Against Imperial Arbitrators: The Brilliance of Canada's New Model Investment Treaty

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

Charles H. Brower II*

ABSTRACT

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

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

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

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

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

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I. Introduction ......................................................................................... 3
II. Customary International Law of State Responsibility for Injuries to Aliens ......................................................................................................................... 6
III. The Unraveling of Consensus ........................................................... 11
IV. Bilateral Investment Treaties: The Arrival of International Investment Law in Three Waves ................................................................. 24
   A. Multilateral Efforts: The Wave that Never Broke ..................... 24
   B. Bilateralism: The First, Humble Wave ...................................... 26
   C. Bilateralism: The Second Wave as Defensive Crouch .............. 31
   D. Bilateralism: The Third Wave as Tsunami.............................. 38
V. Imperial Arbitrators .......................................................................... 40
   A. Structural Constraints on the Role of Tribunals ...................... 41
   B. NAFTA and the Rise of Imperial Arbitrators ......................... 43
   C. BITS and the Entrenchment of Imperial Arbitrators .............. 64
VI. Stumbling Towards Brilliance .......................................................... 83
   A. The Drivers and Direction of Investment Treaty Reforms ........ 84
   B. CETA: Procedure as an Indirect and Partial Solution .......... 89
   C. USMCA: Procedure as Blunt Instrument ................................. 98
   D. Canada’s New FIPA: The Particular Brilliance of Substantive
      Reform ..................................................................................... 101
   E. Possible Criticisms of an Exclusive Emphasis on Substantive
      Reform ..................................................................................... 108
VII. Conclusion ...................................................................................... 114

I. INTRODUCTION

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

1 See Martha Harrison et al., Shifting Tides in Canada’s Approach to Investor-State Dispute
Settlement, FINANCIER WORLDWIDE MAG. (June 2021), https://www.financierworldwide.com/shifting-
tides-in-canadas-approach-to-investor-state-dispute-settlement#.YUYVvi1h3q1.
2 In October 2015, Canada and eleven other Pacific Rim states concluded negotiations for the
Trans-Pacific Partnership. Charles H. Brower II, Trans-Pacific Partnership: Continuity and
2016, the same twelve states signed the agreement, which contains a traditional investment chapter that
provides for investor-state arbitration on terms resembling analogous provisions in the NAFTA or the
2004 U.S. Model BIT, depending on one’s perspective. See About the CPTPP, View the Timeline, GOV’T
OF CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-
signature on February 4, 2016, in Auckland, New Zealand); Ai-Li Chiong-Martinson, Note,
Environmental Regulations and the Trans-Pacific Partnership: Using Investor-State Dispute Settlement
to Strengthen Environmental Law, 7 SEATTLE J. ENV’T L. 76, 88 (2017) (opining that the TPP’s provisions
on ISDS were modeled after analogous provisions in the NAFTA); Brower, supra, at 182 (explaining that
the TPP’s provisions on ISDS generally follow the 2004 U.S. Model BIT).

After the Trump administration definitively withdrew from participation in the TPP, the remaining
states entered into a somewhat revised Comprehensive and Progressive Agreement for Trans-Pacific
Partnership (CPTPP). Jean Galbraith, NAFTA Is Renegotiated and Signed by the United States, 113 AM.
J. INT’L L. 150, 155 n.47 (2019). The CPTPP largely incorporates the TPP but suspends application of
certain provisions, including the TPP’s provisions on investor-state arbitration of claims that state parties
have violated investment authorizations and agreements entered into directly between investors and host
states. See About the CPTPP, View the Final Agreement, CPTPP & Annex, GOV’T OF CAN.,
https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-
ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng (Feb. 21, 2018); CPTPP Suspensions Explained, AUSTL.
for investor-state arbitration of substantive treaty obligations. CPTPP Suspensions Explained, AUSTL.
GOV’T DEPT. OF FOREIGN AFFS. & TRADE, supra. As of this writing, the CPTPP has entered into force
among Canada and six other states parties, namely Australia, Japan, Mexico, New Zealand, Singapore,
and Vietnam. See About the CPTPP, GOV’T OF CAN., https://www.international.gc.ca/trade-
commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/about_cptpp-
that same year, Canada unexpectedly embraced the European Union’s rollout of a permanent international investment court in the Comprehensive Economic and Trade Agreement (CETA). In 2020, Canada abstained from submission to any form of ISDS in the context of the new U.S.-Mexico-Canada Agreement (USMCA). Despite the apparent movement away from ISDS in general and investor-state arbitration in particular, in 2021 Canada released a new model Foreign Investment Protection Agreement (FIPA) that includes a “robust” commitment to investor-state arbitration.

