MAKING AMENDS: AMENDING THE ICSID CONVENTION TO RECONCILE COMPETING INTERESTS IN INTERNATIONAL INVESTMENT LAW

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ABSTRACT

Globalization has increased international investment activity, but no unified legal framework governs international investments. After several attempts to establish a multilateral investment framework, prospective parties remain unable to reach a consensus on a viable system to address investor and state rights. Developed, capital-exporting states wish to protect their citizens' investments, whereas developing states simultaneously seek to attract investments and maintain regulatory autonomy.

In the absence of a comprehensive agreement, bilateral investment treaties serve as the primary legal instruments setting forth the terms of cross-border investments. These treaties often grant private investors the right to file claims before the International Centre for the Settlement of Investment Disputes (ICSID). ICSID cases sometimes raise questions that mirror the competing interests of developed and developing states that surface during multilateral investment treaty negotiations.

Amending the ICSID Convention to include a provision allowing tribunals to consider environmental, public health, and labor concerns would serve as a positive step toward establishing an investment regime that maximizes the interests of investors and host

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states alike. This scheme would better address state interests, enhance ICSID's legitimacy, and increase the likelihood of future, successful negotiations to establish a workable and comprehensive multilateral investment framework.

INTRODUCTION

Suppose a Spanish company invests in a hotel and resort community in Egypt that will welcome foreign visitors and stimulate the Egyptian economy by attracting international industry-specific organizations for major conferences. The company satisfies all government regulations and obtains the requisite permits. Relying on the Egyptian government's approval, the Spanish company invests millions of dollars to construct a lavish property. Months after the company opens the resort's doors but prior to recouping its investment, the Egyptian government enacts discriminatory regulations that thwart the hotel's business objectives. The measures require foreign-owned hotel properties to refrain from hosting conferences and to pay a 25 percent assessment on all revenues to fund domestic research projects. The regulations appreciably upset the Spanish company's expectations by cutting away from anticipated profits while providing a distinct advantage to Egyptian competitors that are not subject to the measures. Historically, the Spanish company would have had little choice but to turn to Egypt's domestic courts to seek damages on an expropriation claim. Egyptian courts would likely favor its government's measures over the Spanish company's interests.

International investment law, however, provides alternative recourse through binding arbitration, even without a contractual arbitration provision. Under Spain and Egypt's bilateral investment treaty (BIT), private investors from one state may bring claims against the other state through the International Centre for the Settlement of Investment Disputes (ICSID).[1] BITs provide ground rules for protecting foreign investment, and commentators contend they facilitate international commercial transactions.[2] ICSID arbitration protects cross-border investment by hearing disputes over

1. Agreement on the Reciprocal Promotion and Protection of Investments, Egypt-Spain, art. 11, ¶ 2, Nov. 3, 1992, 1820 U.N.T.S. 194.

2. RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 12 (1995).

agreements among sovereign states, including BITs and regional trade agreements that address foreign investment. These international agreements are at the heart of a number of the 122 disputes pending before ICSID.[3] Some commentators have criticized these agreements for being one-sided.[4] Unequal bargaining power often translates into a developing country's acceptance of international investment agreements on a take-it-or-leave-it basis.[5] In agreeing to unfavorable BIT terms, a developing state often limits its ability to enact regulatory measures contrary to the interests of private parties in developed states.

When capital-importing states enact measures to enhance environmental or social conditions within their borders, governments may find themselves subject to expropriation claims by foreign investors. Although investment protection carries the benefit of promoting capital flows and funding poor countries, private investors may perceive potential windfalls within strong protection provisions and bring claims against states for enacting legitimate regulations that promote sustainable development consistent with international treaties. The possibility of facing costly lawsuits may discourage developing countries from enacting measures to promote environmental and social initiatives. This possibility may also render states hostile toward ICSID jurisdiction or participation in an international investment law regime.

Attempts to create a comprehensive international investment treaty have failed due in large part to a historic discrepancy between the interests of developed and developing states.[6] New proposals for a

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3. International Centre for the Settlement of Investment Disputes, List of Pending Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last visited Sept. 28, 2009). *See generally* LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION (2004) (providing a procedural overview of ICSID arbitration).

4. E.g., Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 468 (2008).

5. *See, e.g.*, Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 2008 U. ILL. L. REV. 265, 277 ("Host countries, on the other hand, realize that they must compete with other potential hosts, and therefore cannot demand changes to the core provisions of the treaties.").

6. *See, e.g.*, Peter Muchlinski, *Policy Issues*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3, 14 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) (addressing the need for a balance "between the legitimate interests of investors to enjoy their investments in a settled, transparent, and predictable investment policy environment and the legitimate interests of the host country to pursue its development goals").

comprehensive multilateral investment agreement would likely succumb to the same shortcomings that thwarted previous efforts.[7] Alternative methods of enhancing international investment's legal framework could provide a much needed push toward reconciling competing interests.[8] Incremental changes to the current international investment system incorporating compromise measures would provide a forum to test innovations in investment law. It would also pave the way for a successful multilateral agreement that accounts for the competing interests of developed and developing countries.

The international trade regime, which, unlike investment law, has an institutional backbone through the World Trade Organization (WTO), accommodates some state regulatory activity through a series of General Exceptions included in the General Agreement on Tariffs and Trade (GATT),[9] the General Agreement on Trade in Services (GATS),[10] and the Agreement on Trade-Related Investment Measures (TRIMs).[11] In spite of the potential for protectionist market effects that run contrary to the WTO's free trade goals,[12] the General Exceptions recognize state regulatory autonomy in areas including public health and the environment.[13] By providing a safe harbor for certain regulatory activities, these provisions have the potential to encourage developing states to adopt policies for sustainable development and social growth.

This Note argues that amending the ICSID Convention to include a provision allowing arbitral tribunals to consider environmental, public health, and labor concerns would constitute a positive step toward developing an investment regime that maximizes the interests of investors and host states alike. A provision that

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7. *See infra* Part II.

8. *See generally* Muchlinski, *supra* note 6, at 10–15 (describing ideological controversies in international investment law).

9. General Agreement on Tariffs and Trade, art. XX, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

10. General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, 33 I.L.M. 1167.

11. Agreement on Trade-Related Investment Measures, art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186, *available at* http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

12. *See generally* PETER GALLAGHER, THE FIRST TEN YEARS OF THE WTO: 1995–2005 (2005) (describing WTO activities during its first decade in operation); AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND GATT: ECONOMICS, LAW, AND POLITICS (2005) (providing a historical overview and analysis of the international trade system).

13. Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 69 (2001).

enables and encourages ICSID arbitrators to evaluate investor-state disputes similar to the General Exceptions set forth in the World Trade Organization regime would more adequately address state interests, enhance ICSID's legitimacy, and lead to a workable and comprehensive multilateral investment framework.

Part I presents background on international investment law. First, it examines the competing interests that have blocked previous attempts to establish a comprehensive, multilateral investment treaty. Second, it addresses the novelty of investor-state disputes before ICSID and demonstrates why it may be an appropriate forum through which to take alternative measures to ultimately enable a multilateral investment framework. Part II analyzes the failures of previous attempts to create a multilateral investment treaty and suggests how these failures should guide future negotiations. Part III introduces trade law exemptions, which provide a logical source for a provision that seeks to balance interests between states and private parties in the investment regime. Finally, Part IV explores the potential effectiveness of an ICSID amendment to advance international investment law, looking to changes in the international investment paradigm as well as the implications of using investment treaties grounded in anachronistic assumptions.

I. THE INTERNATIONAL INVESTMENT SYSTEM AND INVESTOR-STATE DISPUTES

In the absence of a comprehensive international investment framework, BITs commonly set forth the terms of cross-border investment activity. The rights and obligations that arise from these treaties attain their authority through enforcement mechanisms, including international arbitration.[14] In the international investment context, ICSID arbitration provides investors with a right of action that compels compliance with the terms of BITs.[15] A significant amount of international investment law may be characterized through the rise of both BITs and investor-state disputes.[16]

14. DOLZER & STEVENS, *supra* note 2, at 120–21.

15. Joachim Delaney & Daniel Barstow Magraw, *Procedural Transparency*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 6, at 721, 726.

16. *See* CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 26 (2007) ("BITs became viewed as a preferred type of international instrument to regulate the bilateral treatment of foreign investments.").

To fully grasp the need for reform in international investment law, some background on BITs, investor-state arbitration, and their interplay is necessary. Part I.A introduces BITs and Part I.B traces the development of ICSID arbitration. Part I.C introduces potential challenges to ICSID's legitimacy, which may be skirted with the implementation of an amendment that addresses the interests of capital-importing states.

