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Book Review: Commentaries on Selected Model Investment Treaties

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Book Review: *Commentaries on Selected Model Investment Treaties*

Edited by Chester Brown. Oxford, UK: Oxford University Press.
2013. Pp. 1,024. £180.00.

Reviewed by Jack J. Coe, Jr.* & Ashley K. Puscas**

I. INTRODUCTION

Twenty-five years ago, a professor teaching an International Business Transactions course might reasonably have allocated only modest class time to Bilateral Investment Treaties (BITs), perhaps preferring to feature Friendship, Commerce and Navigation Treaties (FCNs) more prominently.¹ The practical importance of FCNs might well have been explored by examining the ELSI case,² in which the United States pressed a claim against Italy before the International Court of Justice, alleging that treatment received by a United States investor violated the Italy-U.S. FCN.³

Although several countries including the United States had initiated BIT programs by February 1987 when the ELSI claim was initiated, few direct investor-State claims of the kind contemplated by most BITs had been launched.⁴ BITs were thus regarded as a device by which States desirous of

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1. For a contemporaneous view of the perceived role of FCNs in protecting investors, see WALTER S. SURREY & CRAWFORD SHAW, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 322-28 (1963).

2. Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), ICJ Judgment of July 20, 1989.

3. *See generally id.*

4. Reportedly, the first BIT based investor-State arbitration was launched in 1987, the same year the application in ELSI was made. *See Sachet Singh & Sooraj Sharma, Investor-State Dispute*

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investment affirmed a general commitment to the rule of law by promising investors fair and non-discriminatory treatment and compensation in the event of expropriation.⁵ With respect to foreign direct investment, BITs represented an improvement upon FCNs by dealing with investment activities and protections in a more focused and comprehensive fashion.⁶ By way of innovation, however, they also generally contained each State's consent to arbitrate claims brought directly against it by aggrieved investors from the other State who alleged breaches of the BIT in question.⁷

The investor-State arbitration option found in many BITs eventually came to be utilized by investors, and not as an aberration. In the mid-1990s, States were named as respondents in multiple arbitrations brought by foreign investors.⁸ Claims under NAFTA Chapter Eleven—essentially a trilateral investment treaty—were among the earliest to be initiated,⁹ but multiple

Settlement Mechanism: The Quest for a Workable Roadmap, 29 MERKOURIOS 88, 90 (2013) (citing *Asian Agricultural Products Ltd v. Sri Lanka*, ICSID Case No. ARB/87/3 (1990)). The U.K. investor in that case recovered approximately \$500,000. See *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3 (1990), available at <http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf>.

5. See generally Jack J. Coe, Jr. & Noah Rubin, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (2005).

6. See generally KENNETH VANDEVELDE, UNITED STATES INVESTMENT TREATIES POLICY AND PRACTICE 14-28 (1992); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995).

7. Antonio R. Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REV. 287 (1997) (demonstrating how direct arbitral standing for investors is a common feature).

8. See generally Jack J. Coe, Jr. & Clyde C. Pearce, *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311 (2000).

9. *Id.*

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claims under BITs soon followed.¹⁰ The incidence of such claims continued to increase—perhaps encouraged by the handful of recoveries experienced by some, but certainly not all, investors.¹¹

A surge in the literature addressing BITs, which often focused upon investor-State arbitration, corresponded to the proliferation in investment claims that continued into the new millennium.¹² The available commentary enlarged from a small cache of books¹³ and articles¹⁴ to the now overwhelming, and still expanding, corpus of works by academics, practitioners, and various governmental and intergovernmental entities. To a large extent, these writings assess the content of BITs through the arbitral jurisprudence produced under them.¹⁵

10. See UNCTAD, *Reform of Investor-State Dispute Resolution: In Search of a Roadmap*, IIA ISSUES NOTE, NO. 2, June 2013, at 2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

11. The NAFTA Claim by Ethyl against Canada reportedly led to a \$13 million settlement. See 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, 132 (2003). The tribunal in *Metalclad v. Mexico* awarded the investor over \$16 million. See Jack J. Coe, Jr., *Metalclad - A Retrospective*, in *NAFTA ARBITRATION REPORTS* (J.C. Thomas & J.C. Mowatt eds., 2002). While more substantial than some recoveries had by investors, see *supra* note 4, these amounts were truly modest in comparison to certain subsequent awards that have more robustly caused States to reconsider their consent to arbitrate investor-State claims. See, e.g., UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, IIA ISSUES NOTE, NO. 1, May 2013, at 1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf (reporting on the \$1.77 billion award made to Occidental in its arbitration against Ecuador Occidental Petroleum Corp. & Occidental Exploration & Prod. Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11 (2012)).