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

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


associated with “evolutionary, experimental approaches . . . in turbulent fields characterized by diverse preferences.”

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

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

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

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

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

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

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


recurrent instability of governments in that region;13 (3) the concentration of capital in Europe and North America, combined with the lack of sufficient investment opportunities in those regions;14 (4) innovations in transportation and other communications that made it possible to grow, harvest, and distribute even perishable commodities on a global scale;15 (5) the reorientation of Latin American immigration policies to attract skilled North American and European workers;16 and (6) the dawn of a relatively peaceful period among great powers between the end of the Napoleonic Wars in 1815 and the outbreak of World War I in 1914.17 As a result of these forces, British foreign investment grew from $500 million in 1825 to $12.1 billion in 1900.18 Over the same period, French foreign investment grew from $100 million to $5.2 billion.19

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

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13 EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 242–43 (1915); DUNN, supra note 11, at 54; see also HATHAWAY & SHAPIRO, supra note 9, at 33–34.
14 J.A. HOBSON, IMPERIALISM 79–83 (1902); Root, supra note 11, at 518–19.
16 SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION 31 (2012); see also VANDEVELDE, supra note 8, at 20–21; Root, supra note 11, at 517–18.
17 VANDEVELDE, supra note 8, at 20.
19 Id.
20 See DUNN, supra note 11, at 53.
21 Id.
22 Chua, supra note 12, at 227; Jorge M. Guira, MERCOSUR as an Instrument for Development, 3 L. & BUS. REV. AM. 53, 61 (1997); see also DUNN, supra note 11, at 54, 66.
23 DUNN, supra note 11, at 53–54.
themselves with a sufficient degree of permanence. During a transitional period, political disorder and revolution occurred frequently in Latin America, inflicting losses on foreign workers and property owners.

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

24 Id. at 53.
25 BORCHARD, supra note 13, at 242–43; DUNN, supra note 11, at 54, 55; see also Alejandro Alvarez, Latin America and International Law, 3 AM. J INT’L L. 269, 273 (1909).
26 DUNN, supra note 11, at 54, 57; MONTT, supra note 16, at 32. A case well known to U.S. students of international law involved allegations that a military commander of one faction in a civil conflict unlawfully detained, assaulted, and pressed into service the U.S. owner and operator of a machinery repair shop and waterworks in Bolivar, Venezuela. See Underhill v. Hernandez, 168 U.S. 250, 254 (1897).
27 Bubb & Rose-Ackerman, supra note 8, at 294.
28 See supra note 11 and accompanying text.
30 BORCHARD, supra note 13, at 28, 349; 1 LASSE OPPENHEIM, INTERNATIONAL LAW 374 (1905); Root, supra note 11, at 526–27; see also MILES, supra note 9, at 48.
31 BORCHARD, supra note 13, at 27, 30–32.
32 Id. at 39, 349; see also OPPENHEIM, supra note 30, at 376.
33 See OPPENHEIM, supra note 30, at 376–77 (observing that “an alien must be afforded such protection of his person and property as is enjoyed by a citizen,” and opining that “[a]part from protection of person and property, every state can treat foreigners at discretion,” but recognizing that “there is a tendency within all the States which are members of the Family of Nations to treat admitted foreigners more and more on the same footing as citizens, political rights and duties, of course, excepted”); see also BORCHARD, supra note 13, at 38, 40 (noting that the “modern tendency is to bring about an approximation of the alien to the national in the enjoyment of civil rights”); Root, supra note 11, at 521 (asserting that “[e]ach country is bound to give to the nationals of another country the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens”).
34 BORCHARD, supra note 13, at 39.
Elaborating these principles, states had to exercise due diligence in protecting aliens from crimes and civil disturbance, and to provide judicial mechanisms for the administration of justice. In general, host states bore no responsibility for damages caused by revolutionary movements, except in the case of frequent or prolonged political disorder. Nor did they bear international responsibility for mere non-performance of their contractual relations with aliens, though they might bear responsibility for arbitrary annulment of contracts or confiscation of property without recourse to a judicial determination regarding the legality of state action. Frequent and fundamental changes in the legal environment could also attract international responsibility.