A. BITs: The De Facto Building Blocks of International Investment Law

States enter into BITs to promote economic cooperation and encourage international investment flows that "stimulate . . . economic development."[17] BITs set forth the terms by which host states treat international investment and provide dispute resolution provisions for potential breaches.[18] A capital-exporting state enters into a BIT to protect its citizens' and corporations' investments in a particular country, whereas capital importers provide "an economic bill of rights"[19] to encourage that investment.[20] A capital exporter negotiates for limits on a host state's regulatory autonomy, because it represents investors who wish to minimize expenditures.[21]

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17. *E.g.*, Treaty Between the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, Feb. 5, 2004, *available at* http://www.bilaterals.org/article.php3?id_article=137 (follow "US draft model BIT" hyperlink) (last visited Apr. 16, 2009) [hereinafter 2004 U.S. Model BIT]; Treaty Between the United States of America and the Government of the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 4, 2005, S. TREATY DOC. NO. 109-9 (2006) [hereinafter U.S.-Uruguay BIT]. For a general overview of BITs and international investment disputes, see generally DOLZER & STEVENS, *supra* note 2.

18. Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 470 (2000).

19. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 172 (2007).

20. *Id.* Common protections within BITs include

> guarantees of appropriate compensation for expropriation, promises of freedom from unreasonable or discriminatory measures, guarantees of national treatment for the investment, assurances of fair and equitable treatment, promises that investments will receive full protection and security, undertakings that a sovereign will honor its obligations, and assurances that foreign direct investment . . . will receive treatment no less favorable than that accorded under international law.

Id.

21. *See* Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?*, 26 NW. J. INT'L L. & BUS. 95, 98–99 (2005) ("[F]oreign investors do not want their transaction costs to be increased by seemingly burdensome requirements beyond the evaluation and entry process.").

Developing countries largely perceive foreign direct investment (FDI) as a necessity for economic growth.[22] In fact, developing states often enact regulations for the very purpose of attracting foreign investment.[23] Competition to attract available capital exists among similarly situated developing states, thereby inducing them to grant concessions when negotiating BITs with capital-exporting states as well as individual contracts with private investors.[24] Free trade agreements containing investment provisions operate in a similar manner, as do regional trade provisions, notably the investment provisions prescribed in Chapter 11 of the North American Free Trade Agreement (NAFTA).[25]

Developing countries have historically objected to the principles embodied within BITs and other international investment agreements.[26] This is especially true of Latin American countries that subscribed to the Calvo Doctrine's assertions of sovereignty for much of the twentieth century.[27] The Calvo Doctrine posits that foreign investors are subject to a host government's legal system and are not entitled to enhanced treatment, including external fora for resolving disputes.[28] By the 1970s, however, developing states felt it necessary to attract foreign investment and many proceeded to enter into BITs,[29] despite their provisions for international dispute resolution.

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22. *Id.* at 97.

23. *Id.* at 101.

24. *See id.* at 125–26 ("Developing countries have also been willing to sign on to BITs providing for compensation because BITs offer an opportunity to negotiate and offer concessions to a potential investor in competition to and, hopefully, at the exclusion of, other potential hosts.").

25. Several ICSID claims arise from NAFTA and free trade agreements, and BITs bear overwhelming similarity to these instruments. In principle, BITs, regional trade agreements, and free trade agreements may be discussed in tandem; however, this Note primarily focuses on BITs. On a broader scale, the international investment system may be described as a "dense and diverse web of overlapping instruments, including bilateral (BITs), regional, sectoral, and multilateral instruments, and non-binding initiatives which differ considerably in legal characteristics, scope, and subject-matter." Friedl Weiss, *Trade and Investment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 6, at 182, 186.

26. Vandevelde, *supra* note 18, at 470.

27. Former Argentine foreign minister Carlos Calvo first articulated the doctrine, and several Latin American countries incorporated the doctrine into their constitutions. Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 728 (2008). For further discussion of the Calvo Doctrine, see CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 16–19 (2008).

28. Ryan, *supra* note 27, at 728.

29. *Id.* at 730.

Some commentators have suggested that "international legal sovereignty" is so important in the contemporary global economy that "any adverse impacts on Westphalian sovereignty are more than offset by the benefits that derive from [participation in the international investment] regime."[30]

By 2008, more than 2,500 BITs had entered into force.[31] The agreements almost uniformly include provisions on the scope of investment,[32] standards of treatment for investment,[33] the scope of expropriation,[34] and dispute settlement procedures.[35] BITs are generally entered into on a take-it-or-leave-it basis[36] according to drafts offered by developed countries.[37] The one-sided nature of BIT negotiations favoring developed states can explain treaty standardization.[38]

The manner in which developing countries seek to enter into BITs suggests that developing countries find the agreements essential to their economic well-being. Signing BITs "may help legitimize a developing country in the international arena and, thus, attract increased levels of foreign direct investment."[39] There is no definitive proof, however, that the existence of a BIT increases investment flows.[40] The existence of a BIT may simply be one among many factors influencing an investment decision, including financial risks, market stability, human capital, and existing relationships.[41] Professor Jürgen Kurtz has argued that a BIT may simply act as a mechanism of wealth transfer because investors do not consider the existence of a

30. Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 144 (2002).

31. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 17 (2008).

32. *E.g.*, U.S.-Uruguay BIT, *supra* note 17, at art. 2.

33. *E.g.*, *id.* art. 5.

34. *E.g.*, *id.* art. 6.

35. *E.g.*, *id.* § B.

36. Elkins et al., *supra* note 5, at 276.

37. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 170 (2005).

38. *See* Elkins et al., *supra* note 5, at 277 ("This uniformity suggests that host countries are price takers with respect to the terms of these treaties . . . .").

39. Ryan, *supra* note 28, at 737.

40. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 339 (2007).

41. *See id.* (listing "critical variables" that factor into investment decisions).

BIT when making investment decisions.[42] Procedural rights granted in dispute settlement provisions, however, are among the most attractive aspects of BITs; these provisions regularly provide private investors with a right of action outside a host state's legal system.[43]

B. ICSID and Investor-State Arbitration

Nearly all BITs provide investors with a private right of action through ICSID arbitration, in accordance with arbitral rules established by the United Nations Commission on International Trade Law (UNCITRAL), or through the International Chamber of Commerce Court of Arbitration.[44] ICSID's caseload surged as states entered into BITs, which represent the most common basis for investment arbitration.[45]

ICSID, a branch of the World Bank, was established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) to provide an alternative international forum for disputes that arise in the course of international commerce.[46] Unlike the World Trade Organization Dispute Settlement Body and other international dispute resolution institutions, ICSID does not require aggrieved investors to petition their home states to bring a claim against a host state.[47] ICSID also provides an alternative to filing a suit in a host state's domestic legal system, which may lack the sophisticated legal protections with which an investor may be familiar. Even in states with legitimate legal

42. Jürgen 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, 730 (2002).

43. *See* Franck, *supra* note 19, at 172–73 ("Rather than creating unenforceable substantive rights or forcing investors to rely on home governments to resolve disputes on their behalf, [investment] treaties provide a forum to redress alleged wrongs.").

44. Stefan D. Amarasinha & Juliane Kokott, *Multilateral Investment Rules Revisited*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 6, at 119, 148–50.

45. DOLZER & SCHREUER, *supra* note 31, at 242.

46. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Preamble, Mar. 18, 1965, 575 U.N.T.S. 159 (addressing "the need for international cooperation and economic development").

47. The advent of an investor-state dispute system can depoliticize a claim, particularly when home states may be reluctant to pursue a claim against a host state for reasons of diplomacy. *See, e.g.*, Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 358 (2007) (noting that investor-state arbitration "provides an avenue for transferring disputes from political sphere to legal").

systems, investors may justifiably fear a home-state bias.[48] Investors also value the structural flexibility that parties retain during an ICSID arbitration.[49] This very provision provides investors with a sense of protection that likely factors into a corporation's investment decisions. More than 140 states are parties to the ICSID Convention.[50]

Consent to arbitration occurs when a sovereign state signs an investment treaty that allows investors from another state to submit claims against it.[51] Three arbitrators, one appointed by each party to a dispute and one appointed by the two initial arbitrators, comprise a typical ICSID tribunal arising from BITs.[52] Arbitrators are generally familiar with investment disputes or a specialized area relevant to the dispute.[53] ICSID tribunals apply previously stipulated governing law, and in the event that parties have not previously reached such an agreement, a tribunal will apply the host state's domestic laws and rules of international law.[54] Arbitral proceedings are, at least in part, made available publicly.[55] They are popular among investors because arbitral awards are widely enforceable.[56]

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48. Franck, *supra* note 40, at 365. ICSID arbitration distances investor-state disputes from political concerns. *See* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 751 ("[ICSID] also sought to reduce the role of national courts in enforcement even more than in other available systems of private international arbitration by providing for direct enforcement with no possibility of challenging an award in national courts in which enforcement otherwise would have been sought.").

49. Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 248–49 (2007).

50. International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention, ICSID/3 (Nov. 4, 2007), http://icsid.worldbank.org (follow "List of Contracting States" hyperlink) (last visited Sept. 28, 2009).

51. In addition to consent through bilateral and multilateral investment treaties, consent may arise through a direct agreement between a sovereign state and a private investor or through national legislation on investment. DOLZER & SCHREUER, *supra* note 31, at 238.

52. REED ET AL., *supra* note 3, at 78.

53. David R. Sedlak, Comment, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN ST. INT'L L. REV. 147, 152 (2004).

54. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 46, art. 42(1). In an ICSID arbitration, domestic rules are tested against international legal principles. In the event of an international law violation, a domestic law may not be applied in an award. Odumosu, *supra* note 47, at 368.

55. Odumosu, *supra* note 47, at 361.

56. *See* DUGAN ET AL., *supra* note 27, at 182 ("This widespread compliance with arbitration awards is due in large part to the effectiveness of the New York and ICSID Conventions' enforcement provisions, which ensure that in most circumstances a losing respondent will be unable to avoid execution on assets in scores of national court jurisdictions."). The New York Convention requires states to enforce arbitral awards under

Independent of BITs, customary international law[57] allows states to regulate foreign investment within their borders as a function of sovereignty.[58] Under this principle, states maintain the right to make decisions regarding permissible foreign investment within their borders and establish related controls.[59] But customary international law, despite these benefits, has been considered insufficient to vindicate the rights of foreign investors,[60] whose interests are unlikely to align with capital-importing states' agendas.[61] ICSID is in many respects a solution to cure perceived deficiencies in customary international law as private investors become more prevalent in the international arena.[62] By allowing individuals to bring claims against foreign governments, ICSID reflects international law's shift toward recognizing individuals as subjects.[63]

ICSID's novelty rests in the power it grants private investors wishing to bring suits against sovereign states;[64] ICSID arbitration, however, was not commonly used during its first two decades.[65] As states enter into an increasing number of BITs, investors have seized the opportunity to bring claims involving billions of dollars and

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most circumstances, *id.* at 88, and "creates an automatic priority for arbitration over national court litigation," MCLACHLAN ET AL., *supra* note 16, at 83.

57. One definition characterizes customary international law as a source of law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). State practice "includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy." *Id.* § 102 cmt. B. For a discussion of customary international law, see generally LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 59–108 (4th ed. 2001).

58. Mosoti, *supra* note 21, at 100.

59. *Id.*

60. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 114 (2007).

61. *See infra* Part I.A.

62. *See* Gabriel Egli, Comment, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1064 (2007) ("The lack of customary international law governing the treatment of international investments makes the current BIT regime essential to the protection of international investors and investments.").

63. Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 686 (2007) ("This shift from inter-State dispute resolution to transnational dispute resolution is . . . . part of the larger story of the increasing importance of individuals as actors under, and objects of, international law.").

64. *See* Franck, *supra* note 40, at 343 (explaining that ICSID provides a private right of action and a forum in which investors may act as private attorneys general).

65. *See* DOLZER & SCHREUER, *supra* note 31, at 2 (describing ICSID as "dormant" until the early 1990s).

implicating questions regarding sovereignty.[66] The 122 pending[67] and 176 concluded[68] ICSID arbitrations amount to what some have called a "litigation explosion."[69] ICSID arbitration and other dispute resolution provisions within BITs are attractive to investors and their home states because "[t]rust in the future conduct of [the] host state and investor lies at the heart of every investment decision."[70]

Capital-exporting states and private investors maintain several justifications for using ICSID to vindicate rights under BITs. First, developed states wish to secure legal rights for their citizens comparable to those found within sophisticated legal systems.[71] Second, states themselves have an interest in removing themselves from investment disputes and leaving their resolution to nongovernmental entities for political and financial reasons.[72] Finally, participation in the international investment regime may enhance legal procedures and substance in developing states.[73] Because parties may appoint arbitrators who are knowledgeable in the area of investment disputes[74] but may not have a connection with either party,[75] ICSID arbitration may lessen some of the bias inherent in an international dispute.

C. Potential Challenges to ICSID's Legitimacy as a Justification for Change

Despite the legitimacy-enhancing rules described in Part I.B and ICSID's arguable success in providing remedies for private investors, ICSID may be improved in many respects. Common concerns involve

66. Franck, *supra* note 19, at 165.

67. International Centre for Settlement of Investment Disputes, *supra* note 3.

68. International Centre for Settlement of Investment Disputes, List of Concluded Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (last visited Sept. 28, 2009).

69. Franck, *supra* note 19, at 165.

70. DOLZER & SCHREUER, *supra* note 31, at 6.

71. Ryan, *supra* note 28, at 742.

72. *See id.* ("[B]y creating a private right of action for investors, governments effectively depoliticized investment disputes and transferred the responsibility and cost of enforcement to investors.").

73. *See id.* ("[D]eveloped countries hoped that the BIT regime would increase the global respect for property rights and lead to an improvement in the domestic legal systems of developing countries . . . ."); *see also* Borgen, *supra* note 63, at 688 (asserting that international dispute resolution reinforces both substantive law and procedures for evaluating claims).

74. Sedlak, *supra* note 53, at 153.

75. *Id.* at 152.

the tribunal's legitimacy,[76] arbitrator accountability,[77] costs,[78] transparency,[79] and award consistency.[80] ICSID's surge in usage has simultaneously rendered it less popular among host states.[81] Some states are beginning once again to embrace the Calvo Doctrine, emphasizing sovereignty over international cooperation, and have either adopted or contemplated "measures to limit investment treaty arbitrations and bring [investment disputes] under national control."[82] These perceived weaknesses in ICSID arbitration and corresponding responses illustrate the need for reform; it is possible that an amendment to the ICSID Convention itself could temper some of these concerns.

The strongest manifestation of a distaste for ICSID came in 2007, when Bolivia withdrew from the ICSID Convention[83] following President Evo Morales's nationalization of hydrocarbon assets.[84] Ecuador officially limited the scope of its participation in ICSID when it filed a notification of certain classes of disputes for which it

76. *See* Odumosu, *supra* note 47, at 373 (arguing that ICSID faces a legitimacy crisis because of its adoption of a "single economic rationale for investment protection" that does not address alternative interests).

77. *See* Borgen, *supra* note 63, at 737 (describing participants in investor-state disputes as an interconnected elite).

78. *See* Gottwald, *supra* note 49, at 239 (recognizing the expense developing countries must make for a proper defense in investor-state disputes).

79. *See id.* at 256 (emphasizing the negative effects related to difficulties finding previous ICSID awards).

80. Egli, *supra* note 62, at 1078–79 (expressing concern regarding inconsistencies in investment arbitrations, which "often lack the finality and comparative uniformity of traditional court rulings").

81. These countries include Argentina, Bolivia, Nicaragua, and Venezuela, described *infra* notes 83–91 and accompanying text.

82. Wenhua Shan, *From "North-South Divide" to "Public-Private Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 635 (2007). Even the United States' revised approach to investment treaties has been described as an "apparent adoption of the Calvo Doctrine." DUGAN ET AL., *supra* note 27, at 488.

83. Press Release, International Centre for Settlement of Investment Disputes, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), http://icsid.worldbank.org (follow "More" hyperlink under "Announcements," then follow hyperlink to "Denunciation of ICSID Convention") (last visited Aug. 19, 2009).

84. Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT'L L.J. 359, 382 (2008).

rejected ICSID's jurisdiction.[85] The exception includes oil, gas, and minerals.[86]

Some states have expressed criticism with respect to ICSID. Argentina, which faced dozens of ICSID claims[87] in response to the 2001 financial crisis,[88] has been critical of ICSID.[89] In its legal arguments before ICSID tribunals, Argentina has argued that its monetary actions, which relied on non-precluded measures provisions within its BITs, were necessary.[90] Argentina has also advanced an argument that BITs and investor-state dispute procedures run afoul of its constitution.[91]

Some developed states have even acted in a manner that forecloses ICSID arbitration. The 2004 United States-Australia Free Trade Agreement excluded an investor-state dispute provision,[92] although these provisions are routinely included in comparable agreements concluded by other states.[93] One explanation for this omission suggests that the parties attempted to establish a shield from liability.[94] Should additional states reject participation, ICSID may

85. Press Release, International Centre for Settlement of Investment Disputes, Ecuador's Notification Under Article 25(4) of the ICSID Convention (Dec. 5, 2007), http://icsid.worldbank.org (follow "More" hyperlink under "Announcements," then follow hyperlink to "Ecuador's Notification under Article 25(4) of the ICSID Convention") (last visited Aug. 19, 2009).