12. See generally CAMPBELL MCLACHLAN QC ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007).

13. See VANDELDE, *supra* note 6, at 14-28; DOLZER & STEVENS, *supra* note 6.

14. See K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. L. 105, 105 (1986); Gerald Aksen, *The Case for Bilateral Investment Treaties*, in *PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1981* 357 (1981).

15. See CAMPBELL MCLACHLAN QC ET AL., *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007).

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Approximately 2,850 BITs now exist¹⁶—a number representing explosive growth over the last two decades.¹⁷ These treaties display many common patterns and common sections of texts, suggesting the use of standard models and considerable cross-pollination. Being the product of individual bilateral negotiations, however, such treaties naturally exhibit purposeful variations and noticeable diversity. After all, no single model could be expected to suffice on a global basis without some adjustments given the range of States involved and their distinctive circumstances—economic, political and legal. In getting to the bottom of this mix of diversity and uniformity, one can hardly do better than to consult *Commentaries on Selected Model Investment Treaties (Commentaries)*, a substantial, one-volume work recently published by Oxford University Press and edited by Dr. Chester Brown.¹⁸

II. STRUCTURE AND SCOPE OF THE BOOK

Commentaries presents detailed and substantial examinations of selected investment treaty programs, comprising of 895 pages and 18 chapters.¹⁹ The individual chapters' authors are from government, academia, and private practice.²⁰ With the exception of the chapter on NAFTA,²¹ each chapter

16. See UNCTAD, *Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making*, IIA ISSUES NOTE, NO. 5, July 2013 [hereinafter *New Generation*], available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d6_en.pdf.

17. UNCTAD, *Bilateral Investment Treaties 1959–1999*, iii, UNCTAD Doc. UNCTAD/ITE/IIA/2 (2000), available at <http://unctad.org/en/Docs/poiteiid2.en.pdf> (describing the “rapid increase” in BITs during the 1990s, amounting to a nearly a five-fold increase between the end of the 1980s and the end of the 1990s).

18. COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (Chester Brown ed., 2013) [hereinafter COMMENTARIES].

19. *Id.*

20. *Id.*

21. See Andrea Bjorklund, *NAFTA Chapter 11*, in COMMENTARIES, *supra* note 18, at 465.

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addresses a specific country and focuses on Model BIT practices of that specific State. Common chapter features include a general commentary on the history of the respective State's BIT policy, a detailed discussion of the model's principal provisions, and the textual variations found in practice.²²

Although *Commentaries* is limited to sixteen countries plus NAFTA, the States selected for inclusion remind us that BIT relations are no longer limited to the original pattern in which a particular capital exporting country, based on a model text of its design, formed a BIT with a country seeking foreign direct investment.²³ While, as one would expect, the book has chapters on the model BIT programs of Canada, Italy, France, Germany, the Netherlands, the United Kingdom, and the United States, so too are there chapters analyzing the models adopted by China, Columbia, Korea, Latvia, and Russia.²⁴ BITs are now often formed between States at equivalent stages of development,²⁵ and promoted by States that not long ago had to be coaxed to accept BIT obligations in order to attract foreign direct investment.

22. The work also contains comprehensive tables listing the book's contents (chapter-by-chapter), the cases cited, the treaty instruments examined, and a serviceable index. COMMENTARIES, *supra* note 18. All but one chapter ends with a "select bibliography." *Id.*

23. A recurrent question raised within the literature is whether BITs in fact stimulate foreign direct investment and correspondingly whether States benefit in such measure as to warrant the risks and costs associated with investor-State arbitration. See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1997).

