. 2003); Winston R.

Algeria,[122] Egypt,[123] Ethiopia,[124] Indonesia,[125] Iran,[126] Iraq,[127] Kuwait,[128] Libya,[129] Saudi Arabia,[130] Sri Lanka,[131] Sudan,[132] Uganda,[133] and Zambia.[134]

Even in states with distant memories of colonial rule and without allegiance to the Soviet Union, the prevailing atmosphere favored economic nationalism and the reduction of foreign influence in economic affairs.[135] Thus, Argentina,[136] Bolivia,[137] Brazil,[138] Chile,[139] Guatemala,[140] Peru,[141] and Venezuela[142] nationalized mines, utilities, and other major enterprises. Applying the "dependencia" theory (according to which foreign investment resembles colonialism by causing a net outflow of resources to foreign states),[143] many Latin American states also adopted laws to restrict foreign investment.[144] Taken together, expropriations driven by decolonization and

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Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 172 n.126 (2004).

122 LOWENFELD, *supra* note 68, at 484; NEWCOMBE & PARADELL, *supra* note 8, at 19; RUBINS & KINSELLA, *supra* note 71, at 160 n.36, 161.

123 LOWENFELD, *supra* note 68, at 484; NEWCOMBE & PARADELL, *supra* note 8, at 19.

124 Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 423 (6th Cir. 1984); RUBINS & KINSELLA, *supra* note 71, at 160 n.36, 161; *see also* Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1159, 1206 n.177 (1987).

125 LOWENFELD, *supra* note 68, at 484; NEWCOMBE & PARADELL, *supra* note 8, at 19.

126 LOWENFELD, *supra* note 68, at 484; NEWCOMBE & PARADELL, *supra* note 8, at 19.

127 LOWENFELD, *supra* note 68, at 484; NEWCOMBE & PARADELL, *supra* note 8, at 19

128 NEWCOMBE & PARADELL, *supra* note 8, at 19; VANDEVELDE, *supra* note 8, at 46.

129 NEWCOMBE & PARADELL, *supra* note 8, at 19.

130 LOWENFELD, *supra* note 68, at 484; NEWCOMBE & PARADELL, *supra* note 8, at 19.

131 RUBINS & KINSELLA, *supra* note 71, at 160 n.36.

132 VANDEVELDE, *supra* note 8, at 46.

133 Est. of Charania v. Shulman, 608 F.3d 67, 69 (1st Cir. 2010); RUBINS & KINSELLA, *supra* note 71, at 160 n.36, 161; VANDEVELDE, *supra* note 8, at 46; Nagan & Hammer, *supra* note 121, at 172 n.126.

134 VANDEVELDE, *supra* note 8, at 46.

135 See Les Riordan, Comment, *Three Proposals for a Latin American Stock Exchange in Miami: Full-Service Exchange, Private Offshore Market, or a Computerized Financial Information Service*, 27 U. MIAMI INTER-AM. L. REV. 585, 589–90 (1996).

136 LOWENFELD, *supra* note 68, at 483; NEWCOMBE & PARADELL, *supra* note 8, at 19.

137 LOWENFELD, *supra* note 68, at 483; NEWCOMBE & PARADELL, *supra* note 8, at 19.

138 LOWENFELD, *supra* note 68, at 483; NEWCOMBE & PARADELL, *supra* note 8, at 19.

139 NEWCOMBE & PARADELL, *supra* note 8, at 19; RUBINS & KINSELLA, *supra* note 71, at 160 n.36.

140 LOWENFELD, *supra* note 68, at 483; NEWCOMBE & PARADELL, *supra* note 8, at 19.

141 LOWENFELD, *supra* note 68, at 483; NEWCOMBE & PARADELL, *supra* note 8, at 19.

142 RUBINS & KINSELLA, *supra* note 71, at 160 n.36.

143 *See* SORNARAJAH, *supra* note 8, at 57–58.

144 Carrasco & Thomas, *supra* note 15, at 550; Enrique R. Carrasco, *Law, Hierarchy and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 234–35 (1994).

economic nationalism in the developing world began in the 1960s, increased during the 1970s, and reached their height in about 1975.[145]

In addition to individual acts of expropriation, communist states, newly independent states, and the increasingly assertive states of Latin America joined forces in the United Nations, where they leveraged an overwhelming numerical majority to seek an alteration of the balance between traditional property rights and national welfare under international law.[146] Loosely tracking the escalating pace of expropriations during the same period, the efforts began modestly in the 1960s, but reached a fever pitch by the mid-1970s.

In 1962, the General Assembly adopted the Declaration on Permanent Sovereignty over Natural Resources as a modest compromise between the aspirations of developing states and the traditional expectations of developed states.[147] In essence, the Declaration on Permanent Sovereignty recognized the "right of peoples and nations to permanent sovereignty over their natural resources," as well their obligation to exercise that right "in the interest of their national development and of the well-being of the people of the State concerned."[148] It also endorsed the principle that the importation of foreign capital required for the development of those resources "should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable."[149] Upon admission to the relevant state, the Declaration called for foreign capital and the earnings on foreign capital to be governed "by the national legislation in force, and by international law."[150] The Declaration endorsed the power of states to expropriate private property for "public utility, security, or the national

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145 Bubb & Rose-Ackerman, *supra* note 8, at 295. According to Vandevelde, expropriations outside the communist world remained unusual. VANDEVELDE, *supra* note 8, at 46. At the start of the 1960s, fewer than ten expropriations occurred per year in the developing world. *Id.* By the late 1960s, the number had increased to twenty to thirty expropriations per year. *Id.* By the early 1970s, the number had grown again to fifty expropriations per year. *Id.* The phenomenon peaked in 1975, when eighty expropriations occurred. *Id.* All told, between 1960 and mid-1974, sixty-two developing states engaged in 875 expropriations. SALACUSE, *supra* note 54, at 69; Shafruddin, *supra* note 4, at 439.

146 *See, e.g.*, CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 23–24 (2008); LOWENFELD, *supra* note 68, at 489–90; VANDEVELDE, *supra* note 8, at 47; *see also* DOLZER & SCHREUER, *supra* note 71, at 4; NEWCOMBE & PARADELL, *supra* note 8, at 31. This represents a concrete example of the tendency for the economic nationalists in developing states to make common cause with Marxists on the topic of foreign investment, where both groups share inward-looking philosophies and a suspicion of foreign capital. Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 625 (1998).

147 *See* Declaration on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/1803 (Dec. 14, 1962); *see also* Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 128 n.38 (1984).

148 Declaration on Permanent Sovereignty over Natural Resources, *supra* note 147, para. 1.

149 *Id.* at para. 2.

150 *Id.* at para. 3.

interest," provided that the state paid "appropriate compensation" in accordance with the host state's national law and "in accordance with international law."[151] The Declaration did not, however, identify any particular standard of compensation, much less the so-called Hull standard of "prompt, adequate, and effective compensation."[152] This omission may be understandable given differences even among traditional authorities regarding the extent of recovery for indirect losses,[153] not to mention differences regarding the existence of international standards relating to the form and timing of compensation.[154] However imperfect, the compromises contained in the Declaration on Permanent Sovereignty over Natural Resources have come to be seen as the reflection of a genuine global consensus as of 1962.[155]

As the pace of expropriations reached a peak in the mid-1970s,[156] the General Assembly endorsed a more radical rebalancing of traditional property rights and national welfare.[157] After explicitly calling for the establishment of a New International Economic Order,[158] the General Assembly adopted a Charter on the Economic Rights and Duties of States (CERDS) in 1974.[159] Like the Declaration on Permanent Sovereignty over Natural Resources, the CERDS affirmed the right of every state to "regulate and exercise authority over foreign investment within *its* national jurisdiction in accordance with *its* laws and regulations and in conformity with *its* national objectives and priorities."[160] Unlike the Declaration on Permanent Sovereignty over Natural Resources, the CERDS did not even mention international law as one of the sources shaping the regulation of foreign investment.[161]

Like the Declaration on Permanent Sovereignty over Natural Resources, the CERDS endorsed the right to "nationalize, expropriate or transfer

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151 *Id.* at para. 4.

152 *See* MILES, *supra* note 9, at 96. The United States proposed that "appropriate compensation" be defined as "prompt, adequate, and effective compensation," but withdrew the suggestion due to lack of support. NEWCOMBE & PARADELL, *supra* note 8, at 27.

153 *See supra* note 46 and accompanying text.

154 *See supra* notes 78–84, 100 and accompanying text.

155 Texas Overseas Petroleum Co. v. Libya, Award on Merits at para. 87 (Jan. 19, 1977), 17 I.L.M. 1, 30 (1978) [hereinafter *TOPCO* Award]; LOWENFELD, *supra* note 68, at 489.

156 *See supra* note 145 and accompanying text.

157 MILES, *supra* note 9, at 96.

158 Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S–VI), at 3, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974).

159 Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) [hereinafter CERDS].

160 *Id.* art. 2(2)(a) (emphasis added).

161 *See supra* note 151 and accompanying text.

ownership of foreign property" and it mentioned the concept of "appropriate compensation."[162] However, in a departure from the Declaration on Permanent Sovereignty over Natural Resources, the CERDS did not limit the grounds for expropriation to "public utility, security, or the national interest."[163] In a second departure, the CERDS did not use mandatory language to introduce the concept of "appropriate compensation,"[164] opting instead to cast the principle in more aspirational terms.[165] In a third and final departure, the CERDS called on expropriating states to take into account *their own* relevant national laws when assessing compensation.[166] The CERDS did not even mention international law as a source of guidance in the formulation of standards for compensation.[167]

Thus, in the CERDS, communist states, newly independent states, and Latin American states combined forces at the United Nations in an effort to deny the existence of international law governing the measure of compensation for the expropriation of foreign investment property,[168] or even a duty of host states to provide any compensation at all.[169] While opposed by virtually all capital-exporting states,[170] and while having no direct legal effect,[171] the General Assembly resolutions passed by overwhelming majorities.[172] They signaled a growing opposition to the protection of foreign investment under international law.[173] The voting records of states opposing

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162 CERDS, *supra* note 159, art. 2(2)(c).

163 *See supra* note 151 and accompanying text; *see also* LOWENFELD, *supra* note 68, at 492.

164 *See supra* note 151 and accompanying text.

165 *See* CERDS, *supra* note 159, art. 2(2)(c) (indicating only that expropriating states "should" pay appropriate compensation); *see also* LOWENFELD, *supra* note 68, at 492; SALACUSE, *supra* note 54, at 73; VANDEVELDE, *supra* note 8, at 47.

166 CERDS, *supra* note 159, art. 2(2)(c); *see also* VANDEVELDE, *supra* note 8, at 48.

167 *See supra* note 151 and accompanying text; *see also* MILES, *supra* note 9, at 98; NEWCOMBE & PARADELL, *supra* note 8, at 32; VANDEVELDE, *supra* note 8, at 48.

168 DOLZER & SCHREUER, *supra* note 71, at 4; LOWENFELD, *supra* note 68, at 491–92; NEWCOMBE & PARADELL, *supra* note 8, at 32; SORNARAJAH, *supra* note 8, at 480; VANDEVELDE, *supra* note 8, at 47–48.

169 DOLZER & SCHREUER, *supra* note 71, at 4; DUGAN ET AL., *supra* note 146, at 25; LOWENFELD, *supra* note 68, at 491–92; NEWCOMBE & PARADELL, *supra* note 8, at 32; VANDEVELDE, *supra* note 8, at 47.

170 *TOPCO* Award, *supra* note 155, at para. 85, 17 I.L.M. at 29; DUGAN ET AL., *supra* note 146, at 25; LOWENFELD, *supra* note 68, at 493; NEWCOMBE & PARADELL, *supra* note 8, at 32; *see also* SORNARAJAH, *supra* note 8, at 480.

171 *TOPCO* Award, *supra* note 155, at para. 86, 17 I.L.M. at 29; NEWCOMBE & PARADELL, *supra* note 8, at 32.

172 *TOPCO* Award, *supra* note 155, at para. 85, 17 I.L.M. at 29; DUGAN ET AL., *supra* note 146, at 25; NEWCOMBE & PARADELL, *supra* note 8, at 32.

173 *See* DUGAN ET AL., *supra* note 146, at 23; LOWENFELD, *supra* note 68, at 492; *see also* DOLZER & SCHREUER, *supra* note 71, at 5; NEWCOMBE & PARADELL, *supra* note 8, at 31.

these resolutions also demonstrated the existence of "scarcely twenty countries in the world committed to liberal investment principles."[174]

With several decades of hindsight and viewed in isolation, it is easy to dismiss the relevant General Assembly resolutions as a failed ideological program that never gained the force of law.[175] However, when viewed in conjunction with the increasing pace of expropriations by dozens of states and their refusal to provide compensation in bilateral relations, it becomes clear that customary international law on state responsibility with respect to the protection of foreign investment faced an existential threat. One can see this in the jurisprudence of the United States Supreme Court during the 1960s and that of the International Court of Justice in the 1970s.

In the wake of the Cuban Revolution, a Cuban state-owned bank brought a claim for conversion against the U.S.-based receiver of a dispossessed Cuban sugar producer owned by U.S. investors.[176] In so doing, the Cuban bank sought to assert property rights acquired through expropriation.[177] The receiver defended on the grounds that the Cuban state acquired no such rights, inasmuch as the expropriation violated the obligation to provide compensation under customary international law.[178] In reply, the Cuban bank invoked the so-called "act of state doctrine," a rule of federal common law to the effect that the courts of the United States shall not sit in judgment of the validity of the acts of a foreign state on its own territory.[179]

The Supreme Court agreed with the bank and used the act of state doctrine to sidestep the receiver's assertion that the Cuban expropriations violated customary international law.[180] However, the Court observed in dicta that "there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[181] While recognizing the existence of some practice supporting the so-called Hull standard, the Court emphasized that communist countries recognized no obligation to provide compensation and that newly independent states took the position that they had not consented to "imperialist" standards.[182] Given the state of play, the Court found it "difficult to imagine . . . embarking on adjudication in an area which

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174 *See* Vandevelde, *supra* note 18, at 374, 384–85 & nn.85–86.

175 *See* NEWCOMBE & PARADELL, *supra* note 8, at 32; LOWENFELD, *supra* note 68, at 492; MILES, *supra* note 9, at 99–100; Denza & Brooks, *supra* note 119, at 910.

176 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401–06 (1964).

177 *Id.* at 406.

178 *Id.*

179 *Id.* at 406, 416, 423–25.

180 *Id.* at 427–37.

181 *Id.* at 428.

182 *Id.* at 429–30.

touches more sensitively the practical and ideological goals of the various members of the community of nations."[183]

According to one observer who served in the State Department's Office of the Legal Adviser at the time, "the Supreme Court's characterization of the law of international investment [in the mid-1960s] was essentially accurate."[184] It was also damning. In a system of customary international law based on consistent state practice performed out of a sense of legal obligation, the Supreme Court's dicta regarding the existence of deep divisions in state practice cast doubt on the continued existence of a customary international law regarding the protection of foreign investment property.[185]

In 1970, the International Court of Justice (ICJ) decided the *Barcelona Traction* case, in which Belgium alleged that Spain was responsible for taking the assets of a power generating and distribution company incorporated in Canada but owned almost entirely by Belgian shareholders.[186] Although the ICJ dismissed the case on the grounds that Belgium lacked standing to assert the claims of a Canadian entity,[187] the court touched on the state of customary international law regarding the protection of foreign investment. In so doing, the ICJ emphasized the "intense conflict of systems and interests" concerning the protection of foreign investment, the need for the consent of the states concerned in making international law, and the difficulties thus encountered in the evolution of customary international law regarding the protection of foreign investment.[188] The ICJ also emphasized that, "in the present state of the law," protection of foreign investors depended on "treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment

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183 *Id.*

184 LOWENFELD, *supra* note 68, at 467; *see also* Lord Collins of Mapesbury, *In Memoriam: Andreas (Andy) Lowenfeld (1930-2014)*, 109 AM. J. INT'L L. 58, 59–60 (2015) (describing Lowenfeld's service in the Office of the Legal Adviser, where he rose from Special Assistant to the Legal Adviser to Deputy Legal Adviser, as well as his transition to teaching in 1966).

185 Charles H. Brower II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L L. 259, 306 n.322 (2008); David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. 651, 715 & n.337 (2001); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 318 n.81 (1999); Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27, 27 (2004); *see also* MONTT, *supra* note 16, at 62.

186 Case Concerning Barcelona Traction, Light, and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 6–10, 12, 16–23 (Feb. 5).

187 *Id.* at 32–50.

188 *Id.* at 47.

is placed."[189] This was another way of saying that customary international law on the topic had stalled,[190] if not perished,[191] and that the development of international investment law would have to be treaty-based.[192]

IV. BILATERAL INVESTMENT TREATIES: THE ARRIVAL OF INTERNATIONAL INVESTMENT LAW IN THREE WAVES

By the time that the Supreme Court and the ICJ were making their pronouncements in *Sabbatino* and *Barcelona Traction*, multilateral treaty-making efforts with respect to the protection of foreign investment had already launched and failed several times. As explained below, the failure of multilateral efforts left bilateral investment treaties as the only viable tool for developing international investment law.[193] Bilateralism arrived in three waves: first in the form of efforts by less powerful European states to extract commitments in principle that newly independent states would play by traditional rules (1959 to the mid-1970s); second in the form of explicit efforts by great powers to resist the establishment of a New International Economic Order through instruments that affirmed traditional principles of substantive law and broke new ground by granting investors direct rights of action against host states (mid-1970s-1980s); and third in the transformation of the second wave from a modest phenomenon to a tidal wave that virtually covered the globe (1990s-2000s).

A. Multilateral Efforts: The Wave that Never Broke

In 1929, the League of Nations and the International Chamber of Commerce proposed a Draft Convention on the Protection of Foreign Property.[194] Given an extensive body of arbitral practice on the topic,

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189 *Id.*

190 *See* SORNARAJAH, *supra* note 8, at 213–14 (using this passage from *Barcelona Traction* to illustrate the point that there was a need for rapid development in the law on the protection for foreign investment, which went unmet due to the conflicting views and practices of states at the time).

191 *See* PAPARINSKIS, *supra* note 29, at 143; *see also* MONTT, *supra* note 16, at 61 & n.145.

192 *See* NEWCOMBE & PARADELL, *supra* note 8, at 37; *see also* SORNARAJAH, *supra* note 8, at 213. *But see TOPCO* Award, *supra* note 155, at paras. 85–87, 17 I.L.M. at 29–30 (refusing to give effect to the legal principles asserted in the CERDS and, instead, treating as a global consensus the compromise position set forth in the Declaration on Permanent Sovereignty over Natural Resources, which called for the application of international law and mandated "appropriate compensation" in the event of expropriation).

193 *See* DOLZER & SCHREUER, *supra* note 71, at 8–9; VANDEVELDE, *supra* note 8, at 56.

194 GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 19 (2007); VANDEVELDE, *supra* note 8, at 35; A.A. Fatouros, *An International Code to Protect Private Investment—Proposals and Perspectives*, 14 U. TORONTO L.J. 77, 79 (1961); Arthur K. Kuhn, *The International Conference on the Treatment of Foreigners*, 24 AM. J. INT'L L. 570, 570–73 (1930).

proponents judged the field ripe for codification.[195] They did not account for the fact that the different political interests of capital-exporting and capital-importing states would render it impossible to reach the consensus required for such an undertaking.[196] Whereas capital-exporting states sought rules favorable to the protection of capital flows, capital-importing states preferred rules favorable to the protection of their autonomy.[197] These conflicting interests made it impossible to reach agreement on a definite body of rules, even at a time when the universe of independent states resisting codification of existing jurisprudence was mostly limited to Latin America.[198]

After World War II, discussion of an international investment code resurfaced several times.[199] The same dynamics repeated themselves, though with scores of newly independent states joining the opposition to rules designed to confer high levels of protection on foreign investment.[200] Codification efforts thus failed during the late 1940s in the context of negotiations relating to the Havana Charter for the creation of an International Trade Organization.[201] In 1959, a group of capital exporting states unsuccessfully promoted the Abs-Shawcross Draft Convention on Investments Abroad.[202] Although that effort failed, the resulting draft provided a basis for further discussions among like-minded states within the Organisation for Economic Cooperation and Development (OECD).[203] Discussions within the OECD produced a Draft Convention on the Protection of Foreign Property just as the United Nations General Assembly endorsed the Declaration of Permanent Sovereignty over Natural Resources in 1962.[204]

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195 DUNN, *supra* note 11, at 61.

196 *Id.* at 61–62.

197 *Id.*

198 *See id.* at 62; *see also supra* notes 54, 72–76 and accompanying text. According to one observer, a majority of the 42 delegations could reach agreement on two topics, namely denial of justice and the obligation of diligence. VANDEVELDE, *supra* note 8, at 35–36. But 17 delegations, mostly from Latin America and eastern Europe, contended that foreigners could never claim any standard of treatment higher than that accorded to nationals of the host state. *Id.* at 35. Because the conference required a supermajority of two-thirds for adoption, the conference produced no results. *Id.* at 36.

199 Charles H. Brower II, *Corporations as Plaintiffs Under International Law: Three Narratives About Investment Treaties*, 9 SANTA CLARA J. INT'L L. 179, 210 n.219 (2011).

200 *See* VANDEVELDE, *supra* note 8, at 42.

201 CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION 284, 287–88 (2d ed. 2017); SORNARAJAH, *supra* note 8, at 87; VAN HARTEN, *supra* note 194, at 19–20; Greg Anderson, *How Did Investor-State Arbitration Get a Bad Rap? Blame It on NAFTA, of Course,* 40 WORLD ECON. 2937, 2946 (2017); Fatouros, *supra* note 194, at 79–81; Vandevelde, *supra* note 18, at 381.

202 LIM ET AL., *supra* note 43, at 64; SALACUSE, *supra* note 54, at 87–88; SORNARAJAH, *supra* note 8, at 87–88; VAN HARTEN, *supra* note 194, at 20–21; VANDEVELDE, *supra* note 8, at 54; Fatouros, *supra* note 194, at 79–81.

203 DOLZER & SCHREUER, *supra* note 71, at 8; MCLACHLAN ET AL., *supra* note 201, at 288.

204 OECD Draft Convention on Protection of Foreign Property: Text with Comments and Notes (1962), https://www.oecd.org/daf/inv/internationalinvestmentagreements/39286571.pdf [hereinafter

Five years later, the OECD released a second draft,[205] but by that time the gulf between capital-exporting states and capital-importing states had widened to the point where multilateral consensus had become impossible.[206] Under these circumstances, the OECD settled for recommending the draft as a model for the bilateral investment treaties of member states.[207]

B. Bilateralism: The First, Humble Wave

With respect to the protection of foreign investments, Germany and Switzerland initiated the first wave of bilateralism in the shadow of failing multilateralism and for very specific reasons. Judging that powerful states were not sufficiently committed to multilateral solutions,[208] Germany concluded its first bilateral investment treaty with Pakistan in 1959.[209] It had very specific reasons for seeking treaty protections.[210] As enemy aliens, German individuals and corporations had experienced wartime seizures of assets across the globe during and after the Second World War, meaning that the state was particularly sensitive to the need for legal rules on the protection of investment.[211] Also, during the post-war recovery period, German

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OECD Draft Convention (1962)]; DOLZER & SCHREUER, *supra* note 71, at 8; VANDEVELDE, *supra* note 8, at 56; *see also supra* notes 147–55 and accompanying text.

205 OECD Draft Convention on Protection of Foreign Property: Text with Comments and Notes (1967), https://scholar.smu.edu/cgi/viewcontent.cgi?article=4365&context=til [hereinafter OECD Draft Convention (1967)]; DOLZER & SCHREUER, *supra* note 71, at 8; LIM ET AL., *supra* note 43, at 64; VAN HARTEN, *supra* note 194, at 21; VANDEVELDE, *supra* note 8, at 56.

206 DOLZER & SCHREUER, *supra* note 71, at 8. The prospects for multilateral consensus remained dim throughout the following decades and, arguably, until today. During a six-year period between 1998 and 2004, pursuit of multilateral efforts on the protection of foreign investment failed again within the OCED, the World Trade Organization, and a proposed Free Trade Area for the Americas. Brower, *supra* note 199, at 190 n.68, 205, 210 n.218; *see also* DOLZER & SCHREUER, *supra* note 71, at 10–11; VANDEVELDE, *supra* note 8, at 69–70.

As mentioned above, twelve Pacific-Rim states negotiated and signed the Trans-Pacific Partnership in 2016. *See supra* note 2. However, the United States withdrew from participation under the Trump administration and, as of this writing, the regime has entered into force for only seven of the twelve states. *Id.* Under these circumstances, the success of the TPP as a multilateral effort seems arguable at best. At the very least, a truly "comprehensive multilateral solution to investment issues" remains out of sight. DOLZER & SCHREUER, *supra* note 71, at 11.

207 DOLZER & SCHREUER, *supra* note 71, at 8–9; Bubb & Rose-Ackerman, *supra* note 8, at 297; Denza & Brooks, *supra* note 119, at 910.

208 Rudolf Dolzer & Yun-i Kim, Germany, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 289, 294 (Chester Brown, ed. 2013); *see also* VANDEVELDE, *supra* note 8, at 54.

209 DOLZER & SCHREUER, *supra* note 71, at 6; LIM ET AL., *supra* note 43, at 59; SALACUSE, *supra* note 54, at 49.

210 *See* MONTT, *supra* note 16, at 116.

211 SALACUSE, *supra* note 54, at 91; Dolzer & Kim, *supra* note 208, at 293; Asoka de Z. Gunawardana, *The Inception and Growth of Bilateral Investment Promotion and Protection Treaties*, 86 AM. SOC'Y INT'L L. PROC. 544, 545 (1992); Vandevelde, *Brief History*, *supra* note 44, at 169.

economic capacity quickly exceeded the needs of a small domestic market, meaning that German companies would again operate on a global scale.[212] As a defeated enemy power, however, Germany lacked the political and diplomatic resources needed to guarantee the protection of German investments abroad through the traditional channels of soft power.[213] It had lost the ability to project power by forcible means and did not yet have the standing required to negotiate broader treaties on friendship and amity.[214] Nor did Germany have longstanding historical, cultural, or administrative ties to a significant number of former colonies in the developing world.[215] Given these deficits, Germany turned to bilateral investment treaties as a source of legal protection for German investors in developing states.[216]

Switzerland followed Germany's lead for similar reasons in 1961.[217] Although not a defeated enemy power, Switzerland faced similar challenges as a country with global economic interests,[218] but without significant

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212 Dolzer & Kim, *supra* note 208, at 290–91, 293.

213 *Id.* at 294.

214 *See* Tristana Moore, *Will Germany's Army Ever Be Ready for Battle*, TIME (June 27, 2009), http://content.time.com/time/world/article/0,8599,1906570,00.html (describing the demilitarization of Germany in 1945, the formation of the Bundeswehr only after West Germany joined NATO in 1955, the Bundeswehr's strictly defensive role, and the increase of Germany's military role only after France left NATO in 1966); Dolzer & Kim, *supra* note 208, at 294 (observing that in the late 1950s broader treaties on amity remained beyond Germany's reach due to its conduct in World War II).

215 Shortly after achieving its own unification in 1871, Germany came late to the colonization of Africa in 1884, but "gobbled up some of the most desirable lands in German Southwest Africa (now Namibia) and Kamerun (present day Cameroon)" before losing those handful of colonies as a result of World War I. Ndiva Kofele-Kale, *Asserting Permanent Sovereignty over Ancestral Lands: The Bakweri Land Litigation Case Against Cameroon*, 13 ANN. SURV. INT'L & COMP. L. 103, 106 & n.7 (2007); *see also* Sarah H Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territory, and the Nineteenth Century*, 81 TEX. L. REV. 1, 257 (2002); Peter Muchlinski, *The Development of German Corporate Law Until 1900: An Historical Reappraisal*, 14 GERMAN L.J. 339, 345 (2013).

216 *See* LIM ET AL., supra note 43, at 61.

217 DOLZER & SCHREUER, *supra* note 71, at 7; Vandevelde, *Brief History*, *supra* note 44, at 169.

218 Michael Schmid, *Switzerland*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 650, 650 (Chester Brown, ed. 2013).

political leverage,[219] military power,[220] or historical, cultural or administrative connections to former colonies.[221] Although possibly having fewer global economic interests and somewhat fewer deficits with respect to leverage when compared to Germany and Switzerland during the post-war years, the Netherlands and Belgium quickly followed suit for broadly similar

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219 *See Most Influential Countries (2021)*, U.S. NEWS & WORLD REP., https://www.usnews.com/news/best-countries/most-influential-countries?slide=8 (ranking Switzerland behind Greece and Turkey in terms of "political influence"). Following World War II, Switzerland's commitment to neutrality hardened to the point that the country would not join political organizations such as the U.N. that might require Switzerland to impose economic sanctions on other states or even to join customs unions, such as the European Union. Thomas Fischer & Daniel Mockli, *Swiss Neutrality Policy in the Cold War*, 18 J. COLD WAR STUDIES 12, 14–15 (2017). Complete abstinence from participation in those sorts of organizations might seem incompatible with the development of political influence in the traditional sense, but it created openings for the development and enjoyment of soft power. According to one observer, Swiss multinational companies felt that Switzerland's reputation for neutrality (as opposed to its political influence) gave them an advantage when navigating political risk in developing countries after World War II. Pierre-Yves Donze, *The Advantage of Being Swiss: Nestle and Political Risk in Asia During the Early Cold War, 1945-1970*, 94 BUS. HIST. REV. 373, 383 (2020).

220 As a perpetually neutral state, Switzerland lacks any right of aggressive action and avoids military entanglements. Phillip Marshall Brown, *The Rights of States Under International Law*, 26 YALE L.J. 85, 88 (1916); George B. Davis, *Neutrality*, 24 YALE L.J. 89, 96 (1914).

221 *See* SALACUSE, *supra* note 54, at 92.

reasons.[222] Over the next two decades, those four countries concluded over 100 bilateral investment treaties.[223]

One can debate whether France participated in the first wave of BITs. One observer includes France in the roster of early adopters.[224] However, only one French investment treaty entered into force during the 1960s.[225] In

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222 The Netherlands concluded its first BIT with Tunisia in 1963. VANDEVELDE, *supra* note 8, at 55; Nico Schrijver & Vid Prislan, *The Netherlands*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 535, 542 (Chester Brown, ed. 2013). Like Germany and Switzerland, the Netherlands has a small home market, but ranks high in terms of outbound foreign direct investment. Schrijver & Prislan, *supra*, at 536. Like their German counterparts, Dutch investors had already been subjected to seizures. *See id.* at 541–42 (referring to the nationalization of Dutch properties by Indonesia during the late 1950s). Like Switzerland, the Netherlands ranks relatively low in terms of political influence. *See Most Influential Countries*, *supra* note 219. However, unlike Switzerland, the Netherlands has a long history of colonialism. MILES, *supra* note 9, at 33–42; Schrijver & Prislan, *supra*, at 535–36. As recently as the late 1940s, the Netherlands sought to maintain colonial rule over Indonesia by force. Michael S. Bennett, *Banking Deregulation in Indonesia*, 16 U. PENN. J. INT'L BUS. L. 443, 454 (1995); John L. Langhus, Book Annotation, *Subversion as Foreign Policy: The Secret Eisenhower and Dulles Debacle in Indonesia*, 30 NYU J. INT'L L. & POL. 425, 426 (1997-1998). Unlike Switzerland, the Netherlands armed forces participate in significant non-defensive military operations in places like Afghanistan. Matt Bassford et al., *Strengths and Weaknesses of Netherlands Armed Forces* 54 (2010), https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR690.pdf. But the Netherlands armed forces are not a heavyweight. Marc Bentinck, *Why the Dutch Military Punches Below Its Weight*, JUDY DEMPSEY'S STRATEGIC EUROPE (Feb. 8, 2018), https://carnegieeurope.eu/strategiceurope/75484; *see also* Bassford et al., *supra*, at 54 (concluding that Dutch forces would require a "rest period" following involvement in Afghanistan).

Belgium concluded its first BIT with Tunisia in 1964. *Investment Policy Hub: Belgium*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/19/belgium; VANDEVELDE, *supra* note 8, at 55. Like Germany, Switzerland, and the Netherlands, it has a small home market and an economy that relies significantly on outbound foreign investment. *See Belgium: Trade and Investment Statistical Note 1*, OECD (2017), https://www.oecd.org/investment/Belgium-trade-investment-statistical-country-note.pdf; *Handbook of Statistics: Foreign Direct Investment, Table 4*, UNCTAD (2020), https://stats.unctad.org/handbook/EconomicTrends/Fdi.html. Like Switzerland and the Netherlands, it ranks relatively low in terms of political influence and is not a military power. *See Most Influential Countries*, *supra* note 219; Michel Liegois & Galia Glume, *A Small Power Under the Blue Helmet: The Evolution of Belgian Peacekeeping Policy*, 61 STUDIA DIPLOMATICA 111, 111 (2008). It came late to colonialism in the Congo largely as an effort to increase its status among greater European powers, performed dreadfully, and by the 1950s lacked the political, economic, and military resources even to maintain that colonial "empire." Georgi Verbeeck, *Legacies of an Imperial Past in a Small Nation: Patterns of Postcolonialism in Belgium*, 21 EUR. POL. & SOC. 292, 293–94 (2020).

223 MONTT, *supra* note 16, at 117.

224 *Id.*; *see also* Yas Banifatemi & Andre von Walter, *France*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 245, 247 (Chester Brown, ed. 2013) (opining that an "important phase on the development of French investment treaties started in the 1960s").

225 *See Investment Treaty Navigator: France*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/72/france; *see also* French-Tunisia BIT (1963), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3496/download. Vandevelde states that France concluded a BIT with Chad in 1960. However, he also states that the "French BITs of the 1960s, however, never entered into force and thus, for all practical purposes, the French BIT program did not commence until the early 1970s." VANDEVELDE, *supra* note 8, at 55 n.209.

fact, the country's BIT program began in earnest only in 1972.[226] Viewed from this perspective, it makes more sense to include France on the roster of countries that launched BIT programs as a response to the NIEO during the second wave investment treaty practice.[227]

Perhaps their modest aspirations explain the success of early BITs.[228] Very brief and open-ended provisions directed at a single topic (investment) made the treaties easy to negotiate.[229] Dispute settlement provisions called for state-to-state arbitration or judicial settlement before the ICJ.[230] Because state-to-state arbitration and judicial settlement of investment disputes have been rare,[231] and because the early BITs created no direct rights of action for investors,[232] the early BITs did not threaten to tread heavily on the

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226 *See Investment Treaty Navigator: France*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/72/france (last visited June 13, 2022); DOLZER & SCHREUER, *supra* note 71, at 7; MONTT, *supra* note 16, at 63 n.150; NEWCOMBE & PARADELL, *supra* note 8, at 43; Gunawardana, *supra* note 211, at 545; Vandevelde, *supra* note 18, at 387 n.96.

227 Gunawardana, *supra* note 211, at 545; Vandevelde, *supra* note 146, at 628; Vandevelde, *supra* note 18, at 387 n.96; *see also* MONTT, *supra* note 16, at 63 n.150; *see infra* notes 241–49 and accompanying text.

228 *See* SALACUSE, *supra* note 54, at 95 (indicating that the early European BITs were "less demanding with respect to guarantees on such matters as free conversion of local currency, abolition of performance requirements, and protection against expropriation").

229 *See* K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on the Origin, Purposes, and General Treatment Standards,* 4. INT'L TAX & BUS. LAW. 105, 110 (1986). By way of example, the Germany-Pakistan BIT of 1959 includes terse provisions on non-discrimination sounding in national treatment, expropriation, and full protection and security of investments (diligence). *See* Gesetz zu dem Vertrag vom 25 November 1959 zwischen der Bundesrepublik Deutschland und Pakistan zur Forderung und zum Schutz von Kapitalanlagen [Treaty Between Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments], Nov. 25, 1959, BUNDESGESETZHLATT, Teil II [BGBL II] at 793, arts. 2–3 (Ger.). It does not include provisions on fair and equitable treatment or MFN treatment, two of the more contentious provisions in modern investment treaty practice. LIM ET AL., *supra* note 43, at 60.