86. Jacobs & Paulson, *supra* note 84, at 383.

87. Odumosu, *supra* note 47, at 373.

88. For a discussion of investor-state arbitration in the context of sovereign debt, see generally Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335 (2006); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711 (2007).

89. *See* Shan, *supra* note 82, at 643 (describing the Argentine government's "attempt to 'renationali[z]e' state-investor disputes"). Venezuela and Nicaragua have also "questioned their commitment to international investment law." Ryan, *supra* note 28, at 726. Russia, Ukraine, the Republic of Congo, Indonesia, and Pakistan have grown reluctant to enforce ICSID awards. Emily A. Alexander, Note, *Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law*, 48 VA. J. INT'L L. 817, 829 (2008).

90. For a comprehensive analysis of non-precluded measures provisions in investor-state disputes, see William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307 (2008).

91. Shan, *supra* note 82, at 638.

92. Vandevelde, *supra* note 37, at 190. This dispute resolution provision demonstrates that states may find alternative solutions to investment law disputes.

93. *E.g.*, U.S.-Uruguay BIT, *supra* note 17, at § B.

94. *See* Franck, *supra* note 40, at 360–61 ("[T]wo nations with shared economic and political goals, and substantial cross-border investment flows, recognize that they are both likely to be on the receiving end of investor-State disputes. This means that both countries have an

find its legitimacy compromised.[95] To prevent further criticism by ICSID members, the arbitral procedure should better reflect the interests of developing states.

II. UNSUCCESSFUL ATTEMPTS TO ESTABLISH A COMPREHENSIVE MULTILATERAL INVESTMENT TREATY

Numerous proposals for a comprehensive multilateral investment treaty have been made since World War II, but none have garnered sufficient support.[96] This Part addresses previous failed attempts to reach a comprehensive, multilateral framework for international investment. Part II.A looks at investment negotiations in the context of international trade. Part II.B addresses the failures of the 1990s negotiations for a Multilateral Agreement on Investment (MAI).

A common thread in the history of these multilateral investment agreement talks has been the conflicting interests between developed states—traditionally capital exporters—and developing states that import capital. A multilateral agreement streamlining the international investment system would likely only be plausible to the extent that these competing interests may be reconciled. Introducing an ICSID Convention provision modeled after the GATT General Exceptions would provide an opportunity to address the interests of capital importers in a forum preferred by capital exporters.

A. Investment in the World Trade Organization System

The international community first considered a multilateral investment agreement as a possible third international structure to complement the post–World War II Bretton Woods institutions in the 1940s.[97] At the United States' insistence, the 1948 Charter for an International Trade Organization, or the Havana Charter, would have provided protection for foreign investment from discriminatory

incentive to create a dispute resolution mechanism that creates barriers limiting the potential number of claims."). It is plausible that this decision had little to do with distrust for the investor-state dispute system, but rather involved a comfort level based on the parties' mutual use of the Common Law. *See id.* at 360 ("[B]oth countries have well-developed rules of law and a reliable and independent court systems [*sic*].").

95. For further discussion on developed states that have reformed positions on international investment law, see *infra* Part IV.A.

96. Amarasinha & Kokott, *supra* note 44, at 125–29.

97. Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275, 287 (2000).

treatment and expropriation.[98] United States corporations, however, felt the Havana Charter was too lenient toward developing countries, whereas developing countries believed the proposed standards granted investors too much power.[99] The disagreement resulted in the Havana Charter's failure.[100] From 1973 to 1979, the United States again encouraged an investment agreement for the GATT Tokyo Round agenda, but developing countries blocked the suggestion.[101]

Limited measures relating to investment were adopted during the Uruguay Round, which also implemented the World Trade Organization (WTO).[102] The General Agreement on Trade in Services (GATS),[103] designed "to remove barriers to cross-border trade in services"[104] applies wherever services are delivered through one of four modes, including a "commercial presence,"[105] which encompasses investment. The Agreement on Trade-Related Investment Measures (TRIMs Agreement)[106] created a limited exception to GATT articles for investment related to the trade of goods following an investor's entry into a host state.[107] The narrow TRIMs measures allow governments to mandate that investors incorporate domestically produced inputs in manufacturing operations.[108] These provisions did not assume the role of BITs because they are not comprehensive agreements on investment. Developed states walked away from the Uruguay Round feeling dissatisfied with the investment measures and

98. *Id.*

99. *Id.* at 288.

100. *Id.*

101. Benjamin Martin, Comment, *An Environmental Remedy to Paralyzed Negotiations for a Multilateral Foreign Direct Investment Agreement*, 1 GOLDEN GATE U. ENVTL. L.J. 209, 232 (2007).

102. For a comprehensive discussion of the Uruguay Round negotiations and their results, see generally WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS (1999).

103. General Agreement on Trade in Services, *supra* note 10.

104. Vandevelde, *supra* note 37, at 176.

105. General Agreement on Trade in Services *supra* note 10, art. I.2. Professor Kenneth J. Vandevelde has pointed out that under the GATS, "the WTO potentially has jurisdiction over all foreign investment in the service sector of the economy." Vandevelde, *supra* note 37, at 176.

106. Agreement on Trade-Related Investment Measures, *supra* note 11.

107. The TRIMs agreement has been criticized for taking a skeptical view of investment that does not incentivize investment. *See, e.g.*, Dattu, *supra* note 97, at 291 (addressing criticism that calls TRIMs "attuned to the concerns of an era in policy-making characterized more by suspicion of—and the need to control—foreign investment than by keenness to compete for and attract such investment" (internal quotation marks omitted)).

108. WTO SECRETARIAT, *supra* note 102, at 77.

"defeated by the developing world in their quest to achieve a high degree of investment liberalization within the WTO."[109]

In 2001, the Doha Ministerial Declaration again included plans for multilateral investment negotiations.[110] Developing states both supported and criticized the possibility of revisiting investment.[111] But opposition from certain developing states, including India and Malaysia, put an end to these investment talks.[112] These states opposed the negotiations for several reasons, including: lack of preparation for additional rulemaking, a belief that investment policy should remain in state hands and not be transferred to the WTO, confidence in the protection that BITs afford investors, a view that investment policy could not treat all states equally, and a desire to develop domestic industries.[113]

B. The Multilateral Agreement on Investment

Outside the WTO negotiating environment, the United States encouraged negotiations for a comprehensive, multilateral investment agreement within the Organisation for Economic Cooperation and Development (OECD) in 1995.[114] Supporters of the proposed MAI hoped that a swift round of negotiations would be possible in light of the OECD's like-minded members, namely developed states with "well-established, liberal, and transparent foreign investment policies."[115] The MAI initially provided measures for increased protection for investment, including national treatment, nondiscrimination, and reduced barriers to investment.[116] The initial

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109. Dattu, *supra* note 97, at 295. Attempts to again revisit investment regulation in the Doha Round were pushed aside. Martin, *supra* note 101, at 235.

110. *See generally* GALLAGHER, *supra* note 12, at 96–119 (describing the Doha Ministerial Conference agenda and achievements).

111. Chile, Costa Rica, Korea, and Mexico supported investment negotiations. Weiss, *supra* note 25, at 189.

112. *Id.*

113. *Id.*

114. *See* Kurtz, *supra* note 42, at 757 ("The basis for the U.S. preference for the OECD appears to be linked to the relatively modest results of the Uruguay Round TRIMS Agreement which was often attributed to the recalcitrance of developing states.").

115. Dattu, *supra* note 97, at 276; *see also* Kurtz, *supra* note 42, at 757 (describing the intended MAI negotiations to be "an uncontroversial, somewhat technical exercise of building upon existing norms").