24. COMMENTARIES, *supra* note 18.

25. See *New Generation*, *supra* note 16, at 5.

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III. BIT SIMILARITIES AND DIVERGENT RESULTS

As a perusal of *Commentaries* will confirm, many similarities exist among BITs.²⁶ A cluster of treatment undertakings are virtually standard; promises of national treatment, most favored nation treatment, fair and equitable treatment,²⁷ full protection and security,²⁸ and compensation in the event of measures equivalent to a taking²⁹ are commonplace within BITs.³⁰

A standard template also seems to have influenced the investor-State arbitration provisions found in most BITs. Typically, an investor is given a choice of two arbitral formats. Not uncommonly the two alternatives are arbitration administered by the International Centre for the Settlement of Investment Disputes (ICSID)³¹ or UNCITRAL Rules arbitration.³² In

26. See James Crawford, *Foreword*, in COMMENTARIES, *supra* note 18, at vii (“customary international law is ‘shaped by the conclusion of more than two thousand bilateral investment treaties and many [FCN treaties]’”).

27. See UNCTAD, *Fair and Equitable Treatment*, UNCTAD Doc. UNCTAD/ITE/IIT/11 (Vol. III) (1999), available at <http://unctad.org/en/docs/psiteiid11v3.en.pdf>.

28. See George Foster, *Recovering ‘Protection and Security’: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. OF TRANSNAT’L L. 1095 (2012).

29. Jack J. Coe, Jr. & Noah Rubin, *Regulating Expropriation and the Tecmed Case: Context and Contributions*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (2005).

30. The common, recurrent, treatment undertakings may also evidence customary international law. See Crawford, *supra* note 26.

31. There are two forms of ICSID arbitration: ICSID Convention Arbitration and ICSID Additional Facility Arbitration. If both the host State and home State have ratified the ICSID Convention (International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 37(2)(b), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]) the Convention supplies the applicable arbitral regime. See CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2009); LUCY REED, JAN PAULSSON, AND NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION (2011) [hereinafter GUIDE]. If only one of the two States involved has ratified the Convention, ICSID Additional Facility Rules arbitration may still be available. Indeed, the Additional Facility has been pressed into service in recent years for NAFTA Chapter Eleven disputes. Until recently, the United States was the only

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practice, the majority of investor-State arbitrations have been administered by ICSID,³³ though by no means to the exclusion of the UNCITRAL option.³⁴

To date, investors have initiated arbitration well over 500 times advancing claims representing billions of dollars.³⁵ States from virtually every region have been named respondents, often several times.³⁶ The

NAFTA State to have ratified the ICSID Convention. As a consequence, ICSID Convention arbitration was not available to a NAFTA investor.

32. See generally Stephen Jagush & Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Rules Arbitration: Areas of Divergence and Concern*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel et al. eds., 2010); Piero Bernardini, *ICSID Versus Non-ICSID Investment Treaty Arbitration* (Sept. 15, 2009), available at http://www.arbitration-icca.org/media/0/12970223709030/bernardini_icsid-vs-non-icsid-investent.pdf.

33. Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 977 (2011) (demonstrating ICSID is rightly considered the leading international arbitration institution devoted to investor-State dispute settlement).

34. See generally Jagush & Sullivan, *supra* note 32.

35. See UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA ISSUES NOTE, NO. 2, June 2013, at 2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. The rapid growth in the investor-State docket has been made possible by two structural predicates: a high number of ICSID parties (at present, 149 States, see ICSID, <https://icsid.worldbank.org/ICSID>) and the large number of sovereign commitments to arbitrate found principally, but not exclusively, in the plentiful BITs in existence. Cf. GUIDE, *supra* note 31, at 57-58 (majority of cases now BIT cases); UNCTAD, *supra* note 17, at iii (describing the "rapid increase" in BITs during the 1990s, amounting to a nearly a five-fold increase between the end of the 1980s and the end of the 1990s). Added to these factors is the tendency of States to regulate on a sector-wide basis, such that a single measure may affect investors from many countries thus implicating many different BITs. See R. Doak Bishop & Roberto Aguirre Luzi, *Investment Claims: First Lessons from Argentina*, in *INTERNATIONAL LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 425 (2005).

36. The ICSID website offers case analyses that include illustrative charts. See *The ICSID Caseload - Statistics*, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx> (last visited Jan. 18, 2015).