According to one observer, the Swiss BITs of the 1960s were mostly concluded with African countries and contained "rudimentary disciplines on the treatment and protection of investment, such as expropriation and free transfer of payments in relation to investment." Schmid, *supra* note 218, at 656–57.

230 DOLZER & SCHREUER, *supra* note 71, at 7. As between the two options, state-to-state arbitration was the more common solution. MONTT, *supra* note 16, at 63; VANDEVELDE, *supra* note 8, at 55; *see also* Bubb & Rose-Ackerman, *supra* note 8, at 296.

231 *See* David Gaukrodger, *State-to-State Dispute Settlement and the Interpretation of Investment Treaties* 6 (OECD Working Paper on International Investment 2016/03), https://dx.doi.org/10.1787/5jlr71rq1j30-en ("Overall, it is clear that governments have been very reluctant to seek to use [state-to-state dispute settlement] under investment treaties. There are very few cases where governments have sought to invoke [state-to-state dispute settlement] provisions."); *see also* NEWCOMBE & PARADELL, *supra* note 8, at 35–36 (indicating that the ICJ has "played a minimal role in resolving foreign investment disputes," hearing just six cases since the court's establishment in 1945 and dismissing three of those cases for lack of jurisdiction).

232 *See* LIM ET AL., *supra* note 43, at 61 (indicating that BITs providing for investor-state dispute settlement did not appear until 1975).

sovereignty of host states and, so, were easy to accept.[233] In essence, lesser European powers had called on newly independent states to signal a commitment in principle to traditional standards regarding the treatment of foreign investment.[234] Since this entailed few costs and occurred before the complete polarization of international investment law, the newly independent states obliged.[235] In terms of format and structure, this first wave of bilateral investment treaties remained the norm until the end of the 1970s,[236] and, arguably, numerically preponderant until the mid-1980s.[237]

While an important stage in the development of BITs, one should bear in mind that the treaties of the first wave were limited in content and appealed mainly to a small number of initial users that had a distinct profile. Early BITs may have been generally effective,[238] but they lacked punch in the sense of providing investors with direct rights of action for treaty violations. Given the relatively limited scope of application, the first wave produced only a limited body of practice, amounting to the conclusion of only seventy-five BITs worldwide from 1959 to 1969 and another ninety-two BITs from 1969 to 1979.[239]

C. Bilateralism: The Second Wave as Defensive Crouch

Consistent with Newton's third law,[240] the demands for a New International Economic Order and the unraveling of the international consensus on the protection of foreign investment provoked a second wave of BITs, in which the cast of characters, the purposes of BIT programs, and the substance of the instruments all changed. As explained below, great powers took the field in a defensive crouch. They saw BITs as an opportunity to establish treaty and arbitral practice that would revitalize traditional

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233 *See* MONTT, *supra* note 16, at 117.

234 *See id.* at 118 (contending that "the BIT programs launched by Germany in 1959 and Switzerland in 1960 clearly serve as focal points for countries that later wished to . . . signal their commitment to property rights and liberalization . . . .").

235 Not surprisingly, the most active early adopters from the developing world included states that were highly interested in attracting foreign investment, that had relatively strong commitments to liberal economic principles, or both. *Id.* at 116–17. That roster includes Egypt with twelve BITs, Singapore with seven BITs, South Korea with seven BITs, and Malaysia with six BITs from 1959 to 1979. *Id.* at 117.

236 Between 1959 and 1979, Germany, Switzerland, the Netherlands, and Belgium concluded 101 of the 167 BITs concluded by all countries during the same period. *See id.* at 117 (listing the numbers of BITs concluded by the most frequent users during the relevant period); VANDEVELDE, *supra* note 8, at 59 (listing the total numbers of BITs concluded by all states during the relevant period).

237 *See* MONTT, *supra* note 16, at 64, 116–17.

238 *See* Denza & Brooks, *supra* note 119, at 910.

239 VANDEVELDE, *supra* note 8, at 59.

240 *See* Ozan O. Varol, *Alien Citizens: Kurds and Citizenship in the Turkish Constitution*, 57 VA. J. INT'L L. 769, 797 (2018) ("For every action, there is an equal and opposite reaction.").

principles of state responsibility regarding the protection of foreign investment, particularly the Hull standard of compensation for expropriation. To that end, they promoted treaty texts with more detailed substantive disciplines and direct rights of action for investors. The movement was essentially conservative in character: defense of the traditional mechanisms for disciplining exceptional failures of the nightwatchman and the rule-of-law states.

During the 1970s and early 1980s, several states launched new BIT programs as a direct response to the accelerating pace of expropriations in the developing world,[241] the approach of a New International Economic Order,[242] and the erosion of traditional standards on the protection of foreign investment.[243] The protagonists in this second wave had a different profile. They principally included great powers that were the traditional sources of foreign investment and leaders of the capitalist world: France,[244] the United Kingdom,[245] Japan,[246] and the United States.[247] These states entered the arena with a defensive purpose:[248] to develop a body of treaty and arbitral practice that would undermine the NIEO and validate traditional standards regarding the protection of foreign investment.[249] Because compensation for

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241 José E. Alvarez, Remarks at the Proceedings of the 115th ASIL Annual Meeting, 86 AM. SOC'Y INT'L L. PROC. 550, 555 (1992) [hereinafter Alvarez Remarks]; Denza & Brooks, *supra* note 119, at 909; Gudgeon, *supra* note 229, at 110; Vandevelde, *supra* note 80, at 209; Kenneth J. Vandevelde, *The BIT Program: A Fifteen-Year Appraisal*, 86 AM. SOC'Y INT'L L. PROC. 532, 534 (1992) [hereinafter Vandevelde, *Fifteen-Year Appraisal*].

242 Alvarez Remarks, *supra* note 241, at 555; Denza & Brooks, *supra* note 119, at 908–09; Gudgeon, *supra* note 229, at 111; Vandevelde, *supra* note 80, at 209; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 534; Vandevelde, *supra* note 146, at 628.

243 *See* Denza & Brooks, *supra* note 119, at 910; *see also* Vandevelde, *supra* note 18, at 386; *see also* Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 534.

244 Gunawardana, *supra* note 211, at 545; *see also* Vandevelde, *supra* note 146, at 628; Vandevelde, *supra* note 18, at 386 n.96.

245 *See* Denza & Brooks, *supra* note 119, at 908–09; *see also* Gunawardana, *supra* note 211, at 545; Vandevelde, *supra* note 146, at 628; Vandevelde, *Brief History*, *supra* note 44, at 170; Vandevelde, *supra* note 18, at 386 n.96.

246 *See* Gunawardana, *supra* note 211, at 545; *see also* Vandevelde, *Brief History*, *supra* note 44, at 170; Vandevelde, *supra* note 146, at 628; Vandevelde, *supra* note 18, at 386 n.96.

247 Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 534; Vandevelde, *supra* note 146, at 628; Vandevelde, *supra* note 18, at 386 n.96. The State Department decided to undertake a BIT program in 1977. Vandevelde, *supra* note 80, at 209; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 534. Due a lengthy interagency process and a shift in responsibilities between the State Department and the Office of the United States Trade Representative, the U.S. government did not reach agreement on a model treaty text until 1981. Vandevelde, *supra* note 80, at 210; *see also* Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 536.

248 *See* Vandevelde, *Brief History*, *supra* note 44, at 171.

249 KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 26, 31 (2009); Gudgeon, *supra* note 229, at 111; Vandevelde, *supra* note 80, at 210, 258; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 534; *see also Bilateral Investment Treaties with the Czech and Slovak Federal Republic, The Democratic Republic of Congo, The Russian Federation, Sri Lanka, and Tunisia,*

expropriation, the measure of compensation, and the modalities of compensation had become focal points for virtually all debates on the topic of foreign investment,[250] efforts tended to concentrate on giving effect to something like the Hull standard: prompt payment of market value in a recognized medium of exchange.[251]

The protagonists of the second wave sought to weave other traditional standards of protection into their investment treaties. As a result, the instruments generally included an obligation to provide full protection and security,[252] which closely tracks the obligation of diligence in protecting aliens and their property under international law.[253] They also included an obligation to provide "fair and equitable treatment" to the investments of investors.[254] In so doing, they drew on the OECD's Draft Convention on the Protection of Foreign Property, which had used this phrase to incorporate the customary international law "minimum standard" of treatment for aliens and their property.[255] That included a prohibition of discrimination against aliens

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and Two Protocols to Treaties with Finland and Ireland: Hearings Before the S. Comm. on Foreign Relations, 102d Cong. 66, 67 (1992) (statement of Kenneth J. Vandevelde) [hereinafter Vandevelde Statement]. One author notes that the capital-exporting states with BIT programs virtually coincided with the list of states that voted against the CERDS. *See* Gunawardana, *supra* note 211, at 548–49.

250 *See* Lillich, *supra* note 11, at 11, 14; Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Injury to Aliens? State Responsibility and the Calvo Clause in Mexico After the NAFTA*, 25 ST. MARY'S L.J. 1147, 1150 (1994); *see also* DOLZER & SCHREUER, *supra* note 71, at 100; SALACUSE, *supra* note 54, at 323; Vandevelde, *supra* note 146, at 627.

251 NEWCOMBE & PARADELL, *supra* note 8, at 322, 383–84; SALACUSE, *supra* note 54, at 135, 323; Gudgeon, *supra* note 229, at 129; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 534, 536; Vandevelde, *supra* note 146, at 627; Vandevelde Statement, *supra* note 249, at 67; *see also* Vandevelde, *supra* note 18, at 386 n.97.

252 GARY B. BORN, INTERNATIONAL ARBITRATION LAW AND PRACTICE 436 (2d ed. 2016); DOLZER & SCHREUER, *supra* note 71, at 160–61; NEWCOMBE & PARADELL, *supra* note 8, at 307–08; REDFERN & HUNTER, *supra* note 44, at 494; SALACUSE, *supra* note 54, at 132, 207; VANDEVELDE, *supra* note 8, at 243.

253 NEWCOMBE & PARADELL, *supra* note 8, at 307–08; REDFERN & HUNTER, *supra* note 44, at 494; SALACUSE, *supra* note 54, at 132, 209; VANDEVELDE, *supra* note 8, at 243; *see also* DOLZER & SCHREUER, *supra* note 71, at 161.

254 BORN, *supra* note 252, at 435; DOLZER & SCHREUER, *supra* note 71, at 130; NEWCOMBE & PARADELL, *supra* note 8, at 255; REDFERN & HUNTER, *supra* note 44, at 489; SALACUSE, *supra* note 54, at 131, 218; VANDEVELDE, *supra* note 8, at 190.

255 OECD Draft Convention (1967), *supra* note 205, art. 1, note 4(a); OECD Draft Convention (1962), *supra* note 204, art. 1, note 4(a). At a minimum, it is likely that OECD member states accepted the OECD's understanding that the formulation operated as a placeholder for the customary international law minimum standard for treatment of aliens. NEWCOMBE & PARADELL, *supra* note 8, at 269; *see* Gudgeon, *supra* note 229, at 111 & n.31.

Perhaps more importantly, the state practice of Switzerland, the United Kingdom, and the United States (the main protagonists in the first and second waves) explicitly supports the use of "fair and equitable treatment" as a placeholder for the minimum standard of treatment. NEWCOMBE & PARADELL, *supra* note 8, at 268–69.

The main argument against this proposition is textual: if drafters meant to incorporate the "international minimum standard" they should have used that phrase. DOLZER & SCHREUER, *supra* note

with respect to the protection of persons and property, an obligation to curtail arbitrary state action, and access to independent, impartial, and effective channels for the administration of justice.[256] The drafters used the phrase "fair and equitable treatment" as a placeholder for these principles because it lacked the political baggage of express references to an "international minimum standard."[257] It also blunted the likelihood of objections by negotiating partners who could hardly criticize demands for "fair and equitable treatment."[258]

At least some states considered whether to pursue standards significantly more protective than their understandings of customary international law.[259] Although representatives of the business community favored higher standards,[260] the drafters of model BITs approached the undertaking with one eye towards their role as salespeople in subsequent negotiations with developing states.[261] Given their defensive stance in a politically charged context, the great powers could hardly ask for

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71, at 134; NEWCOMBE & PARADELL, *supra* note 8, at 265; SALACUSE, *supra* note 54, at 226. Because they did not use that phrase, they must have meant something other than the "international minimum standard." NEWCOMBE & PARADELL, *supra* note 8, at 265. The problems with that overly abstract textual argument are at least threefold: (1) if not used at a placeholder for a defined term, "fair and equitable treatment" becomes a hopelessly vague and meaningless standard; (2) there is no evidence of any state practice clearly indicating an intention to introduce "fair and equitable treatment" as a completely new standard; and (3) given the sensitivities of the period and the defensive posture of capital exporting states, it made sense to use "fair and equitable treatment" as a "convenient, neutral, and acceptable reference to the minimum standard of treatment." NEWCOMBE & PARADELL, *supra* note 8, at 267, 269.

Although early arbitral practice did not generally regard "fair and equitable treatment" as a placeholder for the international minimum standard of treatment, the subsequent treaty practice of states has tilted more decisively in favor of regarding the concepts as equivalent. *Compare* NEWCOMBE & PARADELL, *supra* note 8, at 264–65 (discussing arbitral practice as of 2009), *with* RADI, *supra* note 11, at 71 (noting that the United States initiated the explicit linkage of these two concepts in its treaty practice and that the approach "has spread over treaty practice, most notably during the 2010s"); *see also* DOLZER & SCHREUER, *supra* note 71, at 135 (noting that the European Parliament adopted a resolution in 2011 linking "fair and equitable treatment" to customary international law).

By generally incorporating the standards of customary international law into the substantive obligations of BITs, the drafters ensured that investors could invoke investor-state dispute settlement provisions for any violations of customary international law regarding the protection of foreign investment. Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 537.

256 *See supra* notes 32–36 and accompanying text; *see also* OECD Draft Convention (1967), *supra* note 205, art. 1 & notes 4, 7, 8; OECD Draft Convention (1962), *supra* note 204, art. 1 & notes 4, 7, 8; DOLZER & SCHREUER, *supra* note 71, at 134 (quoting Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 151 (Stephan W. Schill ed., 2010)) (treating "fair and equitable treatment" as shorthand for the "rule of law").

257 NEWCOMBE & PARADELL, *supra* note 8, at 263, 269.

258 *Id.* at 263.

259 *See* Denza & Brooks, *supra* note 119, at 911.

260 *Id.*

261 *Id.*

significantly more protection than the traditional principles that were already under attack.[262]

Treaty drafters did, however, seek incremental enhancements to customary international law standards with respect to non-discrimination.[263] For example, customary international law already required non-discrimination with respect to the protection of aliens and their property.[264] In the late 19th century, state practice had been moving towards complete equality between nationals and aliens with respect to the protection of economic and commercial rights but was not strictly required.[265] European treaty negotiators sought to codify this commitment to national treatment in the *post-establishment* phase of investment,[266] effectively preserving the ability of states to screen investments in sensitive sectors of the economy,[267] thereby formalizing the prevailing state of play. U.S. treaty drafters sought to extend the principle of national treatment to the *pre-establishment* phase,[268] thereby creating a presumption of equal access, subject to exceptions for existing measures and for particularly sensitive industries.[269] In addition, treaty drafters introduced the requirement of MFN treatment for investors and their investments, subject to exceptions for regional customs unions, free trade areas, and tax treaties.[270] Although probably not required

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262 *See* MONTT, *supra* note 16, at 69.

263 Denza & Brooks, *supra* note 119, at 911. Vandevelde states that in some respects the U.S. BIT program aimed to establish "conventional protection . . . beyond that accorded even by the U.S. interpretation of customary international law." VANDEVELDE, *supra* note 249, at 26. In addition to enhanced principles of nondiscrimination, the topics covered by this statement appear to include freedom from restrictions on the transfer of currency and the direct right of action by foreign investors against host states before international arbitral tribunals. Denza & Brooks, *supra* note 119, at 911; *see also* VANDEVELDE, *supra* note 249, at 26, 30, 525, 527. They also seem to include a modest effort to promote stability and transparency by requiring host states to publish all laws, regulations, and adjudicatory decisions relating to foreign investment. VANDEVELDE, *supra* note 249, at 26, 418. However, the "most politically sensitive provisions" were drafted so as not to "go beyond what was thought to reflect international law." Denza & Brooks, *supra* note 119, at 911–12.

264 *See supra* note 33 and accompanying text.

265 *See id.*; *see also* NEWCOMBE & PARADELL, *supra* note 8, at 149 (explaining that the national treatment standard is a treaty-based obligation); Gudgeon, *supra* note 229, at 117 (opining that customary international law does not require national treatment).

266 *See* DOLZER & SCHREUER, *supra* note 71, at 89; NEWCOMBE & PARADELL, *supra* note 8, at 158; *see also* SALACUSE, *supra* note 54, at 196.

267 SALACUSE, *supra* note 54, at 197.

268 DOLZER & SCHREUER, *supra* note 71, at 89; SALACUSE, *supra* note 54, at 199; VANDEVELDE, *supra* note 8, at 375; Gudgeon, *supra* note 229, at 117; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 541.

269 NEWCOMBE & PARADELL, *supra* note 9, at 190; Gudgeon, *supra* note 229, at 119; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 537; Vandevelde Statement, *supra* note 249, at 68.

270 NEWCOMBE & PARADELL, *supra* note 8, at 231–32; *see also* Kenneth R. Propp, *Bilateral* Investment *Treaties: The U.S. Experience in Eastern Europe*, 86 AM. SOC'Y INT'L L. PROC. 540, 543 (1992).

by customary international law,[271] MFN treatment had been a common feature of commercial and economic treaty practice for centuries.[272] The incremental expansion of non-discrimination also matched the liberal ideals of the neutral and impartial nightwatchman and rule-of-law states.[273] It also served as prophylactic against the economic nationalism that was driving the NIEO in much of the non-communist developing world.[274]

Turning from substance to remedies, the treaty drafters of the second wave introduced a novel feature: a direct right of action for covered investors to seek arbitration of claims alleging treaty violations under the ICSID Convention,[275] ICSID's Additional Facility Rules,[276] the UNCITRAL Arbitration Rules,[277] and occasionally under rules administered by private institutions such as the International Chamber of Commerce,[278] the London Court of International Arbitration,[279] or the Stockholm Chamber of

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271 NEWCOMBE & PARADELL, *supra* note 8, at 193–94; Gudgeon, *supra* note 229, at 117; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 537. From time to time, some observers have contended that customary international law does in fact require MFN treatment. NEWCOMBE & PARADELL, *supra* note 8, at 193–94.

272 *See* Vandevelde, *supra* note 80, at 205, 216; Vandevelde, *Brief History*, *supra* note 44, at 158–59.

273 *See, e.g.*, Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 63 (1987); *see also* Eric Engle, *A New Cold War? Cold Peace. Russia, Ukraine and NATO*, 59 ST. LOUIS U. L.J. 97, 142 (2014).

274 *See supra* notes 135–45 and accompanying text. National treatment in the pre-establishment phase also forbids the type of investment screening historically practiced by the communist governments of Eastern Europe. Propp, *supra* note 270, at 541.

275 BORN, *supra* note 252, at 422; DOLZER & SCHREUER, *supra* note 71, at 238–39; NEWCOMBE & PARADELL, *supra* note 8, at 72; Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Arbitrators*, 96 CORNELL L. REV. 47, 51 n.13 (2010). The "ICSID Convention" means the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. The ICSID Convention applies if the investor's home state and the respondent state have both ratified the ICSID Convention. NEWCOMBE & PARADELL, *supra* note 8, at 72; Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 49 (2001) [hereinafter Brower, *Empire Strikes Back*]; Charles H. Brower II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347, 350 (2006) [hereinafter Brower, *FTC Notes*].

276 DOLZER & SCHREUER, *supra* note 71, at 240; NEWCOMBE & PARADELL, *supra* note 8, at 72–73; Kapeliuk, *supra* note 275, at 51 n.13. The ICSID Additional Facility Rules apply if either the investor's home state or the respondent state (but not both) have ratified the ICSID Convention. DOLZER & SCHREUER, *supra* note 71, at 240; NEWCOMBE & PARADELL, *supra* note 8, at 72–73; Brower, *Empire Strikes Back*, *supra* note 275, at 49; Brower, *FTC Notes*, *supra* note 275, at 350.

277 BORN, *supra* note 252, at 422; DOLZER & SCHREUER, *supra* note 71, at 241; NEWCOMBE & PARADELL, *supra* note 8, at 73; Kapeliuk, *supra* note 275, at 51 n.13.

278 *Id*.

279 Vera Weghmann & David Hall, *The Unsustainable Political Economy of Investor–State Dispute Settlement Mechanisms*, INT'L REV. ADMIN. SCI. 1, 4 (2021), https://journals.sagepub.com/doi/pdf/10.1177/00208523211007898.

Commerce.[280] At least three motives underlay this development: the depoliticization of investment disputes in the sense of removing them from the sphere of intergovernmental relations,[281] the related ability of investors to obtain effective relief without regard to political considerations,[282] and the development of arbitral practice validating traditional principles of international law relating to the protection of foreign investment.[283]

With the benefit of hindsight, observers have often described investor-state arbitration as the most important feature of investment treaties during the second wave.[284] Henceforth, treaty obligations would have punch. Investors could get a hearing for every grievance, and effective relief for every treaty violation. In other words, investment treaties would tread much more heavily on the sovereignty of host states.[285]

However, there was no indication that treaty drafters during the second wave expected arbitration to become a form of governance in the sense of routinely second-guessing the normal operations of modern regulatory states. The great powers were engaged in the defense of traditional principles created before the existence of the regulatory state and that were directed towards the fundamental guarantees of security promised by the nightwatchman and rule-of-law states.[286] There is no indication that the great powers intended to catapult tribunals into a field and into roles with which international law had virtually no experience.[287] On the contrary, there is every indication that the great powers viewed international law as a forum

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280 BORN, *supra* note 252, at 422; NEWCOMBE & PARADELL, *supra* note 8, at 73; Kapeliuk, *supra* note 275, at 51 n.13.

281 VANDEVELDE, *supra* note 8, at 432; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 534–35; Vandevelde Statement, *supra* note 249, at 67.

282 REDFERN & HUNTER, *supra* note 44, at 468; SALACUSE, *supra* note 54, at 387; Vandevelde, *supra* note 80, at 258; Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 535; Vandevelde Statement, *supra* note 249, at 67.

283 *See* Vandevelde, *supra* note 80, at 258 (discussing the goals for which drafters introduced direct rights of action into the U.S. BIT program, and explaining that recourse to arbitration would "over time . . . result in further elaboration of the substantive provisions of the BITs").

284 *See* Ceskoslovenská Obchodní Banka A.S. v. Slovk., ICSID Case No. ARB/97/4, Decision on Jurisdiction at para. 57 (May 24, 1999), 1999 WL 33944062; BG Grp., PLC v. Arg., 572 U.S. 25, 57 (2014) (Roberts, C.J., dissenting) (quoting SALACUSE, *supra* note 54, at 137); Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 172 (2007); Vandevelde, *Fifteen-Year Appraisal*, *supra* note 241, at 538.

285 *See* SALACUSE, *supra* note 54, at 138 (noting that direct rights of action force host states to "take their treaty responsibilities seriously").

286 *See* Vandevelde, *supra* note 80, at 275 (emphasizing that the core provisions of U.S. BITs relating to fair and equitable treatment, full protection and security, national treatment, MFN treatment, and expropriation were "rooted in United States treaty practice dating back to the . . . nineteenth century").

287 *See* MONTT, *supra* note 16, at 371 (explaining that "international law [historically] lacks experience in controlling the regulatory state"); *see also Alvarez Remarks*, *supra* note 241, at 550 (emphasizing that U.S. BITs were "designed to deal with the problems of the 1970s").

that left states free to exercise police powers (meaning taxation, as well as regulation of health, safety, and morals),[288] unless performed in a manner that violated the basic obligations of the nightwatchman or rule-of-law states.

While the second wave marks an important stage in the development of BITs, one should bear in mind that the worldwide inventory of BITs still grew slowly.[289] During the 1980s, states concluded another 219 BITs for a grand total of 386 BITs during the period 1959 to 1989.[290] Tellingly, the 1980s ended without the conclusion of a single arbitration under any bilateral investment treaty.[291] In other words, the great powers launched the second wave of investment treaties into a hostile environment for limited purposes and with limited results. The proliferation of BITs would have to await the decline of communism and economic nationalism, which drove scores of states to signal their commitment to economic liberalism and to embrace foreign investment as the only viable path to economic development during the 1990s.

D. Bilateralism: The Third Wave as Tsunami

Driven by four powerful forces, the number of BITs quintupled during the 1990s. First, as a result of the Third World debt crisis and Western governments' growing dissatisfaction with foreign aid programs, worldwide access to capital fell precipitously.[292] In this new environment, foreign

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288 During the 1920s, the future Judge of the International Court of Justice, Phillip C. Jessup emphasized the lawfulness of uncompensated interference with property rights short of direct takings, if performed as "a reasonable measure taken by the state in the interests of the public welfare." *See* PAPARINSKIS, *supra* note 29, at 220 (quoting Phillip C. Jessup, *Confiscation*, 21 AM. SOC'Y INT'L L. PROC. 38, 39–40 (1927)). Endorsement of this principle, at least as applied to measures involving taxation, public health, safety, and other exercises of police powers appears in the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, the American Law Institute's Second Restatement on the Foreign Relations Law of the United States, the Third Restatement on the Foreign Relations Law of the United States, and Sir Ian Brownlie's standard work on international law. *See* Louis B. Sohn et al., *Draft Convention on the International Responsibility of States for Injuries to Aliens*, art. 10.5, 55 AM. J. INT'L L. 548, 554 (1961); RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 197 & cmt. a, illus. 1, 3 (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 cmt. g (1987); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 511–12 (6th ed. 2003).

289 Perhaps one reason for the slow growth, the United States only negotiated BITs with "friendly" developing countries where the substantive treaty provisions aligned with "existing policy." Vandevelde, *supra* note 80, at 211. Evidently, skepticism about the relevant principles remained prevalent among developing countries at the time. VANDEVELDE, *supra* note 8, at 59.

290 VANDEVELDE, *supra* note 8, at 59.

291 The first investment treaty award was not handed down until 1990. *See infra* note 303 and accompanying text.

292 NEWCOMBE & PARADELL, *supra* note 8, at 48–49; SORNARAJAH, *supra* note 8, at 215; VANDEVELDE, *supra* note 8, at 59–61; Gudgeon, *supra* note 229, at 130; Vandevelde, *supra* note 18, at 387–88.

investment became the primary source of development,[293] and states had to compete for it.[294] Second, with the demise of communism and the disintegration of the Soviet Union, former client states and newly emerging states lost traditional sources of income, and reoriented their policies towards the enhancement of political and economic freedom.[295] Under these circumstances, BITs became powerful tools for emerging states to signal their thirst for investment, their break from the past, and their commitment to Western values.[296] Third, Latin American states began to abandon the *dependencia* theory and economic nationalism, which had led to economic stagnation across the region.[297] And fourth, the contrasting successes of East Asian "tigers" reignited interest in economic liberalization as a fast track to development.[298]

Given the constellation of circumstances just described, the worldwide stock of BITs increased dramatically during the 1990s.[299] By the end of the decade, states had concluded a total of 1,857 BITs.[300] The growth in the number of BITs slowed but remained significant in later years,[301] with 2,844 BITs and another 420 treaties with investment provisions concluded as of mid-2021.[302]

The phenomenon of investment treaty arbitration also got its start during the 1990s, with the first award rendered in 1990.[303] The total number of investment treaty claims continued as a trickle of just six cases over the next

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293 VANDEVELDE, *supra* note 8, at 62.

294 *See id.* at 63.

295 SORNARAJAH, *supra* note 8, at 214–15; VANDEVELDE, *supra* note 8, at 62–63; Vandevelde, *supra* note 146, at 628.

296 SORNARAJAH, *supra* note 8, at 215; Vandevelde, *supra* note 146, at 628.

297 SORNARAJAH, *supra* note 8, at 57–58.

298 NEWCOMBE & PARADELL, *supra* note 8, at 48; VANDEVELDE, *supra* note 8, at 62; Vandevelde, *supra* note 18, at 389.

299 *See* NEWCOMBE & PARADELL, *supra* note 8, at 47 (indicating that "BITs quintupled during the 1990s"); Press Release, *Bilateral Investment Treaties Quintupled During the 1990s,* UNCTAD (Dec. 15, 2000) [hereinafter UNCTAD Press Release].

300 UNCTAD Press Release, *supra* note 299.

301 The number of new investment treaties peaked in 1996 with well over 200 instruments concluded that year. United Nations Conf. on Trade and Dev. (UNCTAD), *The Changing IIA Landscape: New Treaties and Recent Policy Developments*, IIA ISSUES NOTE, July 2020, Issue 1, at 1, fig. 1. Following 2001, the number of new investment treaties generally fell, with less than 150 new instruments in 2002, less than 100 in 2005, and consistently 50 or fewer new treaties during the years 2011-2019. *Id.* Numbers of new treaties had not been that low since 1989. *Id.*

302 *International Investment Agreement Navigator*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements (last visited June 13, 2022).

303 MONTT, *supra* note 16, at 2, 84, 119; REDFERN & HUNTER, *supra* note 44, at 468; SALACUSE, supra note 54, at 382; *Investment Dispute Navigator*, *supra* note 302 A second award was rendered in 1994, a third in 1995, and a fourth in 1996. *Id.* The number of new awards did not exceed the single digits in any year until after 1999. *Id.*

five years, with the parties settling in three cases and the claimants prevailing in three cases.[304] During the second half of the 1990s, that trickle grew into a stream with a cumulative total of 40 investment treaty claims, ten of which were brought under NAFTA's investment chapter.[305] In later years, that stream became a torrent. By the end of 2010, investors had brought a cumulative total of 407 investment treaty claims.[306] By the end of 2020, the cumulative total of investment treaty claims had grown to 1,104, with 740 concluded cases, 354 pending cases, and the status of 10 cases unknown.[307] For reasons developed in Part IV, investment treaty arbitration came to develop a "toxic" reputation starting in the mid-2010s,[308] with the result that even the architects of the first and second waves turned against their own creations.

V. IMPERIAL ARBITRATORS

As discussed, the capital-exporting states that pioneered the first and second waves of BITs envisioned investment treaties as tools for signaling and reinforcing a commitment to traditional principles of state responsibility for injuries to aliens and for policing exceptional failures to provide the basic levels of security contemplated by the nightwatchman and rule-of-law states.[309] As explained below, in establishing direct rights of actions for investors, capital-exporting states clearly anticipated the potential for arbitration with tribunals having significant power to render awards against host states. However, BITs included a number of structural elements likely to confine tribunals to policing exceptional failures of the nightwatchman and rule-of-law states.

Despite the relatively modest goals of BIT programs and the structural limitations mentioned above, "imperial arbitrators" have become the central

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304 Investment Dispute Navigator, *supra* note 302.

305 *Id.*

306 *Id.*

307 *Id.*

308 *See* Paul Ames, *ISDS: The Most Toxic Acronym in Europe*, POLITICO (Sept. 17, 2015), https://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/; Lauge N. Skovgaard Poulsen & Geoffrey Gertz, *Reforming the Investment Treaty Regime* at 1–2 (Chatham House Briefing Paper Mar. 17, 2021), https://www.chathamhouse.org/sites/default/files/2021-03/2021-03-10-reforming-investment-treaty-regime-poulsen-gertz.pdf.

309 *See supra* notes 234, 249–62, 286–88 and accompanying text. As suggested above, the third wave did not involve any change in the goals of capital exporting states. *See* Vandevelde Statement, *supra* note 249, at 68 (opining that the U.S. "BIT program has not changed in any fundamental way since 1990"). The third wave simply involved a fortuitous coalescence of political and economic circumstances that facilitated the successful pursuit of BIT programs on a global scale. *See supra* notes 292–98 and accompanying text.

problem of modern investment treaty practice.[310] As explained below, this means the rise of arbitrators who do not merely police exceptional lapses of the nightwatchman and rule-of-law states, but who have transformed investment treaty arbitration into a form of governance in which tribunals routinely second-guess the normal operations of modern regulatory states, virtually without checks or balances.

Seeking to elaborate the points just made, Part IV(A) identifies the structural elements of BITs that logically tend to limit the activities of tribunals. Part IV(B) explains how NAFTA's investment chapter fortuitously transformed investment treaty arbitration in ways that created an opening for imperial arbitrators. Part IV(C) describes how the phenomenon became more generalized in investment treaty practice. Finally, Part IV(D) explores how the rise of imperial arbitrators ultimately rendered ISDS politically toxic even to pioneering states, with the result that at least some observers have started to write credibly about the death of investment treaty arbitration.

A. Structural Constraints on the Role of Tribunals

The drafters of BITs during the second wave must have known that they were conferring substantial powers on arbitral tribunals.[311] However, they likely believed that a number of structural constraints would limit the activity of tribunals. First, as explained below, the numbers of arbitrations were likely to remain low and, in fact, did remain low for several decades. One may attribute this to the relatively low number of BITs concluded until the 1990s, the fact that BITS were only designed to police against exceptional failures of the nightwatchman and rule-of-law states, and the fact that investors tended to view treaty claims as a last resort in managing relations with host states.[312] Second, the role of arbitrators was limited to fact-finding

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310 According to some definitions, "imperial" means having "supreme administrative authority" or "supreme authority." *See Imperial,* COLLINS ONLINE DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/imperial (last visited June 13, 2022) (defining "imperial" as "having supreme authority"); *Imperial,* MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/imperial (last visited June 13, 2022) (providing the history and etymology for "imperial" and referring to "supreme administrative authority"); *Imperial,* DICTIONARY.COM, https://www.dictionary.com/browse/imperial (last visited June 13, 2022) (describing the origin of "imperial" and referring to "supreme authority"). The author uses the term in that sense.

311 *See* VANDEVELDE, *supra* note 249, at 30 (observing that the direct right of action "was intended to be an unprecedentedly effective" remedy).

312 *See* Gus van Harten, *Commentary: A Case for an International Investment Court*, INV. TREATY NEWS (Aug. 7, 2008), https://www.iisd.org/itn/en/2008/08/07/commentary-a-case-for-an-international-investment-court/; *see also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1540 n.74 (2005).

and the application of agreed standards to particular disputes.[313] Third, their decisions lacked any precedential effect.[314] Fourth, since the treaties aimed only to discipline exceptional failures of the nightwatchman and rule-of-law states, the imposition of liability would be an exceptional event.[315] For developed states with stable political systems and independent courts, the possibility of liability seemed so remote as to be virtually irrelevant.[316] In other words, tribunals might aggregately produce a body of decisions

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313 As stated by the distinguished judge, arbitrator, and civil servant, Sir Franklin Berman, "the overwhelming majority of what one finds in the Awards is about 'application'—the application of the treaty standard to the specific factual circumstances of the actual case." *See* Sir Franklin Berman, *The Interpretation and Application of Fair and Equitable Treatment: An Arbitrator's Perspective*, *in* PAPARINSKIS, *supra* note 29, at 264, 266. Berman goes on to say:

> . . . A tribunal is brought into being to settle a particular dispute and then disappears. Its members may never have sat together before and may never do so again, and it's unlikely in the extreme that the same composition will ever sit again together. And the fact that it is called into existence solely and exclusively to dispose of a particular dispute, and usually under the specific rules of a particular bilateral treaty, makes it far more likely that the tribunal will focus its core attention on settling the dispute, not on settling the law; it will be all too conscious that it has a particular mandate to do the former, and no general mandate to do the latter.

Id.; *see also* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 189 & n.44 (2010); Irene Ten Cate, *The Cost of Consistency Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSNAT'L L. 418, 459 (2013); *cf.* Richard Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47, 47 (2019) (emphasizing that "each tribunal is constituted to resolve a single dispute").