116. COMM. ON INT'L INV. & MULTINATIONAL ENTERS. & COMM. ON CAPITAL MOVEMENTS AND INVISIBLE TRANSACTIONS, OECD, A MULTILATERAL AGREEMENT ON INVESTMENT, DAFFE/CMIT/CIME(95)13/FINAL (May 5, 1995), *available at* http://www1.oecd.org/daf/mai/htm/cmitcime95.htm.

dispute settlement procedures would have allowed for both state-to-state and investor-state dispute systems, including ICSID arbitration.[117]

By removing negotiations from the WTO, MAI proponents believed that developing states' objections would be foreclosed from negotiations.[118] OECD members hoped to swiftly negotiate[119] and sign a multilateral treaty to which developing states would later accede.[120] Ultimately, the inability of even developed capital-exporting states to agree on investment terms resulted in the MAI's demise.[121] France's withdrawal from the negotiations in October 1998 signaled the end of the MAI talks.[122] France grounded its withdrawal upon a Special Commission's determination that the MAI threatened national sovereignty[123] and also objected to the absence of a cultural exception in the draft agreement.[124] Within two months, MAI negotiations within the OECD ceased.[125]

Interestingly, the MAI negotiations incorporated many of the arguments developing states traditionally advanced, despite the OECD negotiation setting. When a MAI draft leaked out over the Internet in 1997, nongovernmental organizations and civil society expressed outrage against the exclusive nature of the negotiations, which "created an air of hostility to the project that made it hard to justify on a political level."[126] In response, later drafts of the MAI incorporated provisions addressing sustainable development. These revisions included recognition of sustainable development in the

117. Dattu, *supra* note 97, at 301.

118. M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 170 (2000).

119. The OECD originally envisioned MAI negotiations to conclude within two years. Kurtz, *supra* note 42, at 758.

120. Dattu, *supra* note 97, at 298. Some developing states served as observers in the OECD negotiations, including Argentina and Brazil. *Id.* at 295.

121. *See id.* at 298 (pointing to the amount of bracketed text in the draft MAI to demonstrate how contentious the negotiations were even among OECD members).

122. DAVID HENDERSON, THE MAI AFFAIR: A STORY AND ITS LESSONS 31–32 (1999).

123. Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1048–49 & n.83 (2000).

124. France and Canada, who "feared an 'Americanisation' of global media industries," supported a cultural exception that would allow discriminatory action in the interest of preserving cultural heritage. *Id.* at 66. *See generally* Daisuke Beppu, Note, *When Cultural Value Justifies Protectionism: Interpreting the Language of the GATT to Find a Limited Cultural Exception to the National Treatment Principle*, 29 CARDOZO L. REV. 1765 (2008) (analyzing cultural exceptions in the context of international trade).

125. Kurtz, *supra* note 42, at 761.

126. Muchlinski, *supra* note 123, at 1040.

treaty's Preamble,[127] confirmation of state regulatory authority regarding health, safety, and environmental concerns consistent with the MAI's text,[128] and a provision restricting activity that constitutes a race to the bottom.[129] A fourth suggestion would have appended to the MAI OECD's Guidelines for Multinational Enterprises—a document that expresses expectations for corporate behavior, including employment standards and environmental concerns.[130] These issues are consistent with some of the concerns regarding regulatory autonomy expressed by developing states in investment treaty talks.[131]

The MAI may have ultimately failed, but it clarified some of the central questions that will arise in future multilateral investment initiatives. The willingness of OECD negotiators to revise the draft MAI to address civil society's interests demonstrates that compromise will not only be necessary, but also feasible, as the international investment law community gradually agrees upon elements for a comprehensive international investment regime. A series of compromises should be reached before again attempting to advance what one commentator describes as a "patchwork of international rules on foreign investment."[132]

To reach a successful multilateral investment agreement, the international investment system should implement incremental changes that will help prospective participants in the system recognize the advantages that such an agreement would provide. In 2000, one commentator noted that "[m]any more bilateral and regional agreements on investment have to be negotiated and concluded" to make a multilateral agreement realistic.[133] In addition to signing additional investment treaties, the long-term nature of FDI[134] means that it may be premature to judge the effectiveness of recent treaties.

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127. Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 467, 472 (1998).

128. *Id.* at 472–73.

129. *Id.* at 473. The language of this exception was drawn from NAFTA principles. Kurtz, *supra* note 42, at 772.

130. Geiger, *supra* note 127, at 473 (describing the OECD's Guidelines for Multinational Enterprises as "an effective tool in promoting responsible conduct").

131. E.V.K. FitzGerald, *Developing Countries and Multilateral Investment Negotiations*, *in* MULTILATERAL REGULATION OF INVESTMENT 35, 48 (E.C. Nieuwenhuys & M.M.T.A. Brus eds., 2001).

132. Kurtz, *supra* note 42, at 723.

133. Dattu, *supra* note 97, at 277.

134. *E.g.*, DOLZER & SCHREUER, *supra* note 31, at 3.

Investment does not immediately spike following the conclusion of a BIT,[135] and certain types of disputes may be unlikely to arise in the years immediately following an investment. Amending the ICSID Convention in a manner that directly addresses the competing interests that have stifled decades of multilateral investment discussions would ultimately guide an attempt to ratify a comprehensive multilateral investment agreement. Attempts to enact a wholesale multilateral treaty on investment have failed, and a more gradual approach appears suitable.

III. BORROWING FROM TRADE LAW'S GENERAL EXCEPTIONS TO RECONCILE DIFFERENCES IN AN INTERNATIONAL INVESTMENT REGIME

The General Exceptions provisions in international trade instruments set forth a series of exceptions that may logically be carried over to the international investment area as a framework for formally recognizing state regulatory autonomy in certain areas. Article XX of the General Agreement on Tariffs and Trade[136] establishes General Exceptions for legitimate, nondiscriminatory regulation.[137] The provision includes measures relating to public morals;[138] human, animal, or plant life or health;[139] labor;[140] cultural

135. *E.g.*, Franck, *supra* note 40, at 339.

136. General Agreement on Tariffs and Trade, *supra* note 9. The GATT provisions sought to reduce trade barriers and served as a de facto trade regime from their adoption in 1947 until their incorporation into the World Trade Organization in 1994. Edith Brown Weiss & John H. Jackson, *The Framework for Environment and Trade Disputes*, *in* RECONCILING ENVIRONMENT AND TRADE 1, 5 (Edith Brown Weiss, John H. Jackson & Nathalie Bernasconi-Osterwalder eds., 2d ed. 2008).

137. The GATT General Exceptions have a long history. The exceptions were first included in the 1927 International Agreement for the Suppression of Import and Export Prohibitions and Restrictions. Padideh Ala'i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. REV. 1129, 1132 (1999). In 1947, the same exceptions became the basis for GATT Article XX. *Id.* at 1133.

138. The Article XX(a) public morals exception has never been interpreted under the GATT or the WTO systems, but conflicts between trade and public morals might relate to fur trade, pornographic material, products manufactured by child labor, or animal cloning. Anne-Marie de Brouwer, *GATT Article XX's Environmental Exceptions Explored: Is There Room for National Policies? Balancing Rights and Obligations of WTO Members Under the WTO Regime*, *in* THE WTO AND CONCERNS REGARDING ANIMALS AND NATURE 9, 23 (Anton Vedder ed., 2003). The provision's uncertain legal meaning may be a reason for its nonuse, despite its potential for use in environmental disputes. *Id.* For additional discussion of possible applications of the public morals exception, see Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 736–43 (1998).

value;[141] and exhaustible natural resources.[142] Within these areas, states may act in a manner that amounts to discrimination provided the measures are not "arbitrary or unjustifiable."[143] Similar provisions are included in Article XIV of the General Agreement on Trade in Services (GATS) and in Article III of the TRIMs agreement, which both specifically address international investment.[144] Through these provisions, General Exceptions legitimizing state regulation for sustainable development or social goals have the potential to cover nearly all aspects of international trade. Investment law has the capacity to formally provide for similar protections, even though trade and investment bear unique attributes.

The WTO Appellate Body has gradually broadened its interpretation of the General Exceptions provisions, making them feasible safeguards for government action.[145] Initially, these provisions were interpreted narrowly. Two GATT decisions from the 1990s concluded that United States regulations barring the importation of tuna caught in a manner harmful to dolphins contravened trade provisions under GATT, despite the environmental protection provisions set forth in Article XX.[146] In the first dispute, the GATT panel expressed a belief that Article XX should be interpreted narrowly,[147] and that the word "necessary" in Article XX(b) ought not to protect unpredictable environmental conditions.[148]

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139. General Agreement on Tariffs and Trade, *supra* note 9, art. XX(b).

140. *Id.* art. XX(e).

141. This exception relates to measures "imposed for the protection of national treasures of artistic, historic, or archaeological value." *Id.* art. XX(f).

142. *Id.* art. XX(g).

143. *Id.* art. XX.

144. Article 3 of the TRIMS agreement adopts all of GATT's exceptions. Agreement on Trade-Related Investment Measures, *supra* note 11, art. 3. For further discussion of the GATS and TRIMs agreements, see *supra* text accompanying notes 103–09. This Note generally refers to GATT Article XX exceptions, but the reasoning provided would be equally applicable using the GATS and TRIMS exceptions.