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heavy-laden investor-State docket³⁷ demonstrates that among investors, the perception persists that BIT arbitration, for all its flaws, is often to be preferred to either espousal (typified by the ELSI case)³⁸ or local courts.³⁹

The investor-State system, however, was not fully prepared for the heavy accumulation of cases that occurred. Initial flurries of awards helped accentuate the system's lack of a formal ordering of precedent and the absence an appeals mechanism to unify decisional authority;⁴⁰ these two attributes—some would say “weaknesses”—came to be much discussed when awards based on highly similar or identical BIT texts occasionally diverged.⁴¹

37. See generally Jose E. Alvarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 195, 368-405 (2011); cf. Roberto Dañino, Opening Remarks at Symposium on “Making the Most of Investment Agreements” (Dec. 12, 2005), available at, <http://www.oecd.org/investment/internationalinvestmentagreements/36053800.pdf> (stating that by the end of 2005, there were 113 pending cases, representing “exponential growth”).

38. Concerning espousal of claims by the investor's State of nationality, as occurred in the ELSI case, see generally Preliminary Report of the International Law Commission on Diplomatic Protection, Feb. 4, 1998, U.N. Doc. A/CN.4/484 (Bennouna: Rapporteur) [hereinafter Preliminary Report]; Werner Goldschmidt, *Transactions Between States and Public Firms and Private Foreign Firms (A Methodological Study)*, 136 RECUEIL DES COURS (HAGUE ACADEMY OF INT'L L.) 203, 239-42 (1972); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 406-407 (5th ed. 1998); PETER MALUNCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 256-57 (7th ed. 1997); JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 223-224 (2002).

39. See Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. FOREIGN INV. L.J. 1 (1986). Especially when the arbitration is being conducted other than under the ICSID Convention, local courts nevertheless continue to play a role. See generally Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAA?*, 19 J. INT'L ARB. 185 (2002); David Williams, *Review and Recourse Against Awards Rendered Under Investment Treaties*, 4 J. WORLD INV. 251 (2003).

40. Singh & Sharma, *supra* note 4, at 99-100.

41. Susan Franck, *Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521 (2005).

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IV. FRONT-END ADJUSTMENTS—THE U.S. EXAMPLE

As one might expect, successive generations of BITs demonstrate an awareness of the divergent arbitral decisions now in the public domain. Although it is common for critics favoring State sovereignty to focus heavily on the claim mechanisms established by BITs, calls to eliminate investor-State arbitration fully are not likely to be embraced widely. What is evident from State practice chronicled in *Commentaries* is that generally States have chosen not to do away with the “back end” of BITs (the investor claims sections), but have elected instead to regulate outcomes by adding guidance in the “front end”—where the substantive promises are set forth.⁴² The resulting trend is for the BIT texts to involve more detail than earlier models. The substantive impact of the added precision has generally been to restrict theories of recovery.⁴³

The U.S. BIT program is among the more mature and influential programs, and for present purposes, it effectively illustrates how States may refine BIT texts—typically by adding provisions—to address new concerns as they emerge. The result has been longer, more detailed BITs addressing increasingly more topics.

A. *An Early Focus on Expropriation*

The initial BIT models published by the United States were made up of provisions inspired in part by the provisions on investment found in the FCN treaties to which the United States was a party.⁴⁴ Those investment provisions were isolated and supplemented during the 1980s in formulating

42. COMMENTARIES, *supra* note 18.

43. See generally Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law* (paper delivered to the ABA Section of International Law) (Feb. 21, 2006), available at <http://www.transnational-dispute-management.com/article.asp?key=780>.

44. *Id.*

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what would become an evolving U.S. Model BIT and the basis for NAFTA Chapter 11.⁴⁵ The U.S. program was introduced to replicate what certain European countries had already initiated.⁴⁶ Although the protections to be created were bilateral, the principal aim of U.S. BITs was to promote outbound foreign investment, by establishing on a country-by-country basis for minimal protections in prospective host States.⁴⁷

In the mid-1980s, the prospect of U.S. investors suffering uncompensated expropriations was very much in the minds of U.S. treaty drafters.⁴⁸ These concerns were evident in the model texts produced by the United States; they contained elaborate provisions on the fullness and effectiveness of compensation to be given in the event of a taking and a notion of taking that included much more than outright seizures—extending to measures “tantamount to expropriation.”⁴⁹ Modern BITs of the United States still have elaborate expropriation provisions, and indeed those provisions have become more detailed with the introduction of an additional set of considerations coming to the forefront soon after NAFTA took effect.⁵⁰