314 Some investment treaties establish this point expressly. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1136, 17 Dec. 1992, 32 I.L.M. 605 (1993); United States Model BIT, art. 34(4) (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; Roberts, *supra* note 313, at 189 n.44. Even in the absence of such a provision, the general rule is that decisions in international adjudication have no precedential effect. Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence* Constante*, in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 265 (Colin Picker et al. eds., 2008); Judith Gill, Q.C., *Is There a Special Role for Precedent in Investment Arbitration?*, 25 ICSID REV.-FOREIGN INV. L.J. 87, 93 (2010); Lucy Reed, *The De Facto Precedent in Investment Arbitration: A Case for Proactive Case Management*, 25 ICSID REV.-FOREIGN INV. L.J. 95, 95 (2010). The ad hoc character of investor-state arbitration, and the bilateral nature of most investment treaties makes the field particularly ill-suited to any system of precedent. Bjorklund, supra, at 265; Roberts, *supra* note 313, at 189 n.44.

315 *Compare* MONTT, *supra* note 16, at 21 (quoting Kennedy v. Mex., 4 RIAA 194, 198 (1927)) ("[F]ollowing the reasoning of the Mexican-United States General Claims Commission, in the BIT generation, states should only be liable for the 'failure to maintain the *usual order* which it is the duty of every state to maintain within its territory.'"), *with* MONTT, *supra* note 16, at 21 (quoting Asian Agric. Prods. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award at para. 77 (June 27, 1990)) ("In other words as observed in the very first award based on a BIT, a 'reasonably well-organized modern State' should not be liable.").

316 As stated by a law professor from Duke University, who worked in the Investment Division at the Office of the United States Trade Representative during the early years of the U.S. BIT program, "[f]rom the United States' standpoint, the rights and duties under the BITs are redundant because investments in the United States already receive substantial and nondiscriminatory protection." Pamela Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373, 374 (1985).

upholding traditional principles of state responsibility.[317] But from the drafters' perspective, tribunals were unlikely to become frequent players, to look beyond the horizon of the particular case, to engage in a conscious and robust program of lawmaking, or to impose liability for the normal actions of normal states during normal times.

B. NAFTA and the Rise of Imperial Arbitrators

During the early 1990s, the future of investment treaty practice seemed questionable. To begin with, the structural constraints just discussed should have imposed real limitations on the frequency and scope of investment treaty arbitration practice. On top of that, the demise of communism and economic nationalism, combined with the near universal embrace of economic liberalism,[318] prompted one former BIT negotiator and future prominent BIT observer to question whether bilateral instruments were even needed to "prop up the rule of law" in the new political and economic context.[319] By the end of the decade, an explosion of claims under NAFTA's investment chapter would resolve doubts about the continued relevance of investment treaty practice. As explained below, the same phenomenon would also change the way that investors sought to use investment treaties: not just to police exceptional failures of the nightwatchman and rule-of-law states, but also to challenge the normal operations of modern regulatory states. The explosion of claims would also change the way that arbitrators reached decisions and understood their role, essentially driving them towards a form of collective lawmaking. For a time, it also threatened to create a body of jurisprudence that would allow arbitrators to second-guess the normal operations of modern regulatory states, without significant checks or balances. In other words, circumstances had created an opening for the rise of "imperial arbitrators," at least until the three NAFTA Parties organized a strategic shot across the bow.

As previously mentioned, the stock of investment treaties grew slowly in the 1960s, 1970s, and 1980s.[320] Investment treaty arbitration developed even more slowly. The first investment treaty arbitration was commenced in 1987.[321] Six years elapsed before commencement of the second case.[322] Investors commenced two more cases in 1994.[323] That brought the total to

317 *See supra* note 283.

318 *See supra* notes 295–98 and accompanying text.

319 Alvarez Remarks, *supra* note 241, at 555.

320 *See supra* notes 239, 289–90 and accompanying text.

321 *Investment Dispute Navigator, supra* note 302.

322 *Id.*

323 *Id.*

four investor-state arbitrations commenced in the history of investment treaties, with each case brought under a different treaty.[324] Over the next five years, investors commenced another forty investment treaty arbitrations.[325] Investors commenced ten of those arbitrations under NAFTA's investment chapter, with six of those arbitrations commenced against Canada or the United States.[326] Investors commenced three more arbitrations under the U.S.-Argentina BIT, and two arbitrations under the German-Poland BIT.[327] Each of the remaining twenty-five arbitrations was brought under a different treaty.[328] Only one of the thirty non-NAFTA arbitrations was brought against a developed, capital-exporting state.[329] As explained below, the cluster of disputes under NAFTA's investment chapter (particularly against Canada and the United States) had important implications for how investors sought to use investment treaties, and how tribunals understood and performed their roles.

Given Mexico's history of expropriations in the agricultural and oil sectors,[330] U.S. negotiators viewed NAFTA's investment chapter as the price of Mexico's admission to participation in the trans-continental free trade area.[331] However, Canadian and U.S. investors have not fared particularly well in claims against Mexico under NAFTA's investment chapter. Of the eighteen NAFTA arbitrations brought against Mexico and concluded as of this writing, the state prevailed in ten cases,[332] and investors discontinued

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324 *Id.*

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.*

329 *Id.* That case was *Maffezini v. Spain*, an unusual case involving an Argentine investor in a West European state. *See* Maffezini v. Spain, ICSID Case No. ARB/97/7, Award paras. 1–4 (Nov. 13, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0481.pdf.

Over the next five-year period (2000-2004), investors commenced another 135 investment treaty arbitrations. *Investment Dispute Navigator*, *supra* note 302. Of those, investors brought eighteen arbitrations under NAFTA's investment chapter, with eleven proceedings against Canada or the United States. *Id.* None of the remaining 117 arbitrations were commenced against a developed, capital-exporting state. *Id.*

330 *See supra* notes 72–108 and accompanying text.

331 Anderson, *supra* note 201, at 2949; Charles H. Brower II, *Investor-State Arbitration Under NAFTA: A Tale of Fear and Equilibrium*, 29 PEPP. L. REV. 43, 43, 47, 51 (2001) [hereinafter Brower, *Fear*]; Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 VAND. J. TRANSNAT'L L. 1533, 1547 (2003); Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 194 (2001); Shafruddin, *supra* note 4, at 442.

332 Vento Motorcycles, Inc. v. Mexico, ICSID Case No. ARB(AF)/17/3, Award para. 340 (July 26, 2020), https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/848/vento-v-mexico; Nelson v. Mexico, ICSID Case No. UNCT/17/1, Award para. 396 (June 5, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11557_0.pdf; Bayview Irrigation Dist. v. Mexico, ICSID Case No. ARB(AF)/05/1, Award para. 124 (June 19, 2007),

proceedings in another two cases.[333] Investors prevailed in just six cases,[334] three of which related to the same measure.[335] The awards against Mexico

https://www.italaw.com/sites/default/files/case-documents/ita0076_0.pdf; Fireman's Fund Ins. Co. v. Mexico, ICSID Case No. ARB(AF)/02/1, Award, para. 226 (July 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0331.pdf; Int'l Thunderbird Gaming Corp. v. Mexico, Award, para. 222 (Jan. 6, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf; GAMI Inv. Inc. v. Mexico, Award, para. 137 (Nov. 15, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0353_0.pdf; Waste Mgmt. v. Mexico (II), ICSID Case No. ARB(AF)/00/3, Award, paras. 140, 178 (Apr. 30, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf; Waste Mgmt. v. Mexico (I), ICSID Case No. ARB(AF)/98/2, Award, pt. IV (June 2, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0892.pdf; Azinian v. Mexico, ICSID Case No. ARB(AF)/97/2, Award, para. 128 (Nov. 1, 1999), https://www.italaw.com/sites/default/files/case-documents/ita0057.pdf. In addition, UNCTAD's Investment Dispute Settlement Navigator reports that the tribunal ruled against the investor in KBR, Inc. v. Mexico. *Investment Dispute Settlement Navigator: KBR v. Mexico*, UNCTAD, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/534/kbr-v-mexico (last visited June 13, 2022). The investor in that case did not consent to publication of the award. *See* Letter from Guillermo Aguilar Alvarez, King & Spalding to Meg Kinnear, Secretary General, ICSID (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw10870.pdf.

333 According to UNCTAD's Investment Dispute Settlement Navigator, Adams v. Mexico was commenced in 2001, but discontinued before constitution of a tribunal. UNCTAD, *Adams v. Mexico*, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/63/adams-v-mexico. Frank v. Mexico was brought in 2002 and discontinued before constitution of a tribunal. UNCTAD, *Frank v. Mexico*, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/90/frank-v-mexico.

334 Lion Mexico Consolidated L.P. v. Mexico, ICSID Case No. ARB(AF)/15/2, Award, para. 924 (Sept. 20, 2021) [hereinafter *Lion* Award], https://www.italaw.com/sites/default/files/case-documents/italaw16302.pdf; Cargill, Inc. v. Mexico, ICSID Case No. ARB(AF)/05/2, Award, paras. 554, 556–57 (Sept. 18, 2009) [hereinafter *Cargill* Award], https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf; Corn Prods. Int'l, Inc. v. Mexico, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, para.193 (Jan. 15, 2008) [hereinafter *Corn Prods.* Decision on Responsibility]; Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB(AF)/04/05, Award, para. 304 (Nov. 21, 2007) [hereinafter *ADM* Award], https://www.italaw.com/sites/default/files/case-documents/ita0037_0.pdf; Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, para. 210 (Dec. 16, 2002) [hereinafter *Feldman* Award], https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf; Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, paras. 74–112 (Aug. 30, 2000) [hereinafter *Metalclad* Award], https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

335 The claims brought by Cargill, Archer Daniels Midland, and Corn Products all related to Mexico's tax on soft drinks that used high fructose corn syrup as a sweetener. *See Cargill* Award, *supra* note 334, at para. 1; *Corn Prods.* Decision on Responsibility, *supra* note 334, at para. 3; *ADM* Award, *supra* note 334, at para. 2.

were substantial in those three cases and arguably substantial in a fourth,[336] but disappointingly small to investors in the other two.[337]

Turning to claims against Canada and the United States, one would expect investors to have significantly lower chances of success, at least when judged by the standard of fundamental security guarantees provided by the nightwatchman and rule-of-law states. Of course, one might find examples of disgraceful lapses in the administration of justice,[338] shockingly vindictive harassment by regulators,[339] and even uncompensated takings.[340] However, such examples would be extremely rare in jurisdictions like Canada and the United States, which rank near the top of every rule-of-law index.[341] To

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336 The damages award in *Corn Products Int'l Inc. v. Mexico* is not publicly available, but UNCTAD's Investment Dispute Settlement Navigator reports that the tribunal awarded the investor $58 million. UNCTAD, *Corn Products v. Mexico*, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/166/corn-products-v-mexico. In Archer Daniels Midland Co. v. Mexico, the tribunal awarded just over $33.51 million. *ADM* Award, *supra* note 334, at para. 304. In *Cargill, Inc. v. Mexico*, the tribunal awarded just over $77.329 million. *Cargill* Award, *supra* note 334, at para. 559.

In *Lion Mexico Consolidated L.P. v. Mexico*, the Tribunal awarded the claimant roughly $47 million for denial of justice in the cancelation of two mortgages. *Lion* Award, *supra* note 334, at para. 924(1)–(2). However, the mortgages secured loans that had outstanding principal and interest in excess of $104 million as of October 2012, subject to a 25% default interest rate, capitalized every three months. *Id.* paras.66, 75, 82, 638. While the claimant had contended that the mortgages had a market value of over $85.9 million, the tribunal placed the value closer to $67 million. *Id.* paras. 644, 762. Also, the tribunal refused to award the claimant the market value of the mortgages and, instead, reduced the amount by 30% to reflect the litigation risk that the investor faced even without the denial of justice. *Id.* paras. 762–71. The resulting $47 million in damages precisely coincided with Mexico's position on damages. *Id.* paras. 644, 771. Essentially, while the investor won on liability, Mexico prevailed on the measure compensation, a fact that the tribunal took into account when allocating the costs of arbitration and legal representation. *Id.* para. 915. It is hard to believe that the investor did not feel a sense of disappointment at the results produced by nearly six years of arbitration and over $8 million in legal fees. *Id.* paras. 1, 894, 924.

337 In *Metalclad v. Mexico*, the tribunal awarded $16.685 million. *Metalclad* Award, *supra* note 334, at para.131. The CEO of the company described that amount as a "token" and as "Pyrrhic a victory as any experienced." Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of* Metalclad Corporation v. United Mexican States, 10 MINN J. GLOBAL TRADE 209, 259 (2001). In *Feldman v. Mexico*, the tribunal awarded a "small" amount of damages. Todd Weiler, *Current Legal Trends in the Americas: NAFTA Chapter 11 Jurisprudence: Coming Along Nicely*, 9 SW. J.L. & TRADE AM. 245, 249 (2002–2003). Specifically, the tribunal awarded roughly 17 million Mexican pesos. *Feldman* Award, *supra* note 334, para. 211. At current exchange rates, that amount would be substantially less than $1 million. Currency Converter, OANDA, https://www1.oanda.com/currency/converter/.

338 *See* The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, para. 119 (June 26, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf.

339 Pope & Talbot, Inc. v. Gov't of Can., Award in Respect of Damages, para. 68 (May 31, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0686.pdf.

340 *See* AbitibiBowater, Inc. v. Gov't of Can., Consent Award, paras. 2, 20 (Dec. 15, 2010), https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/abitibi-03.pdf.

341 *See, e.g.*, World Justice Project, WJP Rule of Law Index (2020), https://worldjusticeproject.org/rule-of-law-index/global/2020 (ranking Canada 9th, the United States 21st, and Mexico 104th); Rule of law – Country rankings (2019), THEGLOBALECONOMY.COM,

pursue any significant cluster of claims against Canada or the United States, investors would have to focus instead on the normal operations of modern regulatory states, to test linguistic play in the provisions on expropriation and fair and equitable treatment, to convince tribunals to accept much broader understandings of those provisions than anticipated by the drafters of BITs, and to leverage favorable decisions by persuading tribunals to adopt a de facto system of precedent.[342]

The subject matter of early controversies under NAFTA's investment chapter generally fit the model just hypothesized: investors challenged plain-packaging regulations on tobacco,[343] restrictions on the transportation and disposal of hazardous wastes,[344] restrictions on fuel additives for ostensibly environmental reasons,[345] forestry management,[346] and tax measures.[347] Later disputes involved environmental and socio-cultural regulation of large-scale surface mining.[348]

Arguments submitted in those disputes exposed a high level of textual indeterminacy with respect to things like the scope of indirect expropriation

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https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/ (ranking Canada 12th, the United States 20th, and Mexico 139th).

342 *See* Anderson, *supra* note 201, at 2939, 2962 (observing that "the mere presence of [investment treaty] rules in the context of developed states incentivized the legal testing" of the play in NAFTA's investment chapter). According to Anderson, Canada and the United States were respondents in thirty-six out of fifty known investment claims brought under NAFTA as of 2017. *Id*. at 2938.

343 Canada considered plain packaging requirements for cigarettes. Representing American tobacco companies, former United States Trade Representative Carla Hills threatened to commence arbitration under NAFTA's investment chapter. It is widely reported that the threat deterred Canada from implementing the plain packaging requirements. MILES, *supra* note 9, at 183–84; Alberto R. Salazar, *Defragmenting International Investment Law to Protect Citizen-Consumers: The Role of Amici Curiae and Public Interest Groups*, 19 LAW & BUS. REV. AM. 183, 194 (2013); *see also* Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383, 425 n.238 (2016).

344 *See generally* S.D. Myers, Inc. v. Canada, Partial Award (Nov. 13, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf; *Metalclad* Award, *supra* note 334.

345 *See generally* Methanex Corp. v. United States, Award on Jurisdiction and Merits (Aug. 3, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf; Ethyl Corp. v. Canada, Award on Jurisdiction (June 24, 1998), https://www.italaw.com/sites/default/files/case-documents/ita0300_0.pdf.

346 *See generally* Pope & Talbot, Inc. v. Gov't of Can., Interim Award (June 26, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0674.pdf; *see also* Merrill & Ring Forestry L.P. v. Gov't of Can., ICSID Case No. UNCT/07/1, Award (Mar. 31, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf.

347 *See generally* Feldman Award, *supra* note 334.

348 *See generally* Glamis Gold, Ltd. v. United States, Award (June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf; Clayton v. Canada, Award on Jurisdiction and Liability (Mar. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.

and the contours of fair and equitable treatment.[349] The lack of textual clarity persuaded many observers that NAFTA tribunals were engaged in lawmaking on some significant scale.[350] Privately, arbitrators have confirmed that the opportunity to shape the law constitutes one of the most exciting and satisfying aspects of deciding investment treaty disputes.

In exercising their lawmaking functions, several of the early NAFTA tribunals articulated substantive principles that offered significant leeway for second-guessing the routine operations of modern regulatory states. For example, in *Metalclad Corp. v. Mexico*, a case alleging unlawful interference with the operation of a hazardous waste facility due to community opposition, the tribunal defined indirect expropriation to include "incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property."[351] Contrary to longstanding understandings of international law,[352] the tribunal did not even mention the role that the

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349 Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 60–61 (2003) [hereinafter Brower, *Structure*]; *see also* J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 694 (2007); Jason Webb Yackee, *Toward a Minimalist System of International Investment Law?*, 32 SUFFOLK TRANSNAT'L L. REV. 303, 313–14 (2009).

350 *See* Brower, *Structure*, *supra* note 349, at 53, 63–64, 66 (explaining that the adoption of indeterminate legal text often requires specification of concepts through judicial or other adjudicative processes; thus, by adopting an obligation of "fair and equitable treatment" towards foreign investors, the drafters of NAFTA Chapter 11 established "a somewhat creative, rather than a purely analytical, charge for ad hoc tribunals"); *see also* Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEO. J. INT'L L. 531, 565 (2013) (noting the existence of NGO reports criticizing arbitration of disputes under NAFTA's investment chapter, and recounting their argument that "investor-state arbitration represented the bankruptcy of public policy and a form of undemocratic international law-making in the era of economic globalization"). A number of observers have written thoughtfully about the lawmaking functions of arbitral tribunals constituted under investment treaties. Roberts, *supra* note 313, at 189–91; Stephan W. Schill, *Beyond Dispute: International Judicial Institutions as Lawmakers: System Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1086, 1088, 1092–93 (2011); Ten Cate, *supra* note 313, at 452, 475; Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT'L L. & POL. 1109, 1169–1203 (2012); Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979, 981 (2011).

351 *Metalclad* Award, *supra* note 334, at para. 103.

352 *See supra* note 288 and accompanying text. Some writers have observed that the *Metalclad* tribunal's focus on effects and its failure consider the exercise of police powers coincides with the award in Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica (*Santa Elena*) and the jurisprudence of the Iran-U.S. Claims Tribunal. *See* Julianne J. Marley, Note, *The Environmental Endangerment Finding in International Investment Disputes*, 46 N.Y.U. J. INT'L L. & POL. 1003, 1018 (2014); Anderson, *supra* note 201, at 2954; Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENV'T L.J. 64, 86–90 (2002). In the *Santa Elena* case, the tribunal famously stated:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That

exercise of police powers relating to health, safety, and the environment might play as a counterweight to liability.[353] The *Metalclad* tribunal went on to impose liability for expropriation based on the municipality's denial of a construction permit and the Mexican state's incorporation of the property into

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> is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.

Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award, para. 71 (Feb. 17, 2000) [hereinafter *Santa Elena* Award], https://www.italaw.com/sites/default/files/case-documents/italaw6340.pdf. In reaching that conclusion, the *Santa Elena* tribunal relied on the following statement by the Iran-U.S. Claims tribunal: "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact." *Id.* para. 77 (quoting Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, Award No. 141-7-2 (June 22, 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1986)).

However, the *Santa Elena* case a involved a formal, direct, and actual taking of property. *See Santa Elena* Award, *supra*, at para. 17; Ying Zhu, *Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?,* 60 HARV. INT'L L.J. 377, 400–01 (2019). While the majority of cases considered by the Iran-U.S. Claims tribunal did not involve formal takings, they did involve physical seizures of property in the context of the Islamic Revolution. *See* Sebastian Lopez Escarcena, *Expropriations and Other Measures Affecting Property Rights in the Case Law of the Iran-United States Claims Tribunal*, 31 WISC. INT'L L.J 177, 183–84 (2013).

Domestically and internationally, the permanent physical appropriation or seizure of an asset incurs liability without regard to the nature of the public interest involved. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"); *see also* 2012 U.S. Model Bilateral Investment Treaty, art. 6 & Annex B, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (imposing liability for direct takings, which involve formal transfer or outright seizure of investment property, and for indirect takings, which do not involve formal transfers or outright seizures, but involve measures that have equivalent effect as determined by a weighing of the economic impact, the extent of interference with reasonable investment-backed expectations, and the character of the government action). Consideration of the character of the government action, such as the exercise of police powers, comes into play only for the consideration of *indirect* takings. *Id.*; *see also* RADI, *supra* note 11, at 156 (observing that the "notion of police powers is heavily discussed with regard to indirect expropriation"). This distinction is implicit in frequent observations that direct takings raise no conceptual difficulties, whereas indirect expropriations often raise difficult questions regarding the distinction between takings and non-compensable regulatory measures. *Compare* MCLACHLAN ET AL., *supra* note 201, at 380 (opining that "tribunals have considered direct expropriation as being relatively easy to recognize"), *with* BORN, *supra* note 252, at 436 (opining that "difficulties frequently arise in distinguishing between compensable indirect . . . expropriations and non-compensable regulatory measures").

Very few modern investment treaty disputes involve formal takings or physical seizures of property. DOLZER & SCHREUER, *supra* note 71, at 101. Like *Metalclad*, they tend to involve the question of state interference with property rights in the absence of formal takings or physical seizures. *Id.*; MCLACHLAN ET AL., *supra* note 201, at 360; RADI, *supra* note 11, at 155–56. In that context, long-standing principles of international law and domestic constitutional law recognize that the exercise of police powers constitutes a factor weighing heavily or decisively against treatment of state action as an indirect expropriation. *See supra* note 288 and accompanying text; *see also infra* notes 362–63, 420 and accompanying text.

353 MILES, *supra* note 9, at 158.

a natural area directed at the protection of rare cacti.[354] A reviewing court in British Columbia commented that the tribunal's definition of indirect expropriation was broad enough to include zoning ordinances.[355]

In a contemporaneous award relating to export controls on forestry products, the tribunal in *Pope & Talbot v. Canada* expressly rejected Canada's argument that indirect expropriation did not extend to the nondiscriminatory exercise of police powers.[356] While the tribunal acknowledged that consideration of police powers requires "special care," it opined that Canada's submission went "too far."[357] In the tribunal's view, "*much* creeping expropriation" could be accomplished by regulations.[358] Therefore, the tribunal concluded that "a blanket exception for regulatory measures would create a *gaping loophole* in international protections against expropriation."[359] Although the tribunal rejected the investor's claim of expropriation on the facts of the particular case,[360] the tribunal's reference to the frequency of employing regulations as a tool of expropriation, and the tribunal's rejection of a safe harbor for nondiscriminatory exercise of police powers as a "gaping loophole" created the impression that the tribunal foresaw a significant role for investment treaties in policing the normal operation of modern regulatory states.[361] The suggestion was jarring. It was contrary to much of international law,[362] not to mention domestic constitutional law.[363] It also threatened to stand the international law of state

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354 *Metalclad* Award, *supra* note 334, at paras. 29–54, 59, 104–11.

355 Mexico v. Metalclad Corp., 2001 BCSC 664, para. 99 (May 2, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0512.pdf [hereinafter *Metalclad* Judgment]; JONATHAN BONNITCHA SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES 249 (2014); *see also* Anderson, *supra* note 201, at 2954.

356 *Pope & Talbot* Interim Award, *supra* note 346, at paras. 90, 99.

357 *Id.* at para. 99. The tribunal made no effort to explain what the exercise of "special care" might entail. BONNITCHA, *supra* note 355, at 252.

358 *Pope & Talbot* Interim Award, *supra* note 346, at para. 99 (emphasis added).

359 *Id.* (emphasis added).

360 *Id.* at paras. 100–05; BONNITCHA, supra note 355, at 251.

361 *See* Gilbert M. Bankobeza et al., *Public International Law: Environmental Law*, 35 INT'L LAW. 659, 711 (2001) ("Decisions to date in Chapter 11 disputes raise significant questions for environmental lawmaking in North America. Elimination of the police-powers carve-out from the scope of expropriation, as seen in *Metalclad* and *Pope & Talbot*, could make all environmental laws effectively subject to Chapter 11 disciplines, and compensation required for any significant interference with the operation of a covered foreign investor.").

362 *See supra* notes 288, 352 and accompanying text; *see also infra* note 420 and accompanying text.

363 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992) (holding that regulatory action does not constitute a taking if it prohibits conduct that would fall within common law understandings of nuisance, even if the regulatory action has the effect of destroying all economically productive or beneficial uses of land); *see also* Anderson, *supra* note 201, at 2953 (asserting that "[c]ritics of NAFTA worry that within Chapter 11 proceedings, a . . . liberal definition of takings is emerging that threatens to go beyond domestic law in all three NAFTA countries").

responsibility on its head by imposing liability for the evenhanded exercise of police powers,[364] which constitutes the *performance* (and not the failure to perform) one of the core functions of the nightwatchman and rule-of-law states.[365]

In applying NAFTA's provision on fair and equitable treatment, the *Metalclad* tribunal made a second troubling statement. Specifically, the tribunal interpreted fair and equitable treatment to impose a particularly demanding obligation of transparency on host states:

> There should be *no room* for doubt or uncertainty on matters [relating to legal requirements for the purpose of initiating, completing and successfully operating investments]. Once the authorities of the central government of any Party . . . become aware of *any scope for misunderstanding or confusion* in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.[366]

At first blush, the statement arguably sounds reasonable.[367] It is also possible that the tribunal felt that Mexican officials had affirmatively misled the investor about the need for a municipal construction permit.[368] But on reflection, the passage is breathtaking.[369] In essence, the award shifts the entire risk of doubt, misunderstanding, and confusion about regulatory

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364 *See* John Barlow Weiner et al., *Environmental Law*, 36 INT'L LAW. 619, 662 n.117 (2002) (observing that "the scope of the traditional customary international law exception [to indirect expropriation] for state action in the exercise of its 'police powers' is unclear given the decision of the tribunal in Pope & Talbot Inc. v. Canada, Interim Award"); *see also* Gantz, *supra* note 185, at 742 (indicating that "[t]he potential exception theoretically available under Article 1110 for reasonable regulation under the police power may have been narrowed in *Pope & Talbot*").

365 *See* Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 904 (2000); Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 428–29 (2000); Jeffrey A. Hank, *Consumer Law: Chemicals and Toxins in Consumer Goods: Cause for Concern?*, 89 MICH. BAR J. 33, 35 (2010).

366 *Metalclad* Award, *supra* note 334, at para. 76 (emphasis added).

367 *See* Brower, *Fear*, *supra* note 331, at 82.

368 *See Metalclad* Award, *supra* note 334, at paras. 85, 89; Alan O. Sykes, *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, 113 AM. J. INT'L L. 482, 530 (2019).

369 *See* Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 43 (2011) (opining that the *Metalclad* tribunal "articulated an exacting expectation of transparency to which host states should be held"); Jerry L. Lai, Comment, *A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms*, 34 EMORY INT'L L. REV. 259, 263 (2021) (opining that the *Metalclad* tribunal "maintained an unusually strict standard for transparency").

requirements from the investor to the host state.[370] Because complex, modern regulatory systems naturally breed some degree of ambiguity, doubt, misunderstanding, and confusion,[371] the award establishes a constant threat of liability based on the routine operations of modern regulatory states.

In applying NAFTA's provision on fair and equitable treatment, the *Pope & Talbot* tribunal did not discuss the concept of transparency. But while recognizing that the treaty text suggested a connection to international law, the tribunal refused to confine the scope of fair and equitable treatment to the exceptional situations historically covered by the international minimum standard of treatment.[372] On the contrary, the tribunal declared that it would apply the "fairness elements under ordinary standards applied in the [domestic law of] NAFTA countries,"[373] a vague formulation that suggested a roving mandate to determine the fairness of regulatory action on the same footing as domestic courts applying domestic administrative law.[374]

On the heels of the *Metalclad* and *Pope & Talbot* awards, observers warned that the emerging jurisprudence was transforming investment treaties from a shield for investors into a sword that corporate interests could use

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370 *See* S. Benton Cantey, Comment, *International Arbitration to Resolve Disputes Under NAFTA Chapter 11: Investment*, 9 TULSA J. COMPAR. & INT'L L. 285, 302 (2001) (quoting Public Citizen Global Trade Watch, *Our Future Under the Multilateral Agreement on Investment*, http://www.citizen.org/pctrade/nafta/cases/metalcla.htm) ("Without NAFTA's forceful provision on expropriation, Metalclad by itself would be compelled to assume the risks of investment. This case is demonstrative of how 'certain non-market related risks of investment could be shifted from companies to governments.'"); *see also* Charles H. Brower II, *Mitsubishi, Investor-State Arbitration, and the Law of State Immunity*, 20 AM. U. INT'L L. REV. 907, 921–22 (2005) (describing the *Metalclad* award as a "groundbreaking, risk-shifting device"); Brower, *supra* note 199, at 185 n.43 (emphasizing that the *Metalclad* award imposes "a strong obligation of transparency that leaves 'no room' for 'doubt,' 'uncertainty,' 'misunderstanding,' or 'confusion' regarding the host state's legal requirements that apply to foreign investment").

371 *See* Jayne E. Daly, *Introduction*, 1995 PACE L. REV. 13, 17; Justin O'Brien, *Barriers to Entry: Foreign Direct Investment and the Regulation of Sovereign Wealth Funds*, 42 INT'L LAW. 1231, 1253 (2008); Tracie R. Porter, *Pawns for a Higher Greed: The Banking and Financial Services Industry's Capture of Federal Homeownership Policy and the Impact on Citizen Homeowners*, 37 HAMLINE L. REV. 139, 197 (2014).

372 Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, paras. 110–11 (Apr. 10, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf.

373 *Id.* at para. 118.

374 *See* Robert Wisner, *The Modern View of the "Fair and Equitable Treatment" Standard in the Review of Regulatory Action by States*, 20 INT'L L. PRACTICUM 129, 131 (2007) (lamenting the fact that "the *Pope & Talbot* tribunal gave little indication as to the content of the independent fairness standard beyond the rather vague, ordinary meaning of 'fair and equitable'"); Courtney C. Kirkman, Note, *Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 355 (2002) (observing that the *Pope & Talbot* tribunal "interpreted fair and equitable treatment as encompassing more than the traditional customary law notion of fair and equitable treatment" and "subject[ed] the NAFTA Parties to greater liability"); *see also Pope & Talbot* Award on the Merits of Phase 2, *supra* note 372, at para. 109 (recounting the investor's argument that fair and equitable treatment requires compliance with domestic principles relating to the exercise of regulatory authority).

against efforts to regulate in the public interest.[375] Although the warning sounded shrill and possibly exaggerated,[376] it captured the occurrence of a real shift. Investors were no longer using investment treaties just for protection against exceptional failures of the nightwatchman and rule-of-law states. They were inviting tribunals to develop a jurisprudence that could open the door to second-guessing the routine operations of modern regulatory states, and they were succeeding.[377]

In *S.D. Myers v. Canada*, a dispute relating to Canadian restrictions on the cross-border transportation of hazardous wastes, the tribunal rendered an award that was much more explicitly deferential to the regulatory actions of host states.[378] In applying NAFTA's provision on expropriation, the tribunal recognized the proposition that states were unlikely to face liability for *bona fide* regulatory acts:

> The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA . . . . Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most

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375 *See, e.g.,* Vicki Been & Joel C. 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, 34–35 (2003); John B. Fowles, *Swords into Plowshares: Softening the Edge of NAFTA's Chapter 11 Regulatory Expropriations Provisions*, 36 CUMB. L. REV. 83, 84–85 (2005-2006); Kevin Scott Prussia, Note & Comment, *NAFTA & The Alien Tort Claims Act: Making a Case for Actionable Offenses Based on Environmental Harms and Injuries to the Public Health*, 32 AM. J.L. & MED. 381, 393 (2006); Jessica S. Wiltse, Note, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFF. L. REV. 1145, 1170 (2003).

376 *See* Brower, *Structure*, *supra* note 349, at 46–47 (recounting such concerns, but opining that "the NAFTA Parties enjoyed considerable success in responding to the initial wave of Chapter 11 claims"); Ray C. Jones, Note & Comment, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 B.Y.U. L. REV. 527, 558 ("While Chapter 11 has the potential to be used by investors as a 'sword,' rather than the 'shield' it was intended to be, recent efforts to open up the dispute resolution process signal a favorable trend.").

377 *See* Anderson*, supra* note 201, at 2952 (explaining that early NAFTA cases, including *Metalclad*, were "derided by environmentalists and others as a subversion of the state's ability to regulate in the public interest"); Chris Tollefson, Metalclad v. United Mexican States *Revisited: Judicial Oversight of NAFTA Chapter Eleven Investor-State Claim Process*, 11 MINN. J. GLOB.AL TRADE 183, 215 (2002) (describing the *Metalclad* award as "highly controversial both in terms of legal soundness and its ramifications for the fiscal capacity, political appetite and legal ability of governments to regulate in the public interest").

378 Bryan W. Blades, *The Exhausting Question of Local Remedies: Expropriation Under NAFTA Chapter 11*, 8 OR. REV. INT'L L. 31, 61 (2006); Brower, *Empire Strikes Back*, *supra* note 275, at 59; Brower, *Fear*, *supra* note 331, at 83; *see* Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93, 147 (2013).

> potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.[379]

In applying NAFTA's provision on fair and equitable treatment, the *S.D. Myers* tribunal again emphasized the leeway that international law grants states to regulate in the public interest, as well as an aversion to using that provision as a tool to second-guess the regulatory decisions of host states:

> When interpreting and applying the "minimum standard", a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy . . . for errors in modern governments is through internal political and legal processes, including elections. . . .
>
> The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.[380]

In the very next breath, however, the tribunal expressed the view that any "breach[] [of] a rule of international law specifically designed to protect investors will tend to weigh heavily" in favor of establishing a denial of fair and equitable treatment.[381] If taken seriously, this would have the effect of extending direct rights of action to any provision under any treaty arguably designed to protect investors, even if not mentioned in the relevant investment treaty or if mentioned in the relevant investment treaty but not directly included in the range of provisions covered by the submission to arbitration. For example, the tribunal's interpretation had the potential to

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379 *S.D. Myers* Partial Award, *supra* note 344, at paras. 281–82.

380 *Id.* at paras. 261, 263.

381 *Id.* at para. 264.

extend the direct right of action to violations of the WTO's Agreement on Trade Related Investment Measures or provisions on transparency covered by NAFTA but not incorporated directly into the treaty's investment chapter.[382]

In a separate opinion, the investor's party-appointed arbitrator expressly flirted with the possibility that fair and equitable treatment incorporates principles of transparency developed in other branches of international economic law, including the GATT/WTO system.[383] While the expression was somewhat tentative and while the issue was not fully addressed in the submissions of the disputing parties,[384] the separate opinion provided another toehold to build out the views developed in *Metalclad*. It also suggested that such understandings of fair and equitable treatment were gaining traction and could become a majority view in future cases depending on the composition of the tribunals.[385]

It is no exaggeration to say that the combined weight of *Metalclad*, *Pope & Talbot*, and *S.D. Myers* "threw the three NAFTA Parties into a state of near panic."[386] At the time, all three NAFTA Parties were respondents in significant cases relating to things like waste disposal,[387] the operation of postal services and court systems,[388] and restrictions on fuel additives for ostensibly environmental reasons.[389] In particular, the United States had reached a critical stage in arbitrations relating to California's ban on the fuel additive MTBE and a gross failure of the administration of justice in a

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382 *See* J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 449 (2002); *see also* Jurgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment,* 23 U. PA. J. INT'L ECON. L. 713, 752–53 (2002); Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT'L & COMP. L. REV. 403, 435 (2006).

383 *See* S.D. Myers, Inc. v. Canada, Separate Opinion of Dr. Bryan Schwartz, at paras. 224, 249–57 (Nov. 12, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0748.pdf.

384 *See id.* at para. 258.