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

35 Id. at 217, 220–22; DUNN, supra note 11, at 143–46.
36 See DUNN, supra note 11, at 146–56; PAPARINSKIS, supra note 29, at 194–95; see also BORCHARD, supra note 13, at 43, 335–36; OPPENHEIM, supra note 30, at 376.
37 DUNN, supra note 11, at 159–63; see also BORCHARD, supra note 13, at 229.
38 BORCHARD, supra note 13, at 284–85, 292–94, 336; DUNN, supra note 11, at 163–69; MILES, supra note 9, at 48; Bubb & Rose-Ackerman, supra note 8, at 293; see also J.E.S. Fawcett, Some Foreign Effects of Nationalization of Property, 27 BRIT. Y.B. INT’L L. 355, 355 (1950).
39 See PAPARINSKIS, supra note 29, at 220.
40 See MONTT, supra note 16, at 18 (explaining that “in this earlier era, international law was essentially concerned with the proper administration of justice and adequate maintenance of the order publique, both central functions of the nineteenth century ‘night-watchman’ state”). Borchard tied the parameters of diplomatic protection to the “true function of the state,” which he described in the following terms:

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

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

41 DUNN, supra note 11, at 145, 154.
engage in the diplomatic protection of their nationals,\textsuperscript{42} which might include diplomatic protest,\textsuperscript{43} forcible intervention,\textsuperscript{44} or the assertion of legal claims through inter-state arbitration.\textsuperscript{45} In the event of legal claims, the law required full compensation for losses.\textsuperscript{46} Theoretically, international law did not contemplate punitive damages,\textsuperscript{47} but in practice some tribunals considered the extent of delinquency in establishing monetary compensation.\textsuperscript{48}

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

\textsuperscript{42} \textit{Id.} at 145–46, 154–55; see also BORCHARD, supra note 13, at 25.

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

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

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

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

\textsuperscript{47} BORCHARD, supra note 13, at 419; DUNN, supra note 11, at 172.

\textsuperscript{48} BORCHARD, supra note 13, at 419; DUNN, supra note 11, at 175–78, 181–82.

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

\textsuperscript{50} BORCHARD, supra note 13, at 242–43; DUNN, supra note 11, at 55, 161.

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

\textsuperscript{52} BORCHARD, supra note 13, at 347; DUNN, supra note 11, at 55–56; Root, supra note 11, at 520; \textit{see also} PAPARINSKIS, supra note 29, at 23.
created opportunities for abuse of the legal process.\textsuperscript{53} Under the banner of the Calvo Doctrine, Latin American states pushed back, claiming that international law only required host states to treat foreigners as well as they treated their own nationals, however good or bad that might be.\textsuperscript{54} The proposition failed to attract support among the more powerful states of Europe and North America.\textsuperscript{55} As a result, the customary international law of state responsibility for injuries to aliens remained a tool for policing exceptional lapses of the nightwatchman and rule-of-law states. At this stage, it addressed the protection of aliens in general and did not focus specifically on the protection of foreign investment.\textsuperscript{56} Also, international law did not aspire to control the normal operations of the modern regulatory state, which was neither debated as a legitimate phenomenon until the 1920s,\textsuperscript{57} nor widely recognized until the 1930s.\textsuperscript{58}

\textbf{III. The Unraveling of Consensus}

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

\textsuperscript{53} Borchard, supra note 13, at 347; Dunn, supra note 11, at 56–57; Lillich, supra note 11, at 3; Root, supra note 11, at 521.

\textsuperscript{54} Dunn, supra note 11, at 56; Miles, supra note 9, at 49–51; Newcombe & ParadeLL, supra note 8, at 13; Paparinskis, supra note 29, at 23–24; Jeswald W. Salacuse, The Law of Investment Treaties 49 (2010); Lillich, supra note 11, at 4.

\textsuperscript{55} Miles, supra note 9, at 51; Newcombe & ParadeLL, supra note 8, at 13; Salacuse, supra note 54, at 49; Lillich, supra note 11, at 4.

\textsuperscript{56} See Newcombe & ParadeLL, supra note 8, at 12; Paparinskis, supra note 29, at 43, 46, 64; Radi, supra note 11, at 3; Bubb & Rose-Ackerman, supra note 8, at 293.


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

\textsuperscript{59} See supra note 56 and accompanying text.

\textsuperscript{60} Bubb & Rose-Ackerman, supra note 8, at 293.