45. *Id.*

46. *Id.*

47. *Id.*

48. Two factors combined to focus attention on the need to regulate expropriations: First, there had been a wave of expropriations affecting US companies during in the late 1950s—most notably by Castro’s Cuba and by Brazil (together involving billions of dollars in US property). VANDELDE, *supra* note 6, at 24. The twenty years that followed, in turn, were punctuated by episodes involving seizures affecting US citizens’ property. *Id.* at 20-21. Second, there was concern about the direction that customary international law might be taking, in light of calls in the 1970’s in some quarters for a New International Economic Order (NIEO). *See id.* One precept exemplifying the NIEO movement was that developing countries should be held only to a flexible standard in accounting for their actions regarding the property of others. *Id.* Thus, the notion that customary international law required full compensation in cases of expropriation was subject to debate. Added to this was the loss of American property occurring in the late 1970s when the Islamic Revolution led to a change of government in Iran. *Id.*

49. *See generally id.* at 14-28; DOLZER & STEVENS, *supra* note 6.

50. *See supra* note 42 and accompanying text.

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B. Sample Adjustments

Although the United States is a party to numerous BITs that allow investor claims, it has predominantly been NAFTA that has generated investment claims against the United States.⁵¹ Not surprisingly, the adjustments one finds in successive U.S. Model BITs to a large extent address U.S. experience as a Respondent under NAFTA Chapter 11, a treaty which was no doubt thought to reflect the state of the art in 1992.⁵² These adjustments have clarified (in a pro-State manner) the scope of the substantive protections accorded investors, while also introducing some new features.

U.S. Model BITs now address the thorny question of regulatory taking, which NAFTA (being based on existing BITs) has yet to fully tackle. The question was to what extent regulation pursued for a public purpose could constitute an expropriation so as to trigger the obligation to tender full compensation. On one hand, to exempt all regulation would supply an unduly large regulatory space and render a treaty's taking provisions almost meaningless (since most often States will act through some form of "regulation" and will ostensibly act for a public purpose). On the other hand, it might be argued that a chilling effect will naturally follow if there is a duty to make compensation to foreign enterprises whenever regulation, however laudable and necessary, eliminates or substantially curtails an investment.⁵³

In the absence of precise guidance in BITs, the approaches of tribunals to regulatory taking had varied significantly. The question would come into sharper focus with NAFTA claims such as that brought against the United

51. See generally Bureau of Public Affairs, *Diplomacy in Action*, U.S. DEPARTMENT OF STATE, www.state.gov (last visited Feb. 5, 2015).

52. See generally Jack J. Coe, Jr. & Clyde C. Pearce, *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311 (2000).

53. See Coe & Rubin, *supra* note 29, at 598-99.

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States by Methanex in response California legislation phasing MTBE out of the gasoline sold in that state.⁵⁴ Ultimately, the 2004 and 2012 U.S. Model BITs addressed the question by establishing a species of presumption, lessening host State exposure to taking liability. Implementation of this technique can be seen, for example, in the Korea-U.S. Trade Agreement, which in relevant part states:

Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.⁵⁵

A second illustration of a BIT adjustment relates to fair and equitable treatment clauses, and also illustrates the use of a clarification tool now built into U.S. BITs. Fair and equitable treatment clauses are common among

54. Methanex Corp. v. U.S., In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal (Aug. 3, 2005).

55. KORUS FTA, ANNEX B 11-B. The reference to housing prices is not found in the U.S. Models of 2004 and 2012, and thus demonstrates how standard BIT provisions are tailored to meet concerns arising uniquely with respect to the treaty partner in question. Footnote 19 of the KORUS FTA text adds: “[f]or greater certainty, the list of ‘legitimate public welfare objectives’ in subparagraph (b) is not exhaustive.” A study of *Commentaries* demonstrates that regulatory taking “clarifications” of this type are found not only in the U.S. Models of 2004 and 2012, but in the models of Canada, Colombia and Korea, which texts the U.S. Model has seemingly influenced. See Celine Levesque & Andrew Newcombe, *Canada*, in COMMENTARIES, *supra* note 18, at 93-94; Jose Antonio Rivas, *Colombia*, in COMMENTARIES, *supra* note 18, at 244; Hi-Taek Shin, *Republic of Korea*, in COMMENTARIES, *supra* note 18, at 393, 408-11. Interestingly, some States have embellished the basic formula set forth in the U.S. 2004 model by suggesting what is meant by “except in rare circumstances.” See Rivas, *supra* note 55, at 224 (reprinting article VI of the Colombian model which in pertinent part provides: “except in rare circumstances, such as when [measures] are so severe in light of their purpose that they cannot be reasonably viewed as having been adopted in good faith”).