145. Ala'i, *supra* note 137, at 1132.

146. Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 6.1, DS29/R (June 16, 1994) [hereinafter *Dolphin-Tuna II]*; Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 7.1(a), DS21/R–39S/155 (Sept. 3, 1991) [hereinafter *Dolphin-Tuna I*].

147. *Dolphin-Tuna I*, *supra* note 146, ¶ 5.22.

148. *Id.* ¶ 5.28 (noting that the U.S. limitation afforded the Mexican authorities inadequate notice as to whether their policies conformed to U.S. standards at any given moment).

In its 1998 decision in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (*Shrimp-Turtle*),[149] however, the WTO Appellate Body[150] recognized the right of WTO member states to invoke Article XX exceptions[151] provided the activities meet requirements set forth in the provision.[152] To reach this conclusion, the WTO Appellate Body relied upon the Vienna Convention of the Law of Treaties.[153] The Appellate Body also set forth a two-step test to determine Article XX's applicability. First, a government action must fall within the meaning of one of the exceptions.[154] Second, the measure must be consistent with Article XX's chapeau.[155] When the Appellate Body applied this framework in *Shrimp-Turtle*, however, it found that a U.S. regulation on shrimp imports did not take into account differing conditions in other states,[156] and it found that the measure failed to satisfy the chapeau.[157]

In 2001, a court used Article XX to allow public health considerations to trump trade goals. In *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*,[158] the WTO Appellate Body validated France's use of Article XX to allow a ban on asbestos production, use, and trade.[159] In recognizing the health risks despite Canada's commercial argument to uphold

149. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS56/AB/R (Oct. 12, 1998).

150. Following the conclusion of the Uruguay Round and the birth of the WTO, the WTO Dispute Settlement Body and the WTO Appellate Body became the formal dispute resolution institutions within the WTO. Weiss & Jackson, *supra* note 136, at 18–19.

151. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 149, ¶ 156. The Appellate Body stated that WTO members "can and should" adopt measures to protect endangered species and the environment. *Id.* ¶ 185.

152. *Id.* ¶ 157.

153. *Id.* at 61 n.152.

154. Robert Howse, *The Appellate Body Rulings in the* Shrimp/Turtle *Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 494 (2002).

155. *Id.* Article XX's chapeau, or preamble, reads

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

General Agreement on Tariffs and Trade, *supra* note 9, art. XX.

156. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 149, ¶ 164.

157. *Id.* ¶ 187.

158. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

159. KELLY, *supra* note 152, at 102.

traditional trade goals, "the Appellate Body demonstrated its desire to uphold the panel's precedent-setting support for non-trade goals."[160]

This evolution of Article XX jurisprudence in the international trade context demonstrates an increasing openness to environmental and public health objectives in an area of law designed to promote commercial interests. Although some commentators have criticized the WTO's ability to make use of Article XX in a genuine fashion,[161] exceptions based on this model could create an effective mechanism for reconciling competing interests in the international investment context.

The traditional separation of trade and investment law is an apparent obstacle to importing GATT principles into ICSID. International law treats trade and investment separately due to their distinct economic roles.[162] Because trade involves exports and investment attracts capital, legal frameworks designed to promote these sectors to their fullest would involve inverse goals.[163]

Considering trade and investment together, despite this distinction, is reasonable because both subjects involve international commerce. A single government office within a state often handles trade and investment.[164] At the individual level, certain business operations may involve a combination of trade and investment initiatives, and through legal argument, certain categories of trade may be categorized as investment. The group of states that would adhere to a comprehensive international investment treaty would likely mirror participants in the World Trade Organization, and

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160. *Id.* at 106.

161. *E.g.*, Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341, 356 (1996).

162. The duration of transactions reinforces this distinction. *See, e.g.*, DOLZER & SCHREUER, *supra* note 31, at 3 ("Whereas a trade deal typically consists in a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host country.").

163. *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 53–54 (2008) ("[T]rade and investment disciplines have traditionally focused on different, but complementary, objectives: *liberalization* of trade flows, in the case of trade, and *protection* and *promotion* of foreign investment, in the case of investment.").

164. In the United States, the Office of the United States Trade Representative handles matters of both trade and investment. For more information, see Office of the United States Trade Representative, Mission of the USTR, http://www.ustr.gov/about-us/mission (last visited Aug. 19, 2009).

investment rules would therefore be barred from undermining trade agreements.

International trade and international investment law share many of the same underlying values. Article XX's implementation in GATT required an evaluation of "the balance between the free trade imperatives of . . . nondiscrimination rules and the various exemptions for national policies."[165] This same evaluation is at the heart of the disagreement in the international investment law context, even though regional investment efforts such as NAFTA have not included exceptions similar to Article XX.[166] Additionally, a number of international investment law analyses prescribe an international investment framework within the WTO.[167] Establishing a practice that resembles GATT's Article XX General Exceptions would streamline future negotiations for a comprehensive, multilateral investment regime as part of the WTO. For these reasons, borrowing principles from international trade law is appropriate for the investment regime.[168]

IV. COMPROMISE THROUGH AN ICSID CONVENTION AMENDMENT

An alternative approach to WTO and OECD attempts to reconcile competing interests in international investments may lie within the ICSID framework. A primary ICSID goal "is to provide a level playing field for investors and host countries."[169] At present, however, developing host states facing ICSID claims[170] often lack sufficient resources to adequately represent themselves in proceedings. Developing states must pay expensive legal fees to elite Western law firms[171] to obtain representation comparable in caliber to that of private investors. When states cannot or do not wish to impose

165. Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 737 (1998).

166. Kurtz, *supra* note 42, at 740.

167. *E.g.*, Dattu, *supra* note 97, at 315–16.

168. *But see* Kurtz, *supra* note 42, at 741 ("GATT panels themselves have struggled with the application of Article XX and its constituent parts, which has led to a variety of inconsistent interpretations. These inconsistencies have in turn led to questions about the underlying legitimacy of the GATT and the capacity of GATT panels to manage complex tradeoffs between free trade and broader public values.").

169. Sedlak, *supra* note 53, at 153.

170. Nearly two-thirds of filed investment treaty claims involve developing host states. Gottwald, *supra* note 49, at 250.

171. *Id.* at 239.

this burden on taxpayers, government attorneys without specialized knowledge of the international investment regime are "left to contend with scattered and incomplete legal authority resources with no organized legal assistance from the international community."[172] An ICSID provision that recognizes legitimate government regulation relating to the environment and social rights could provide leverage to states in investor-state disputes and further ICSID's goal of creating a level playing field.

The ICSID Convention may be amended in accordance with the provisions set forth in Chapter IX.[173] Ratification, acceptance, or approval by all Contracting States is required for an amendment to become effective.[174] Amending the ICSID Convention, therefore, is no easy feat. Some scholars have even suggested that the unanimous ratification requirement largely rules out the possibility of ICSID amendments.[175] Other scholars believe that pending amendments become effective among contracting states that agree to them before they achieve universal ratification.[176] Despite this controversy, a series of ICSID amendments became effective in 2006, including measures to make ICSID more transparent, increase third-party participation, and provide a mechanism to dismiss frivolous claims.[177]

The 2006 amendments demonstrate that the amendment procedure can be used when necessary to reflect evolving norms common among ICSID Convention signatories.[178] An amendment

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172. *Id.* at 240.

173. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 46, ch. 9.

174. *Id.* art. 66(1). Any state party may propose an amendment to the Administrative Council. If a proposal is approved by a majority vote by the Administrative Council, the proposed amendment will be circulated to all parties to the ICSID Convention. *Id.* For a brief overview of ICSID amendment procedures, see Reisman, *supra* note 48, at 806.

175. *See, e.g.*, CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1267 (2001) (adopting this position).

176. Reisman, *supra* note 48, at 806 ("It appears that prior to universal acceptance, the amendment would be effective between contracting states that accepted it, but not between an accepting state and a state that had not yet accepted it."). *But see* SCHREUER, *supra* note 175, at 1267 n.2 ("Art. 40 of the Vienna Convention on the Law of Treaties foresees the application of an agreement amending a treaty only among States that are parties to the amending agreement. But this rule only applies unless the treaty in question otherwise provides.").

177. J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 687 (2007).

178. *But see* Sedlak, *supra* note 53, at 157 (calling the ICSID Convention amendment process "unwieldy to the point of being impractical").

recognizing the consideration of environmental, public health, and labor standards could reasonably be accepted by all contracting states. First, the provision would signal to signatories that ICSID is willing to look more favorably upon a state's ability to regulate. Second, to the extent that ICSID signatories recognize the importance of taking a step toward reconciling ongoing differences in comprehensive multilateral investment treaty negotiations,[179] the potential long-term benefits of this provision should become apparent. Because the provision would address developing states' interests in a manner that even developed states favoring investment liberalization have begun to advocate,[180] the provision is an ideal point of departure for multilateral investment talks.