385 *See infra* notes 449–59 and accompanying text (describing the subsequent emergence and popularization of an interpretation that measures fair and equitable treatment by reference to the legitimate expectations of investors, which are deemed to incorporate compliance with exacting standards of transparency); *see also Maffezini* Award, *supra* note 329, at para. 83 (opining that "the lack of transparency with which [a] loan transaction was conducted was incompatible with Spain's commitment to ensure the investor a fair and equitable treatment"); DOLZER & SCHREUER, *supra* note 71, at 149 (explaining that "[t]ransparency is closely related to protection of the investor's legitimate expectations"); Chen, *supra* note 313, at 85 (noting that fair and equitable treatment "has been invoked to address . . . lack of transparency").

386 Brower, *supra* note 199, at 191; Brower, *supra* note 2, at 165–66.

387 *See Waste Mgmt. (II)* Award, *supra* note 332.

388 *See* United Parcel Serv. of Am. v. Canada, Award (May 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0885.pdf; *Loewen* Award, *supra* note 338; Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf.

389 *See Methanex* Award, *supra* note 345.

Mississippi state court.[390] The amounts in controversy for those two cases alone exceeded $1.7 billion.[391] The three NAFTA Parties must have understood that investors and tribunals had already broken the seal on the use of investment treaties to second-guess the routine operations of modern regulatory states.[392] They must have feared the path dependence that opened for pending and future claims.[393]

The fact that the early NAFTA claims emerged in a significant cluster, and the only significant cluster under any one investment treaty at that time,[394] changed the way that disputing parties presented cases, the way that tribunals considered cases, and the way that tribunals decided cases. Following an initial period of secrecy,[395] the NAFTA Parties started to post significant filings and decisions in NAFTA investment arbitrations on government websites.[396] It became routine for disputing parties to file copies of helpful submissions and decisions culled from other pending matters.[397]

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390 *Id.*; *Loewen* Award, *supra* note 338.

391 *See Methanex* Award, *supra* note 345, at Part IV, ch. A, para. 2; Loewen Grp., Inc. v. United States, Notice of Arbitration, at para. 187 (Oct. 30, 1998), https://www.italaw.com/sites/default/files/case-documents/italaw9045.pdf.

392 *See* Anderson*, supra* note 201, at 2959; Dhooge, *supra* note 337, at 273–74; Rainer Geiger, *Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment*, 11 N.Y.U. ENV'T L.J. 94, 105 (2002); Jurgen Kurtz, *NGOs, the Internet, and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment*, 3 MELB. J. INT'L L. 213, 229–30 (2002); Andres Rueda, Note, *Tuna, Dolphins, Shrimp and Turtles: What About Environmental Embargoes Under NAFTA?*, 12 GEO. INT'L ENV'T L. REV. 647, 691 (2000).

393 *See* Anderson*, supra* note 201, at 2953 (explaining that the direction of NAFTA jurisprudence suggested by the *Metalclad* and *Pope & Talbot* awards explained "subsequent nervousness regarding the *Methanex* case"); John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT'L L. 429, 432 (2006) (observing that investors have continued to cite *Metalclad*, and critics have expressed concern that later tribunals, including *Methanex*, would follow it).

394 *See supra* notes 325–26 and accompanying text.

395 Brower, *Empire Strikes Back*, *supra* note 275, at 44 n.4; Brower, *Fear*, *supra* note 331, at 48 n.34.

396 *See* NAFTA-Chapter 11-Investment, Cases Filed Against the Government of Canada, GLOBAL AFFAIRS CANADA, https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng; Secretaria de Economia, Acciones y Programmas, Comercio Exterior, Solucion de Controversias, GOBIERNO DE MEXICO (May 10, 2015), https://www.gob.mx/se/acciones-y-programas/comercio-exterior-solucion-de-controversias?state=published; International Claims and Investment Disputes, NAFTA Investor-State Arbitrations, Cases Filed Against the United States of America, U.S. DEPT. OF STATE, https://2009-2017.state.gov/s/l/c3741.htm [hereinafter Cases Filed Against the United States of America (2009-2017)]. The United States apparently stopped publishing such documents and now only provides access to documents archived through 2017. *See* Cases Filed Against the United States of America (2009-2017), *supra*.

397 *See* David A. Gantz, *Settlement of Disputes Under the Central-America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMPAR. L. REV. 331, 352 (2007) (describing the NAFTA experience and explaining that "both the investor and the host state will cite prior decisions that tend to support their arguments before the tribunal"); *Questions for Mark Clodfelter and David Gantz*, 42 S. TEX. L. REV. 1303, 1306 (2001) (asserting that "earlier Chapter 11 cases are already being widely cited

As decisions came down in *Metalclad*, *Pope & Talbot*, and *S.D. Myers*, and were communicated to arbitrators in other disputes, a tribunal member in the *Methanex* case was reliably (though privately) reported to have remarked that it was like sitting in several different arbitrations at once. Given the obligation to consider the submissions of the parties,[398] arbitrators could not ignore the materials from other cases.[399]

Slowly but surely, it became clear that a de facto doctrine of precedent had begun to emerge.[400] Arbitrators could no longer focus only on finding

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in later proceedings by counsel on both sides"); David MacArthur, Comment & Note, *NAFTA Chapter 11: On an Environmental Collision Course with the World Bank?*, 2003 UTAH L. REV. 913, 930 (indicating that "the lawyers representing the various parties [in NAFTA Chapter 11 arbitrations] have likewise turned to those decisions to shore up their respective arguments").

Chen regards the citation of previous awards by investors and states as a form of active encouragement for tribunals to develop a body of precedent and to assume a lawmaking function. Chen, *supra* note 313, at 77; *see also* Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 5, 60 (Albert Jan van den Berg ed., 2009). The author of this article doubts that investors and states had such grand aspirations. More likely, as suggested by the citations above, investors and states simply cited previous awards to support their arguments without much consideration of systemic consequences. *See also* Reed, *supra* note 314, at 97 (writing from the perspective of a leading practitioner and opining that "we" address publicly available decisions in submissions because "we want to make it comfortable and easy as possible for arbitrators to decide treaty issues our party's way, by steering them towards the decisions of right-thinking peers").

398 *See* REDFERN & HUNTER, *supra* note 44, at 335–37 (discussing the legal obligation of arbitrators to act in a judicial manner, which includes giving the parties a fair opportunity to present their cases). In the context of investment treaty arbitration, the ICSID Arbitration Rules and the ICSID Additional Facility Rules require tribunals to render awards that "contain . . . the submissions of the parties," as well as "the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based". ICSID ARBITRATION RULES, ART. 47(1)(H)-(I) (2006), https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf; ICSID ADDITIONAL FACILITY RULES, ART. 52(1)(H)-(I) (2006), https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf.

399 *See Feldman* Award, *supra* note 334, at para. 107 ("In view of the fact that both of the parties . . . have extensively cited . . . some of the earlier decisions, the Tribunal believes it appropriate to discuss . . . relevant aspects of earlier decisions"); Bjorklund, *supra* note 314, at 278 ("Counsel will usually rely on arbitral awards in making arguments before the tribunal; the tribunal would thus be obligated to consider those arguments . . . ."); Gantz, *supra* note 397, at 352 (explaining that citations by investors and host states to previous decisions in other cases left tribunals with "little choice" about the consideration of those materials); W. Michael Reisman, *"Case Specific Mandates versus "Systemic Implications": How Should Investment Tribunals Decide*, 29 ARB. INT'L 131, 146 (2013) (explaining that "arbitrators who are philosophically opposed to the consideration . . . of prior decisions can hardly avoid them" because "disputing counsel canvass" them in their submissions); J. Romesh Weeramantry, *The Future Role of Past Awards in Investment Arbitration*, 25 ICSID REV.-FOREIGN INV. L.J. 111, 116 (2010) ("Investment tribunals often refer to past decisions simply because they have been relied on by the parties in their pleadings.").

400 *Glamis Gold* Award, *supra* note 348, at para. 8 (quoting Int'l Thunderbird Gaming Corp. v. Mexico, Separate Opinion of Thomas Wälde at para. 129 (Jan. 26, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf); Joel Vander Kooi, *The ASEAN Enhanced Dispute Settlement Mechanism: Doing It the ASEAN Way*, 20 N.Y. INT'L L. REV. 1, 15 (2007).

the facts and applying agreed standards to a single dispute.[401] They were engaged in a form of collective lawmaking and had to take a wider frame.[402] This created incentives for some arbitrators to write awards that would establish the definitive standards for emerging and poorly understood topics, thereby enhancing the influence and stature of those who wrote the awards.[403] In addition, observers were quick to point out the emergence of inconsistent awards on important and recurring legal issues, as well as the danger that this phenomenon posed to the legitimacy of NAFTA's investment chapter and to the broader universe of investment treaties.[404] Although not provable, these observations likely increased the incentives for arbitrators to engage in a loose form of collaboration, monitoring each other's work and striving to achieve relatively consistent lines of jurisprudence on key topics where possible.[405]

In short, early arbitration practice under NAFTA's investment chapter created an opening for imperial arbitrators in the sense that tribunal members were engaged in a collective lawmaking process almost calculated to invite frequent arbitral second-guessing of the normal operations of modern regulatory states. Unfortunately, there seemed to be few checks and balances on the development of this practice.[406] Once the tribunals had blown past the

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401 Chen, *supra* note 313, at 51, 63–64, 77.

402 *Id.* at 64, 77–79.

403 *See* Zachary Douglas, *Nothing if Not Critical for Investment Treaty Arbitration:* Occidental, Eureko *and* Methanex, 22 ARB. INT'L 27, 27 (2006) (describing the "fierce competition among arbitral tribunals to author a pithy, single-paragraph proclamation of what the fair and equitable standard of treatment actually means for posterity"); *see also* Tai-Heng Cheng*, Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1046 (2007) ("Arbitrators reap significant reputational benefits among fellow arbitrators, lawyers and the college of international jurists if they render awards that are regarded as well reasoned.").

In the early years of investment treaty arbitration, observers began to write about the competitive marketplace for awards in Darwinian, survival-of-the-fittest terms. Bjorklund, *supra* note 314, at 276; Gill, *supra* note 314, at 94; Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, *in* ICCA CONGRESS SERIES NO. 13, INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 879, 880 (Albert Jan van dev Berg ed., 2007); Reed, *supra* note 314, at 99. With the parameters of the discipline publicly cast in those terms, one can easily imagine elite arbitrators framing awards in a manner calculated to make a lasting impression.

404 Brower, *Structure*, *supra* note 349, at 66–68; Franck, *supra* note 312, at 1558–87.

405 *See* Chen, *supra* note 313, at 56 ("The actors in the [investment treaty arbitration] context were in fact motivated to use precedent to increase the predictability of the system and thereby promote its long-term legitimacy.").

406 Anthea Roberts has written a number of extremely thoughtful articles highlighting the role of states as the primary lawmakers for investment treaties and the need to enhance their formal role in the development of norms in the context of adjudications. *See generally* Roberts, *supra* note 313; Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353 (2015). Though not expressly cast in these terms, one can view those works as exploring the absence of, and calling for the introduction of, meaningful checks and balances on the work of tribunals. *See* George Kahale, III, *Rethinking ISDS*, 44 BROOK. J. INT'L L. 11, 47 n.77 (2018) ("At some point, starting with a clean slate based on a well-defined set of legal principles, a new ISDS might emerge, with all

anticipated structural constraints relating to the frequency and scope of investment arbitration practice,[407] the only remaining check available for every investment treaty arbitration involved the limited remedy of set-aside proceedings, in which either a national court or a second tribunal could police awards for fundamental errors relating to consent, jurisdiction, procedural integrity, and public policy.[408] A provincial court in British Columbia used that opportunity to order partial set-aside of the *Metalclad* award on the (likely accurate) grounds that fair and equitable treatment did not incorporate any obligation of transparency.[409] However, the decision came under severe criticism as a thinly veiled effort by a national court to review the merits of an investment treaty award.[410] No other court has attempted a similar move in subsequent practice under NAFTA's investment chapter.

Concerned about the rise of imperial arbitrators and the relative absence of checks and balances, the three NAFTA Parties ultimately decided to hit tribunals with a swift, unexpected, and strategic "shot across the bow."[411] Without warning, on July 31, 2001, the three NAFTA Parties invoked a provision that authorized their trade ministers acting as the Free Trade Commission (FTC) to issue a binding interpretation of (but not an amendment to) the treaty's provision on fair and equitable treatment.[412] With

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the checks and balances of a credible legal system, but it is doubtful that such a system can be built upon the foundation of the current ISDS."); Guillermo J. Garcia Sanchez, *The Blurring of the Public/Private Distinction or the Collapse of a Category? The Story of Investment Arbitration*, 18 NEV. L.J. 489, 497 (2018) (describing a scholarly perspective in which "investment arbitration begins to look more like a system of public adjudication, losing the benefits of arbitration without fully integrating the checks and balances of a traditional judicial system").

407 *Compare supra* notes 312–16 and accompanying text.

408 ICSID Convention, *supra* note 275, art. 52(1)-(3); UNCITRAL, UNICTRAL Model Law on International Commercial Arbitration, art. 34(2) (2006), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf; BORN, *supra* note 252, at 443–44; DOLZER & SCHREUER, *supra* note 71, at 300–07.

409 *Metalclad* Judgment, supra note 355, at paras. 70–72; *see also Cargill* Award, *supra* note 334, at para. 294; *Feldman* Award, *supra* note 334, at para. 113; *Glamis Gold* Award, *supra* note 348, at paras. 568–82, 619–22; Kingsbury & Schill, *supra* note 397, at 22.

410 Attorney General of Canada v. Clayton, 2018 FC 436 at para. 165 (Fed. Ct. Can. May 2, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9696.pdf; Frédéric Bachand, *Recent Developments on Grounds for Annulment and Non-Enforcement of International Arbitral Awards in Canada: Report to the NAFTA 2022 Committee*, 13 SW. J. L. & TRADE AM. 107, 115 (2006); Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 482 (2002); Brower, *Empire Strikes Back*, *supra* note 275, at 66–69, 81; Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L 1381, 1411 (2003); Noah Rubins, *Judicial Review of Investment Arbitration Awards*, *in* NAFTA, INVESTMENT LAW AND ARBITRATION; PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 359, 379 (Todd Weiler ed., 2004); Todd Weiler, Metalclad v. Mexico: *A Play in Three Parts*, 2 J. WORLD INV. 685, 700 (2001).

411 Anderson*, supra* note 201, at 2955.

412 FREE TRADE Commission, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS, § B (2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp

respect to the fair and equitable treatment provision in NAFTA Article 1105, the FTC's Notes of Interpretation asserted the following three points:

> Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
> The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
> A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[413]

It should be evident that the FTC intended the Notes of Interpretation to influence the outcome of pending arbitrations by discrediting the *Metalclad*, *Pope & Talbot*, and *S.D. Myers* awards on the topic of fair and equitable treatment.[414] The move was effective. With few exceptions,[415] subsequent tribunals treated the action as a *bona fide* and binding interpretation,[416] even as applied to disputes already pending or under submission at the time of adoption.[417]

Following the FTC Notes, a new wave of NAFTA awards emerged with a distinctly different tone.[418] First, in 2003, the tribunal in *Loewen Group Inc. v. United States* expressed the view that arbitrators should not display

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[hereinafter FTC Notes of Interpretation (2001)]; Brower, *Empire Strikes Back*, *supra* note 275, at 56 n.71; Brower, FTC Notes, *supra* note 275, at 350, 353–54; *see also* NAFTA, *supra* note 314, at art. 2001 (establishing a Free Trade Commission (FTC) consisting of the trade ministers of the three NAFTA Parties); *id*. at art 1131(2) (stating that the FTC's interpretations of NAFTA provisions shall be binding on tribunals); *id*. at art. 2202 (stating that amendments and modifications come into force only after approval in accordance with the applicable legal procedures in each NAFTA Party).

413 FTC Notes of Interpretation (2001), *supra* note 412.

414 Brower, *supra* note 199, at 191; Brower, *FTC Notes*, *supra* note 275, at 354; Wisner, *supra* note 374, at 131; Carl-Sebastian Zoellner, Note, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT'L L. 579, 615 (2006).

415 *See infra* notes 429–30 and accompanying text.

416 DOLZER & SCHREUER, *supra* note 71, at 32; Brower, *FTC Notes*, *supra* note 275, at 355.

417 *See, e.g.*, *Methanex* Award, *supra* note 345, at part II, ch. H, para. 23; *Loewen* Award, *supra* note 338, at paras. 125–26, (June 26, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf; ADF Group v. United States, ICSID Case No. ARB(AF)/00/1, Award, paras. 175–86 (Jan. 9. 2003), https://www.italaw.com/sites/default/files/case-documents/ita0009.pdf; United Parcel Service of America, Inc. v. Canada, Award on Jurisdiction, para. 97 (Nov. 22, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0884.pdf; *Mondev* Award, *supra* note 388, at paras. 120–21.

418 Brower, *supra* note 199, at 191–92.

"too great a readiness to step from outside into the domestic arena" and to impose liability even for serious "local error[s]."[419] In other words, tribunals should feel reluctant to infringe on the customary prerogatives of host states and should apply investment treaties to provide relief only in extraordinary cases. Over the next two years, tribunals operationalized the principle in the specific contexts of indirect expropriation and fair and equitable treatment.

In the *Methanex* case, the tribunal ruled for the United States on all claims. In considering the investor's claim for indirect expropriation based on health and safety regulations, the tribunal stated as follows:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects . . . a foreign investor or investment is not deemed expropriatory . . . unless specific commitments had been given by the regulating government to the . . . foreign investor contemplating investment that the government would refrain from such regulation.[420]

Likewise, the tribunal in *Waste Management v. Mexico II* ruled for Mexico on all claims. In considering the investor's claim for denial of fair and equitable treatment, the tribunal articulated the relevant standard as follows:

> [T]he . . . standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, *grossly* unfair, unjust or idiosyncratic, is discriminatory *and* exposes the claimant to sectional or racial prejudice, or involves a lack of due process *leading to an outcome which offends judicial propriety*—as might be the case with a *manifest* failure of natural justice in judicial proceedings or a *complete* lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[421]

The heavy use of emphatic adjectives and conjunctions highlights the narrow and exceptional circumstances that expose states to liability.[422] It also serves to establish the consistency of the standard with traditional principles

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419 *Loewen* Award, *supra* note 338, at para. 242.

420 *Methanex* Award, *supra* note 345, at Part IV, ch. D, para. 7.

421 *Waste Mgmt. II* Award, *supra* note 332, at para. 98 (emphasis added).

422 *See Glamis Gold* Award, *supra* note 348, at para. 614 (regarding "the abundant and continued use of adjective modifiers throughout arbitral awards" as evidence of a "strict standard").

of state responsibility for injuries to aliens,[423] and to eliminate possibilities for second-guessing the normal operations of modern regulatory states.[424]

Several years later, the tribunal in *Glamis Gold v. United States* declared that the guarantee of "fair and equitable treatment" under NAFTA Article 1105 prohibits only the sort of "egregious," "outrageous" or "shocking" government acts condemned in *Neer v. Mexico*, which dates from the 1920s and has long been considered a classical statement of the minimum standard of treatment under customary international law.[425] The *Glamis Gold* tribunal went on to recognize that perceptions of what constitutes "egregious," "outrageous," and "shocking" government conduct had likely shifted and become less tolerant since the 1920s.[426] But the point is that the tribunal correctly shifted the focus away from second-guessing the normal operations of modern regulatory states and back to the intended task of policing exceptional failures of the nightwatchman and rule-of-law states. Although the *Glamis Gold* award remains unusually emphatic in tone and expression,[427] the fact is that NAFTA awards tending to second-guess the normal operation of modern regulatory states came to be a rare or non-existent phenomenon following the FTC's Notes of Interpretation.[428]

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423 *Id.*

424 *See* MCLACHLAN ET AL., *supra* note 201, at 314 (describing the *Waste Mgmt. II* award as a means "to distinguish a merely unfavourable or disappointing outcome of an administrative process from one that fails to meet a baseline of internationally acceptable state conduct").

425 *See Glamis Gold* Award, *supra* note 348, at paras. 612–16. That same year, another tribunal similarly interpreted the fair and equitable treatment standard under NAFTA's investment chapter. *See Cargill* Award, *supra* note 334, at para. 293. Not known as a critic of investment treaties, the late David Caron served on the *Glamis* and *Cargill* tribunals. Donald McRae, who penned the dissenting opinion in Clayton/Bilcon v. Canada, also sat on the tribunal in *Cargill*. *See infra* note 428 and accompanying text.

426 *See Glamis Gold* Award, *supra* note 348, at paras. 631, 616.

427 One observer has referred to the *Glamis* award as an "outlier." José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 36 n.73 (2009). Claimants and advocacy organizations, usually at opposite ends of the spectrum when it comes to investment treaties, have echoed this view. *See* Clayton/Bilcon v. Canada, Investor's Response to the Article 1128 Submission of the Non-Disputing Party at para. 72 (May 17, 2013), https://pcacases.com/web/sendAttach/2276; Lori Wallach & Ben Beachy, Occidental v. Ecuador *Award Spotlight Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used "Egregious" Damages Logic to Hit Ecuador with $2.4 Billion Penalty in Largest Ever ICSID Award*, (Nov. 21, 2012), https://www.citizen.org/wp-content/uploads/oxy-v-ecuador-memo.pdf. *But see Cargill* Award, *supra* note 334, at para. 293 (closely tracking the holding in *Glamis*); *Lion* Award, *supra* note 334, at para. 397 (also requiring evidence of "egregious" procedural conduct that "shocks" the sense of judicial propriety).

428 *See Merrill & Ring* Award, *supra* note 346, at para. 200 (citing the *Glamis* award as evidence that NAFTA jurisprudence had stiffened since the FTC issued its Notes of Interpretation). Following the Notes of Interpretation, only the award in *Clayton/Bilcon v. Canada* arguably involves second-guessing of regulatory decisions relating to surface mining, environmental protection, and the preservation of community core values. *See* Clayton/Bilcon v. Canada, Dissenting Opinion of Professor Donald McRae at paras. 2, 30–31, 34–37, 40, 43–51 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf (asserting that the tribunal found a denial of fair and equitable treatment based

Although the FTC's action proved to be effective, the gambit was controversial and politically costly. In the view of many observers, and even some tribunals, the Notes of Interpretation probably constituted an unauthorized amendment of NAFTA.[429] In fact, even those tribunals that purported to apply the Notes of Interpretation actually ignored them to the extent that they purported to exclude consideration of general principles of law as a source for determining the scope of fair and equitable treatment.[430] Others criticized the NAFTA Parties' heavy-handed effort to alter the outcome of pending matters brought against them.[431] In any event, the episode was distasteful and has never been attempted a second time.[432]

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on an arguable breach of Canadian law and warning that this would lead to second-guessing the weight that regulators assign to environmental and community values).

429 *Merrill & Ring* Award, *supra* note 346, at para. 192; *Pope & Talbot* Award in Respect of Damages, *supra* note 338, at para. 47; Methanex Corp. v. United States, Second Opinion of Professor Sir Robert Jennings, Q.C. at 1, 4 (Sept. 6, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0983.pdf; REDFERN & HUNTER, *supra* note 44, at 493; Bjorklund, *supra* note 314, at 269 n.16; Brower, *FTC Notes*, *supra* note 275, at 348, 355; Roberts, *supra* note 313, at 180.

430 Brower, *FTC Notes*, *supra* note 275, at 349, 362.

431 *Pope & Talbot* Award in Respect of Damages, *supra* note 339, at paras. 13, 50; *Methanex*, Second Opinion of Professor Sir Robert Jennings, Q.C., *supra* note 429, at 4–5; DOLZER & SCHREUER, *supra* note 71, at 32–33; Brower, *FTC Notes*, *supra* note 275, at 354–55; Roberts, *supra* note 313, at 180, 217.

432 *See* Poulsen & Gertz, *supra* note 308, at 6 (explaining that "in the NAFTA context the parties only managed to proceed with one substantive note of interpretation despite wide-ranging agreement across a range of issues"). In October 2003, the FTC issued three "statements" relating to the recommended format for notices of intent to submit claims to arbitration, the recommended format for requesting leave to file *amicus curiae* submissions, and the intent of Canada and the United States to support open hearings. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, NAFTA COMMISSION DOCUMENTS, https://ustr.gov/archive/Trade_Agreements/Regional/NAFTA/NAFTA_Commission/Section_Index.html ; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, STATEMENT OF THE FREE TRADE COMMISSION ON NON-DISPUTING PARTY Participation, https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file45_3600.pdf; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, STATEMENT OF THE FREE TRADE COMMISSION ON NOTICES OF INTENT TO SUBMIT A CLAIM TO ARBITRATION, https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file212_3601.pdf; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE , STATEMENT ON OPEN HEARINGS IN NAFTA CHAPTER ELEVEN ARBITRATION, https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf; Howard Mann, *The Free Trade Commission Statements of October 7, 2003, on NAFTA's Chapter 11: Never-Never Land or Real Progress*?, IISD 1, 3 (2003), https://www.iisd.org/system/files/publications/trade_ftc_comment_oct03.pdf. The "statements" did not purport to constitute "interpretations," and could not be "interpretations," inasmuch as they addressed issues not covered by any NAFTA provision, and therefore have the force of recommendations. Mann, *supra*; *see also* VanDuzer, *supra* note 349, at 709.

C. BITS and the Entrenchment of Imperial Arbitrators

After the initial cluster of NAFTA arbitrations revealed the ways that investors could challenge public regulation, and the legal standards that tribunals might be persuaded to adopt,[433] the number of new investment treaty claims exploded from less than 20 in 2001, to more than 40 new claims in 2004, to more than 50 in 2011, to nearly 70 in 2013, and to a record high of more than 80 in 2015 alone.[434] The cumulative number of arbitrations rose from zero to well over 1,000 in the space of roughly 30 years.[435] As explained below, the development of investment treaty claims followed many of the patterns observed in early NAFTA cases, though with more emphatic results. Foreign investors used treaty claims to challenge regulatory measures, though in a wider range of contexts. Tribunals rendered decisions that suggested enthusiasm for second-guessing the normal operations of modern regulatory states according to standards that often would be impossible to satisfy. A de facto system of precedent continued to emerge, though it became increasingly sticky. Critics, supporters, and reformers all began to describe investment treaty arbitration as a form of "global administrative law," in which arbitrators had the final say on public regulation in sensitive areas without meaningful checks or balances. Although it took more than a decade, these developments reached a crisis point after investors attempted to second-guess the decisions of developed states to control tobacco and to phase out nuclear power.

When one turns from the early NAFTA cases to the broader universe of investment treaty claims since the early 2000s, one encounters familiar themes in the genre of regulatory disputes. These include claims relating to permits for hazardous waste facilities,[436] establishment of ecological

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433 *See* Scott Sinclair, *The* Rise *and Demise of NAFTA Chapter 11,* POLICY ALTERNATIVES, at 12 (April 2021), https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2021/04/The_Rise_and_Demise_of_NAFTA_Chapter_11.pdf (describing the impact of NAFTA Chapter 11 on the broader universe of investment treaty claims, "which skyrocketed after investors started winning their suits," in part because they "demonstrated that cases challenging virtually any government measure could be fought and won").

434 UNCTAD, *Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019*, IIA ISSUES NOTE, July 2020, at 1, fig. 1.

435 *Id.*

436 Abengoa S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award (April 18, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3187.pdf; Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf [hereinafter *Tecmed* Award]. *The Abengoa* award appears only in Spanish, but there are English-language summaries of the claim. *See* Fernando Cabrera Diaz, *Spanish Firms Launch ICSID Dispute Against Mexico over Stalled Toxic Waste Disposal Project*, INV. TREATY NEWS (Jan. 13, 2010),

preserves,[437] restrictions on mining activities for environmental reasons,[438] and regulatory action aimed, at least in part, at cultural preservation.[439] With the passage of time, new themes emerged, including challenges of measures relating to affirmative action,[440] minimum-wage requirements,[441] fines and tariff limitations directed at distributors of contaminated water supplies,[442] restrictions on water exports,[443] failure to authorize electricity rate increases and to control rampant electricity theft by impoverished ratepayers,[444] and changes to privatization programs involving key players in sensitive industries such as insurance and rail transport.[445] Prescient observers predicted that investors would eventually challenge measures designed to mitigate climate change.[446]

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https://www.iisd.org/itn/en/2010/01/12/spanish-firms-launch-icsid-dispute-against-mexico-over-stalled-toxic-waste-disposal-project/.

437 Unglaube v. Republic of Costa Rica, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award (May 16, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1052.pdf.

438 Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction (Dec. 4, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9384.pdf; *Clayton/Bilcon* Award on Jurisdiction and Liability, *supra* note 348; Eco Oro Minerals Corp. v. Republic of Colom., Request for Arbitration (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw9443.pdf; Gabriel Resources Ltd. v. Romania, ICSID Case No. Arb/15/31, Notice of Arbitration, paras. 3–6, 28–29 (July 21, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw8540.pdf.

439 *Clayton/Bilcon* Award on Jurisdiction and Liability, *supra* note 348; Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf; Jerrod Hepburn, *Croatia Faces New Claim at ICSID by Elitech B.V. and Razvoj Golf DOO over Golf Resort Development*, INV. ARB. REP. (Sept. 7, 2017), https://www-iareporter-com.proxy.lib.wayne.edu/articles/croatia-faces-new-claim-at-icsid-over-golf-resort-development/.

440 Foresti v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf; Weghmann & Hall, *supra* note 279, at 3.

441 Luke Eric Peterson, *French Company Veolia Launches Claim Against Egypt over Terminated Waste Contract and Labor Wage Stabilization Promises*, INV. ARB. REP. (June 27, 2012), https://www-iareporter-com.proxy.lib.wayne.edu/articles/french-company-veolia-launches-claim-against-egypt-over-terminated-waste-contract-and-labor-wage-stabilization-promises.

442 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf.

443 Spółdzielnia Pracy Muszynianka v. Slovak Republic, PCA Case No. 2017-08, Award (Oct. 7, 2020), https://jusmundi.com/en/document/decision/en-spoldzielnia-pracy-muszynianka-v-slovak-republic-none-currently-available-friday-1st-january-2016.

444 TCW Group, Inc. v. Dom. Rep., Amended Notice of Arbitration and Statement of Claim (June 17, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0836.pdf.

445 Eureko B.V. v. Republic of Pol., Partial Award (Aug. 19, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf; R.R. Dev. Corp. v. Republic of Guat., ICSID Case No. ARB/07/23, Award (June 29, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1051.pdf; *see also* Weghmann & Hall, *supra* note 279, at 1 (discussing the use of investment treaty claims to prevent the reversal of privatizations).

Mirroring the experience of early NAFTA cases, tribunals rendered awards that included a substantial degree of lawmaking. As under NAFTA, tribunals had to decide whether to consider the regulatory character of government activities or only the magnitude of their effects when determining whether they rose to the level of indirect expropriations. Increasingly, tribunals reached the conclusion that indirect expropriation only required consideration of effects.[447] However, in a break for host states, tribunals rarely concluded that the effects of regulatory interference rose to the level of indirect takings.[448]

With respect to fair and equitable treatment, the transition towards lawmaking and the potential for liability in regulatory disputes became more

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446 *See* MILES, *supra* note 9, at 187; *see also* Sinclair, *supra* note 433, at 24; Stuart Braun, *Multi-Billion Euro Lawsuits Derail Climate Action*, DEUTSCHE WELLE (Apr. 19, 2021), https://www.dw.com/en/energy-charter-treaty-ect-coal-fossil-fuels-climate-environment-uniper-rwe/a-57221166; Poulsen & Gertz, *supra* note 308, at 2; Weghmann & Hall, *supra* note 279, at 3.

447 *See, e.g.*, *Tecmed* Award, *supra* note 436, at para. 121 ("[W]e find no principle stating that regulatory . . . actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society . . . —such as environmental protection—, particularly if the negative economic impact of such actions . . . is sufficient to neutralize in full the value, or economic or commercial use of its investment . . . ."); *Azurix* Award, *supra* note 442, at para. 310 ("For the tribunal, the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim."); *see also* DOLZER & SCHREUER, *supra* note 71, at 112 ("The effect of the measure upon the economic benefit and value as well as upon the control over the investment is the key question when it comes to deciding whether an indirect expropriation has taken place."); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 262 (2015) ("Many tribunals have adopted a 'sole effects' test, looking only at the burden imposed by regulation.").

448 For example, in Azurix v. Argentina, the tribunal first endorsed the "sole effects" test, but then concluded that the regulatory measures did not involve the level of interference with ownership and control required to constitute an indirect expropriation. *Azurix* Award, *supra* note 442, at para. 322. Other tribunals have emphasized the extremely high threshold for establishing indirect expropriations based on economic effects or loss of control. *See, e.g.*, Burlington Res., Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, para. 399 (Dec. 14, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf (emphasizing that it is not sufficient to establish a reduction in profits and that "[i]t must be shown that the investment's continuing capacity to generate a return has been virtually extinguished"); Mamidoil Jetoil Greek Petrol. Prod. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, para. 566 (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf (quoting *Santa Elena* Award, *supra* note 352, at para. 76) (holding that the "decisive criterion for most tribunals . . . is not the fact of having incurred a damage and/or the loss of value as such, but the finding . . . *'that the owner has truly lost all the attributes of ownership*'").

One distinguished tribunal recognized the existence of a *jurisprudence constante* for the proposition that indirect expropriations require proof of the "substantial, radical, severe, devastating or fundamental deprivation of [an investor's] rights or their virtual annihilation and effective neutralization." Enkev Beheer B.V. v. Republic of Pol., PCA Case 2013-01, First Partial Award, para. 344 (Apr. 29, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw6208.pdf; *see* Grand River Enters. Six Nations, Ltd, v. United States, Award, para. 151 (Jan. 12, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0384.pdf ("ICISD tribunals have rejected expropriation claims involving significant diminution of the value of a claimant's property where the claimant nevertheless retained ownership and control.").

pronounced. In *Tecnicas Medioambientales Tecmed, S.A. v. Mexico (Tecmed)*, the tribunal introduced the proposition that fair and equitable treatment requires host states to uphold the legitimate expectations of investors at the time they made their investments. In so doing, the tribunal opined as follows:

> The foreign investor expects the host State to act in a *consistent* manner, *free from ambiguity* and *totally transparently* in its relations with the foreign investor, so that it may know beforehand *any and all* rules and regulations that will govern its investments, *as well as the goals* of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[449]

Whereas the *Metalclad* tribunal diligently used treaty interpretation to justify its incorporation of transparency into NAFTA's expression of fair and equitable treatment,[450] the *Tecmed* tribunal did not. Nor did the *Tecmed* tribunal cite any authority, state practice, or empirical data to justify its views regarding the definition of legitimate expectations and its incorporation into the requirements of fair and equitable treatment.[451] The tribunal simply invented these propositions.[452] One can hardly imagine a more obvious example of arbitral lawmaking, or a clearer invitation to second-guess the normal operations of modern regulatory states.[453]

In addition to lacking any foundation, the *Tecmed* award has drawn academic criticism for establishing an aspirational standard unlikely to be

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449 *Tecmed* Award, *supra* note 436, at para. 154 (emphasis added).

450 *Metalclad* Award, *supra* note 334, at paras. 70–71, 74–76; Brower, *supra* note 410, at 468–70.

451 *See* Douglas, *supra* note 403, at 28 (observing that "*no* authority was cited by the tribunal in support of its *obiter dictum*"); *see also* Chen, *supra* note 313, at 87 (acknowledging that "commentators have shown flaws in *Tecmed's* thin reasoning").

452 Christopher Campbell, *House of Cards: The Relevance of Legitimate Expectations Under Fair and Equitable Treatment Provisions in Investment Treaty Law*, 30 J. INT'L ARB. 361, 368–69, 378 (2013); *see* Chen, *supra* note 313, at 87.