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several generations of BITs,⁵⁶ but when invoked under NAFTA, they raised questions of first impression. Chief among these questions was whether the promise of fair and equitable treatment was an autonomous treaty undertaking (subject to an ordinary meaning approach) or a promise rigorously circumscribed by customary international law.⁵⁷ The question divided tribunals and commentators, though host States were in rather solid accord that the standard was indeed intended to be anchored exclusively and restrictively in customary international law as classically understood.⁵⁸

As has been much discussed, the approach of the NAFTA states was to issue a binding Interpretive Note in 2001;⁵⁹ the contents of which would later be reflected in subsequent U.S. Model BITs. That Note affirmed that NAFTA's fair and equitable treatment promise accorded protection no more expansive than that established under customary international law.⁶⁰ The interpretive note mechanism, of course, may be employed with respect to many interpretive questions that arise in relation to BITs to which the United States is a party.⁶¹

A third substantive example from among dozens of purposeful refinements introduced into a U.S. Model BIT is seen in essential security

56. See generally Jack J. Coe, Jr., *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y OF INT'L LAW PROC. (2002).

57. See generally J. Christopher Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REV. FOREIGN INV. L. J. 21, 21 (2002).

58. *Id.*

59. See FTC Note of July 31, 2001. See generally 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, 347 (2006).

60. *Id.*

61. The Korea-U.S. Trade Agreement provides an example that closely follows the U.S. Models of 2014 and 2012 example: "A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 22.2.3(d) (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision." KORUS FTA, arts. 22.2.3(d); 1122(3). For criticism of the Interpretive Note Mechanism, see Brower, *supra* note 59, at 347, and Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003).

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provisions. Article 18 of the 2012 U.S. Model provides in relevant part: “[n]othing in this treaty shall be construed to . . . preclude a Party from applying measures that *it* considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”⁶²

According to Caplan’s and Sharpe’s contributions to *Commentaries*,⁶³ the language is intended to be clear that the determination of what is necessary is “within the discretion of the Party” taking the measure.⁶⁴ This explicitness with respect to the provision’s self-judging character is intended to be an improvement upon the formulation found, for example, in the Argentina-U.S. BIT. Article XI of that text is not clear on the question of who decides when a measure was “necessary”—the respondent State or the tribunal.⁶⁵ An example of the provision as clarified can be found, for instance, in the Korea-U.S. Free Trade Agreement.⁶⁶

V. PARSING THE TEXTS

As noted above, many of the thousands of BITs in existence share several common characteristics. Yet, a review of investor-State awards confirms that differences in BIT texts remain important. The kinds of detailed comparisons that one might wish to make will certainly be

62. U.S. Model BIT (2012), art. 18(2) (emphasis added).

63. Lee Caplan & Jeremy Sharpe, *United States*, in COMMENTARIES, *supra* note 18, at 755. The requirement that the provision be applied in good faith, in principle, prevents a State from exploiting opportunistically the self-judging element in the provision. *See id.*

64. *Id.* at 813.

65. The Argentina-U.S. BIT is reprinted in LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 311 (2d ed. 2011). On the issues raised by the evolving essential security text, see generally KENNETH J. VANDELDE, BILATERAL INVESTMENT TREATIES—HISTORY, POLICY, AND INTERPRETATION 179-86 (2010).

66. KORUS FTA, art. 23.2. A footnote in the KORUS FTA adds: “For greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter Eleven (Investment) . . . the tribunal or panel hearing the matter shall find that the exception applies” *Id.* n. 2.

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facilitated by *Commentaries*. Indeed, when traveling back and forth among the book's chapters, one encounters both stark line drawing and quite subtle crafting.