\textsuperscript{61} Newcombe & ParadeLL, supra note 8, at 12.
property. As a result, expropriations of foreign investments did not occur on any significant scale. As explained below however, during the twentieth century, three political movements challenged the traditional distribution of property rights as incompatible with “the well-being of [the] nation as a whole.” These movements included communist and socialist revolutions, decolonization, and the rise of economic nationalism. Expropriations became a widespread phenomenon. The duty to provide compensation, the modalities for compensation, and the measure of compensation for expropriation became contested topics in bilateral relations and in the United Nations. By the 1960s and 1970s, divisions had become so intense that even the United States Supreme Court and the International Court of Justice expressed doubts regarding the existence of any customary international law regarding minimum standards for the protection of foreign investment.

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

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63 As already discussed, in that period, foreign investment often occurred in the context of colonization by the great powers. See supra note 8 and accompanying text. The coercive structures of colonization left indigenous peoples few avenues for dissent. See supra note 9 and accompanying text; see also Fonkem Achankeng, *Nationalism and Intra-State Conflicts in the Postcolonial World* 10 (2015). In the newly independent states of Latin America, the governing elite were of European extraction and shared the great powers’ commitment to economic liberalism. See supra notes 21–22 and accompanying text.


66 *Rep. on Expropriation*, supra note 64, at 8; see also Paparinskis, supra note 29, at 67; Vandevelde, supra note 8, at 34.

67 See Newcombe & Paradei, supra note 8, at 14; Vandevelde, supra note 8, at 34; Fawcett, supra note 38, at 357.

Against Imperial Arbitrators

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

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

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

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69 REP. ON EXPROPRIATION, supra note 64, at 8.
70 Id. at 9.
71 Id.; RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2 (2d ed. 2012); LOWENFELD, supra note 68, at 470–71; NOAH RUBINS & M. STEPHAN KINSSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 160–61 (2005); Vandeveld, supra note 18, at 380–81.
72 REP. ON EXPROPRIATION, supra note 64, at 10.
74 See Morineau, supra note 65, at 1078.
75 See id.
77 REP. ON EXPROPRIATION, supra note 64, at 10; Minister of Foreign Affairs Letter of Aug. 3, 1938, supra note 73, at 187, 190.
78 See REP. ON EXPROPRIATION, supra note 64, at 10; Morineau, supra note 65, at 1079.
value at the time of dispossession. By contrast, the Mexican government proposed to compensate landowners with agrarian bonds having long maturities, with the result that over a decade could pass without any payments whatsoever. While the U.S. government claimed that the measures were tantamount to confiscation, Mexican officials opined that international law established no rules regarding the timing or form of compensation.

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

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

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

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

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

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


87 Id.

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

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

90 Maurer, supra note 85, at 9.

91 Mexican Expropriation of Foreign Oil, supra note 86.
and secure an important source of revenue by nationalizing the oil industry. The underlying assumptions probably were false, given that Mexican oil production consistently declined between 1921 and 1933, every foreign oil company had already begun the process of disinvestment by 1931, and the Mexican oil industry was in a state of financial distress. Although the Mexican state made “creeping” inroads against the interests of foreign oil companies during this period, the issue came to a head in 1938 when a Mexican labor board ordered foreign oil companies to implement extremely large and retroactive wage increases for Mexican oil workers. Foreign oil companies defied both the award of Mexican labor board and the Mexican Supreme Court’s judgment mandating compliance with the award. Although the Mexican president appeared willing to mediate a compromise, a personal insult by oil executives during negotiations provided the last straw. The president promptly ordered expropriation and nationalization of their investment property.