453 *See* Chen, *supra* note 313, at 87 (discussing the tendency of the *Tecmed* standard to open the door to claims against states for good-faith regulatory changes not involving any abusive or exploitative behavior on the part of states); *see also* James Crawford, *Foreword* to ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS xxi (2009) ("Ad hoc tribunals have produced an erratic pattern of decisions, with reasoning often impressionistic and displaying a certain disregard for state regulatory prerogatives."). One cannot overstate the importance of setting the fair and equitable treatment standard on this trajectory, given that it constitutes the standard most frequently invoked by claimants and most frequently applied by tribunals when imposing liability on host states. UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures*, IIA ISSUES NOTE, at 5 (Nov. 2017), https://unctad.org/system/files/official-document/diaepcb2017d7_en.pdf; Chen, *supra* note 313, at 85.

met across the range of functions performed by modern regulatory states.[454] Despite that criticism, and the occasional willingness of tribunals to consider the legitimate expectations of *governments* as an element of fair and equitable treatment,[455] the *Tecmed* standard quickly became the leading elaboration of fair and equitable treatment.[456] Over the years, observers regularly affirmed that *Tecmed* remains the award most often cited for the substance of fair and equitable treatment.[457] Empirical data supports that proposition. As of 2016, lawyers at Allen & Overy reported that the *Tecmed* award had been cited by other tribunals a total of 101 times, placing it second only to *Mondev Int'l Ltd. v. United States* (with 103 citations) as the most cited investment treaty award of all time.[458] Four years later, a doctoral dissertation at Cambridge University confirmed that "*Mondev* and *Tecmed* . . . have remained [the most cited precedents] up to this day: when looking at the most popular precedent each quarter of a year, one of these two awards top the ranking of most-cited precedents 75% of the time."[459]

As should be evident from statements regarding the popularity of *Tecmed* and other awards, the de facto system of precedent became entrenched in BIT practice.[460] Even in awards that warned against

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454 *See* BROWNLIE'S PRINCIPLES, *supra* note 11, at 615; MCLACHLAN ET AL., *supra* note 201, at 315; Douglas, *supra* note 403, at 28.

455 *See*, *e.g.*, Saluka Inv. B.V. v. Czech Rep., Partial Award, paras. 305–06 (Mar. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

456 Douglas, *supra* note 403, at 27–28; Schill, *supra* note 350, at 1102.

457 DUGAN ET AL., *supra* note 146, at 510; Ian A. Laird & Borzu Sabahi, *Trends in International Investment Disputes: 2007 in Review*, 2008-2009 Y.B. INT'L INV. L. & POL'Y 79, 91; Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 14 (2014); Arato, *supra* note 447, at 265; Lucy Ferguson Reed & Simon Consedine, *Fair and Equitable Treatment: Legitimate Expectations and Transparency*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS AT ICSID 283, 288, 292 (2015); John F. Coyle & Jason Webb Yackee, *Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts*, 49 ARIZ. ST. L.J. 61, 90 n.132 (2017); *see* Chen, *supra* note 313, at 86 (describing the *Tecmed* award as "the leading statement on the meaning of [fair and equitable treatment]"); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 357, 371 (2007) (emphasizing the influence of *Tecmed* in fleshing out the contours of fair and equitable treatment).

458 Rishab Gupta & Katrina Limond, *Who Is the Most Influential Arbitrator in the World?*, GLOBAL ARB. REV., Jan. 14, 2016.

459 Damien Charlotin, *"Authorities" in International Dispute Settlement: A Data Analysis* 148–49 (June 2020) (Ph.D. dissertation, Corpus Christi College), https://www.repository.cam.ac.uk/bitstream/handle/1810/312324/DamienCharlotin_Thesis%20-%20Final.pdf?sequence=1.

460 *See* Kaufmann-Kohler, *supra* note 457, at 357 n.2 (referring to the "exponential growth of citations to other cases in investment awards since 2001"); *see also* Chen, *supra* note 313, at 55–56 (describing the citation of past decisions as "routine" and the use of precedent as "entrenched" in investment treaty arbitration). By 2006, Christoph Schreuer opined that "tribunals in investment treaty disputes . . . rely on previous decisions of other tribunals whenever they can." Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 TRANSNAT'L DISP. MGMT. 14 (Apr. 2006).

overreliance on previous awards, some tribunals devoted pages and pages to consideration of previous awards on contested topics.[461] In so doing, they often left the impression they framed discussion in a manner calculated to leave their mark on the development of international investment law.[462] In awards and academic writing, a leading arbitrator recognized the absence of any formal system of precedent, but then called for tribunals to "adopt solutions established in a series of consistent cases" as part of a broader "duty . . . to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[463] Although the source of the duty may have been perplexing,[464] and the goal of doctrinal harmony may have seemed quixotic for hundreds of tribunals formed under hundreds of treaties,[465] the message seems clear: the person described as the world's "most influential arbitrator" actively sought to increase the influence of awards by introducing an obligation to consider previous awards and to

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461 *Compare* Renta 4 SVSA v. Russian Fed'n, SCC Case No. Arbitration V 024/2007, Award on Preliminary Objections, para. 91 (Mar. 20, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0714.pdf (warning against overreliance on statements in previous awards as precedent), *with id.* paras. 22–25, 34–35, 47–49, 57, 79–80, 89, 95–101 (extensively discussing previous decisions of tribunals, international courts and domestic courts); *see* Weeramantry, *supra* note 399, at 113–14 (2010) (recounting with irony an award in which the tribunal asserted the absence of any formal system of precedent and immediately cited a previous decision to support that proposition).

462 *See* Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today?,* 28 ARB. INT'L 577, 588 (2012) (lamenting the tendency of "esteemed" and "eminent" colleagues to focus on the development of international law in framing awards and to "write treatises on international law into their awards though their relevance for the decision reached is hard to understand").

A few prominent arbitrators have eschewed and publicly warned against the practice of writing awards with the purpose of developing international law. *See id.* at 588 ("[W]e should be very much aware that arbitral tribunals received their mandate . . . from the parties . . . which appoint them for the case at hand. And that mandate is to decide on the relief sought, and to consider all the factual and legal issues relevant for that decision . . . but . . . no more."); Reisman, *supra* note 399, at 132 (arguing for a purely case-specific approach to deciding cases and eschewing any approach that introduces a "modicum" of "systems-implication" concerns or even a "greater contextual awareness").

463 Saipem S.p.A. v. People's Republic of Bangl., ICSID Case No. ARB/05/7, Award, para. 90 (June 30, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0734.pdf; Kaufmann-Kohler, *supra* note 457, at 377; *see* Noble Energy, Inc. v. Republic of Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction, para. 50 (Mar. 5, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0563.pdf.

464 While generally referring to the "legitimate expectations of the community of States and investors," the *Sapiem* award engages in no rigorous effort to identify the source of the purported duty or the specific entities to which the duty is owed. *See Saipem* Award, *supra* note 463, at para. 90. In fact, the purported duty seems difficult to reconcile with the actual mandate textually imposed on tribunals by treaty: to resolve a specific dispute and nothing more. *See* Patrick M. Norton, *The Use of Precedents in Investment Treaty Arbitration Awards*, 25 AM. REV. INT'L ARB. 167, 176 (2014); *see also* Gill, *supra* note 314, at 88; Reed, *supra* note 314, at 99.

465 *See* Roberts, *supra* note 313, at 189 n.44 (observing that the ad hoc character of investor-state arbitration, and the bilateral nature of most investment treaties makes the field particularly ill-suited to any system of precedent); *see also* Bjorklund, *supra* note 314, at 265; Chen, *supra* note 313, at 55.

adhere to the ones that had already gained some purchase in the field.[466] It should be obvious that, this so-called duty to follow precedent simultaneously "camouflages lawmaking while enabling it."[467]

The entrenchment of a de facto system of precedent grew to concerning proportions. One prominent observer criticized the formation of a "closed-circuit feedback loop," in which the arbitrators who made law listened chiefly or exclusively to other arbitrators.[468] At times, they appeared to pay scant attention to treaty text, state practice, or the concordant submissions of states regarding the proper interpretation of treaty provisions.[469] In effect, they were operating without meaningful checks or balances in their development of the law.[470]

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466 *See* Gupta & Limond, *supra* note 458 (declaring Kaufmann-Kohler to be "the most influential arbitrator in the field of investment treaty arbitration); *see also Gabrielle Kaufmann-Kohler*, LEVY KAUFMANN-KOHLER, https://lk-k.com/team/gabrielle-kaufmann-kohler-lawyer/ (last visited June 30, 2022) (advertising the fact that a 2016 study described Kaufmann-Kohler as "the most influential arbitrator in the world").

467 *See* Alec Stone Sweet, *The European Court and Integration*, *in* THE JUDICIAL CONSTRUCTION OF EUROPE 1, 10 (Alec Stone Sweet ed., 2004) (describing the function of precedent in court systems); *see also* Zachary Douglas, *Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?*, 25 ICSID REV.-FOREIGN INV. L.J. 104, 110 (2010) (opining that the "incessant citation of past decisions" serves to "keep us all quiet while someone else was doing all the work"); Schill, *supra* note 350, at 1102 ("What is crucial in order to understand arbitral decision-making as an exercise of public authority and lawmaking is that subsequent tribunals increasingly do not critically examine earlier jurisprudence and its premises, but apply it as if it were binding.").

468 *See* Roberts, *supra* note 313, at 190. The same author described tribunal jurisprudence as a "house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular." *Id.* at 179; *see also* Weeramantry, *supra* note 399, at 115.

469 In *Railroad Dev. Corp. v. Republic of Guatemala*, the relevant treaty (the Central American Free Trade Agreement) defined fair and equitable treatment in relation to customary international law. *See RDC* Award, *supra* note 445, at para. 212. An annex required evidence of state practice as an element of customary international law. *Id.* Four of seven states parties to the CAFTA made submissions emphasizing the tribunal's obligation to define fair and equitable treatment in relation to state practice, and not the opinions of other tribunals applying other treaties. *Id.* paras. 159–61, 207–11.

In rendering its decision, however, the *Railroad Dev. Corp.* tribunal did not consider evidence of state practice, gave no weight to the submissions of the majority of states parties, and instead relied on the standards articulated in *Waste Management. v. Mexico II*, an arbitral award rendered under a different treaty (NAFTA). *Id.* paras. 212–19; Omar E. Garcia-Bolivar, Railroad Development Corporation v. Republic of Guatemala: *The First CAFTA Award on the Merits*, 28 ICSID REV.-FOR. INV. L.J. 27, 29–31 (2013); *see also* Aguas del Tunari, S.A. v. Republic of Bol., ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, para. 251 (Oct. 21, 2005), https://www.italaw.com/sites/default/files/case-documents/italaw10957_0.pdf (refusing to rely on the separate but concordant views of Bolivia and the Netherlands because "[t]he coincidence of several statements does not make them a joint statement" and "there was no intent that these statements be regarded as an agreement").

470 A small but important body of awards questions or criticizes the grandiose aspirations of tribunals to transform a decentralized patchwork of treaties and an ad hoc system of dispute settlement into an integrated system of international investment law. *See* Romak S.A. v. Republic of Uzb., PCA Case No. AA280, Award, para. 171 (Nov. 26, 2009), https://www.italaw.com/sites/default/files/case-

Summarizing and crystallizing many of the points made above, tribunals regularly engaged in a form of collective lawmaking. In so doing, they often developed standards that invited arbitral second-guessing of the normal operations of modern regulatory states. Given that shift, decisions increasingly affected regulatory measures adopted by developed states.[471] Understandably, critics, supporters, and reformers all came to describe investment treaty arbitration as a form of "global administrative law."[472] In performing that role, tribunals mostly listened to each other and operated without meaningful checks or balances. A small group of elite arbitrators dominated the field,[473] both in terms of the frequency of their appointments and the influence of their awards.[474] In effect, they had become imperial arbitrators, or the supreme authorities in administrative matters that often had fiscal significance for respondent states.[475]

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documents/ita0716.pdf ("Ultimately, the Arbitral Tribunal has not been entrusted . . .with a mission to ensure the coherence or development of 'arbitral jurisprudence.' [Its] mission is more mundane . . . : to resolve the present dispute . . . in a reasoned and persuasive manner. . . ."); *Glamis Gold* Award, *supra* note 348, at para. 8 ("First, a tribunal should confine its decision to the issues presented by the dispute before it . . . . The Tribunal observes that a few awards have made statements not required by the case before it. The Tribunal does not agree with this tendency . . . .").

471 *See* Shafruddin, *supra* note 4, at 444 (noting that investment treaty claims against developed states used to be rare, but that the proportion of new cases brought against developed states grew to 34% in 2012, 47% in 2013, 40% in 2014 and 2015, and 29% in 2016 and 2017).

472 Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 122, 148–49 (2006); Kingsbury & Schill, *supra* note 397, at 5–7, 64, 68; MONTT, *supra* note 16, at xi, 12, 16, 135.

Van Harten has been described as "one of the most strident critics of investment arbitration." Catherine Rogers, *A Window into the Soul of International Arbitration: Arbitrator Selection, Transparency and Stakeholder Interests*, 46 VICT. U. WELLINGTON L. REV. 1179, 1181 (2015). Schill has been described as "the foremost proponent of viewing the network of international investment agreements as leading towards a genuine [and desirable] multilateral system." Diane Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 FLA. J. INT'L L. 51, 84 n.121 (2014). Though clearly distinguished from the critics of investment arbitration, Montt has been described as using the lens of global administrative law in an effort to "recalibrate" investment treaty arbitration. Nicolás M. Perrone, *The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?*, 23 IND. J. GLOBAL LEGAL STUD. 603, 611 & n.41 (2016).

473 Chen, *supra* note 313, at 55 n.50 (quoting ALEC SWEET STONE & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 72 (2017)).

474 *See* PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE 38 (2012) (asserting that just 15 arbitrators had decided 55% of all investment treaty claims, 64% of investment treaty claims with more than $100 million at stake, and 75% of investment treaty claims with more than $4 billion at stake); Kapeliuk, *supra* note 275, at 73 (identifying a group of 26 elite arbitrators, at least one of whom was appointed to 105 tribunals in a data set of 131 investment treaty tribunals); Gupta & Limond, *supra* note 458, at 5–9 (discussing the frequency of appointments, frequency of citations, and overall influence of a handful of elite investment treaty arbitrators).

475 According to one study, investors have received more than $100 million in over 50 awards and more than $1 billion in eight awards. Jonathan Bonnitcha & Sarah Brewin, *Compensation Under Investment Treaties: What Are the Problems and What Can Be Done?*, IISD Policy Brief, at 1 (Dec. 2020),

During the early 2000s, governments expressed concerns about investment treaties, though on a limited scale and with limited effects. In 2004, Canada and the United States, two capital-exporting states that had defended significant numbers of investment treaty claims, revised their model investment treaties.[476] Longer and more detailed treaty provisions aimed to limit the discretion and lawmaking authority of tribunals, while preserving somewhat more regulatory space for states.[477] Strictly speaking, those models would only affect the trajectory of future treaty practice and would not alter the substance of investment treaties already in place.[478] However, it is possible that Canada and the United States hoped that new models and new treaties would come to influence the "ordinary meaning" of concepts like indirect expropriation and fair and equitable treatment for purposes of treaty interpretation.[479] At the time, Western European states had little experience in defending investment treaty claims and, therefore, little interest in reforms.[480]

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https://www.iisd.org/system/files/2020-12/compensation-investment-treaties-en.pdf. The rolling 10-year average amount of compensation increased sharply in the 2010s from roughly $50 million to over $250 million by 2020. *Id.* at 2. In a single recent case against Pakistan the tribunal awarded over $4 billion plus compound interest, an amount roughly equal to the country's IMF bailout package for the same year. *Id.* at 3; Poulsen & Gertz, *supra* note 308, at 2.

476 Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myths Versus Reality*, 42 YALE J. INT'L L. 1, 40–41, 44 (2017); Brower, *supra* note 199, at 192–94; Amnon Lehavi, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 451 (2010).

477 Brower, *supra* note 199, at 192–94; *see* Lehavi, *supra* note 476, at 451; Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 757–60 (2008); Kate M. Supnik, Note, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 369–71 (2009).

478 Poulsen & Gertz, *supra* note 308, at 1–2.

479 *See* Vienna Convention on the Law of Treaties, art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S 331 (requiring interpretation of treaties in good faith in accordance with the ordinary meaning to be given the terms). The 2004 U.S. Model BIT includes annexes that define customary international law and the concept of indirect expropriation in relatively narrow ways. U.S. Model BIT (2004), Annexes A & B, https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf. Likewise, the 2004 Canadian Model BIT includes an annex that restrictively defines indirect expropriation. Canadian Model BIT (2004), Annex B.13(1), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download. In both cases, the annexes "confirm" that the restrictive texts reflect the Parties' "shared understanding" of the relevant terms. U.S. Model BIT (2004), Annexes A & B, *supra*; Canadian Model BIT (2004), Annex B.13(1), *supra*. This format arguably emphasizes that the parties sought not to alter the substance of treaty provisions, but to clarify their mutual understandings of the relevant terms. In this way, they reflect state practice providing some evidence regarding the ordinary meaning of relevant terms. *See* C. Ignacio Suarez Anzorena et al., *International Commercial Dispute Resolution*, 40 INT'L LAW. 251, 256–57 n.36 (2006) (treating Annex B of the 2004 U.S. Model BIT as establishing the "ordinary meaning" of indirect expropriation).

480 *See* Alschner, *supra* note 476, at 38 (observing that "few non-experts knew about investment arbitration in Europe" long after NAFTA claims against Canada and the United States began to stir public controversy in those countries); *id.* at 45–46 (mentioning that two investment treaty arbitrations were brought against the German state in the 2000s, discussing Germany's failure to reform its investment

Respondent states in other parts of the world pushed back in different ways. Starting in 2008, Venezuela denounced one BIT, and Ecuador denounced nine.[481] Ecuador denounced another seventeen investment treaties between 2011 and 2017, Indonesia terminated twenty-five investment treaties between 2014 and 2017, and India sent notifications of termination regarding investment treaties to sixty-one states.[482] Likewise, South Africa terminated investment treaties with Western states,[483] and Russia withdrew from the Energy Charter Treaty,[484] a sectoral investment treaty that had served as the vehicle for massive claims against Russia relating to its dismemberment of the Yukos oil company.[485] While treaty terminations can send sharp political messages,[486] lengthy survival clauses meant that the denunciations had few legal effects in the short to medium term.[487]

As another avenue of reform, one prominent observer called for states to make greater use of agreed interpretations, and for tribunals to give them appropriate weight.[488] However, the practice never gained traction[489] and was unlikely to do so except in the unusual situations where the interests of

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treaty practice as a result of those experiences, and attributing German inaction to the fact that the proceedings were conducted in secret, with the result that the "claims were almost completely unknown outside the Ministry of Economics").

481 Sergey Ripinsky, *Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve*, INV. TREATY NEWS, Apr. 13, 2012, https://www.iisd.org/itn/en/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/ (Venezuela); Nathalie Bernasconi-Osterwalder et al., *Terminating a Bilateral Investment Treaty,* IISD Best Practices Series, at 7 (Mar. 2020), https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf.

482 *Id.* at 7–9.

483 Judge Charles N. Brower & Jawad Ahmad*, Why the "Demolition Derby" That Seeks to Destroy Investor-State Arbitration?*, 91 S. CAL. L. REV. 1139, 1151 (2018).

484 Lena U. Serhan, Note, *Arbitration Unbound: How the Yukos Oil Decision Yields Uncertainty for International Investment Arbitration*, 95 TEX. L. REV. 101, 110–11 (2016).

485 *Id.* at 107–10; *see* Christopher S. Gibson, Case Comment, *Yukos Universal Ltd. (Isle of Man) v Russian Federation: A Classic Case of Indirect Expropriation,* 30 ICSID REV.-FOR. INV. L.J. 303 (2015).

486 *Cf.* Ivana Damjanovic & Ottavio Quirico, *Intra-EU Investment Dispute Settlement Under the Energy Charter Treaty in Light of Achmea and Vattenfall: A Matter of Priority*, 26 COLUM. J. EUR. L. 102, 136 (2019) (observing, in a different context, that the assurance that states no longer feel bound by their obligations under investment treaties "sends a strong political message to investors").

487 *See* Bernasconi-Osterwalder et al., *supra* note 481, at 4 & n.9 (indicating that 56% of BITs have 10-year survival clauses, 20% of BITs have 15-year survival clauses, and 15% of BITs have 20-year survival clauses); Allison Giest, Comment, *Interpreting Public Interest Provisions in International Investment Treaties*, 18 CHI. J. INT'L L. 321, 333 (2017) (explaining that "most BITs include 'survival clauses' where matters can continue to be arbitrated for ten to twenty years if they occurred while the treaty was effective"); *see also* Poulsen & Gertz, *supra* note 308, at 4 (explaining that "'survival' clauses keep protections in place for years and sometimes decades after termination, which means this option has limited near-term effect in shielding states from controversial claims").

488 Roberts, *supra* note 313, at 181, 194.

489 *See* Poulsen & Gertz, *supra* note 308, at 6.

the relevant states coincided as likely respondents in a substantial number of claims under the same treaty.[490] As suggested by the foregoing discussion, a "backlash" had begun to grow against imperial arbitrators,[491] but states had few effective tools to manage that phenomenon. As a result, imperial arbitrators continued their ascent until things reached a crisis point.

The reckoning for investment treaty arbitration began to arrive in the 2010s as a result of claims involving sensitive regulations brought mostly against capital-exporting states. In 2010, Phillip Morris brought an investment treaty claim against Uruguay. According to Philip Morris, measures requiring the use of graphic "pictograms," and measures prohibiting the use of phrases like "light," on tobacco packaging amounted to an indirect expropriation and a denial of fair and equitable treatment.[492] In 2011, Philip Morris brought a similar claim against Australia.[493] The optics of a foreign multinational corporation using investment treaties to fight tobacco control provoked outrage,[494] particularly because Philip Morris initially did not just request damages, but also sought injunctive relief.[495] For a time, Australia became the first developed Western state to declare that it would no longer consent to direct rights of action for investors under its investment treaties.[496] Meanwhile, the prospect of massive claims

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490 *See* Roberts, *supra* note 313, at 196, 224.

491 *See generally* MICHAEL WAIBEL ET AL., THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (2010); Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 EUR. J. INT'L L. 551 (2018); Asha Kaushal, Note, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491 (2009).

492 Philip Morris Brands Sarl v. Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, paras. 77(b)–(c), 82–85 (Feb. 19, 2010); *see* MILES, *supra* note 9, at 184; *Philip Morris Sues Uruguay over Graphic Cigarette Packaging*, NPR (Sept. 15, 2014, 4:35 AM), https://www.npr.org/sections/goatsandsoda/2014/09/15/345540221/philip-morris-sues-uruguay-over-graphic-cigarette-packaging.

493 Philip Morris Asia Ltd. v. Australia, Notice of Arbitration, paras. 1.5, 7.2(a)–(b), 7.3–7.8 (Nov. 21, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0665.pdf; *see* MILES, *supra* note 9, at 185.

494 Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 357 (2017).

495 Philip Morris Brands Sarl v. Uruguay, Request for Arbitration, *supra* note 492, paras. 88, 91–92; Philip Morris Asia Ltd. v. Australia, Notice of Arbitration, *supra* note 493, paras. 1.7, 8.2; *see* MILES, *supra* note 9, at 184; Stephanie Hartmann, *When Two International Regimes Collide: An Analysis of the Tobacco Plain Packaging Disputes and Why Overlapping Jurisdiction of the WTO and Investment Tribunals Does Not Result in Convergence of Norms*, 21 UCLA J. INT'L L. & FOREIGN AFF. 204, 224–25 (2017); Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 391 (2014). Philip Morris later withdrew the request for injunctive relief. Korzun, *supra* note 494, at 381 n.117.

496 Shafruddin, *supra* note 4, at 459; *see* Anderson, *supra* note 201, at 2938; Korzun, *supra* note 494, at 357; Michael Nolan, *Challenges to the Credibility of the Investor-State Arbitration System*, 5 AM. U. BUS. L. REV. 429, 431–32 (2016). When another government came into office, Australia changed its

discouraged the adoption of tobacco control measures in places like Africa,[497] and delayed the implementation of contemplated measures in places like Costa Rica,[498] New Zealand, [499] and Paraguay.[500] The *Philip Morris* arbitrations almost certainly drew the attention of regulators in Canada, Finland, France, the United Kingdom, and Turkey, where similar measures were under consideration.[501]

Almost contemporaneously with the *Philip Morris* cases, Swedish energy company Vattenfall hit Germany with a pair of claims that brought investment treaty arbitration to a crisis point. In 2009, Vattenfall filed an arbitration claim under the Energy Charter Treaty, alleging that German officials restricted the terms of water quality permits for a new coal-fired power plant in Hamburg due to political reasons and in violation of previous understandings, with the result that the facility could operate only at 45% of planned capacity (*Vattenfall I*).[502] Although Vattenfall sought roughly €1.4 billion in damages,[503] the arbitration initially stirred little public controversy in Germany,[504] in part because the claimant and the respondent agreed to handle the case in secrecy until the announcement of a settlement in August

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policy to allow consideration of investor-state arbitration on a case-by-case basis. Nolan, *supra*, at 432; Shafruddin, *supra* note 4, at 460.

497 *See* Emilie M. Hafner-Burton et al., *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 YALE J. INT'L L. 279, 300 (2017); Sabrina Tavernise, *Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws*, N.Y. TIMES (Dec. 13, 2013), https://nyti.ms/1dvsmav.

498 S*ee* Cecilia Olivet & Alberto Villareal, *Who Really Won the Legal Battle Between Philip Morris and Uruguay?*, GUARDIAN (July 28, 2016), https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts.

499 *See* Brook K. Baker & Katrina Geddes, *The Incredible Shrinking Victory:* Ely Lily v. Canada*, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS*, 49 LOY. U. CHI. L.J. 479, 503 n.135 (2017); Daniel Kalderimis & Kate Yesberg, *Investment Policy-Making in Its Broader Context*, 21 N.Z. BUS. L.Q. 253, 254 n.3 (2015); *The Twentieth Yearly Review of International Trademark Jurisprudence*, 103 TRADEMARK REP. 567, 692 (2013); Ashley Wagner, Note, *The Failure of Corporate Social Responsibility Provisions Within International Trade Agreements and Export Credit Agencies as a Solution*, 35 B.U. INT'L L.J. 195, 206 n.98 (2017); Olivet & Villareal, *supra* note 498.

500 Olivet & Villareal, *supra* note 498.

501 *See* MILES, *supra* note 9, at 185 & n.396 (describing the repercussions that the Australia dispute would have for these countries); *see also* Maupin, *supra* note 495, at 391; Nolan, *supra* note 496, at 430.

502 Vattenfall AB v. Germany (Vattenfall I), Request for Arbitration at paras. 15-40, 50-54 (Mar. 30, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0889.pdf; Nathalie Bernasconi, *Background Paper on* Vattenfall v. Germany *Arbitration* at 1–2 (July 2009), https://www.iisd.org/system/files/publications/background_vattenfall_vs_germany.pdf.

503 *Vattenfall I* Request for Arbitration, *supra* note 502, at para. 79(ii); Michelle C. Perez, *Trading Goods for Bad: Is Public Policy Undermined by Investor State Dispute Mechanisms?*, 49 U. MIAMI INTER-AM. L. REV. 132 (2018).

504 Stephan Schill, *A Question of Democracy: The German Debate on International Investment Law*, KLUWER ARBITRATION BLOG, Mar. 2, 2015, http://arbitrationblog.kluwerarbitration.com/2015/03/02/the-german-debate-on-investor-state-dispute-settlement/?print=print (observing that *Vattenfall I* did not have "significant political repercussions" in Germany).

2010.[505] According to the settlement, subsequently incorporated into an award on agreed terms,[506] Germany dropped the restrictive permitting terms.[507]

On the day that the tribunal dispatched the consent award in *Vattenfall I*,[508] a 9.0-magnitude earthquake shifted the Earth off its axis and triggered a tsunami that flooded the Fukushima nuclear reactor and caused a major disaster in Japan.[509] The reaction in Germany was swift. Roughly two weeks after the disaster, four German cities saw the largest anti-nuclear demonstrations in the country's history.[510] In Berlin, more than 100,000 protesters flooded streets, double the number the organizers expected.[511] The German government had already shut down the country's seven oldest reactors for safety checks.[512] Shortly thereafter, the German government decided to phase out all nuclear power by 2022[513] and ordered the immediate closure of two nuclear plants operated by Vattenfall affiliates.[514] On May 31, 2012, Vattenfall commenced a second arbitration against Germany under the Energy Charter Treaty (*Vattenfall II*).[515] In so doing, it did not challenge

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505 Alschner, *supra* note 476, at 46; *see also* Bernasconi, *supra* note 502, at 1 (observing that "the arbitration is proceeding entirely in secret, at the choice of the parties").

506 *Vattenfall I*, ICSID Case No. ARB/09/6, Award (Mar. 11, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0890.pdf.

507 Alexsia T. Chan & Beverly K. Crawford, *The Puzzle of Public Opposition to TTIP in Germany*, 19 BUS. & POL. 683, 699 (2017); Valentina Vadi, *Energy Security v. Public Health? Nuclear Energy in International Investment Law and Arbitration*, 47 GEO. J. INT'L L. 1069, 1131 (2016).

508 Perez, *supra* note 503, at 157.

509 *Fukushima Disaster: What Happened at the Nuclear Plant?,* BBC NEWS, Mar. 10, 2021, https://www.bbc.com/news/world-asia-56252695; *see also* Perez, *supra* note 503, at 157 (noting that it was "one of the strongest recorded earthquakes in history and the strongest earthquake that has ever hit Japan").

510 *Germany Stages Anti-Nuclear Marches After Fukushima*, BBC NEWS, Mar. 26, 2011, https://www.bbc.com/news/world-europe-12872339.

511 *Id.*; *see also* Perez, *supra* note 503, at 157 (noting that "Germany witnessed its largest recorded anti-nuclear demonstration" by the end of March 2011).

512 *Germany Stages Anti-Nuclear Marches After Fukushima*, *supra* note 510.

513 *Timeline: Nuclear Power Controversy in Germany*, REUTERS, May 31, 2011, https://www.reuters.com/article/us-germany-nuclear-events-timeline/timeline-nuclear-power-controversy-in-germany-idUSTRE74U2D620110531; *Why Vattenfall Is Taking Germany to Court*, Oct. 5, 2016, https://group.vattenfall.com/press-and-media/newsroom/2016/why-vattenfall-is-taking-germany-to-court; *see also* Weghmann & Hall, *supra* note 279, at 9.

514 *Why Vattenfall Is Taking Germany to Court, supra* note 513; *see also* Vadi, *supra* note 507, at 1099; Jarrod Hepburn, *Swedish Energy Company Reportedly Planning New ICSID Claim over German Nuclear Phase-Out*, INV. ARB. REP., Nov. 2, 2011.

515 Perez, *supra* note 503, at 158; *Germany Is Sued at ICSID by Swedish Energy Company in Bid for Compensation for Losses Arising Out of Nuclear Phase-Out*, INV. ARB. REP. (June 1, 2012), https://www.iareporter.com/articles/germany-is-sued-at-icsid-by-swedish-energy-company-in-bid-for-compensation-for-losses-arising-out-of-nuclear-phase-out/.

Germany's right to phase out nuclear power.[516] However, Vattenfall claimed that Germany had an obligation to compensate the company for its losses.[517] Vattenfall ultimately demanded €4.7 billion,[518] roughly $6 billion at the time.[519]

Vattenfall II touched a nerve in Germany and across Europe.[520] German officials were shocked to be on the receiving end of another investment treaty claim.[521] The image of a foreign multinational challenging the country's decision to phase out nuclear power provoked outrage.[522] Germany's

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516 *Why Vattenfall Is Taking Germany to Court, supra* note 513.

517 *Id.*

518 Chan & Crawford, *supra* note 507, at 700; Weghmann & Hall, *supra* note 279, at 10; *European Energy Disputes Update*, INV. TREATY NEWS (June 24, 2021), https://www.iisd.org/itn/en/2021/06/24/europ; *Update 1-Vattenfall Wants 4.7 Bln Euros for German Nuclear Exit-Govt Source*, REUTERS (Oct. 15, 2014), https://www.reuters.com/article/vattenfall-nuclear-germany-idAFL6N0SA3AK20141015.

519 *Update 1-Vattenfall Wants 4.7 Bln Euros for German Nuclear Exit-Govt Source, supra* note 518. Proceedings in *Vattenfall II* dragged on for nearly a decade. Although the tribunal conducted hearings on jurisdiction, the merits, and damages in 2016, Germany unsuccessfully sought dismissal in 2018 on the additional grounds that intra-EU investment treaty arbitration violates EU law. Vattenfall AB v. Germany, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, paras. 1–2, 9 (Aug. 31, 2018), https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf. Later in 2018, Germany unsuccessfully sought to challenge (disqualify) all members of the tribunal. Vattenfall AB v. Germany, ICSID Case No. ARB/12/12, Decision of the Acting Chair of the Administrative Council (Mar. 6, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10405.pdf. In 2020, Germany unsuccessfully challenged all members of the tribunal a second time. Vattenfall AB v. Germany, ICSID Case No. ARB/12/12, Decision of the Chair of the Administrative Council (July 8, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11631.pdf. After the German Constitutional Court held that the nuclear phase-out regulations violated Vattenfall's constitutionally protected right to property, the parties settled in early 2021 for €1.4 billion. Lisa Bohmer, *German Court Finds That Nuclear Phase-Out Regulations Violate Vattenfall's Constitutional Rights,* INV. ARB. REP. (Nov. 12, 2020), https://www.iareporter.com/articles/german-court-finds-that-nuclear-phase-out-regulations-violate-vattenfalls-constitutional-rights/; Lisa Bohmer, *Breaking: Germany and Vattenfall Settle Long-Running Arbitration Dispute Arising from Nuclear Phase-Out*, INV. ARB. REP. (Mar. 5, 2021), https://www.iareporter.com/articles/breaking-germany-and-vattenfall-settle-long-running-arbitration-dispute-arising-from-nuclear-phase-out/.

520 *See* Schill, *supra* note 504; *see also* Chan & Crawford, *supra* note 507, at 700; Weghmann & Hall, *supra* note 279, at 9.

521 *See* TAYLOR ST. JOHN, THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES 2 (2018) ("The Vattenfall cases surprised German officials and citizens—in the German press there was a sense of incredulity that a foreign corporation could challenge German environmental regulations before an international tribunal, which might award billions of euros in compensation to the foreign firm."); Weghmann & Hall, *supra* note 279, at 12 (opining that "the furious public and governmental response" to *Vattenfall II* "has to be partly explained by the historical expectation that treaties such as the ECT would be used by Germany, not against it").

522 Laura Yvonne Zielinski, *"Legitimate Expectations" in the* Vattenfall *Case: At the Heart of the Debate over ISDS*, KLUWER ARB. BLOG (Jan. 10, 2017), http://arbitrationblog.kluwerarbitration.com/2017/01/10/legitimate-expectations-in-the-vattenfall-case-at-the-heart-of-the-debate-over-isds/; *see also* Roberts & St. John, *supra* note 6, at 144 (noting that "[t]he filing of a controversial, high-profile case, like . . . *Vattenfall* . . . may significantly alter the stock of support for the system"); Stefanie Rosskopf, Investor-State Dispute Settlement (ISDS), Germany and the

growing opposition to investment treaty arbitration played out in the context of the EU's negotiations for a Comprehensive Economic and Trade Agreement (CETA) with Canada and for a Trans-Atlantic Trade and Investment Partnership (TTIP) with the United States,[523] which had been concluded and launched in 2013, respectively.[524] By early 2014, German officials signaled that they might block ratification of CETA if not revised to eliminate ISDS.[525] Likewise, they signaled that they would oppose any version of TTIP that included ISDS.[526] Facing a growing sense of opposition from governments in other EU member states,[527] and recognizing growing concerns about the *Vattenfall* and *Philip Morris* claims,[528] the European Commission froze TTIP negotiations on ISDS and conducted a three-month consultation to assess EU attitudes on the topic.[529]

Transatlantic Relationship 25 (Mar. 5–7, 2015) (submitted to Eur. Union Stud. Ass'n, Fourteenth Biennial Conference), https://www.eustudies.org/conference/papers/11?page=9 ("Vattenfall's arbitration suit against Germany has become the poster child of Germany's opposition to ISDS"); Schill, *supra* note 504 (observing that *Vattenfall II* was "easily instrumentalized to turn public opinion against investor-State arbitration more generally").

523 *See generally* Rosskopf, *supra* note 522.