Umbrella clauses provide an example. Such provisions typically provide a pledge that the host State shall "observe any obligation it may have entered into with regard to investment."⁶⁷ Some States had come to disfavor umbrella clauses in light of the expansive scope accorded them by some tribunals. In the *Commentaries* chapter devoted to Colombia's BIT program is a section titled "Rejection of the Umbrella Clause." Dr. Rivas reports there that umbrella clauses are excluded "[a]s a strict policy matter."⁶⁸ By contrast, umbrella clauses are standard in the Chinese⁶⁹ and Austrian⁷⁰ models. In light of the confusion umbrella clauses have generated with respect to contract disputes,⁷¹ the Austrian text is admirably straightforward and adds a helpful detail. After the familiar "shall observe any obligation" sentence, the treaty provides: "This means, inter alia, that the breach of a contract between the investor and the host State or one of its entities will amount to a violation of this treaty."⁷²

Some differences among BIT texts are subtler. Looking again at the Colombian model,⁷³ one finds much in common with other BITs, but also a distinctive treatment of full protection and security. While promising fair and equitable treatment in accordance with customary international law, the model circumscribes its undertaking with respect to full protection and security: "The full protection and security standard does not imply . . . a better treatment to that accorded to nationals of the Contracting Party where

67. Argentina–U.S. BIT, art. II.2.c.

68. See Rivas, *supra* note 55, at 241.

69. Wenhua Shan & Norah Gallagher, *China*, in COMMENTARIES, *supra* note 18, at 131.

70. Reinisch, *Austria*, in COMMENTARIES, *supra* note 18, at 35.

71. See Katarin Yannaca-Small, *BIVAC BV v. Paraguay: The Umbrella Clause Still in Search of One Identity*, 28 ICSID REV. 307, 307 (2013).

72. Reinisch, *supra* note 70, at 35 (quoting article 11 of the Austrian Model).

73. See Rivas, *supra* note 55, at 185 (examining Article III.4 of the Colombia's model).

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the investment has been made.”⁷⁴ That caveat, which seems to reduce Columbia’s full protection and security undertaking to a promise of national treatment, is in tension with the model’s general endorsement of the international minimum standard.⁷⁵

VI. TERMINATION PROVISIONS—NOT SUCH A FRESH START

Many of the chapters in *Commentaries* discuss BIT termination provisions. Interest in these treaty terms has grown in recent years in part because by the end of 2013 more than 1,300 of the existing BITs became eligible for unilateral termination.⁷⁶ As one can discover by consulting *Commentaries*, however, protection often does not end with termination becoming effective. For existing investments there is often what might be called a “BIT hangover”—a period of ten or fifteen years during which the BITs protections continue to apply.⁷⁷ The prospect of termination, prefigured explicitly in many BITs, may of course lead to renegotiation, giving the two States an opportunity to account for the learning of the last twenty years.

In evaluating the kinds of BIT strategies available to States, the question of investor-State arbitration inevitably arises. The possibility of doing away

74. *Id.* at 216-17.

75. One by-product of there being an international minimum standard is that merely treating foreign investors as well as local enterprise does not necessarily discharge a State’s obligations; the minimum standard may require better treatment than that meted out to local investors.

76. See UNCTAD, *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal*, IIA ISSUES NOTE, NO. 4, June 2013, at 1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf. In March 2014, it was announced that Indonesia was terminating its BIT with the Netherlands. See *Termination Bilateral Investment Treaty*, NETHERLANDS EMBASSY IN JAKARTA, INDONESIA, <http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html> (last visited Jan. 17, 2015). The Indonesian government intends to terminate all 67 of its BITs, and time will tell whether the country is planning on renegotiating the terms of the agreements or eliminating them altogether. See *id.*

77. *Id.*

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with investor-State arbitration—in effect eliminating the back half of most BITs—is a recurrent topic among commentators and States. The question arises, however: what would replace investor-State arbitration? Bearing in mind the problems plaguing many court systems in the world, investors will not generally gravitate toward host States offering only local courts in the event of perceived mistreatment. States, in turn, are unlikely to revert on a wholesale basis to the traditional espousal model with its inefficiencies and risks. For all its deficiencies, investor-State arbitration concentrates risk and control in the dispute's real parties at interest and considerably depoliticizes the investor grievance process.⁷⁸

Some governments have proposed the creation of a first instance investment tribunal on a regional or international basis.⁷⁹ That is an intriguing idea, but in the eyes of investors, such an institution will unlikely represent a satisfactory mechanism for avoiding domestic courts unless it possesses, ironically, many of the attributes characterizing the existing arbitration mechanism: party control over the judges that will preside in a given case, decision maker independence and expertise, flexibility of procedure, and treaty-backed enforceability of the court's rulings on liability. At present, such an institution appears to be quite far off, leaving investor-State arbitration the best alternative in offering investors a way to assert grievances away from local courts.