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

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

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92 See Maurer, supra note 85, at 20.
93 Id. at 2–4.
94 Rep. on Expropriation, supra note 64, at 10–11.
95 Id. at 12.
96 Mexican Expropriation of Foreign Oil, supra note 86.
97 Id.
98 See Arthur W. Macmahon & W.R. Dittmar, The Mexican Oil Industry Since Expropriation, 57 Pol. Sci. Q. 28, 33 (1942) (“But in the end, perhaps, it was the way the representatives of the companies expressed doubt in the President’s word during the negotiations that was the decisive factor in galvanizing national pride.”).
99 Id.; see also Rep. on Expropriation, supra note 64, at 12.
100 Mexican Expropriation of Foreign Oil, supra note 86.
101 Rep. on Expropriation, supra note 64, at 12.
102 Id. In 1938, the Department of Commerce listed the value of U.S. direct investments in Mexico’s oil industry at $69 million. Id.; Macmahon & Dittmar, supra note 98, at 43. In their books, U.S. oil companies listed the value at just over $60 million. Rep. on Expropriation, supra note 64, at 12; Macmahon & Dittmar, supra note 98, at 44. Today, at least, the U.S. State Department describes the oil companies’ demands as “extravagant.” Mexican Expropriation of Foreign Oil, supra note 86.
Mexico a credit for $9 million already placed on deposit, ordered payment of one-third of the balance as of July 1, 1942, and provided for payment of the remaining balance in five equal annual installments. On paper, the outcome seemed unfavorable to U.S. oil companies. In fact, the U.S. government essentially forced the settlement because it did not want the dispute to linger as an irritant during the Second World War. Also, U.S. oil companies had only a secondary interest in compensation for Mexican properties known to have a declining value. Their primary interest had been to set a precedent that would discourage oil expropriations by other countries. In that context, one might see the efforts of U.S. oil companies as successful because the U.S. government intervened on their behalf and ultimately secured an amount of compensation described by some observers as greater than the market value of their already depleted oil fields.

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

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

103 REP. ON EXPROPRIATION, supra note 64, at 12.
104 Koppes, supra note 85, at 62.
105 Mexican Expropriation of Foreign Oil, supra note 86; Koppes, supra note 85, at 62, 72. Following the expropriations, Nazi Germany had become the primary customer for Mexican oil. Mexican Expropriation of Foreign Oil, supra note 86.
106 Maurer, supra note 85, at 14.
107 Id. at 14–15.
108 Id. at 20; see also Koppes, supra note 85, at 71–72 (indicating that the compensation was adequate, “even generous” because the relevant fields had already been depleted).
109 See PAPARINSKIS, supra note 29, at 67; see also DOLZER & SCHREUER, supra note 71, at 2; Maurer, supra note 85, at 20; Hull Letter of Aug. 22, 1938, supra note 79, at 192.
110 See PAPARINSKIS, supra note 29, at 54.
111 LOWENFELD, supra note 68, at 483; NEWCOMBE & PARADELL, supra note 8, at 18–19; Vandevelde, supra note 8, at 41–42; Brower, supra note 2, 147–48; Vandevelde, Brief History, supra note 44, at 167.
part of the Soviet Bloc. Contemporaneously, communist governments came to power in Albania, China, and Yugoslavia. Beginning with Cuba in 1959, and continuing for the next generation, communist and socialist movements worked actively, and sometimes successfully to achieve political control in Latin American jurisdictions such as Chile and Nicaragua. As they advanced, many socialist revolutions produced takings of foreign investments and repudiation of the obligation to compensate under international law.

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

113 Kramer, supra note 112, at 744.
117 See Vandevelde, supra note 8, at 41; see also Lowenfeld, supra note 68, at 483; Newcombe & Paradell, supra note 8, at 18–19.
118 Newcombe & Paradell, supra note 8, at 18–19; Salacuse, supra note 54, at 68; Sornarajah, supra note 8, at 22; Vandevelde, supra note 8, at 42; Vandevelde, Brief History, supra note 44, at 166.
119 Sornarajah, supra note 8, at 22; see also Vandevelde, supra note 8, at 42; Eileen Denza & Shelagh Brooks, Investment Protection Treaties: United Kingdom Experience, 36 Int’l & Comp. L.Q. 908, 909 (1987).
120 Sornarajah, supra note 8, at 22; Vandevelde, supra note 18, at 383.
Algeria, Egypt, Ethiopia, Indonesia, Iran, Iraq, Kuwait, Libya, Saudi Arabia, Sri Lanka, Sudan, Uganda, and Zambia. Even in states with distant memories of colonial rule and without allegiance to the Soviet Union, the prevailing atmosphere favored economic nationalism and the reduction of foreign influence in economic affairs. Thus, Argentina, Bolivia, Brazil, Chile, Guatemala, Peru, and Venezuela nationalized mines, utilities, and other major enterprises. Applying the "dependencia" theory (according to which foreign investment resembles colonialism by causing a net outflow of resources to foreign states), many Latin American states also adopted laws to restrict foreign investment. Taken together, expropriations driven by decolonization and