524 *See Trade Policy Developments*, *Canada-European Union, Background and Negotiations,* OAS FOREIGN TRADE INFO. SYS., http://www.sice.oas.org/tpd/can_eu/can_eu_e.asp (last visited Sept. 2, 2022); *Trade Policy Developments, United States-European Union, Background and Negotiations*, OAS FOREIGN TRADE INFO. SYS., http://www.sice.oas.org/tpd/USA_EU/USA_EU_e.ASP (last visited Sept. 2, 2022) [hereinafter "OAS Background on TTIP"].

525 Anderson, *supra* note 201, at 2938; Rosskopf, *supra* note 522, at 1–2, 13–15; *see also* Jason Langrish, *Despite German Angst, Bet on CETA to Go Ahead*, GLOBE & MAIL (Aug. 6, 2014), https://www.theglobeandmail.com/opinion/despite-german-angst-bet-on-ceta-to-go-ahead/article19928198/.

526 Anderson, *supra* note 201, at 2938; Shawn Donnan & Stefan Wagstyl, *Transatlantic Trade Talks Hit German Snag*, FIN. TIMES (Mar. 14, 2014), https://www.ft.com/content/cc5c4860-ab9d-11e3-90af-00144feab7de; Rosskopf, *supra* note 522, at 12–15. The German positions on CETA and TTIP were no idle threat; it was well known that the European Commission would "not make a major decision on trade policy unless Germany is on board." Chan & Crawford, *supra* note 507, at 683.

527 *See* Marika Armanovica & Roberto Bendini, Civil Society's Concerns About the Transatlantic Trade and Investment Partnership 14 (Oct. 14, 2014), (available at https://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536404/EXPO_IDA%282014%29536404_EN.pdf) (acknowledging that "opposition to ISDS has grown" and that the "governments of certain Member States have backed their representative civil society organizations"); *Still Not Loving ISDS: 10 Reasons to Oppose Investors' Super-Rights in EU Trade Deals*, CORP. EUR. OBSERVATORY (Apr. 16, 2014), https://corporateeurope.org/en/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade [hereinafter *Still Not Loving ISDS*] ("Resistance to investor-state dispute settlement is also growing in Europe, with governments like Germany, Austria and France questioning the investor rights in the proposed transatlantic trade deal TTIP.").

528 *See* Armanovica & Bendini, *supra* note 527, at 13 ("Emblematic cases, in which investors have sought hefty compensation from governments (e.g., Philip Morris from Australia, and Vattenfall from Germany), have reinforced concerns that ISDS mechanisms may not always serve the public interest.").

529 *Id.* at 14; *see also* Donnan & Wagstyl, *supra* note 526; Rosskopf, *supra* note 522, at 8; *Still Not Loving ISDS*, *supra* note 527.

Released in January 2015, the European Commission's report disclosed that the public consultation generated nearly 150,000 responses,[530] which literally overwhelmed the EU's computer servers[531] and registered widespread opposition to the inclusion of ISDS in TTIP.[532] Contemporaneously, the German and French governments declared that they would present a united front against the incorporation of investment treaty arbitration in TTIP.[533] By autumn, hundreds of thousands took to the streets of German cities to protest against ISDS,[534] and the EU's Trade Commissioner Cecelia Malmström declared ISDS to be the "most toxic acronym in Europe."[535]

By late 2016, when the *Vattenfall II* tribunal was conducting hearings on jurisdiction, liability, and damages,[536] the EU and Canada had removed investor-state arbitration from the already finalized CETA text and replaced it with a permanent investment court and appellate body in the context of what was supposed to be a technical legal "scrub."[537] Contemporaneously, the EU and the United States conducted a final and inconclusive round of negotiations on TTIP.[538] Shortly after, a presidential election in the United States brought in a new administration that came out swinging against

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530 EUROPEAN COMMISSION, REPORT: ONLINE PUBLIC CONSULTATION ON INVESTMENT PROTECTION AND INVESTOR-TO-STATE DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AGREEMENT (TTIP) 3 (Jan. 13, 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf [hereinafter EU CONSULTATION REPORT]; Chan & Crawford, *supra* note 507, at 697; Cecile Barbiere, *France and Germany to Form United Front Against ISDS*, EURACTIV (Jan. 15, 2015), https://www.euractiv.com/section/trade-society/news/france-and-germany-to-form-united-front-against-isds.

531 EU CONSULTATION REPORT, *supra* note 530, at 10–11.

532 *Id.* at 14; Chan & Crawford, *supra* note 507, at 697; Barbiere, *supra* note 530.

533 Barbiere, *supra* note 530.

534 Charles H. Brower II, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement*, 49 LOY. U. CHI. L.J. 271, 289 & n.84 (2017); *cf.* Weghmann & Hall, *supra* note 279, at 10 (observing that 90% of the German population supported the nuclear phase-out decision when announced).

535 *See* Ames, *supra* note 308.

536 *Vattenfall II*, Decision on the *Achmea* Issue, *supra* note 519, at para. 9.

537 *See supra* note 3.

538 *See* OAS Background on TTIP, *supra* note 524 (indicating that the EU and the United States conducted a fifteenth and final round of negotiations on TTIP in New York on October 7, 2016); Iana Dreyer, *EU, US Negotiators Officially Drop Aim of Concluding TTIP in 2016*, EURACTIV (Oct. 7, 2016), https://www.euractiv.com/section/trade-society/news/eu-us-negotiators-officially-drop-aim-of-concluding-ttip-in-2016/.

ISDS.[539] Ironically, the pioneers of the first and second waves of investment treaties had become leading antagonists of investment treaty arbitration.[540]

Since 2016, the momentum against investment treaty arbitration has remained strong. The EU has declared that ISDS is "dead" in its treaty practice,[541] and observers have begun to write credibly about the future of ISDS in similar terms.[542] Due at least in part to cases like *Vattenfall II*,[543] and scores of subsequent cases involving the sustainable energy programs of member states,[544] twenty-three of twenty-seven EU member states agreed to

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539 Three days into his administration, President Trump terminated the United States' planned participation in the Trans-Pacific Partnership. David Earnest, *The Trump Administration's Current Policy on Investor-State Dispute Settlement*, OXFORD UNIV. PRESS L. (Apr. 24, 2017), https://oxia.ouplaw.com/page/593. By early 2018, the new United States Trade Representative testified in Congress that the administration would seek to opt out of ISDS in the context of a revised NAFTA, due to concerns that ISDS chills regulations that enjoyed bipartisan support, impinges on sovereignty, and creates incentives for U.S. companies to invest abroad instead of in the United States. Shafruddin, *supra* note 4, at 449; Luke Eric Peterson, *Trump Administration's Top Trade Official Goes on Record About ISDS Skepticism—Confirms That US Is Looking to Opt Out of NAFTA Chapter 11 Arbitration Mechanism and Blames ISDS Mechanism for Chilling Regulation*, INV. ARB. REP. (Mar. 21, 2018), https://www.iareporter.com/articles/trump-administrations-top-trade-official-goes-on-record-about-isds-skepticism-confirms-that-us-is-looking-to-opt-out-of-nafta-chapter11-arbitration-and-blames-isds-mechanism-for-chilling-regulatio/.

540 *See* Anderson, *supra* note 201, at 2938 (calling German opposition to ISDS under the CETA and TTIP "ironic since Germany was the originator of investment rules in the 1950s"); Rosskopf, *supra* note 522, at 2 ("Germany has a longstanding history of negotiating BITs containing ISDS. As one of the originators of investment protection, it seems surprising for many viewers to see Germany now questioning ISDS . . . ."); Matthew Weiniger QC & Vanessa Naish, *The Future of Investor-State Arbitration*, HERBERT FREEHILLS SMITH PUB. INT'L L. NOTES (Nov. 20, 2014), https://hsfnotes.com/publicinternationallaw/2014/11/20/the-future-of-investor-state-arbitration/ (observing that "Germany entered into the first bilateral investment treaty . . . with Pakistan in 1959," which the authors describe as "a fact which now seems ironic given Germany's position in the current debate on . . . investor-state dispute settlement"); *see also* Sinclair, *supra* note 433, at 24 (noting that "U.S. sponsorship was pivotal in the proliferation of ISDS").

541 *A New EU Trade Agreement with Japan* 6, EUR. COMM'N (July 2018), https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf; Brower & Ahmad, *supra* note 483, at 1186; Shafruddin, *supra* note 4, at 452 n.109; Ariel Anderson, Note, *Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflicts Checks*, 49 GEO. J. INT'L L. 1143, 1144 (2018).

542 *See, e.g.*, Sinclair, *supra* note 433 ("*The Rise and Demise of NAFTA Chapter 11*"); Sergio Puig, *The Death of ISDS?*, KLUWER ARB. BLOG (Mar. 16, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/16/the-death-of-isds/?print=print; *see also* Chan & Crawford, *supra* note 507, at 699; Timothy Meyer, *Local Liability in International Economic Law*, 95 N.C. L. REV. 261, 265–66 (2017). *But see* Pia Eberhardt, *The Zombie ISDS 5*, CORP. EUR. OBSERVATORY (Mar. 2016), https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf (asserting that the EU's proposed investment court is "ISDS back from the dead[;] [i]t's the zombie ISDS").

543 Weghmann & Hall, *supra* note 279, at 11.

544 *See ISDS and Climate Change Policies: A Barrier, Facilitator, or Neither*, 114 AM. SOC'Y INT'L L. PROC. 18, 20 (2020) (remarks by Kasturi Das) (referring to a spike in renewable energy cases during 2013-2016, involving a total of 46 arbitrations brought against Spain, 10 against Italy, and fewer against the Czech Republic); *see also* Energy Charter Treaty Secretariat, *Statistics of ECT Cases* (as of 9/10/2020) at 2,

terminate intra-EU BITs.[545] With the support of the European Union,[546] the United Nations Commission on International Trade Law (UNCITRAL) gave its Working Group III a mandate to consider possible reforms to investor-state dispute settlement starting in 2017.[547] According to one observer, many of the states participating in Working Group III share a common perspective on one topic: they "view investor-state arbitration as akin to a horse that has bolted from the barn."[548] In other words, imperial arbitrators have to some significant degree blown past the limits of the strategic space that states envisioned for investment treaty tribunals.

Yet, even when starting with shared premises and under the capable leadership of a Canadian chair,[549] the members of Working Group III "have not . . . converged on which reforms to pursue."[550] A group of "incrementalist" states, including Chile, Japan, and Russia view criticisms of

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https://www.energycharter.org/fileadmin/DocumentsMedia/News/20201009_Statistics_of_ECT_Cases_9_October.pdf (documenting the commencement of renewable energy cases under the Energy Charter Treaty, including a massive spike of 56 new cases between 2013 and 2016).

545 Weghmann & Hall, *supra* note 279, at 11. *But see* Matteo Fermeglia & Alessandra Mistura, *Killing All Birds with One Stone: Is This The End of Intra-EU BITs (As We Know Them)?*, EJIL TALK! (May 26, 2020), https://www.ejiltalk.org/killing-all-birds-with-one-stone-is-this-the-end-of-intra-eu-bits-as-we-know-them/ (observing that the plurilateral agreement terminating intra-EU BITs does not apply to claims arising under the Energy Charter Treaty which has provided the foundation for 45% of intra-EU investment claims, including *Vattenfall II* and the renewable energy sector claims against Spain, Italy, the Czech Republic, and Bulgaria).

546 U.N. Comm'n on Int'l Trade L., Note by the Secretariat, Settlement of Commercial Disputes: Investor-State Dispute Settlement Framework, Compilation of Comments, ch. III.5, Comments by European Union, 50th Sess., July 3–21, 2017, U.N. Doc. A/CN.9/918 (2017).

547 Rep. of the U.N. Comm'n on Int'l Trade L., 50th Sess., July 3–21, 2017, U.N. Doc. A/72/17, GAOR, 72d Sess., Supp. No. 17 (2017); Malcolm Langford et al., *Introduction to Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21 J. WORLD INV. & TRADE 167, 170 (2020).

548 Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410, 410 (2018).

549 At the beginning of the ISDS reform project, member states elected Canadian delegate Shane Spillescy to chair Working Group III. Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual*, EJIL TALK! (Dec. 11, 2017), https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/. In reporting on the work of Working Group III, two well-regarded observers described the way in which Spillescy "adeptly" steered discussions away from contentious, high-level issues that could have stalled discussions and towards technical issues, a setting that allowed participants to function more productively "like a team of engineers breaking down a complex design challenge into its component parts." Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reforms: What Makes Something Fly?*, EJIL TALK! (Feb 11, 2020), https://www.ejiltalk.org/uncitral-and-isds-reforms-what-makes-something-fly/; *see also* Roberts, *supra*, *UNCITRAL and ISDS Reform*, *supra* (stating that "Spelliscy has excellent and well-rounded ISDS experience having worked for many years in both government and private practice, and he conducted the meeting very effectively.").

550 Roberts, *supra* note 548, at 410. More than four years into the process, Professor Roberts and a co-author opined that the process had started to feel "like watching the grass grow[;] [i]t is necessary for reforms to germinate and grow, but slow and boring to watch." Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reform (Hybrid): Season 5—Watching the Grass Grow*, EJIL TALK! (Nov. 24, 2021), https://www.ejiltalk.org/uncitral-and-isds-reform-hybrid-season-5-watching-the-grass-grow.

investor-state arbitration as "overblown" and prefer to focus on modest reforms that address specific concerns.[551] A group of "systemic reformers," led by the European Union and Canada, view investor-state arbitration as a seriously-flawed process, and would replace it with a multilateral investment court and appellate body[552]—in other words, a public-law model with greater checks and balances, including greater control over the membership of those judicial bodies, and the development of a stable jurisprudence more likely to respect the regulatory prerogatives of respondent states.[553] A third group of "paradigm-shifting" states, such as Brazil and South Africa, reject any form of direct action for investors against host states, but have no blueprints for a competing approach towards the protection of foreign investment.[554]

Some observers see the diversity of views in Working Group III as the justification for a flexible approach to reform, in which states could pursue the solutions that appeal to them a la carte.[555] Others predict that the lack of a clear path through difficult topics will favor maintenance of the status quo.[556] In any case, the point is that states are likely to pursue a range of options in developing their investment treaty practices. As suggested above and developed further in Part V, the experimentation evident in Canada's recent investment treaty practice resembles a microcosm of that phenomenon. Examination of Canada's practice might therefore suggest lessons about the various alternatives, including the particular brilliance of the country's new model FIPA.

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551 Roberts, *supra* note 548, at 410, 415.

552 *Id.* at 410, 416.

553 *See* Shafruddin, *supra* note 4, at 451 (opining that one of the "key objectives" of a permanent investment court is "to adopt a more 'public law approach' . . . by increasing . . . the institutionalization of the process," including the introduction of first-instance and appeals bodies with publicly appointed members); Stephan W. Schill, *The European Commission's Proposal for an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, ASIL INSIGHTS (Apr. 22, 2016), https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping (indicating that the EU's proposals for a permanent investment court entail a "'public law approach' to investor-state dispute settlement (ISDS)," with an "emphasis on the right to regulate, and increased institutionalization.").

554 Roberts, *supra* note 548, at 410, 416–17.

555 Anthea Roberts & Taylor St. John, *UNCITRAL and ISDS Reform: Visualizing a Flexible Framework*, EJIL:TALK! (Oct. 24, 2019), https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/.

556 Lisa Sachs et al., *The UNCITRAL Working Group III Work Plan: Locking in a Broken System?*, COLUM. CTR. ON SUSTAINABLE INV. (May 4, 2021), https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system; *see also* Roberts & St. John, *supra* note 6, at 146 (noting that "[s]ome academics and civil society observers emphasize that small-scale corrective action may lock in the existing system").

VI. STUMBLING TOWARDS BRILLIANCE

Although Canada has performed well as a respondent in investment treaty claims, it has characteristics thought to dispose states towards experimentation with investment treaty reform. Likely motivated by those factors and the influence of powerful trading partners, Canada has recently lurched across the spectrum of approaches to ISDS that range from traditional investor-state arbitration in TPP, to a permanent investment court system in CETA, to a complete rejection of ISDS in the USMCA, and back to traditional investor-state arbitration in the 2021 model FIPA. The puzzling choreography raises questions about the various moves and what they accomplished.

Elaborating on the points just made, Part V(A) discusses a recent empirical study identifying the factors that dispose states towards investment treaty reforms directed at the preservation of state regulatory space. Part V(A) also applies those factors to Canada's experience with investment treaties. Parts V(B) and V(C) address Canada's experimentation with largely procedural reforms in CETA and USMCA, respectively. Part V(D) takes up Canada's efforts at substantive reform in the 2021 Model FIPA. Each subpart addresses two obvious questions: what motivated Canada to attempt the particular reform, and how far did it go in addressing the problem of imperial arbitrators? In addition, the subparts grapple with a pair of subtler questions: at what point does the problem of imperial arbitrators sufficiently fade, and whether procedural or substantive adjustments more directly and completely accomplish that goal? Reasonable people could disagree on the answers to these questions.[557] But consistent with empirical studies on reforms directed at preservation of state regulatory space,[558] this author views the problem and the solution in largely substantive terms.[559] Seen from that perspective, one

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557 *Cf.* Langford et al., *supra* note 547, at 172–73 (observing that "the distinction between procedural and substantive is often illusory" because "[s]ubstantive provisions shape the . . . process . . . while ISDS has a transformative effect on substantive provisions . . . ."); Gus Van Harten et al., *Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter* 2 (Osgoode Digit. Commons, Working Paper No. 328, 2019), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1335&context=all_papers (observing that "[s]ubstantive rules of investor protection and investor-state arbitration are in key respects inseparable").

558 *See* Alexander Thompson et al., *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design*, 73 INT'L ORG. 859, 875–76 (2019) (indicating that when states renegotiate investment treaties to preserve state regulatory space, they focus on substantive rules and seem less concerned with the procedures for resolving investment disputes).

559 *See infra* notes 674–719 and accompanying text; *see also 2019 Consultation Report and FIPA Review*, GOV'T OF CAN. (June 5, 2020), https://www.international.gc.ca/trade-commerce/consultations/fipa-apie/report-rapport.aspx?lang=eng (expressing the view that the "best" way to protect public interest regulation "is through clear drafting of the substantive obligations in FIPAs"); Langford et al., *supra* note 547, at 172 ("Many claim that the core concerns with the [procedural] system

can appreciate the particular brilliance of Canada's new FIPA: a revision of substantive provisions that leaves almost no room for arbitrators to second-guess the normal operations of modern regulatory states.

A. The Drivers and Direction of Investment Treaty Reforms

Some observers deplore the extent to which investors have brought claims against, and extracted money from, Canada under NAFTA's investment chapter.[560] When the issue arises at conferences, this author emphasizes Canada's enviable (if not perfect) record as a respondent in NAFTA claims.[561] Over the course of more than 25 years, tribunals have rendered only five awards on the merits against Canada.[562] The amounts awarded have always been modest, ranging from less than US$500,000 to just over C$25 million.[563] In only two cases have tribunals awarded more than C$10 million.[564] In all cases, tribunals have awarded a fraction of

identified by WG III cannot be addressed without accompanying substantive reform to the underlying rules.").

560 *See* Sinclair, *supra* note 433, at 10; *see also* Hadrian Mertins-Kirkwood & Ben Smith, *Digging for Dividends*, CAN. CTR. FOR POL'Y ALTS. 4, 7 (Apr. 30, 2019), https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2019/04/Digging%20for%20dividends.pdf; Scott Sinclair, *Canada's Track Record Under NAFTA Chapter 11*, CAN. CTR. FOR POL'Y ALTS. 1 (Jan. 16, 2018), https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf.

561 *But see* Lai, *supra* note 369, at 275 (describing Canada's track record as "unenviable").

562 *See* Windstream Energy LLC v. Canada, PCA Case No. 2013-22, Award, para. 515 (Sept. 26, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7875.pdf; *Clayton/Bilcon*, Award on Jurisdiction and Liability, *supra* note 348, at para. 742; Mobil Inv. Can., Inc. v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, at para. 490(3) (May 22, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1145.pdf; Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase-2, *supra* note 372, at para. 195; S.D. Myers, Inc. v. Canada, Partial Award, *supra* note 344, at para. 322.

563 *See* Clayton/Bilcon of Delaware, Inc. v. Canada, PCA Case No. 2009-04, Award on Damages, para. 400 (Jan. 10, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10377_0.pdf (awarding US$7,000,000); *Windstream Energy Award*, *supra* note 562, at para. 515 (awarding just over C$25,000,000); Mobil Inv. Can., Inc. v. Canada, ICSID Case No. ARB(AF)/07/4, Award, para. 178 (Feb.20, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4399_0.pdf (awarding Mobil Investments of Canada, Inc. roughly C$13,900,000 and awarding co-claimant Murphy Oil Corp. roughly C$3,400,000); *Pope & Talbot* Award in Respect of Damages, *supra* note 339, at para. 91 (awarding just over US$461,000); S.D. Myers, Inc. v. Canada, Second Partial Award, para. 311 (Oct. 21, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0752.pdf (awarding just over C$6,000,000).

564 *See Windstream Energy Award*, *supra* note 562, at para. 515 (awarding just over C$25,000,000); *Mobil Inv. Can., Inc. Award, supra* note 563, at para. 178 (awarding Mobil Investments of Canada, Inc. roughly C$13,900,000 and awarding co-claimant Murphy Oil Corp. roughly C$3,400,000).

amounts claimed.[565] Viewed against a landscape of some 30 to 44 claims,[566] one might reasonably say that Canada rarely loses, and never loses big.

Despite Canada's enviable record of wins and losses, a broader description of Canada's experience reveals characteristics that dispose states towards investment treaty reform directed at the preservation of state regulatory space. Approaching the problem from this perspective, one should recall Canada's experience as a *respondent* under investment treaties has developed almost exclusively under NAFTA,[567] but largely and extensively under traditional BITs as the *home state* to energy and mining companies that have investments in countries with developing or transitional economies.[568] Of the three NAFTA Parties, Canada has been the most frequent target of

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565 *Compare supra* note 562 (listing the amounts awarded in five successful claims), *with* Sinclair, *supra* note 433, at 28–29, 32–33, 39 (listing the amounts claimed). According to the sources cited above, Clayton/Bilcon claimed $101 million but received US$ 7 million. Windstream Energy LLC claimed C$476 million but received just over C$25 million. Mobil Investments Canada, Inc. and Murphy Oil Corp. claimed $66 million but received roughly C$17.3 million. Pope & Talbot claimed $500 million, but received just over US$461,000; S.D. Myers claimed $20 million, but received just over C$6 million.

566 According to Sinclair, U.S. investors have brought 44 claims against Canada. Sinclair, *supra* note 433, at 10. According to UNCTAD, the correct number is 30. UNCTAD, *Investment Dispute Settlement Navigator*, INV. POL'Y HUB (Dec. 31, 2021), https://investmentpolicy.unctad.org/investment-dispute-settlement/country/35/canada [hereinafter UNCTAD, Investment Dispute Navigator, Canada]. It appears that Sinclair reaches the higher number by including fourteen claims that were subsequently withdrawn by the investors, that were discontinued, or that otherwise had become inactive. Sinclair, *supra* note 433, at 28–30, 32–33, 35, 37, 41–42 (listing 16 withdrawn, discontinued, or inactive claims by Signa S.A., Sun Belt Water, Inc., Ketcham Investments, Inc., Trammell Crow. Co., Albert J. Connolly, Peter Pesic, Gottlieb Investors Group, Georgia Basin Holdings L.P., the Shiell Family, David Bishop, Christopher and Nancy Lacich, John R. Andre, CEN Biotech, and Omnitrax Enterprises, Inc.).

567 Of the 31-investment treaty claims against Canada currently listed by UNCTAD, 30 were brought by U.S. investors under NAFTA. UNCTAD, Investment Dispute Navigator, Canada, *supra* note 566.

568 As of early 2015, one source ranked Canadian investors as the fifth most frequent users of ISDS, behind the United States, the Netherlands, the United Kingdom and Germany. Scott Miller & Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check (Report of the CSIS Scholl Chair in International Business)*, CTR. FOR STRATEGIC & INT'L STUD. 8 (Jan. 21, 2015), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf. Of the 58 claims currently listed by UNCTAD as brought by Canadian investors under investment treaties, only 17 were listed as brought against the United States under NAFTA's investment chapter. UNCTAD, Investment Dispute Navigator, Canada, *supra* note 566. Sinclair lists 20 such claims and 1 threatened claim. Sinclair, *supra* note 433, at 21, 44–51. Again, Sinclair reaches this higher number by listing three "inactive" claims. *See id.* at 45–46 (listing claims by James Russell Baird, Doman, Inc. and Paget). Of the remaining 41 claims brought by Canadians, four were brought by Canadian investors against Mexico under NAFTA's investment chapter. UNCTAD, Investment Dispute Navigator, Canada, *supra* note 566. The balance was brought largely against developing states in Latin America, developing states in Central Asia, and transitional states in Eastern Europe; though one claim was brought against Tanzania. *Id.* At least 20 of those claims relate to investments in the mining sector and at least five relate to the energy sector. *Id.* According to another source, 70% of investment treaty claims brought by Canadian investors outside North America involved the mining and energy sectors, and 86% of investment treaty claims brought by Canadian investors outside North America involved developing or transitional states. Mertins-Kirkwood & Smith, *supra* note 560, at 5, 18, 20.

claims (exclusively brought by U.S. investors) under NAFTA's investment chapter,[569] with somewhere between 30 and 44 claims depending on how one counts.

Although tribunals have ruled against Canada on the merits in only five cases and have only awarded modest sums,[570] three of the five tribunals articulated substantive views that, if replicated, could invite second-guessing of regulatory decisions by federal or provincial authorities.[571] In addition, Canada has settled at least another seven cases.[572] Although it can be difficult to characterize investment treaty settlements as wins or a losses,[573] at least four of the settlements required Canada to make important concessions, including cash payments or credits ranging from US$13 million to C$130 million, apologies, and withdrawal of regulatory measures.[574] Aggregating the outlays of public funds in these cases, one observer concludes that Canada has paid "more than $263 million in damages and settlements," as well as "more than $113 million in unrecoverable legal costs."[575] The Canadian

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569 Mertins-Kirkwood & Smith, *supra* note 560, at 7.

570 *See supra* notes 562–64 and accompanying text.

571 *See supra* notes 356–66, 372–74, 381–85, 428 and accompanying text.

572 *See* Sinclair, *supra* note 433, at 28, 34, 36–37, 40–42 (discussing Canada's settlement of NAFTA claims brought by Ethyl Corp., Dow AgroSciences LLC, AbitibiBowater, Inc., St. Mary's VCNA, LLC, Mobil Investments Canada, Inc., Murphy Oil Corp., and OmniTrax Enterprises, Inc.)

573 Reviewing the worldwide stock of investment claims, one writer observes that settlements constitute one of the least transparent issues and one of the hardest to track. Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 150 (2019). The same writer correctly notes that settlement payments constitute direct liabilities for states and amount to a non-trivial cost of ISDS. *Id.* at 150–51, 159. To the extent that settlements result in payments to investors, another group of writers presumptively treats them as a partial win for investors. Daniel Behn et al., *Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration*, 38 NW. J. INT'L L. & BUS. 333, 355 n.84 (2018). By the same token, one should bear in mind that the settlements also constitute partial wins for states, in the sense that they result in the termination of claims on terms more favorable than the state expects to achieve through adjudication. One should also bear in mind that some settlements involve no payment of value and no withdrawal of the challenged measures. *See* Sinclair, *supra* note 433, at 34 (discussing the settlement of Dow AgroSciences LLC's claim against Canada, pursuant to which the Government of Quebec formally acknowledged that a product does not pose an "unacceptable risk" to human health, but paid no compensation and did not withdraw a measure banning application of the product to lawns in the province). Therefore, other writers do not presumptively treat settlements as losses for states. *See* Brower, *supra* note 534, at 287 & n.78 (treating settlements as separate from wins and losses).

574 According to Sinclair, the settlement with Ethyl Corp. required Canada to pay US$13 million, repeal the ban on a fuel additive, and apologize to the company. Sinclair, *supra* note 433, at 28. The settlement with AbitibiBowater, Inc. required Canada to pay C$130 million. *Id.* at 36. The settlement with St. Mary's VCNA, LLC contemplated a C$15 million payment from the Ontario government. *Id.* at 37. The settlement with Mobil Investments Canada, Inc. required Canada to provide the investor with a credit of C$35 million to indemnify it for the cost of complying with provincial research and development guidelines previously found to violate NAFTA's investment chapter. *Id.* at 40.

575 *Id.* at 10.

government appears to view its track record in similar terms.[576] By contrast, as a home state to investors under NAFTA, Canada has seen its nationals bring 17 to 20 claims against the United States under NAFTA's investment chapter,[577] none of them successful.[578]

According to a recent empirical study, experience with investment treaty arbitration increases the appetite of states for reforms that preserve regulatory space.[579] The number of investment treaty claims brought against states has the strongest impact in this regard.[580] "Being the home state to claimants and losing cases also matter," but these factors have weaker effects.[581] When states revise investment treaties to preserve state regulatory space, their efforts skew towards substantive treaty provisions,[582] even though the common wisdom suggests that procedural reforms are more likely to garner widespread support,[583] which would be particularly relevant in a multilateral context and in other situations where negotiating partners might be resistant to significant change.[584]

Based on the principles mentioned above, it should come as no surprise that Canada became a leading proponent of investment treaty reform. At one

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576 *See* Canada, Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 431 (June 11, 2019), at 28890 (Hon. C. Freeland) (Can.); *Prime Minister Trudeau and Minister Freeland Speaking Notes for the United States-Mexico-Canada Agreement Press Conference*, CAN.: PRIME MINISTER OF CAN. JUSTIN TRUDEAU (Oct. 1, 2018), https://pm.gc.ca/en/news/speeches/2018/10/01/prime-minister-trudeau-and-minister-freeland-speaking-notes-united-states [hereinafter *Trudeau and Freeland Speaking Notes*].

577 *See supra* note 568.

578 *See* Mertins-Kirkwood & Smith, *supra* note 560, at 31; Sinclair, *supra* note 433 at 17. The United States did have a "close call" during the initial wave of NAFTA claims. Sinclair, *supra* note 433, at 8. In *Loewen Group, Inc. v. United States*, the tribunal held that certain judicial proceedings in a Mississippi state court constituted a "disgrace" by "any standard of treatment," and that they violated the minimum standard of treatment required by NAFTA Article 1105. *See Loewen Award*, *supra* note 338, at paras. 119, 136–37. However, the tribunal went on to dismiss based on lack of jurisdiction because the claimant settled the domestic litigation without perfecting a petition for certiorari to the United States Supreme Court and, in any event, emerged from a bankruptcy reorganization as a U.S. entity, which eliminated the foreign nationality required to support jurisdiction for a claim against the United States under NAFTA's investment chapter. *Id.* at paras. 200–04, 215–17, 234–40.

579 Thompson et al., *supra* note 558, at 872, 875.

580 *Id.* at 872, 875–76.

581 *Id.* at 876.

582 *Id.* at 873, 875–76.

583 *See, e.g.,* Langford et al., *supra* note 547, at 173.

584 During the 1960s, the World Bank framed the ICSID Convention as a *procedural* vehicle for resolving investment disputes because the contentious atmosphere of that era would have prevented any multilateral agreement on *substantive* rules for the protection of foreign investment. LIM ET AL., *supra* note 43, at 63; LOWENFELD, *supra* note 68, at 536–37. More recently, the mandate for UNCITRAL Working Group III "is implicitly limited to procedural reforms," due in part to the facts that there is "only a fragile consensus" on the need for such reforms, and "no agreement amongst states on whether there are substantive problems with the underlying treaties." Langford et al., *supra* note 547, at 172–73.

point, Canada was not just the most frequently sued NAFTA Party,[585] but the developed country most frequently sued under investment treaties.[586] It remains one of the most frequently sued countries under investment treaties.[587] Canada may have lost only a small fraction of investment treaty claims,[588] but wins and losses appear not to weigh heavily among factors that motivate states in the context of investment treaty reform.[589] If they did, the United States and Germany (which technically have not lost an investment treaty case) might never have experimented with investment treaty reform.[590]

In any event, when one compares Canada's top ranking on rule-of-law indexes with its surprisingly frequent experience as a respondent in NAFTA claims,[591] one can understand the Canadian government's interest in investment treaty reform. Based on the empirical study discussed above, one might have expected the Canadian government's efforts to skew towards substantive, as opposed to procedural, reforms.

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585 Sinclair, *supra* note 433, at 10.

586 Sunny Freeman, *NAFTA's Chapter 11 Makes Canada Most Sued Country Under Free Trade Tribunals*, HUFFINGTON POST (Jan. 14, 2015), https://www.huffpost.com/archive/ca/entry/canada-sued-investor-state-dispute-ccpa_n_6471460; Kyla Tienhaara, *Canada Has an ISDS Clause with The US. It Has Faced 35 Challenges. Is This Australia's Future?*, THE CONVERSATION (Oct. 8, 2015, 3:23 PM), https://theconversation.com/canada-has-an-isds-clause-with-the-us-it-has-faced-35-challenges-is-this-australias-future-48757; Lee Williams, *This Secret UK-Eurotunnel Tribunal Reveals Something Disturbing About Refugees and TTIP*, INDEPENDENT (Feb 2, 2016, 6:26 PM), https://www.independent.co.uk/voices/secret-tribunals-where-companies-sue-governments-reveal-something-disturbing-about-uk-eurotunnel-refugees-and-ttip-a6849331.html.

587 An empirical study of investment treaty arbitration ranks Canada as the sixth-most-sued-state for the period 1987–2017, ranking behind Argentina, Venezuela, Spain, the Czech Republic, and Egypt. Roberto Echandi, *The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence (1987-2017) and Policy Implications*, 34 ICSID REV.-FOREIGN INV. L.J. 32, 45 (2019).

588 *See supra* notes 562–66 and accompanying text.

589 *See supra* note 581 and accompanying text.

590 *See* Sinclair, *supra* note 433, at 17 ("The U.S., as its State Department likes to boast, has never lost a NAFTA case."). Germany has been the target of five investment claims as of this writing. In 2000, an investor sued Germany under that country's BIT with India. Alschner, *supra* note 476, at 45. In 2009 and 2012, Vattenfall commenced the two investment treaty arbitrations discussed above. *See supra* notes 502–19 and accompanying text. All three claims were settled. Alschner, *supra* note 476, at 45–46; *see supra* notes 505–07, 519 and accompanying text. In 2019, three related Austrian investors commenced a fourth arbitration against Germany under the Energy Charter Treaty, and in 2021 six related Irish and German investors commenced a fifth arbitration against Germany under the Energy Charter Treaty. Lisa Bohmer & Eric Peterson, *UPDATED: As Vattenfall Nuclear Case Sees New Round of Submissions, Germany Faces Another Energy Charter Treaty Arbitration Following Modification of Renewables Incentive Regimes*, INV. ARB. REP. (Sept. 22, 2019), https://www.iareporter.com/articles/as-vattenfall-nuclear-case-sees-new-round-of-pleadings-germany-faces-another-energy-charter-treaty-arbitration-following-modification-of-renewables-incentives-regime/; Lisa Bohmer, *Germany Round-Up: A New ICSD Case, a New Bifurcation Decision, a Newly Disclosed Tribunal, and an Update on Other Arbitration-related Developments*, INV. ARB. REP. (May 14, 2021), https://www.iareporter.com/articles/germany-round-up-a-new-icsid-case-a-bifurcation-decision-a-newly-disclosed-tribunal-and-an-update-on-other-arbitration-related-developments/.

591 *See supra* notes 341, 566 and accompanying text.

B. CETA: Procedure as an Indirect and Partial Solution

As suggested above, one can regard the TPP as a baseline for Canada's investment treaty practice before the introduction of reforms during the legal "scrub" of CETA in February 2016.[592] With negotiations concluded in October 2015 and the final text signed in February 2016,[593] the TPP closely resembled the U.S. and Canadian model BITs of 2004.[594] Substantively, all three documents recognize the possibility that states may commit indirect expropriations and require compensation for indirect takings, while clarifying that bona fide measures to protect health, safety, and the environment do not constitute expropriations "except in rare circumstances."[595] In other words, they discouraged arbitral second-guessing of such measures but left the door ajar. Echoing the FTC's Notes of Interpretation,[596] all three clarified that fair and equitable treatment means the customary international law minimum standard of treatment for aliens.[597] The TPP added that the standard "includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world," but excludes "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations . . . , even if there is loss or damage to the covered investment as a result."[598] In other words, the disappointment of legitimate expectations would not be sufficient,

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592 *See supra* notes 2–3, 523–37 and accompanying text.