Incremental modifications to the international investment regime through the ICSID Convention are appropriate in light of two key changes in the assumptions that underlie the international investment regime. This Part will explore these key changes. First, many suppliers of foreign investment come from developing countries, and developed states are increasingly capital importers.[181] Second, the ideological basis for strong investment protection underlying ICSID's original mandate, which emphasized protection from widespread nationalization during the Cold War,[182] is outdated. Addressing these concerns through an amendment to the ICSID Convention would better reflect contemporary concerns in international investment and enhance ICSID's legitimacy.

A. Shifting the Paradigm: Capital Exporters Become Capital Importers

The traditional international investment paradigm involves a developed state, typically the United States, Japan, or a Western European country, exporting capital to a developing state.[183] In these situations, the capital exporter demands investment protection in the form of substantive rights, such as assurances for nondiscrimination

179. *See* Dattu, *supra* note 97, at 298–302 (identifying areas of disagreement in the MAI negotiations).

180. *See* 2004 U.S. Model BIT, *supra* note 17, art. 12 (recognizing expanded state regulatory autonomy in matters concerning environmental protection).

181. Vandevelde, *supra* note 37, at 182.

182. *Id*. at 167–70.

183. Kurtz, *supra* note 42, at 716 (observing that, as of 2000, most foreign direct investment came from a "Triad" consisting of the European Union, the United States, and Japan).

and against expropriation, as well as procedural rights through dispute resolution provisions.

This paradigm has shifted since the turn of the twenty-first century. States that have traditionally been considered developing countries have increasingly become sources of foreign investment, rather than recipients.[184] Developed states have simultaneously become capital importers.[185] Moreover, developing states have entered into BITs with one another,[186] perhaps indicating that some businesses based in developing states are becoming major investors.[187] South Korea, Singapore, and Malaysia initially led the way in supplying capital to traditional capital importers; they were later joined by Chile, Mexico, and South Africa.[188] India, China, and Brazil are also increasingly capital exporters.[189] A surge in claims, particularly those arising from NAFTA, against developed states through ICSID and other international arbitral procedures has led traditional advocates for strong investment protection[190] to revisit their investment policy goals.[191]

The United States Model BIT, as revised in 2004, further corroborates this shifting paradigm and adds two articles to protect and expand the regulatory mandate of host states. Article 12 guides the interpretation of BITs so that states may adopt, maintain, or enforce certain measures "in a manner sensitive to environmental concerns."[192] Article 13 states that "it is inappropriate to encourage

184. *See* Elkins et al., *supra* note 5, at 273 (observing that since 1999, the number of developing countries entering into bilateral investment treaties has exploded).

185. Vandevelde, *supra* note 37, at 182 (adding that "foreign direct investment in the United States grew from $83 billion in 1980 to $1.5 trillion in 2003").

186. Shan, *supra* note 82, at 661 ("The changing role of developing states is also witnessed by a notable increase of South-South BITs in recent years . . . . [T]he largest number of new BITs signed during 2004 were between developing states.").

187. Gottwald, *supra* note 49, at 243.

188. Shan, *supra* note 82, at 661; *see also* Vandevelde, *supra* note 37, at 182 ("In 2003, Singapore's stock of direct investment abroad was larger than that of several developed countries, including Austria, Denmark, Finland, Greece, Ireland, Norway, and Portugal.").

189. *See* Shan, *supra* note 82, at 661 (observing that India, China, and Brazil are "at the taking-off stage").

190. The United States initiated investment liberalization reforms in connection with GATT and also recommended the OECD's attempt to negotiate a multilateral agreement. *See supra* Part II.

191. *See, e.g.*, Shan, *supra* note 82, at 650 (pointing out that in the wake of NAFTA tribunals, the United States has gradually weakened its commitment to investment protection).

192. 2004 U.S. Model BIT, *supra* note 17, art. 12.

investment by weakening or reducing the protections afforded in domestic labor laws."[193]

The model treaty's rules on expropriation elaborate similar standards.[194] These rules helped produce Annex B to the 2004 United States Model BIT. Annex B's provisions include a statement that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[195] Previously, no such exceptions existed,[196] and the United States refused to enter into a BIT that did not announce strict rules regarding expropriation.[197] The United States adopted this view as capital inflows became more significant, and it found itself defending claims for expropriation.[198] Investors opposed the changes, calling them a "substantial weakening of investor protections . . . [not] justified by any reasonable assessment of risk to the United States as a defendant against potential claims."[199]

NAFTA's investment provisions, to which the United States and Canada are subject, have been particularly relevant to this transition. During NAFTA negotiations, Canada largely turned away from considerations relating to sovereignty.[200] It was not until Canada became subject to investor-state disputes that it urged that Chapter 11

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193. *Id.* art. 13.

194. Article 6 of the 2004 U.S. Model BIT states that

> [n]either Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law.

Id. art. 6. For further discussion of expropriation in international investment law, see *infra* Part IV.B.

195. 2004 U.S. Model BIT, *supra* note 17, at Annex B.

196. Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Hond., July 1, 1995, S. TREATY DOC. NO. 106-27 (2000).

197. Vandevelde, *supra* note 37, at 171.

198. *See* Ryan, *supra* note 28, at 756 ("[I]n response to its new-found role as a respondent, the United States created a new model BIT that contains far more detailed provisions on certain procedural matters and certain substantive protections accorded to investors.").

199. *Proposed New U.S. "Model" Bilateral Investment Treaty*, 98 AM. J. INT'L L. 836, 837 (2004) (quoting SUBCOMM. ON INV. OF THE U.S. DEP'T OF STATE ADVISORY COMM. ON INT'L ECON. POL., REPORT REGARDING THE DRAFT MODEL BILATERAL INV. TREATY 2–3 (Jan. 30, 2004)).

200. Tollefson, *supra* note 30, at 146.

be revisited to allow nondiscriminatory regulations relating to public health and the environment.[201] Canada also updated its model BIT.[202]

These model BIT changes reflect a willingness on the part of some of the strongest advocates of investment protection, at least historically, to step back from traditionally one-sided BITs. Because an amendment for social and labor conditions would embody many of the principles that the United States has sought to enforce in the international investment regime since 2003, the United States would likely ratify the amendment, and, in turn, influence similarly situated developed states to do the same.[203]

B. Expropriation and the Outdated Ideological Assumptions Underlying International Investment Law

Expropriation has long provoked a vigorous debate in international investment law.[204] It has been described as the area in which "one sees most clearly the inevitable conflict between sovereignty and stability, between the State's need to control its economy and the foreign investor's need to anticipate the costs of that control."[205] Expropriation is central to the formation of any negotiation treaty because it directly affects the rights and expectations of investors.[206] In addition to its recognition in customary international law,[207] expropriation has long been recognized by the United States.[208] Under the Hull Formula, announced by then-Secretary of State Cordell Hull in 1938, expropriation requires

201. *Id.*

202. *But see* Shan, *supra* note 82, at 656 (pointing out that revised BITs "do not alter the fundamental character of these investment treaties as quintessential liberalist instruments, which only protect and 'empower' investors without sufficient consideration of the rights of host states and the duties of the investors").

203. Several countries have followed the United States in reforming its approach to BITs, including Canada, Japan, and certain Latin American states. *Id.* at 652.

204. For background on expropriation in international investment law, see generally DUGAN ET AL., *supra* note 27, at 429–89; August Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 15, at 407, 407–58.

205. Jack Coe, Jr. & Noah Rubins, *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 597, 666–67 (Todd Weiler ed., 2005).

206. *See* DOLZER & SCHREUER, *supra* note 31, at 89 ("Expropriation is the most severe form of interference with property. All expectations of the investor are destroyed in case the investment is taken without adequate compensation.").