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

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


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

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

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

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

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

130 NEWCOMBE & PARADELL, supra note 8, at 19; VANDEVELDE, supra note 8, at 19.

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

132 VANDEVELDE, supra note 8, at 46.

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

134 VANDEVELDE, supra note 8, at 46.


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

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

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

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

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

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

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

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

economic nationalism in the developing world began in the 1960s, increased during the 1970s, and reached their height in about 1975.\textsuperscript{145}

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

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

\begin{footnotesize}
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\item Bubb & Rose-Ackerman, supra note 8, at 295. According to Vandevelde, expropriations outside the communist world remained unusual. VANDEVELDE, supra note 8, at 46. At the start of the 1960s, fewer than ten expropriations occurred per year in the developing world. Id. By the late 1960s, the number had increased to twenty to thirty expropriations per year. Id. By the early 1970s, the number had grown again to fifty expropriations per year. Id. The phenomenon peaked in 1975, when eighty expropriations occurred. Id. All told, between 1960 and mid-1974, sixty-two developing states engaged in 875 expropriations. SALACUSE, supra note 54, at 69; Shafruddin, supra note 4, at 439.
\item See, e.g., CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 23–24 (2008); LOWENFELD, supra note 68, at 489–90; VANDEVELDE, supra note 8, at 47; see also DOLZER & SCHREUER, supra note 71, at 4; NEWCOMBE & PARADELL, supra note 8, at 31. This represents a concrete example of the tendency for the economic nationalists in developing states to make common cause with Marxists on the topic of foreign investment, where both groups share inward-looking philosophies and a suspicion of foreign capital. Kenneth J. Vandevelde, The Political Economy of a Bilateral Investment Treaty, 92 Am. J. Int’l L. 621, 625 (1998).
\item Declaration on Permanent Sovereignty over Natural Resources, supra note 147, para. 1.
\item Id. at para. 2.
\item Id. at para. 3.
\end{enumerate}
\end{footnotesize}
interest,” provided that the state paid “appropriate compensation” in accordance with the host state’s national law and “in accordance with international law.” The Declaration did not, however, identify any particular standard of compensation, much less the so-called Hull standard of “prompt, adequate, and effective compensation.” This omission may be understandable given differences even among traditional authorities regarding the extent of recovery for indirect losses, not to mention differences regarding the existence of international standards relating to the form and timing of compensation. However imperfect, the compromises contained in the Declaration on Permanent Sovereignty over Natural Resources have come to be seen as the reflection of a genuine global consensus as of 1962.

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

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

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151 Id. at para. 4.
152 See MILES, supra note 9, at 96. The United States proposed that “appropriate compensation” be defined as “prompt, adequate, and effective compensation,” but withdrew the suggestion due to lack of support. NEWCOMBE & PARADELL, supra note 8, at 27.
153 See supra note 46 and accompanying text.
154 See supra notes 78–84, 100 and accompanying text.
155 Texas Overseas Petroleum Co. v. Libya, Award on Merits at para. 87 (Jan. 19, 1977), 17 I.L.M. 1, 30 (1978) [hereinafter TOPCO Award]; LOWENFELD, supra note 68, at 489.
156 See supra note 145 and accompanying text.
157 MILES, supra note 9, at 96.
156 Id. art. 2(2)(a) (emphasis added).
161 See supra note 151 and accompanying text.
Against Imperial Arbitrators

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

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

162 CERDS, supra note 159, art. 2(2)(c).
163 See supra note 151 and accompanying text; see also LOWENFELD, supra note 68, at 492.
164 See supra note 151 and accompanying text.
165 See CERDS, supra note 159, art. 2(2)(c) (indicating only that expropriating states “should” pay appropriate compensation); see also LOWENFELD, supra note 68, at 492; SALACUSE, supra note 54, at 73; VANDEVELDE, supra note 8, at 47.
166 CERDS, supra note 159, art. 2(2)(c); see also VANDEVELDE, supra note 8, at 48.
167 See supra note 151 and accompanying text; see also MILES, supra note 9, at 98; NEWCOMBE & PARADELL, supra note 8, at 32; VANDEVELDE, supra note 8, at 48.
168 DOLZER & SCHREUER, supra note 71, at 4; LOWENFELD, supra note 68, at 491–92; NEWCOMBE & PARADELL, supra note 8, at 32; SORNARAJAH, supra note 8, at 480; VANDEVELDE, supra note 8, at 47–48.
169 DOLZER & SCHREUER, supra note 71, at 4; DUGAN ET AL., supra note 146, at 25; LOWENFELD, supra note 68, at 491–92; NEWCOMBE & PARADELL, supra note 8, at 32; SORNARAJAH, supra note 8, at 480.
170 TOPCO Award, supra note 155, at para. 85, 17 I.L.M. at 29; DUGAN ET AL., supra note 146, at 25; LOWENFELD, supra note 68, at 493; NEWCOMBE & PARADELL, supra note 8, at 32; see also SORNARAJAH, supra note 8, at 480.
171 TOPCO Award, supra note 155, at para. 86, 17 I.L.M. at 29; NEWCOMBE & PARADELL, supra note 8, at 32.
172 TOPCO Award, supra note 155, at para. 85, 17 I.L.M. at 29; DUGAN ET AL., supra note 146, at 25; NEWCOMBE & PARADELL, supra note 8, at 32.
173 See DUGAN ET AL., supra note 146, at 23; LOWENFELD, supra note 68, at 492; see also DOLZER & SCHREUER, supra note 71, at 5; NEWCOMBE & PARADELL, supra note 8, at 31.
these resolutions also demonstrated the existence of “scarcely twenty
countries in the world committed to liberal investment principles.”