593 *Timeline of the CPTPP*, GOV'T OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/timeline_negotiations-chronologie_negociations.aspx?lang=eng (last visited Aug. 31, 2022).

594 *See* Brower, *supra* note 2, at 180 (finding an "exceedingly close resemblance" between the TPP's investment chapter and the 2004 U.S. Model BIT); Amokura Kawharu & Luke Nottage, *Models for Investment Treaties in the Asia-Pacific Region: An Underview*, 34 ARIZ. J. INT'L & COMP. L. 461, 464 (2017) (observing that "the TPP's investment chapter . . . adheres closely to the US Model Bilateral Investment Treaty (BIT) framework since 2004); *see also* David A. Gantz, *Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns*, 31 ARIZ. J. INT'L & COMP. L. 203, 233 (2014) (observing that Canada's 2004 model BIT/FIPA "closely resembles the 2004 U.S. Model BIT").

595 Trans-Pacific Partnership, art. 9.8(1) & Annex 9-B(3)(b), https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf; U.S. Model BIT, art. 6.1 & Annex B(4)(b) (2004), https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf; Canadian Model FIPA, Art. 13.1 & Annex B.13(1) (2004), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download.

596 *See supra* note 413 and accompanying text.

597 TPP, *supra* note 595, art. 9.6(1)–(2); U.S. Model BIT (2004), *supra* note 595, art. 5(1)–(2); Canadian Model FIPA (2004), *supra* note 595, art. 5(1)–(2).

598 TPP, *supra* note 595, art. 9.6(2), (4).

but might be relevant, in finding a denial of fair and equitable treatment.[599] Procedurally, all three instruments contemplated traditional investor-state arbitration as the means for resolving disputes,[600] though generally with modest refinements involving things like statutes of limitations,[601] transparency,[602] and the ability of tribunals to order summary dismissal of claims that are "manifestly without legal merit" or otherwise not claims for which an award can be made as a matter of law.[603]

Leaked by the German press in 2014,[604] the supposedly final version of CETA's provision on expropriation resembled its counterpart in TPP.[605] However, it added that "non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations," except in the "rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive."[606] Turning to fair and equitable treatment, the supposedly final version of CETA provided a list of actions deemed to violate the relevant standard:

> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
> (a) Denial of justice in criminal, civil or administrative proceedings;
> (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) Manifest arbitrariness;

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599 Noam Zamir & Paul Barker, *The Trans-Pacific Partnership Agreement and States' Right to Regulate Under International Investment Law*, 45 DENV. J. INT'L L. & POL'Y 205, 222 (2017); *see also* Gathii & Ho, *supra* note 3, at 492 n.274.

600 TPP, *supra* note 595, art. 9.19; U.S. Model BIT (2004), *supra* note 595, art. 24; Canadian Model FIPA (2004), *supra* note 595, art. 27.

601 TPP, *supra* note 595, art. 9.21(1); U.S. Model BIT (2004), *supra* note 595, art. 26.1; Canadian Model FIPA (2004), *supra* note 595, arts. 22(2), 23(2).

602 TPP, *supra* note 595, art. 9.24; U.S. Model BIT (2004), *supra* note 595, art. 29; Canadian Model FIPA (2004), *supra* note 595, arts. 38–39.

603 TPP, *supra* note 595, art. 9.23(4); U.S. Model BIT (2004), *supra* note 595, art. 28(4).

604 Elaine Fahey, *EU Foreign Relations Law: Litigating to Incite Openness in EU Negotiations*, 5 EUR. J. RISK REG. 553, 556 n.27 (2014); Daniel Tencer, *Canada-EU Trade Deal Text Leaked by German TV*, HUFFINGTON POST (Aug. 13, 2014), https://www.huffpost.com/archive/ca/entry/canada-eu-trade-deal-leak_n_5676483.

605 *Compare* Consolidated CETA Text, ch. 10, art. X.11 & Annex X.11 (Final Aug. 1, 2014), https://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf [hereinafter Leaked Final CETA Text of 2014], *with* TPP, *supra* note 595, art. 9.8 & Annex 9-B.

606 Leaked Final CETA Text of 2014, *supra* note 605, Annex X.11(3).

> (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) Abusive treatment of investors, such as coercion, duress and harassment; or
> (f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.[607]

In addition, the supposedly final text clarified that tribunals could "take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."[608] In other words, frustration of legitimate expectations would not necessarily constitute a denial of fair and equitable treatment, but a tribunal could consider legitimate expectations specifically created by the state in the overall weighing of claims.[609]

Substantively, one can debate whether the supposedly final text of CETA restricted or expanded opportunities to pursue claims for the denial of fair and equitable treatment. Taking a restrictive view, one EU legal officer opines that the provision on fair and equitable treatment sets forth an exclusive and demanding list of conduct that violates the relevant standard.[610] Taking a more expansive view, Van Harten observes that the provision on fair and equitable treatment does not purport to limit coverage to the customary international law minimum standard for the treatment of aliens.[611] Nor does it expressly purport to establish an exclusive, as opposed to an illustrative, list.[612] Also, instead of eliminating the judicially constructed concept of legitimate expectations,[613] the supposedly final version of CETA expressly *invites* tribunals to incorporate a version of that standard into some

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607 *Id.* art. X.9(2).

608 *Id.* art. X.9(4).

609 *See* Gus Van Harten, *The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and the European-Vietnam FTA*, 1 U. BOLOGNA L. REV. 138, 157 (2016); Emily Hush, Comment & Case Note, *Where No Man Has Gone Before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Trade Agreements*, 43 COLUM. J. ENV'T L. 93, 144 (2018); Nicholas Wiggins, Comment, *T-TIP Negotiations Round Two: An Opportunity to Redirect the Trajectory of International Investment Law*, 169 U. PA. L. REV. 1289, 1349 (2021).

610 Ramon Vidal Puig, *Promoting Sustainable Development in BITS: The EU Experience*. 30 AM. REV. INT'L ARB. 113, 128–30 (2019).

611 Van Harten, *supra* note 609, at 154–55.

612 *Id.* at 156.

613 *See supra* notes 449–53 and accompanying text.

poorly defined weighing of claims.[614] One might add that even if the list were exclusive or strongly indicative of the threshold for establishing claims, the undefined concept of "manifest arbitrariness" leaves tribunals with substantial leeway in resolving regulatory disputes.[615] Turning from substance to procedure, the supposedly final text of CETA contemplated traditional investor-state arbitration, with modest refinements involving statutes of limitations, provisions on transparency, and summary dismissal of claims that are manifestly without legal merit or claims that are unfounded as a matter of law.[616]

Following the legal "scrub" of CETA in early 2016, the truly final text introduced very few substantive changes. Perhaps responding to the dissenting arbitrator's criticism that the *Bilcon* tribunal had found a denial of fair and equitable treatment based solely on an arguable violation of Canadian law,[617] the provision on fair and equitable treatment added "[f]or greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article[;] [i]n order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a party has acted inconsistently with the obligations in paragraph 1."[618]

Consistent with views expressed in response to the EU's 2014 public consultation about TTIP and CETA,[619] the legal scrub introduced a new substantive provision on "Investment and Regulatory Measures":

> 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

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614 Van Harten, *supra* note 609, at 156–57.

615 *See* Hush, *supra* note 609, at 158; *see also* Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 444 (2013) (noting that fair and equitable treatment standards, even when interpreted to mean "manifest arbitrariness" are "'vague general clauses' and thus act as 'gateways for the integration of arguments based on norms of other spheres of the international legal system'").

616 Leaked Final CETA Text of 2014, *supra* note 605, arts. X.17, X.18(5), X.21, X.22, X.29, X.30, X.33.

617 *See supra* note 428 and accompanying text.

618 Post-Scrub CETA, *supra* note 3, art. 8.10(7); *see also* José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?*, 47 VICTORIA U. WELLINGTON L. REV. 503, 532 n.133 (2016) (drawing a connection between Professor McRae's dissent in *Bilcon* and the insertion of this provision in CETA).

619 EU CONSULTATION REPORT, *supra* note 530, at 4 (identifying "the protection of the right to regulate" as one of "four areas where further improvements should be explored").

> 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.[620]

The provision appears roughly halfway through the substantive provisions of CETA's investment chapter, a placement that seems odd except for the fact that it appears just before the provision on fair and equitable treatment, and the drafters may have wanted to ensure that the right to regulate would catch the eye of anyone considering the obligation to provide fair and equitable treatment.

As explained by an EU legal officer, the new provision does not constitute a treaty exception for regulatory action,[621] and it seems inconceivable that the parties would introduce a broad substantive exception in the context of a legal "scrub." On the contrary, the provision constitutes an interpretive guide that has the same effect as references to the right to regulate in preambular language,[622] except that the placement of this provision in the investment chapter reminds adjudicators that the right to regulate has relevance when interpreting and applying that particular chapter's provisions on the obligations of host states.[623] In essence, the interpretive guide invites adjudicators to find some balance between the rights and the obligations of host states.[624] In so doing, it emphasizes that merely interfering with an investor's expectations does not "by itself" constitute a denial of fair and equitable treatment.[625] But as already noted, the provision on fair and equitable treatment expressly invites tribunals to "consider" the "legitimate expectations" of investors as part of an overall weighing of claims.[626] In short, the truly final text of CETA does not establish any clear substantive carveouts for regulatory action. On the contrary, it permits adjudicators to review the normal regulatory acts of states under standards that invite a discretionary weighing of the right to regulate, legitimate expectations of investors, and "manifestly arbitrary" state action,

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620 Post-Scrub CETA, *supra* note 3, art. 8.9(1)–(2); *see also* Hush, *supra* note 609, at 123 (describing the introduction of this "entirely new article" in the final version of CETA).

621 Puig, *supra* note 610, at 123.

622 *Id.*

623 *See* Hush, *supra* note 609, at 123.

624 *Id.* at 104, 136–37; *see also* Van Harten, *supra* note 609, at 161–62.

625 Puig, *supra* note 610, at 130; Hush, *supra* note 609, at 144.

626 *See supra* notes 608–09 and accompanying text.

unconstrained by the customary international law minimum standard of treatment for aliens.[627]

Although the truly final text of CETA did not introduce substantive provisions likely to establish real checks and balances on imperial arbitrators, it introduced procedural refinements clearly calculated to have that effect. Principally, these include the creation of a 15-member permanent investment court, appointed jointly by the states parties for five-year terms with the possibility of a single reappointment, as well as a six-member permanent appellate body to be appointed jointly by the parties to nine-year, non-renewable terms.[628] In so doing, the EU and Canada aimed to replace imperial arbitrators with a more public-law model of adjudication that has greater checks and balances—including greater control over the membership of judicial bodies—and the development of a stable jurisprudence more likely to respect the regulatory prerogatives of host states.[629] They also undertook to "pursue" the "establishment" of a multilateral investment court and appellate body with other trading partners,[630] signaling that they view procedural refinements as the backbone of a broader program of investment treaty reform.

The foregoing discussion raises the question of why the EU and Canada chose a procedural route and how much it accomplished in dealing with the problem of imperial arbitrators. With respect to the selection of a procedural route, context surely matters. To begin with, Germany objected to investor-state arbitration and not to the inclusion of any particular substantive obligation in CETA.[631] That alone set the parties on a procedural route. Perhaps more importantly, that was arguably the only path open to the parties at the time. They had reached a supposedly final agreement on CETA's text

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627 *See* Van Harten, *supra* note 609, at 154–57.

628 Post-Scrub CETA, *supra* note 3, art. 8.27(2), 8.27(5), 8.28(1), 8.28(3); *Decision No. 1/2021 of the CETA Joint Committee*, THE CETA JOINT COMMITTEE art. 2(1), (3) (Jan. 29. 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021D0264&rid=6.

629 *See supra* note 553 and accompanying text.

630 Post-Scrub CETA, *supra* note 3, art. 8.29. It is interesting to note that the parties to CETA only promised to "pursue" with other trading partners the "establishment" of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. *Id.* They made no express undertakings regarding the post-establishment incorporation of a multilateral investment tribunal and appellate body into their treaty practice. It is possible that Canada views promotion of a multilateral investment court system in UNCITRAL Working Group III as sufficient to satisfy its obligations under CETA. *See supra* note 552 and accompanying text; *see also* Langford et al., *supra* note 547, at 172 (emphasizing UNCITRAL as the "multilateral arena" selected to "pursue" the EU's program of structural reforms). It is also possible that Canada feels no obligation to incorporate a multilateral investment court system into its treaty practice beyond consideration of the possibility should such a system ever come into being. *See infra* notes 673–74, 703, 705 and accompanying text; *see also* Canadian Model FIPA, *supra* note 5, art. 46 (only requiring states parties to "consider whether, and to what extent" to avail themselves of such an institution for disputes arising under the FIPA).

631 *See supra* note 525 and accompanying text.

in 2014,[632] subject to a legal "scrub." While surprising to many,[633] the transformation of dispute settlement procedures as part of a legal "scrub" was at least conceivable.[634] The introduction of major substantive amendments following the completion of treaty negotiations was not.[635]

Turning to the effects of procedural reforms, one can say that they address the problem of imperial arbitrators only indirectly. To be sure, procedural reforms take arbitrators off the table and replace them with a permanent bench. But on the substance, nothing prevents international adjudication regarding the normal operations of modern regulatory states. One simply hopes that institutional continuity and control over the membership of the bench provide the checks and balances needed to encourage a standard of review that more systematically aligns with the regulatory interests of host states.[636] Put one way, the approach retains investment treaty adjudication as a form of global administrative law but aims for a process unlikely to visit liability on "reasonable" regulatory states. This is essentially the outcome endorsed by Santiago Montt.[637] Put in more cynical terms, the EU and Canada were content with the basic rules of the game but tilted the playing field and the sympathies of the referees to their advantage.

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632 *See supra* notes 3, 536–37 and accompanying text.

633 *See* David A. Gantz, *The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements?*, 49 LOY. U. CHI. L.J. 361, 377 (2017) (observing that "there was no public discussion of a modification of the completed text with the traditional investment provisions, which apparently took place during the extended period of legal scrubbing[;] [t]he extensively revised investment chapter in the final CETA text was closely held until the revised CETA was released to the public in February 2016").

634 Political context made Canada's agreement to procedural refinements particularly conceivable. As a smaller trading partner seeking better access to a more diversified range of markets, Canada's main objective was to conclude a free trade agreement with the European Union, period. Hush, *supra* note 609, at 110–11. Canada's newly elected Liberal government was particularly intent on concluding the process and doing what was necessary to smooth the way for ratification in Europe. David Schneiderman, *International Investment Law's Unending Legitimation Project*, 49 LOY. U. CHI. L.J. 229, 249–50 (2017).

635 *Cf.* VanDuzer, *supra* note 3, at 459 ("Possibly it was considered inappropriate to go further when reviewing CETA, the context of which was only to be a 'legal scrub' of an agreed text rather than a renegotiation.").

636 *See* Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223, 251 (2013) (explaining that proponents of a permanent international investment court appear to operate on "the assumption that members might be more likely to demonstrate deference to States and their legitimate State interests"); Schill, *supra* note 350, at 1109 (discussing aspirations for a permanent international investment court that would oversee the development of a *jurisprudence constante* that strikes an appropriate balance between the interests of investors and States); Hush, *supra* note 609, at 122 (describing the structure of CETA's investment court system as an effort "to gain more control over the interpretation of CETA"); Lai, *supra* note 369, at 293–94 (describing the concern of investors that the structure of CETA's investment court system "would fill the permanent tribunal with pro-state judges"); *see also supra* notes 553, 629 and accompanying text.

637 *See* MONTT, *supra* note 16, at 21, 367 (asserting that "investment treaty tribunals must limit themselves to defining minimum thresholds of what is expected from a 'reasonably well-behaved regulatory state'").

The limitations of this approach should be obvious. To the extent that one accepts international adjudication of the normal operations of modern regulatory states, and to the extent that one merely wants to see more frequent wins for states, the procedural reforms chosen for CETA directly address the problem and probably do the trick. But to the extent that one views the root problem as international adjudication of disputes regarding the normal operations of modern regulatory states (as opposed to international adjudication of disputes regarding extraordinary failures of the nightwatchman and rule-of-law states), the procedural path operates only indirectly.[638] It allows the game to continue, at great cost, with a small group of international adjudicators still engaged in collective lawmaking, and still having the final say on the obligations of reasonable regulatory states, but probably with more favorable outcomes for respondent states.[639] From this perspective, the procedural reforms chosen in CETA address the fundamental problems indirectly and incompletely.[640] Perhaps for this reason, Van Harten refers to the investment court system as the "Zombie ISDS" and declares that he sees ISDS in virtually all the alternative processes currently under consideration for investment treaty reform.[641]

Viewed from the perspective of many investors, and measured by the standards that normally apply in international arbitration, the procedural reforms chosen for CETA deserve condemnation. This is because CETA provides for the appointment of adjudicators solely by states (who are always respondents), meaning that only one set of stakeholders participates in the constitution of the tribunal. That imbalance arguably violates the public policy requiring equality of opportunity in the appointment of arbitrators.[642] One might also view it as predisposing arbitrators towards the respondent states who wield the sole power of appointment.[643] Especially when

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638 *See* Eberhardt*, supra* note 542, at 9 (asserting that the proposed investment court system the "would still empower thousands of companies to circumvent national legal systems and sue governments in parallel tribunals if laws and regulations undercut their ability to make money").

639 *See* Van Harten, *supra* note 609, at 144 (suggesting that CETA clears the way for "the same small group" of adjudicators to continue to dominate the elaboration of international investment law).

640 *See* Van Harten et al., *Phase 2*, *supra* note 557, at 15 (opining that "procedural reforms are . . . not sufficient" to resolve "deep-seated concerns about the democratic accountability and legitimacy of the international investment regime as a whole"); *see also* Langford et al., *supra* note 547, at 186 (noting that the procedural ISDS reforms pursued at UNCITRAL, while structural, "do not directly or necessarily address substantive concerns with treaties").

641 *See* Eberhardt*, supra* note 542, at 9 (quoting Van Harten).

642 REDFERN & HUNTER, *supra* note 44, at 151; Leon E. Trakman, *Aligning State Sovereignty with Transnational Public Policy*, 93 TUL. L. REV. 207, 250–51 (2018); Inae Yang, *Procedural Public Policy Cases in International Commercial Arbitration*, 69 DISP. RESOL. J. 59, 66 (2014).

643 S*ee* Ian A. Laird, *TPP and ISDS: The Challenges from Europe and the Proposed TTIP Investment Court*, 40 CAN.-U.S. L.J. 106, 120 (2016) (noting that "judges may make decisions to curry favor with those who appointed them (and will reappoint them)"); Robert W. Schwieder, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, 55 COLUM.

combined with the secrecy and furtiveness surrounding the legal "scrub,"[644] the procedural reforms adopted in CETA's final text could drive large and powerful investors to skirt the process by negotiating directly for agreements providing for commercial arbitration under traditional standards, with all of the proceedings taken in confidence and behind closed doors.[645]

The possible counterargument to condemnation of CETA's procedural reforms is that states parties should not be held to the standards normally applied in arbitration. This is because the states parties were trying to move away from an ad hoc process, in which appointments by specific disputing parties embroiled in specific disputes results in a situation where arbitrators are often seen as "hired guns."[646] To prevent that from happening, the states parties moved towards a more institutionalized process, in which collective appointments by all treaty parties outside the context of any particular dispute increases the chances that "they will be perceived as acting legitimately as treaty parties trying to create an appropriate regulatory balance between investment rights and sovereign prerogatives."[647] While the argument has merit, the response is that investors manifestly have concerns about the independence of arbitrators appointed solely by states.[648] Authorities such as Judge James Crawford lend weight and credibility to their views.[649] And if

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J. TRANSNAT'L L. 178, 203 (2016) (indicating that "judges that are up for reappointment will have an incentive to act in accordance with [the] expectations [of appointing states] in order to secure their employment position"); BARRY APPLETON & SEAN STEPHENSON, INITIAL TASK FORCE DISCUSSION PAPER: THE INVESTMENT TREATY WORKING GROUP TASK FORCE REPORT ON THE INVESTMENT COURT SYSTEM PROPOSAL 14, 132 (2016) (emphasizing "the real risk of bias presented by the potential for re-appointment of members of the Investment Court").

644 *See* Gantz, *supra* note 633, at 377 (observing that the negotiations leading to the introduction of an investment court in CETA "were conducted in secret between the Commission and the new Justin Trudeau administration, apparently without any significant consultations with stakeholders," and adding that this presumably "occurred to avoid lobbying pressure from Canadian stakeholders and perhaps even from the U.S. government").

645 Brower, *supra* note 534, at 300; *see also* Brower & Ahmad, *supra* note 483, at 1195; Langford et al., *supra* note 547, at 187; Roberts & St. John, *supra* note 6, at 123.

646 This observation applies mostly to party-appointed arbitrators. Fernando Dias Simões, *Can Investment Dispute Settlement Ever Be Depoliticized?*, 4 CARDOZO INT'L & COMP. L. REV. 507, 511 (2021) (noting that "[p]arty-appointed arbitrators are frequently portrayed as 'hired guns' who replicate the political divide between host states and foreign investors"). A tribunal mostly consisting of hired guns might behave differently than a tribunal consisting entirely of judges having lengthy terms of appointments, exercising a public function, and having long-term institutional interests of their own. Put in slightly different terms, arbitrators appointed for the specific dispute may "see their principals as only the disputing parties rather than also as the treaty parties" who created the particular treaty regime. Roberts, *supra* note 313, at 182 n.13.

647 *See* Roberts, *supra* note 313, at 211 (making this statement in the context of authoritative treaty interpretations by states parties to investment treaties).

648 *See supra* note 643 and accompanying text.

649 *See* James Crawford, *The Ideal Arbitrator: Does One Size Fit All?*, 32 AM. U. INT'L L. REV. 1003, 1020 (2017) (opining that removal of "the agency of the investor from the appointment of arbitrators could pose challenges to the independence of arbitrators in favor of the State").

powerful investors are not convinced about the independence and legitimacy of CETA's procedural reforms, there remains a real risk that they will vote with their feet.[650]

Also, even if members of the European Union feel comfortable with routine supranational adjudication of regulatory acts by permanent institutions based on their experience with the European Court of Justice and the European Court of Human Rights,[651] it remains to be seen whether states having other traditions will feel so keen about the prospect. Given the tremendous rise of populism and economic nationalism since 2016,[652] one could justifiably harbor doubts.[653]

In short, unless one accepts the continued development of investment treaties as a form of global administrative law (and lawmaking), the procedural solution chosen for CETA seems to address the problem of imperial arbitrators only indirectly and incompletely. It is not clear that key stakeholders would support this model. However, in a context like UNCITRAL Working Group III that *only* has a mandate to consider procedural reforms,[654] the view might be that some progress in curtailing imperial arbitrators would be better than no progress at all.

C. USMCA: Procedure as Blunt Instrument

In negotiating the USMCA, the Canadian and Mexican governments reportedly sought to preserve investor-state arbitration in the agreement's investment chapter.[655] But as mentioned, the United States Trade Representative appointed by the Trump administration publicly attacked

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650 *See supra* note 645 and accompanying text.

651 *See* KATIA FACH GOMEZ, KEY DUTIES OF INTERNATIONAL INVESTMENT ARBITRATORS: A TRANSNATIONAL STUDY OF LEGAL AND ETHICAL DILEMMAS 3 n.15 (2019) (quoting EU Trade Commissioner Cecilia Malström) ("What I'm setting out here [in the investment court system] is a public justice system—just like those we're familiar with in our own countries, and the international courts which Europe has so actively promoted in the past.").

652 *See* Gantz, *supra* note 633, at 368–69.

653 *See* Elizabeth Trujillo, *Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime*, 59 B.C. L. REV. 2735, 2757 (2018) (discussing "the return of populism and a retreat from the desire to come under international governance structures," which "was reflected . . . during the negotiations of the Transatlantic Trade and Investment Partnership ("TTIP") where [even] several European nations reacted negatively to the idea of an investment court with appellate capacities"); *see also* Thompson et al., *supra* note 558, at 860, 862 (mentioning that ISDS has drawn "the ire of populist politicians . . . around the world" and provoked a "'backlash' . . . driven by populism and economic nationalism").

654 U.N. Comm'n Int'l Trade Law, Rep. of UNCITRAL Working Group III on the Work of its Thirty-Fourth Session, U.N. Doc. A/CN.9/930/Rev.1, ¶ 20 (2017); Langford et al., *supra* note 547, at 172.

655 Lai, *supra* note 369, at 275, 278.

investor-state arbitration on three grounds.[656] First, it privileges foreigners by giving them access to remedies not available to domestic investors.[657] Second, it undermines U.S. sovereignty.[658] Third, effective treaty protection for U.S. investors in other countries encourages them to invest abroad instead of at home.[659] In the end, negotiations for the USMCA resulted in a hybrid solution whereby Canada opted out of investor-state arbitration in relations with the United States and Mexico,[660] and the United States and Mexico opted into investor-state arbitration in their bilateral relations, but only for claims alleging denials of national treatment and MFN treatment in the post-establishment phase, as well as claims for direct expropriation, but only after exhaustion of local remedies or their pursuit for 30 months.[661] Even between the United States and Mexico, there would be no investor-state arbitration of claims for indirect expropriation or denials of fair and equitable treatment.[662] However, these limitations on causes of action and the requirement for exhaustion of local remedies do not apply to disputes involving government contracts in the oil, natural gas, power generation, infrastructure, and telecommunications sectors.[663]

Viewed from Canada's perspective, the complete elimination of ISDS from the USMCA situationally made sense. Investor-state arbitration with Mexico remained possible under the CPTPP.[664] The much more powerful United States wanted to eliminate investor-state arbitration with Canada.[665] Dozens of U.S. investors had brought investment treaty claims against Canada, sometimes successfully, sometimes extracting value on settlements, and always at significant cost.[666] By contrast, many Canadian investors had

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656 *See supra* note 539.

657 *Brady-Lighthizer ISDS Exchange*, INT'L. ECON. L. & POL'Y BLOG (March 21, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html; *see also* Lai, *supra* note 369, at 279; Peterson, *supra* note 539.

658 *Brady-Lighthizer ISDS Exchange*, *supra* note 657; Lai, *supra* note 369, at 280; Peterson, *supra* note 539.

659 *Brady-Lighthizer ISDS Exchange*, *supra* note 657; Lai, *supra* note 369, at 280; Peterson, *supra* note 539.

660 Galbraith, *supra* note 2, at 150, 155; Lai, *supra* note 369, at 277.

661 USMCA, *supra* note 4, Annex 14-D, art. 14.D.3(a)(i), 14.D.3(b)(i), 14.D.5(1)(b); Sinclair, *supra* note 433, at 18–19.

662 As noted by one observer, these limitations would prevent another ruling like the award handed down in Metalclad Corp. v. Mexico. *See* Lai, *supra* note 369, at 282–83 (making this observation in the context of the *Metalclad* tribunal's ruling on indirect expropriation).

663 *See* USMCA, *supra* note 4, Annex 14-E, art. 2(a)(i), 2(b)(i), 6(b); *see also* Galbraith, *supra* note 2, at 155–56 (noting that the exhaustion of local remedies is not required for disputes involving state contracts in the specified sectors).

664 Lai, *supra* note 369, at 281; Sinclair, *supra* note 433, at 18.

665 Sinclair, *supra* note 433, at 4; *see also* Lai, *supra* note 369, at 277.

666 *See supra* notes 567, 569–76 and accompanying text.

brought investment treaty claims against the United States, never successfully and never extracting value through settlements.[667] Based on that experience, Canadian officials might have seen the preservation of investor-state arbitration in the USMCA as having little value.[668] Moreover, they could—and did—portray the elimination of investor-state arbitration as a crowning achievement in the preservation of state regulatory space.[669]

As a procedural reform, the elimination of ISDS solves the problem of imperial arbitrators. Without any recourse to investor-state dispute settlement, there can be no second-guessing of the normal operations of modern regulatory states.[670] But as a side effect, there can be no use of investor-state dispute settlement to police exceptional failures of the nightwatchman and the rule-of-law states.[671] In this respect, the elimination of ISDS constitutes a blunt instrument that eliminates the problem of imperial arbitrators, but only by sacrificing the original objective of investment treaties.

As suggested by Australia's investment treaty practice, the complete elimination of ISDS may be situationally acceptable between stable, law-abiding, developed states, where such lapses are likely to be few and far between.[672] However, it is unlikely to be an appealing across-the-board solution in the treaty practice of states like Canada, whose national companies have made significant investments in the energy and mining sectors in developing and transitional states that may be less stable and rank much lower on rule-of-law indexes.[673]

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667 *See supra* notes 577–78 and accompanying text.

668 Alternatively, Canada might have seen investor-state arbitration as having some value as a bargaining chip that it could trade away in exchange for concessions elsewhere in the treaty. Lai, *supra* note 369, at 277.

669 *See Trudeau and Freeland Speaking Notes*, *supra* note 576 (statement of Minister Freeland); Sinclair, *supra* note 433, at 4.

670 *See* Shafruddin, *supra* note 4, at 471 (observing that elimination of ISDS eliminates the risk of being sued by investors on treaty provisions).

671 *See id.* at 469 (emphasizing the need for some form of ISDS because "no country has a perfect domestic legal system").

672 Australia has eliminated ISDS in its FTAs with Japan, Malaysia, and the United States. Brower & Ahmad, *supra* note 483, at 1147. It has also used side letters to eliminate ISDS with New Zealand in the TPP. Kawharu & Nottage, *supra* note 594, at 476, 498; Shafruddin, *supra* note 4, at 462–63; Tania Voon & Elizabeth Sheargold, *Trans-Pacific Partnership*, 5 BRIT. J. AM. LEGAL STUD. 341, 349–50 (2016). However, Australia has consented to ISDS in its BITs with China and South Korea. Brower & Ahmad, *supra* note 483, at 1147. Under these circumstances, several observers have described Australia as taking a case-by-case approach to ISDS, often foregoing it in relations with other developed states. Shafruddin, *supra* note 4, at 460–62, 472–73; *see also* Nolan, *supra* note 496, at 432; Voon & Sheargold, *supra*, at 349.

673 *See supra* note 568 and accompanying text; *see also* Sinclair, *supra* note 433, at 4 (concluding that "the Canadian government remains committed to ISDS in other negotiating venues").

D. Canada's New FIPA: The Particular Brilliance of Substantive Reform

After seeing Canada lurch from investor-state arbitration towards an investment court system in CETA and then towards the complete elimination of ISDS in the USMCA, and after seeing Canada spearhead calls for "systemic" procedural reform in the multilateral forum of UNCITRAL Working Group III, one wondered about the path Canada would choose in the first major overhaul of its model investment treaty since 2003–2004.[674]

In 2018, the Canadian government launched a public consultation relating to the development of a new model investment treaty.[675] That process involved meetings with stakeholders and generated over 280 written responses from individuals, indigenous groups, scholars, civil society, labor organizations, business associations, pension funds, and legal practitioners on the topics of ISDS, the concerns of small and medium enterprises, corporate social responsibility, indigenous rights, women's empowerment, and public interest regulation.[676] The following year, Global Affairs Canada issued a balanced and insightful report on the consultations. In so doing, it acknowledged that civil society and NGOs generally had negative views of ISDS, that the academic community was split on ISDS, and that certain comments had expressed the view that "ISDS puts public interest regulations in jeopardy."[677] However, the report also emphasized that "the traditional ISDS mechanism protects Canadian investors from the risks of investing abroad by providing access to a neutral forum."[678] It further emphasized the view that "[i]t is important to maintain a robust ISDS mechanism in the FIPAs as this provides greater predictability and certainty for businesses investing abroad."[679] When it came to the topic of public-interest regulation, the report highlighted the view that "[g]overnments need to retain the ability to regulate in the public interest . . . , and the best way to achieve this is

674 *See* VanDuzer, *supra* note 3, at 17 (noting the divergent approaches taken by Canada with respect to ISDS in TPP and CETA and arguing that "it would be timely for Canada to engage in a thorough-going review of its approach to ISDS"). Canada last conducted a thorough review of its investment treaty practice in 2003 and released the last major overhaul of its model investment treaty in 2004. *See* Céline Lévesque & Andrew Newcombe, *Canada*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 53, 58 (Chester Brown ed., 2013); GOV'T OF CAN., *Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model*, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.

675 *2019 Consultation Report and FIPA Review*, *supra* note 559.

676 *Id.*

677 *Id.*

678 *Id.*

679 *Id.*

through clear drafting of the *substantive* obligations in FIPAs."[680] In other words, the protection of public regulatory space constitutes a substantive issue best and most directly addressed by substantive reforms.[681]

In May 2021, Canada revealed its new model FIPA,[682] which closely adheres to the balance struck in the consultation report. Consistent with that report and with the empirical study mentioned above, the new model FIPA focuses on substantive reforms while calling for resolution of disputes through investor-state arbitration. As explained below, the particular brilliance of that approach lies in the way that it substantively eliminates almost any possibility for second-guessing the normal operations of modern regulatory states, while preserving investor-state arbitration as a vehicle for investors to police exceptional failures of the nightwatchman and rule-of-law states. In other words, it directly and more fully resolves the problem of imperial arbitrators without sacrificing the original objectives of investment treaties.

Substantively, Canada's new model FIPA includes three provisions likely to cut off efforts to second-guess the normal operations of modern regulatory states. Like CETA, the new model FIPA contains a provision reaffirming the right of states to regulate.[683] As in CETA, the provision probably functions more as an interpretive aid than as an exception to the treaty or a defense to liability.[684] But unlike CETA, the model FIPA specifically designates that provision "Right to Regulate" and, unlike CETA, it places the provision front and center—in the third article, immediately following the provision on scope of the treaty.[685] The text of the FIPA omits the qualifications that claim to provide "greater certainty," but create the impression that they blunt the force of the right to regulate.[686] The text of the

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680 *Id.* (emphasis added).

681 *See* Shafruddin, *supra* note 4, at 468 (urging developed states not to abandon ISDS, but to "address their substantive concerns . . . with more comprehensive drafting of substantive protections").

682 *Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model*, *supra* note 674; *Canada Publishes 2021 Model Foreign Investment Promotion and Protection Agreement*, INV. TREATY NEWS (June 24, 2021), https://www.iisd.org/itn/en/2021/06/24/canada-publishes-2021-model-foreign-investment-promotion-and-protection-agreement/; Crowell & Moring, *supra* note 5; Vladislav Djanic, *Unpacking Canada's New 2021 Model BIT: No Mention of FET, Expedited Arbitration for Small Claims, A Code of Conduct Expanded to Arbitrator Staff and Assistants, and Promotion of Inclusiveness*, INV. ARB. REP. (2021); Dina Prokic, & Kiran Nasir Gore, *Release of the New Canadian FIPA Model: Reflections on International Investment and ISDS at a Crossroads*, KLUWER ARBITRATION BLOG (May 31, 2021), http://arbitrationblog.kluwerarbitration.com/2021/05/31/release-of-the-new-canadian-fipa-model-reflections-on-international-investment-and-isds-at-a-crossroads/.

683 Canadian Model FIPA, *supra* note 5, art. 3.

684 *See supra* notes 621–24 and accompanying text.

685 *Compare* Canadian Model FIPA, *supra* note 5, art. 3, *with supra* text accompanying note 620.