207. Muchlinski, *supra* note 123, at 1035–36.

208. DUGAN ET AL., *supra* note 27, at 483.

"prompt, adequate, and effective" compensation.[209] This principle became "the presumptive standard for modern expropriation compensation."[210] During the twentieth century, the United States went so far as to refuse to sign any investment treaty that did not incorporate the Hull Formula.[211] Expropriation remains among the most common allegations in ICSID jurisprudence.[212]

An initial motivation for developed states to both enter into BITs and consent to ICSID arbitration involved providing protection for investors against expropriation, especially in light of nationalizations following decolonization and throughout the Cold War.[213] Decolonization motivated foreign investment participants to consider treaties because "newly independent states were fiercely protective of their independence."[214] These states also feared that foreign investment would allow former colonizers to reassert control.[215] Socialist states that expropriated private industry equally affected foreign investment, and in 1974, developing and socialist countries provoked the United Nations General Assembly "to establish recognition of their right to expropriate foreign investment."[216] A fear of expropriation without compensation drove developed countries to enter into the earliest BITs.[217]

Assumptions grounded in outdated ideologies of the post-colonial period and Cold War are no longer rational bases for investment laws. These obsolete assumptions remain the basis of the international investment system in the form of BITs. Although these BITs may reap greater profits and larger damages in disputes for

209. David L. Gunton, Note, *Liability Begins at Home: An Alternative Compensation Scheme for NAFTA Expropriations*, 40 N.Y.U. J. INT'L L. & POL. 219, 225 (2007).

210. *Id.* at 226.

211. Vandevelde, *supra* note 37, at 171.

212. *See, e.g.*, Técnicas Medioambientales S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, May 29, 2003, 19 ICSID (W. Bank) 158, ¶¶ 114–16 (2004) (evaluating formalities of expropriation); Metalclad Corp. v. Mexico, ICSID Case No. ARB (AF)/97/1, Aug. 30, 2000, 5 ICSID (W. Bank) 209, ¶¶ 102–04 (2002) (finding indirect expropriation under NAFTA Chapter 11 after Mexico declared conservation measures).

213. *See, e.g.*, DUGAN ET AL., *supra* note 27, at 436 (discussing petroleum concession seizures).

214. Vandevelde, *supra* note 37, at 166.

215. *Id.*

216. *Id.* at 167.

217. *Id.* at 168.

corporations, they do so at the expense of host state taxpayers[218] and sustainable development. Whereas it is rational for private investors to seek higher financial incentives,[219] particularly in the short term, private investors can benefit in the long-term if host states are permitted to regulate in matters relating to the environment and public health. If the labor force within a host state becomes healthier, investors may be able to reap greater productivity in the long run.[220]

Certain perverse incentives within the international investment system have grown apparent, even to the strongest supporters of international investment treaties and investor-state disputes.[221] In addition to a race to the bottom among developing states to incentivize foreign investment, the possibility of liability under the present international investment system may discourage states from enacting legitimate regulations.

As these perverse incentives within the international investment system have become apparent, even to developed states, changes proposed by developing states in comprehensive, multilateral investment agreement negotiations appear increasingly appropriate.[222] Although the traditional motivations for the international investment system bolster a private investor's profits, the failure to incorporate evolving attitudes of the international community into the legal framework could strip ICSID of its adherents and render private investors' international legal framework less potent.

Arbitral awards have also shifted toward this line of reasoning, particularly with respect to the matter of expropriation. In *Feldman v. Mexico*,[223] the tribunal's reasoning reflected this transition, stating that, "In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. . . . Reasonable governmental regulation of this

218. *See* T. Leigh Anenson, *Defining State Responsibility Under NAFTA Chapter Eleven: Measures "Relating to" Foreign Investors*, 45 VA. J. INT'L L. 675, 677 (2005) ("If the corporation wins, the taxpayers of the 'losing' NAFTA nation must pay the bill.").

219. *See* Fry, *supra* note 60, at 112 ("It certainly is not a crime for investors to want the best deal possible.").

220. *Id.* at 112–13.

221. *See supra* notes 190–203 and accompanying text.

222. *See supra* Part II.

223. Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Dec. 16, 2002, 18 ICSID (W. Bank) 488 (2003).

type cannot be achieved if any business that is adversely affected may seek compensation . . . ."[224]

Another tribunal, in *LG&E Energy Corp. v. Argentina*,[225] adopted a balancing test to determine the legitimacy of state regulation.[226] The test balances "the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies."[227] In announcing the test, the tribunal followed *Técnicas Medioambientales S.A. v. Mexico* (Tecmed)[228] and considered the proportionality of a state's actions compared to its effect on the public interest.[229]

These cases stand in sharp contrast to an ICSID award rendered only a few years earlier, which prioritized investor claims at the expense of state interests. In 2000, an ICSID tribunal explained that, "[e]xpropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated . . . the state's obligation to pay compensation remains."[230] This strong language appears to encourage investors to bring claims, even minor ones, when states enact regulations that could result in even the slightest harm.

In their more recent cases, however, ICSID panels have shifted toward firmer protection of state regulatory interests. A provision modeled after Article XX of GATT, therefore, would not be inconsistent with recent ICSID jurisprudence.[231] In fact, the provision would not necessarily alter ICSID awards, particularly in light of the

224. *Id.* ¶ 103. The arbitral award in *Methanex v. United States*, Aug. 3, 2005, 44 I.L.M. 1345 (2005), is widely recognized for deciding that a California ban on gasoline additives was a legitimate regulation after a Canadian company filed a NAFTA claim. *Id.* ¶ 102.

225. LG&E Energy Corp. v. Argentina, ICSID Case No. ARB/02/1, Oct. 3, 2006, 46 I.L.M. 36 (2007) (decision on liability).

226. *Id.* ¶ 189.

227. *Id.*

228. Técnicas Medioambientales, TECMED S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, May 29, 2003, 19 ICSID (W. Bank) 158 (2004).

229. *LG&E Energy Corp.*, 46 I.L.M. 36, ¶ 195.

230. Santa Elena v. Costa Rica, ICSID Case No. ARB/96/1, Feb. 17, 2000, 5 ICSID (W. Bank) 153, 192.

231. *See* Reinisch, *supra* note 204, at 437 (describing instances in which investment dispute panels found state regulatory activity permissible). ICSID awards do not represent binding authority for future claims, but they do provide persuasive support and tribunals do draw upon previous awards. Gottwald, *supra* note 49, at 256. ICSID has, however, been criticized for inconsistent decisions. *Id.* at 259–60.

cases discussed above. Even without an Article XX–type provision, arbitral panels interpreting regulations and following revised BITs could reasonably arrive at the same result without a formal amendment. Although the legal system has the potential to arrive at this result organically, developing countries and critics of the investor-state dispute system may be unaware of informal shifts in the jurisprudence of ICSID that might benefit them. After all, the ICSID tribunals' validations of regulatory activity discussed above occurred before Bolivia and Ecuador repudiated the ICSID Convention in full or in part.[232]

Incorporating an exception for state regulation relating to environmental, public health, and labor standards into the ICSID Convention would provide a means by which state interests might be better balanced against those of private investors. Such a provision might also deter private investors from bringing frivolous claims before ICSID. It has already been noted that trade disputes are increasingly framed as investment disputes[233] for the attractive, enforceable[234] damages that have been awarded through the investor-state dispute process.[235]

In sum, the provision advanced in this Note would reduce the effect of anachronistic assumptions that persist in investor-state arbitration and underlying treaties. The ICSID Convention would better reflect contemporary standards and expectations, enhancing ICSID's popularity among developed and developing countries alike.

CONCLUSION

Developed and developing states may not have interests that are at odds with one another to the extent that some commentators perceive. By taking a relatively small step toward a formal compromise, using an amendment to the ICSID Convention, developed and developing states may be able to sit down at the negotiating table in the future to identify an effective framework for international investment law. This approach would provide an alternative method for reaching an agreement in an area in which negotiations appear perpetually blocked.

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232. *See supra* notes 83–86 and accompanying text.

233. Anenson, *supra* note 218, at 732.

234. *See supra* note 56 and accompanying text.

235. Unlike investor-state disputes, trade cases before the WTO are subject to specific performance remedies. DiMascio & Pauwelyn, *supra* note 163, at 48.

Amending the ICSID Convention to allow ICSID tribunals to consider environmental and social concerns in their evaluation of investor-state disputes would recognize interests that are traditionally underrecognized in this area of law. This addition would be consistent with evolving standards in the area of international investment law and would enhance ICSID's legitimacy. Acknowledging this trend is key as investors bring an increasing number of claims before ICSID and as some member states grow dissatisfied with ICSID rules.

The innovation of ICSID tribunals—namely, granting a right of action for investors—provides an alternative remedy for private parties. This innovation represents an increasingly sophisticated international legal system that addresses global economic challenges. Acting in a manner that is overly sympathetic to investor interests in the short term could easily translate into long-term harm if states, particularly developed ones, become disinterested in ICSID participation. Creating an exception modeled after the GATT Article XX General Exceptions would address developed and developing states' concerns and ensure ICSID's continued success as an institution that provides solutions for complex legal questions associated with global commerce. Simultaneously, this exception may advance the multilateral investment agreement project beyond the recurring disagreements that have barred its culmination and ultimately pave the way toward a workable, comprehensive global investment treaty.