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

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

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

174 See Vandevelde, supra note 18, at 374, 384–85 & nn.85–86.
175 See NEWCOMBE & PARADELL, supra note 8, at 32; LOWENFELD, supra note 68, at 492; MILES,
 supra note 9, at 99–100; Denza & Brooks, supra note 119, at 910.
177 Id. at 406.
178 Id.
179 Id. at 406, 416, 423–25.
180 Id. at 427–37.
181 Id. at 428.
182 Id. at 429–30.
2023] Against Imperial Arbitrators

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

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

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

183 Id.
187 Id. at 32–50.
188 Id. at 47.
is placed.” This was another way of saying that customary international law on the topic had stalled, if not perished, and that the development of international investment law would have to be treaty-based.

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

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

A. Multilateral Efforts: The Wave that Never Broke

In 1929, the League of Nations and the International Chamber of Commerce proposed a Draft Convention on the Protection of Foreign Property. Given an extensive body of arbitral practice on the topic,
proponents judged the field ripe for codification. They did not account for the fact that the different political interests of capital-exporting and capital-importing states would render it impossible to reach the consensus required for such an undertaking. Whereas capital-exporting states sought rules favorable to the protection of capital flows, capital-importing states preferred rules favorable to the protection of their autonomy. These conflicting interests made it impossible to reach agreement on a definite body of rules, even at a time when the universe of independent states resisting codification of existing jurisprudence was mostly limited to Latin America.

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

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195 Dunn, supra note 11, at 61.
196 Id. at 61–62.
197 Id.
198 See id. at 62; see also supra notes 54, 72–76 and accompanying text. According to one observer, a majority of the 42 delegations could reach agreement on two topics, namely denial of justice and the obligation of diligence. Vandeveld, supra note 8, at 35–36. But 17 delegations, mostly from Latin America and eastern Europe, contended that foreigners could never claim any standard of treatment higher than that accorded to nationals of the host state. Id. at 35. Because the conference required a supermajority of two-thirds for adoption, the conference produced no results. Id. at 36.
200 See Vandeveld, supra note 8, at 42.
201 Campbell McLachlan et al., International Investment Arbitration 284, 287–88 (2d ed. 2017); Sornarajah, supra note 8, at 87; Van Harten, supra note 194, at 19–20; Greg Anderson, How Did Investor-State Arbitration Get a Bad Rap? Blame It on NAFTA, of Course, 40 World Econ. 2937, 2946 (2017); Fatouros, supra note 194, at 79–81; Vandeveld, supra note 18, at 381.
202 Lim et al., supra note 43, at 64; Salacuse, supra note 54, at 87–88; Sornarajah, supra note 8, at 87–88; Van Harten, supra note 194, at 20–21; Vandeveld, supra note 8, at 54; Fatouros, supra note 194, at 79–81.
203 Dolzer & Schreuer, supra note 71, at 8; McLachlan et al., supra note 201, at 288.
Five years later, the OECD released a second draft, but by that time the gulf between capital-exporting states and capital-importing states had widened to the point where multilateral consensus had become impossible. Under these circumstances, the OECD settled for recommending the draft as a model for the bilateral investment treaties of member states.