For its part, the arbitral claims machinery could be refined in numerous ways.⁸⁰ One notion gaining support, that might be reflected in future generations of BITs, is the use of mediation as a precursor or parallel process to arbitration. Over one-third of investor-State claims settle, suggesting that a percentage of such claims ought to be good candidates for

78. See Shihata, *supra* note 39, at 32.

79. See H. Rondón de Sansó, *Proposal of Changes to the System of Investment Dispute Resolution: A Contribution from South America*, TDM 1 (2014).

80. For recent thoughts, see generally Anna Joubin-Bret & Jean Kalicki, eds., "*Reform of Investor-State Dispute Settlement: In Search of a Roadmap*", 1 TDM (2014) (collection of essays).

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mediation and the value it can add.⁸¹ Though the prospect of using mediation routinely was not seriously contemplated even ten years ago, it has recently attracted greater interest,⁸² in part because of the formulation of investor-State mediation rules⁸³ and related initiatives.

VII. A VALUABLE REFERENCE

BITs and investor-State arbitration have inspired abundant literature—a full account of which would be nearly impossible to accomplish, even by the most ardent researcher. Currently, articles,⁸⁴ books,⁸⁵ dissertations,⁸⁶ and

81. Jack J. Coe, Jr., *Toward A Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7 (2005).

82. See generally UNCTAD, INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION (2010); Mark A. Clodfelter, *Why Aren't More Investor-State Treaty Disputes Settled Amicably?*, in UNCTAD, INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II (Susan D. Franck & Anna Joubin-Bret eds., 2011); Jeswald Salacuse, *Is There a Better Way: Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L. J. 138, 143-147 (2007); Susan Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161 (2007); Jack J. Coe, Jr., *Toward A Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7 (2005).

83. INTERNATIONAL BAR ASSOCIATION, IBA RULES FOR INVESTOR-STATE MEDIATION (2012), available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx.

84. For a non-exhaustive bibliography comprising fourteen pages (limited to NAFTA Chapter Eleven subjects), see CHARLES H. BROWER, II, ET AL., NAFTA CHAPTER ELEVEN REPORTS, VOL. I, 683-99 (2005); see also *Bibliography on Investment Law and Procedure*, ICSID, <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bibliography-on-Investment-Law-and-Procedure.bak.aspx> (last visited Jan. 17, 2015).

85. See ARBITRATING FOREIGN INVESTMENT DISPUTES (Norbert Horn ed., 2004); INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005); R. DOAK BISHOP, JAMES CRAWFORD, AND W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY (2005); NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (Todd Weiler ed., 2004); CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION SUBSTANTIVE PRINCIPLES (2007);

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reports⁸⁷ of various kinds seem to address every conceivable aspect of the field. In this light, and with time and money ever limited, new book offerings must reach a high standard to make a meaningful contribution.

In our view, *Commentaries* easily meets that standard. The volume provides a wealth of information and thoughtful analysis. Despite its size, *Commentaries* is highly searchable, and despite having been produced by many different authors from different legal cultures, the chapters are nicely integrated and substantive. *Commentaries* will be a profitable read for law students, lawmakers, arbitrators, diplomats, and members of practicing bar. Accordingly, it is likely to become an oft-consulted reference.

CHRISTOPHER F. DUGAN, ET. AL., *INVESTOR STATE ARBITRATION* (2008); *THE FUTURE OF INVESTMENT ARBITRATION* (Catherine A. Rogers & Roger P. Alford eds., 2009).

86. See, e.g., IOANA TODOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* (2008) (based on doctoral research at European University Institute).

87. The systematically-produced publications of UNCTAD are particularly noteworthy.