686 *Compare* Canadian Model FIPA, *supra* note 5, *with supra* text accompanying note 620. In the context of CETA, the relevant article clarifies "for greater certainty," that "the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment

FIPA adds a range of topics recognized as "legitimate policy objectives," including climate change, the rights of indigenous peoples, and gender equality.[687] Like CETA, the FIPA's text may invite a degree of balancing by tribunals,[688] but it seems to impose a broader and more emphatic mandate for tribunals to respect the rights of states to regulate within their borders.[689]

After recognizing the right to regulate, the FIPA's provision on expropriation provides that "a non-discriminatory measure . . . that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety, and the environment, does not constitute indirect expropriation, *even if it has an effect equivalent to direct expropriation*."[690] Evidently, this eliminates the possibility that tribunals could regard legitimate public welfare regulations as indirect takings even if they have the effect of completely destroying the value of investments. Unlike CETA, there is no exception for "rare circumstances." One might still challenge supposedly legitimate public welfare measures as discriminatory or adopted in bad faith. However, those situations involve fundamental breaches of the nightwatchman and rule-of-law states and, so, would not involve the second-guessing of the normal operations of modern regulatory states.[691]

In addition, the model FIPA includes a provision that addresses the "Minimum Standard of Treatment."[692] Unlike CETA, the text of the model

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or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of [fair and equitable treatment] under this Section." Post-Scrub CETA, *supra* note 3, art. 8.9(2). Likewise, it clarifies, "for greater certainty," that "a Party's decision not to issue, renew or maintain a subsidy" does not constitute a violation of fair and equitable treatment in the absence of "any specific commitment under law or contract to issue, renew, or maintain that subsidy." *Id.* at art. 8.9(3)(a). In the author's view, the effect of these clarifications is to emphasize a small number of situations in which regulatory action clearly does not amount to a treaty violation, thereby casting doubt on the legal treatment of the much larger universe of situations likely to arise.

687 Canadian Model FIPA, *supra* note 5, art. 3.

688 *See supra* note 624 and accompanying text.

689 Crowell & Moring, *supra* note 5 (predicting that a "broadly worded provision like this one may be useful for defending against claims and may shape how arbitral tribunals view States' conduct, not least because Article 3 does not require compliance with obligations elsewhere in the FIPA Model"). In this context, another observer notes that the relevant provision seems much more emphatic than NAFTA Art. 1114, which recognized the freedom of states parties to protect "environmental concerns" but only through measures "otherwise consistent with this Chapter," a formulation that left the impression of merely paying "lip-service" to environmental values. *See* Djanic, *supra* note 682 (emphasizing the novelty of the provision on the right to regulate, as well as its breadth of scope when compared to NAFTA Art. 1114); Elyse M. Freeman, Note, *Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights*, 42 COLUM. J. TRANSNAT'L L. 177, 204 (2003) (suggesting that NAFTA Article 1114 only pays "lip service" to environmental values).

690 Canadian Model FIPA, *supra* note 5, art. 9.3 (emphasis added).

691 *See supra* notes 33–34, 40 and accompanying text.

692 Canadian Model FIPA, *supra* note 5, art. 8.1.

FIPA does not even mention "fair and equitable treatment."[693] Unlike CETA, the text of the model FIPA does not invite tribunals to consider any form of "legitimate expectations" in applying the minimum standard.[694] Unlike CETA, the FIPA specifies that it only requires "treatment in accordance with the customary international law minimum standard of treatment of aliens."[695] Like CETA, the text of the FIPA contains a list of state actions that violate that minimum standard.[696] However, unlike CETA, the provision states that a "Party breaches this obligation *only* if a measure constitutes" one of the enumerated actions, thereby expressly establishing a closed list.[697] In reviewing that closed list, one finds significant overlap with CETA, but also significant examples of narrowing, emphasized in italics below:

> (a) denial of justice in criminal, civil or administrative proceedings;
> (b) fundamental breach of due process in judicial and administrative proceedings [*with with no mention of transparency*];
> (c) manifest arbitrariness [*clarified by footnote to explain that "[a] measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact"*];
> (d) targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs;
> (e) abusive treatment of investors, such as *physical* coercion, duress and harassment; or
> (f) a failure to provide full protection and security [*with both parts of that phrase clarified to mean* "*only the physical security of an investor and their covered investment*"].[698]

Taken together, the omission of any reference to "fair and equitable treatment" or "legitimate expectations," the explicit limitation to the customary international law minimum standard of treatment for aliens, the introduction of an expressly closed list, and the narrowing of that list to omit transparency, to define arbitrariness in terms of "evident" irrationality, to prohibit only "physical" coercion, and to guarantee only physical (as opposed

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693 *Canada Publishes 2021 Model Foreign Investment Promotion and Protection Agreement*, *supra* note 682; Djanic, *supra* note 682; Prokic & Gore, *supra* note 682.

694 *See* Crowell & Moring, *supra* note 5 (opining that the provision "appears to preclude arguments based on the legitimate expectations of the foreign investor").

695 Canadian Model FIPA, *supra* note 5, art. 8.1.

696 *Id.*

697 *Id.* (emphasis added).

698 *Compare id., with* Post-Scrub CETA, *supra* note 3, art. 8.2.

to legal) protection and security,[699] virtually eliminate any possibility for second-guessing the normal operations of modern regulatory states. It marks a decisive return to the original objective of codifying traditional principles of state responsibility and policing exceptional failures of the nightwatchman and rule-of-law states. Reading the closed list, one can see how normal states should avoid liability in normal times.

The substance of the closed list also has the potential to alter the way that tribunals function and the roles that they perform. To begin with, the closed and narrowly tailored list of situations violating the minimum standard should have the effect of significantly curtailing the number of cases that investors submit to arbitration, particularly given the model FIPA's adoption of the "loser pays" presumption with respect to the allocation of costs.[700] Second, the limitation of the minimum standard to six relatively narrow, well-defined, and factually intensive causes of action means that tribunals can focus on the application of agreed standards to the facts of particular cases.[701] They should have correspondingly less scope for lawmaking, should feel less temptation to formulate influential legal standards in their awards, and should see less need to cite and to follow other awards in other cases involving other facts. In other words, consistent with the original expectations for BITs, investor-state arbitration should again become more of an individual sport.[702]

It is possible that one might level the same sort of criticism at the model FIPA's substantive reforms that observers leveled against CETA's procedural reforms: large and powerful investors might object to the changes and might use their leverage to conclude investment agreements directly with host states on more favorable terms.[703] For the reasons stated below, however, investors seem less likely to raise such objections, or to raise them effectively, in response to Canada's new model FIPA.

First, one should recall that CETA's incorporation of an investment court system occurred only after the conclusion of negotiations,[704] as the result of strong-arm tactics directed at investors and ISDS,[705] and in the shadow of a public consultation process that was not designed to give much

699 *See* Crowell & Moring, *supra* note 5 (suggesting that this formulation counteracts the recent tendency of tribunals to require host states to provide not just physical, but also "commercial, legal, and regulatory security" to foreign investors).

700 Canadian Model FIPA, *supra* note 5, art. 40.3.

701 *See supra* note 313 and accompanying text.

702 *See supra* note 314.

703 *See supra* note 645 and accompanying text.

704 *See supra* notes 3, 524, 537 and accompanying text.

705 *See supra* notes 525–35 and accompanying text.

weight to the interests of investors.[706] Given the exceptional and goal-oriented chain of events that led to the introduction of an investment court system, one can understand the strongly negative reaction of the investment community. By contrast, as explained above, the public consultation undertaken by Canada in anticipation of its new model FIPA sought out, and gave weight to, the interests of Canadian investors.[707] In particular, it emphasized the importance of "robust" investor-state arbitration to Canadian investors.[708] While acknowledging the need to protect public regulation, the report emphasized substantive reforms as the "best" way forward.[709] The concern for investors seems genuine and evident in the final text, where investors retained access to "robust" investor-state arbitration.[710] Since that may be the most important right under investment treaties,[711] it seems relatively less likely that powerful investors would object to the balance struck by Canada's new model FIPA. At the very least, that conclusion seems consistent with early commentary.[712]

Second, even if powerful foreign investors wanted to object to the balance struck in Canada's new model FIPA, they would likely be less effective in making their case. In the context of CETA's introduction of an investment court system, it was easy for investors and their advocates to object. The investment court system seemed to accept the basic substantive premises of the game while attempting to shift the slope of the playing field and the sympathies of officials.[713] Given that perception, leading writers could easily charge the unilateral appointment of all judges by states would

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706 *See supra* notes 527–35 and accompanying text. It should be recalled that the EU's public consultation process was designed to take a sounding of the nature and intensity of public opposition to the EU's longstanding commitment to investor-state arbitration. *See supra* notes 525–29 and accompanying text; Chan & Crawford, *supra* note 507, at 697 (opining that the EU initiated the public consultation "[i]n order to dampen and coopt opposition"); *see also* Cynthia M. Ho, *A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings*, 6 UC IRVINE L. REV. 395, 465 (2016) (noting that the EU had "strongly defended investor-state disputes for years"). As a result of the consultation, the EU bowed to that public opposition and proposed a completely new, state-driven dispute settlement mechanism. *See supra* notes 537, 628–30 and accompanying text; *see also* Ho, *supra*, at 465 (opining that the EU "did bow to public concern and initiated public consultations in an attempt to address [those] concerns," and that the "consultations were important to the EU's recent inclusion of an investment court, as well as an appellate body in recent agreements"). Clearly, the consultation process was not designed to, and did not, give much weight to the interests of the investment community.

707 *2019 Consultation Report and FIPA Review, supra* note 559.

708 *Id.*

709 *Id.*

710 Crowell & Moring, *supra* note 5; *see also* Canadian Model FIPA, *supra* note 5, arts. 27–28.

711 *See supra* notes 284–85 and accompanying text.

712 *See* Crowell & Moring, *supra* note 5 (opining that the new Canadian model FIPA provides a "vote of confidence to a modernized ISDS system . . . at a time when ISDS has faced criticisms from certain governments and political leaders").

713 *See* text following *supra* note 637.

introduce a bias that loaded a legal process in favor of states.[714] They could charge that the appointment of judges by states would become a political process unlikely to result in selection of the most qualified international lawyers.[715] They could charge that the elimination of party-appointed arbitrators destroyed one of the most important, most consistently available, and long-standing rights of investors under investment treaties.[716]

None of the foregoing arguments can be made in relation to Canada's new model FIPA. It is possible that some powerful investors might not prefer the substantive changes introduced in the model FIPA, but they cannot argue that those substantive changes deprive investors of any intended, inherent, or long-standing right to second-guess the normal operations of modern regulatory states.[717]

In short, Canada's new model FIPA takes a more balanced, direct, and complete approach to the problem of imperial arbitrators. Instead of CETA's procedural reforms, which operate indirectly and incompletely by allowing global administrative law and lawmaking to continue under the supervision of a more deferential permanent international court, Canada's new model FIPA adopts substantive reforms that virtually eliminate the possibility for second-guessing the normal operations of modern regulatory states under any standard of review, that severely curtail opportunities for tribunals to engage in collective lawmaking, and that place corresponding limits on opportunities for development of a de facto system of precedent in international investment law. Instead of the USMCA's procedural reforms, which operate by completely eliminating any form of ISDS in certain contexts,[718] the new model FIPA preserves the traditional right of investors to demand arbitration of claims involving exceptional failures of the nightwatchman and rule-of-

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714 *See supra* notes 642–43 and accompanying text.

715 Brower, *supra* note 534, at 296; Brower & Ahmad, *supra* note 483, at 1184.

716 *See* Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded,* 29 ARB. INT'L 7, 9–11 (2013) (generally opining that the power to appoint an arbitrator constitutes one of the most longstanding, fundamental, and attractive rights for parties selecting arbitration). Observers and courts often connect the right of appointment to the right of equality of treatment for the parties. *See* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1089 (2009). Equality of treatment arguably becomes an issue where one class of potential litigants (states) appoints all of the adjudicators for claims brought solely against members of the appointing class. *See supra* notes 643, 648–49 and accompanying text.

717 As noted above, the customary international law of state responsibility for injuries to aliens is addressed to upholding the fundamental values of the rule-of-law and nightwatchman states, customary international law took shape before the development of the modern regulatory state, investment treaties were developed to reinforce traditional principles of customary international law when the global consensus started to unravel, and international law lacks any significant experience in controlling the modern regulatory state. *See supra* notes 31–40, 57–58, 241–58, 286–87 and accompanying text.

718 *See supra* notes 660–63 and accompanying text.

law states. As stated in the report on Canada's consultations with stakeholders, substantive reform constitutes the "best" way to protect public interest regulation.[719] It also constitutes the best way to realign modern investment treaty practice with customary international law on state responsibility for injuries to aliens, and with the original objectives of modern investment treaties during the second wave of BITs.

E. Possible Criticisms of an Exclusive Emphasis on Substantive Reform

Before closing, one should pause to address two potential criticisms of a purely substantive approach to investment treaty reform. First, one might accept the need for substantive reform, but conclude that it should be pursued in combination with the establishment of a permanent investment court in order to eliminate every possible toehold for imperial arbitrators. Although plausible, the argument does not address the perceived imbalance of empowering states to appoint all tribunal members, or its tendency to drive powerful investors to vote with their feet.[720] Nor does it address the likelihood that the broader universe of states will have little appetite for a new permanent supranational judicial body during a period of populism and economic nationalism.[721]

One should add that a lack of need could further diminish the appetite for a permanent investment court. Assuming the adoption of substantive reforms that clearly limit arbitrators to policing exceptional failures of the nightwatchman and rule-of-law states, and assuming tribunals adhere to that narrow mandate, the universe of viable claims would probably shrink to the point where the maintenance of a two-tier permanent investment court would be unjustifiable.[722]

This raises a second possible criticism of reliance exclusively on substantive reforms: perhaps arbitrators *cannot* be trusted to apply substantive reforms that preserve state regulatory space; perhaps imperial arbitrators will do their best to interpret treaties in ways that blunt or frustrate the goals of substantive reform. As evidence of this tendency, one might cite the recent award in *Eco Oro v. Colombia*,[723] in which one observer asserts

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719 *See supra* notes 680–81 and accompanying text.

720 *See supra* notes 643, 645, 648–49 and accompanying text.

721 *See supra* notes 652–53 and accompanying text.

722 *See supra* note 700 and accompanying text.

723 Eco Oro Minerals Corp. v. Rep. of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (Sept. 9, 2021), https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf [hereinafter *Eco Oro* Award].

the tribunal "simply obliterated" a general exception for measures necessary for environmental protection and conservation.[724] Although necessarily lengthy, one has to summarize the decision in order to understand the point.

In *Eco Oro*, the Canadian investor obtained a concession to explore for and extract silver and gold in a defined area, subject to regulatory approvals that included an environmental license.[725] To some degree, the concession overlapped with a high-altitude wetland of ecological importance.[726] That overlap led to intense divisions within the Colombian government and society, with some stakeholders favoring economic development of natural resources and others favoring protection of the environment.[727] A critical component of the controversy involved the delimitation of the high-altitude wetland, which would have established the extent of overlap between the concession and the wetland.[728] That step was critical because the investor claimed a minimal overlap,[729] whereas others claimed nearly a 55% overlap.[730] For a variety of reasons, Colombia actively promoted the mining project, but still failed to complete the delimitation over a period of years.[731] At the same time, Colombia denied Eco Oro's request to suspend its own obligations under the concession pending completion of the delimitation.[732] Against this background, Eco Oro initiated arbitration against Colombia under the Canada-Colombia Free Trade Agreement,[733] alleging that Colombia's actions amounted to an indirect expropriation of the concession and a violation of the customary international law minimum standard of treatment for aliens.[734]

The tribunal agreed that Colombia's actions amounted to a complete deprivation of Eco-Oro's rights under the concession.[735] However, a majority of the tribunal (consisting of Colombia's party-appointed arbitrator and the

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724 Benton Heath, *Eco Oro and the Twilight of Policy Exceptionalism*, INV. TREATY NEWS (Dec. 20, 2021), https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/.

725 *Id.*; *see also Eco Oro* Award, *supra* note 723, at paras. 86, 101, 104, 176.

726 Heath, supra note 724.

727 *Id.*; *see also Eco Oro* Award, *supra* note 723, at paras. 718, 791, 795 (indicating that conflicting approaches taken by various arms of the Colombian government put Eco Oro on a "regulatory roller-coaster" and led to a state of "utter confusion").

728 Heath, *supra* note 724.

729 *Eco Oro* Award, *supra* note 723, at paras. 568 & n.612, 570; Heath, *supra* note 724.

730 *Eco Oro* Award, *supra* note 723, at paras. 105, 154; Heath, *supra* note 724.

731 *Eco Oro* Award, *supra* note 723, at paras. 773–75, 803, 805; Heath, *supra* note 724.

732 *Eco Oro* Award, *supra* note 723, at paras. 801, 805.

733 Canada-Colombia Free Trade Agreement, Can.-Colom., Nov. 21, 2008, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng [hereinafter Canada-Colombia FTA].

734 *Eco Oro* Award, *supra* note 723, at para. 6; Heath, *supra* note 724.

735 *Eco Oro* Award, *supra* note 723, at para. 634.

presiding arbitrator) found that Colombia's actions fell within Annex 811(2)(b) of the FTA.[736] According to that provision, "non-discriminatory measures . . . designed and applied to protect legitimate public welfare objectives, for example . . . protection of the environment" do not amount to indirect expropriations "[e]xcept in rare circumstances when a measure . . . is so severe . . . that it cannot reasonably be viewed as having been adopted in good faith."[737] In the majority's view, Colombia's actions were clearly bona fide and not so egregious as to fall within the "rare circumstances" justifying liability for expropriation.[738]

Turning to the claim for violation of the minimum standard, a different majority (consisting of Eco Oro's party-appointed arbitrator and the presiding arbitrator) held that Colombia's "arbitrary vacillation and inaction," its failure to delimit the wetlands over a period of years, and its concurrent denial of extensions of time for Eco Oro to perform its obligations under the concession amounted to a "wilful neglect of . . . duty."[739] The majority also described Colombia's actions as inflicting damage on Eco Oro "without serving any apparent purpose," "without serving any legitimate purpose," and in "flagrant disregard for the basic principles of fairness."[740]

As justification for its actions, Colombia invoked Article 2201(3) of the FTA, which adapts the "General Exceptions" set forth in Article XX of the GATT as follows: "nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary" for environmental protection and conservation, "subject to the requirement that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination between investment or investors, or a disguised restriction on international . . . investment."[741] In a brief and convoluted section of the award,[742] the majority suggested both that Article 2201(3) did and did not eliminate liability for a "breach" of the FTA.[743]

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736 *Eco Oro* Award, *supra* note 723, at paras. 635, 642; Heath, *supra* note 724.

737 Canada-Colombia FTA, *supra* note 733, Annex 811(2)(b).

738 *Eco Oro* Award, *supra* note 723, at paras. 645, 675, 699; Heath, *supra* note 724.

739 *Eco Oro* Award, *supra* note 723, at paras. 820–21.

740 *Id.*

741 Canada-Colombia FTA, *supra* note 733, art. 2201(3).

742 *See Eco Oro* Award, *supra* note 723, at paras. 826–37 (spanning only four pages); *see also* Heath, *supra* note 724 (describing this section of the award as a "mess").

743 *Compare Eco Oro* Award, *supra* note 723, at para. 829 (noting that Article 2201(3) does not refer to claims for breaches of the FTA and contrasting this with Annex 811(2)(b)—which includes "an express stipulation as to the circumstances in which a measure is not to constitute a treaty breach"—and concluding that the states parties would not have "left such an important provision of non-liability to be implied" in Article 2201(3)), *with id.* at para. 830 (construing Article 2201(3) as permitting a state party to adopt certain measures "without finding itself in breach of the FTA").

However, the majority was clear on one point: Article 2201(3) is only "permissive" in the sense that it ensures that the parties may adopt and enforce environmental and conservation measures free from claims for restitution of property, but it does not eliminate the obligation to provide compensation.[744] In so doing, the majority compared Annex 811(2)(b) with Article 2201(3), noting that the former contained an express exclusion of circumstances amounting to a treaty violation, whereas the latter did not.[745] Also, while the reasoning is somewhat hard to follow, the majority opined that if Article 2201(3) was deemed to exempt states from liability, there would be situations where it would come into conflict with Annex 811(2)(b) by excusing liability under circumstances in which the Annex required payment of damages.[746] In other words, the decision layered a series of primary obligations, annexes, and exceptions in a way that allowed the majority to conclude that the article on "General Exceptions" ceased to function as an exception to liability.[747] On the contrary, the majority improbably construed the "General Exceptions" as nothing more than a narrow exception to claims for restitution of property.[748]

Following publication, the *Eco Oro* award had certain stakeholders howling. The moderator of one webinar on the topic described the award as "so problematic, so contrary to the public interest of states and their citizens, [and] so fundamentally wrong that it reverberates around the international investment community and beyond."[749] Another observer opined that the *Eco Oro* award could be annulled based solely on the brevity of discussion, the messiness of reasoning, and a result that rendered useless a "key tool in the long-running effort to rebalance one-sided investment treaties."[750] He also expressed the hope that "the defects in this decision will make other tribunals hesitate to follow *Eco Oro*'s lead."[751]

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744 *Eco Oro* Award, *supra* note 723, at para. 829.

745 *Id.*

746 *Id.* at para. 831.

747 As noted above, one observer has opined that the majority "simply obliterated" Article 2201(3) as an exception to liability. *See supra* note 724 and accompanying text.

748 *Eco Oro* Award, *supra* note 723, at para. 829. The construction is improbable because the FTA already limits remedies to damages and restitution of property, and also gives the respondent state the option to pay damages in lieu of restitution, meaning that the FTA creates no right to maintain claims for restitution, and the purpose of Article 2201(3) cannot be to curtail the assertion of any such right. *See* Canada-Colombia FTA, *supra* note 733, art. 834(2).

749 Webinar: *Implications of the Eco Oro Decision for Investment Treaty Negotiations and Reforms,* INT'L INST. SUSTAINABLE DEVEL. (Oct. 28, 2021), https://www.iisd.org/events/implications-eco-oro-decision-investment-treaty-negotiations-and-reforms (statement by Suzy Nikièma, moderator at 01:35).

750 Heath, *supra* note 724.

751 *Id.*

While sharing misgivings about the majority's interpretation of Article 2201(3) in *Eco Oro*, this author does not see the decision as evidence that tribunals generally cannot be trusted to implement substantive reforms and are likely to frame their decisions in ways that blunt or frustrate the goals of substantive reforms. Three reasons support the author's conclusion. First, the *Eco Oro* award is aberrant. It was decided by an unstable, shifting majority.[752] The reasoning is convoluted.[753] The outcome has an important group of stakeholders howling. The award is vulnerable to annulment.[754] Even if it escapes that fate, it seems extremely unlikely to emerge as a precedent in the marketplace of ideas.[755]

Second, the *Eco Oro* award may only serve as a cautionary tale about a *particular approach* to substantive reform. In *Eco Oro*, the interpretive problems arose because the relevant treaty drafters attempted substantive reform by "larding" the instrument with a layered and interlocking series of primary obligations, annexes, and exceptions.[756] In so doing, they imported exceptions drawn from international law governing trade in goods, which "may be ill-equipped" to deal with investment disputes.[757] They also failed to reckon clearly with the fundamental policy choices underlying substantive reform.[758] As a result, the interactions among primary obligations, annexes, and exceptions were difficult to predict and understand.[759] One doubts whether similar problems would arise under Canada's new model FIPA, which focuses substantive reform solely on the elaboration of clear and narrowly defined primary obligations.[760] One can see this in the way it frames the minimum standard of treatment exclusively to encompass denials of justice, fundamental breaches of due process, measures that lack any rational connection to legitimate policy objectives, targeted discrimination on manifestly wrongful grounds, physical coercion or harassment, and denial

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752 *See supra* notes 736, 739 and accompanying text.

753 *See supra* notes 742–48 and accompanying text.

754 *See supra* note 750 and accompanying text.

755 *See supra* note 751 and accompanying text.

756 *See* Heath, *supra* note 724 (criticizing this approach to treaty drafting).

757 *Id.*

758 *Id.*

759 *See* Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, 2018 Y.B. INT'L INV. L. & POL'Y 365, 392 (2018) (explaining that the "increasingly popular strategy of layering regulatory flexibilities by (1) clarifying primary obligations, (2) adding right-to-regulate clauses, and (3) inserting general public policy exceptions creates more confusion than clarity where it is not accompanied by guidance to tribunals on how these novel elements relate to each other").

760 *See* Heath, *supra* note 724 (describing the new model FIPA's lack of reliance on layered and interlocking provisions on primary obligations and exceptions as "seemingly prescient given the ruling in *Eco Oro*").

of physical security.[761] The clarity of the substantive obligations, combined with the omission of layered and interlocking qualifications, leaves tribunals with little room to wander in directions that could blunt or frustrate the goals of substantive reform.[762]

Third, one should take care to separate the reasoning from the outcome in *Eco Oro*. It bears repetition that the majority described Colombia's actions as a willful neglect of duty, as inflicting damage on the investor without any legitimate or even apparent purpose, and in flagrant disregard for basic principles of fairness.[763] Given those findings, it seems unlikely that Article 2201(3) would have justified Colombia's actions. Even if that article establishes general exceptions to liability and the obligation to pay compensation, it seems hard to imagine Colombia's willful neglect of duty, infliction of damage without legitimate or apparent purpose, and flagrant disregard for basic principles of fairness were in any sense "necessary" for protection of the environment or conservation.[764] It also seems hard to imagine that Colombia's actions would satisfy the chapeau to Article 2201(3), which seeks to prevent an "abuse of right" by requiring that the measures not be applied in a manner that constitutes a disguised restriction on international investment.[765] It also seems hard to imagine that Article 2201(3) was designed to provide investors with *less* protection than required by customary international law,[766] meaning that it should provide no justification for the egregious failures of the rule-of-law state found by the majority in *Eco Oro*.

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761 *See supra* note 698 and accompanying text.

762 *See supra* notes 699–702 and accompanying text.

763 *See supra* notes 739–40 and accompanying text.

764 Canada-Colombia FTA, *supra* note 733, art. 2201(3); *see also* Heath, *supra* note 724 (observing that the "necessary" standard may be extremely stringent and concluding that if Colombia had to show that "'arbitrary vacillation' toward Eco Oro's project was somehow 'necessary' for environmental protection . . . it is hard to see how the exception provides any additional security at all").

765 *See* Robert Howse, *The Appellate Body Rulings in the* Shrimp/Turtle *Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. ENV'T L.J. 489, 505 (2002) (explaining that the chapeau to GATT Article XX, from which Canada-Colombia FTA Article 2201(3) was drawn, serves to police against abuse of rights by states when applying measures necessary to environmental protection and conservation); *see also* Heath, *supra* note 724 (observing that Canada-Colombia FTA Article 2201(3) "is modelled after a similar 'general exceptions' provision in Article XX of the General Agreement on Tariffs and Trade"). Put in slightly different terms, violations of the international minimum standard that involve arbitrary treatment are unlikely to be justified by an exception that uses a chapeau to ensure that the exception does not apply to measures that are "applied in an arbitrary or unjustifiable manner." Alschner & Hui, *supra* note 759, at 379.

766 *See* Alschner & Hui, *supra* note 759, at 378 (quoting Celine Lavesque, *The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 363–70 (Roberti Echandi & Pierre Sauve eds., 2013)) (observing that "it would be surprising if countries such as Canada, Japan, and Singapore, by including general exceptions in their IIAs, 'meant to provide their investors with less protection than what is provided by customary international law'").

It seems equally unlikely that Colombia would have prevailed under the standards incorporated into Canada's new model FIPA, which prohibits denials of justice, fundamental breaches of due process, and manifestly arbitrary measures that have no rational connection to legitimate policy objectives.[767] Whatever one might say about the majority's reasoning in *Eco Oro*, its award does not constitute an example of a tribunal imposing liability beyond exceptional failures of the nightwatchman and rule-of-law states. On the contrary, the findings support the conclusion that Colombia did not satisfy the fundamental guarantees of security demanded from a rule-of-law state.

For the reasons just stated, the author would not accept *Eco Oro* as evidence that arbitrators will generally seek to blunt or to frustrate the goals of substantive treaty reforms, particularly when pursued through the clear and narrow articulation of primary obligations chosen by the drafters of Canada's new model investment treaty.

VII. CONCLUSION

It helps to view Canada's recent investment treaty practice from an historical perspective and in relation to the central problem of modern investment treaty practice: the rise of imperial arbitrators who engage in collective lawmaking and who have developed important lines of jurisprudence that support arbitral second-guessing of the normal operations of modern regulatory states.

From the historical perspective, one learns that the customary international law on state responsibility for injury to aliens aimed to protect against the exceptional failures of the nightwatchman and rule-of-law states. When the customary international law standard came under attack following World War II as a result of decolonization, socialist revolution, and economic nationalism, two waves of investment treaties aimed to reinforce the traditional principles of customary international law, and later, to give investors direct rights of action against host states. In so doing, the drafters likely expected relatively small numbers of arbitrations, with tribunals focused on fact-finding, the application of agreed legal standards, and rendering awards that would have no precedential effect. There is no indication that drafters thought they were empowering tribunals to second-guess the normal operations of modern regulatory states, which would have amounted to a new frontier for international law, and could not have been launched by capital-exporting states who were in a defensive crouch, struggling just to maintain the status quo. Later, the simultaneous decline of communism, economic nationalism, commercial lending to developing

767 *See supra* note 698 and accompanying text.

states, and foreign aid programs created a window for the proliferation of foreign direct investment and investment treaties. At that time, there was no discussion of investment treaties as tools for second-guessing the normal operations of modern regulatory states.

NAFTA marked a fortuitous turning point in modern investment treaty practice. Although directed at Mexico in light of that country's history of agricultural and oil expropriations, NAFTA's investment chapter unexpectedly spawned a large number of claims by U.S. investors against Canada, and by Canadian investors against the United States. Given the high rankings of those states on rule-of-law indexes, claims were unlikely to succeed when measured against the traditional expectations for the nightwatchman and rule-of-law states. Thus, the context invited claimants to focus on the normal operations of modern regulatory states, to test the linguistic play in the provisions on expropriation and fair and equitable treatment, and to convince tribunals to accept much broader understandings of those provisions. That strategy bore fruit in a handful of early NAFTA cases; tribunals experimented with lawmaking, and the unexpectedly large number of claims created incentives for litigants and tribunals to cite the decisions of other tribunals. The stage was set for a de facto system of precedent that claimants could use to leverage favorable decisions. Taken together, these fortuitous circumstances created an opening for the problem of imperial arbitrators.

In the NAFTA context, the FTC's Notes of Interpretation effectively nipped the rise of imperial arbitrators in the bud. But after the initial cluster of NAFTA arbitrations revealed the types of claims that investors could bring, and the legal standards that tribunals might be persuaded to adopt, the number of new claims under BITs grew in following years. Those claims occurred in a context where few treaties had formal mechanisms like the FTC process,[768] and in which there was no universal kill switch for claims brought under scores of different treaties. In that context, tribunals engaged in lawmaking, often articulating standards that supported arbitral second-guessing of the normal operations of modern regulatory states. Tribunals developed, and to some extent formalized, a system of precedent in which arbitrators competed for influence and, in any case, cited almost exclusively

768 Writing at the relevant time, two leading scholars of international investment law opined that "BITs do not normally have institutional mechanisms to obtain authentic interpretations of their meaning," though they recognized that U.S. investment treaty practice was heading in that direction. DOLZER & SCHREUER, *supra* note 71, at 32; *see also* Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP. L.Q. 361, 372 (2008). Although states can issue joint interpretive statements even in the absence of institutional mechanisms, they have rarely done so. Report, UNCTAD, Interpretation of IIAs: What States Can Do, IIA Issues Note No. 3 (Dec. 2011), at 4, https://unctad.org/system/files/official-document/webdiaeia2011d10_en.pdf; Poulsen & Gertz, *supra* note 308, at 6.

to other arbitrators. Despite periodic expressions of concern, the process continued without meaningful checks and balances. The problem of imperial arbitrators had emerged full-blown, at least until the *Phillip Morris* and *Vattenfall* cases brought things to a crisis point.

Since that time, ISDS has become politically toxic even in states that pioneered investment treaty practice. Although some observers portray those states as malcontents who got exactly what they bargained for,[769] it is hard to believe that the drafters of investment treaties foresaw the rise of imperial arbitrators or their emergence as the central problem of modern investment treaty practice.[770] To some degree, members of the arbitration bar and arbitrators bear responsibility for exploiting opportunities that aligned with professional interests and could be logically justified, but had little foundation in the history of international law or the goals of investment treaties, and were likely to disturb the core interests of powerful states at some point.

Given the circumstances described above, investment treaty reform has been a hot topic for the past several years, including in the multilateral context of UNCITRAL Working Group III, where Canada and the EU are leading the charge for some package of systemic reform. In many ways, Canada's recent investment treaty practice constitutes a microcosm of the options. Over the course of five years and under the influence of powerful negotiating partners, Canada has lurched from traditional investor-state arbitration in the TPP, to an investment court system in CETA, to the elimination of ISDS in the USMCA, and back to a robust version of investor-state arbitration in the new model FIPA—though in the last case accompanied by substantive reforms that eliminate the ability of tribunals to second-guess the normal operations of modern regulatory states.

Even though it may appear clumsy or perplexing at times, Canada's uneven progress confirms Carville's assertion that "[t]he only person who ever stumbles is a guy moving forward."[771] Though sometimes changing direction under pressure from powerful negotiating partners, Canada has

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769 *See* Brower & Steven, *supra* note 331, at 195 (describing "the distress felt by Canada and the United States . . . by the novel and disconcerting fact of having to live up to the same substantive and procedural guarantees that they have required of their BIT partners," and observing that "the NAFTA Parties are getting precisely what they bargained for").

770 *See* Poulsen & Gertz, *supra* note 308, at 4 ("The historical record suggests states did not necessarily intend to grant investors such extensive legal rights when signing on to investment treaties, and did not foresee the wide-ranging implications for other public policy areas."); Thompson et al., *supra* note 558, at 862–63 (asserting that "it may have been difficult to assess the consequences of these treaties when they were originally signed and before they were interpreted via arbitration"); Yackee, *supra* note 349, at 309 (suggesting that "the sacrifice of sovereignty that BITs arguably represent is not the sacrifice that developed or developing states imagined it was going to be when they originally consented").

771 *See supra* note 7 and accompanying text.

pursued a series of reforms that preserve state regulatory space in significant ways. Viewed in isolation, each step represents progress. Viewed as paradigms, each option has garnered political and academic support.[772] But viewed against the perspective of history and the problem of imperial arbitrators, the new model FIPA stands out as Canada's most brilliant step.

Viewed from the perspective of history, one sees that the relevant body of customary international law and the pioneers of investment treaties aimed to provide security against exceptional failures of the nightwatchman and rule-of-law states. They did not aim to encourage supranational review of routine regulatory action under any standard of review. Viewed from this perspective, procedural reforms of investment treaties often miss the mark. CETA's investment court system enables the continuation of ISDS as a form of "global administrative law," though in a forum thought to be more deferential to the regulatory interests of states. The USMCA's elimination of ISDS between Canada and the United States eliminates the ability of investors and arbitrators to drive a system of "global administrative law." But it also deprives investors of the ability to protect themselves against exceptional failures of the nightwatchman and rule-of-law states. By contrast, Canada's new model FIPA uses substantive reform to eliminate the use of ISDS as a form of global administrative law, while preserving a robust version of investment treaty arbitration to protect investors against exceptional failures of the nightwatchman and rule-of-law states. Historically speaking, this constitutes a return to the strategic space that investment treaties were intended to occupy.

In other words, Canada's new model FIPA rightly eliminates investment treaties and ISDS as tools of governance while ensuring that they will continue to play an important role in providing security in a chaotic and often dangerous world.

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772 Writers endorsing CETA's introduction of an international investment court include VanDuzer, *supra* note 3, at 17. International organizations and states endorsing the establishment of an international investment court include the EU and Canada. *See supra* notes 546–47, 552–53 and accompanying text. Writers endorsing the USMCA's elimination of ISDS as a model for future investment treaties include Lai, *supra* note 369, at 259, 294; Mertins-Kirkwood & Smith, *supra* note 560, at 32–33. States endorsing the elimination of ISDS from investment treaties include Brazil, Ecuador, New Zealand, and South Africa. *See* Mertins-Kirkwood & Smith, *supra* note 560, at 33; *see also supra* note 554 and accompanying text.