B. Bilateralism: The First, Humble Wave

With respect to the protection of foreign investments, Germany and Switzerland initiated the first wave of bilateralism in the shadow of failing multilateralism and for very specific reasons. Judging that powerful states were not sufficiently committed to multilateral solutions, Germany concluded its first bilateral investment treaty with Pakistan in 1959. It had very specific reasons for seeking treaty protections. As enemy aliens, German individuals and corporations had experienced wartime seizures of assets across the globe during and after the Second World War, meaning that the state was particularly sensitive to the need for legal rules on the protection of investment. Also, during the post-war recovery period, German
economic capacity quickly exceeded the needs of a small domestic market, meaning that German companies would again operate on a global scale.\(^\text{212}\) As a defeated enemy power, however, Germany lacked the political and diplomatic resources needed to guarantee the protection of German investments abroad through the traditional channels of soft power.\(^\text{213}\) It had lost the ability to project power by forcible means and did not yet have the standing required to negotiate broader treaties on friendship and amity.\(^\text{214}\) Nor did Germany have longstanding historical, cultural, or administrative ties to a significant number of former colonies in the developing world.\(^\text{215}\) Given these deficits, Germany turned to bilateral investment treaties as a source of legal protection for German investors in developing states.\(^\text{216}\)

Switzerland followed Germany’s lead for similar reasons in 1961.\(^\text{217}\) Although not a defeated enemy power, Switzerland faced similar challenges as a country with global economic interests,\(^\text{218}\) but without significant

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\(^{212}\) Dolzer & Kim, supra note 208, at 290–91, 293.

\(^{213}\) Id. at 294.

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

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

\(^{216}\) See Lim et al., supra note 43, at 61.

\(^{217}\) Dolzer & Schreuer, supra note 71, at 7; Vandevelde, \textit{Brief History}, supra note 44, at 169.

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

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


221 See SALACUSE, supra note 54, at 92.
reasons.\textsuperscript{222} Over the next two decades, those four countries concluded over 100 bilateral investment treaties.\textsuperscript{223}

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

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


\item \textsuperscript{223} \textit{Montt}, supra note 16, at 117.

\item \textsuperscript{224} \textit{Id.; see also} Yas Banifatemi & Andre von Walter, \textit{France}, in \textit{Commentaries on Selected Model Investment Treaties} 245, 247 (Chester Brown, ed. 2013) (opining that an “important phase on the development of French investment treaties started in the 1960s”).

\item \textsuperscript{225} See \textit{Investment Treaty Navigator: France}, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/72/france; \textit{see also} French-Tunisia BIT (1963), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3496/download. Vandevelde states that France concluded a BIT with Chad in 1960. However, he also states that the “French BITs of the 1960s, however, never entered into force and thus, for all practical purposes, the French BIT program did not commence until the early 1970s.” \textit{Vandevelde}, supra note 8, at 55 n.209.
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fact, the country’s BIT program began in earnest only in 1972.226 Viewed from this perspective, it makes more sense to include France on the roster of countries that launched BIT programs as a response to the NIEO during the second wave investment treaty practice.227 Perhaps their modest aspirations explain the success of early BITs.228 Very brief and open-ended provisions directed at a single topic (investment) made the treaties easy to negotiate.229 Dispute settlement provisions called for state-to-state arbitration or judicial settlement before the ICJ.230 Because state-to-state arbitration and judicial settlement of investment disputes have been rare,231 and because the early BITs created no direct rights of action for investors,232 the early BITs did not threaten to tread heavily on the

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

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

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

229 See K. Scott Gudgeon, United States Bilateral Investment Treaties: Comments on the Origin, Purposes, and General Treatment Standards, 44 INT’L TAX & BUS. LAW. 105, 110 (1986). By way of example, the Germany-Pakistan BIT of 1959 includes terse provisions on non-discrimination sounding in national treatment, expropriation, and full protection and security of investments (diligence). See Gesetz zu dem Vertrag vom 25 November 1959 zwischen der Bundesrepublik Deutschland und Pakistan zur Forderung und zum Schutz von Kapitalanlagen [Treaty Between Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments], Nov. 25, 1959, BUNDESGESETZBLATT, Teil II [BGBl. II] at 793, arts. 2–3 (Ger.). It does not include provisions on fair and equitable treatment or MFN treatment, two of the more contentious provisions in modern investment treaty practice. LIM ET AL., supra note 43, at 60.

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

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

231 See David Gaukroder, State-to-State Dispute Settlement and the Interpretation of Investment Treaties 6 (OECD Working Paper on International Investment 2016/03), https://dx.doi.org/10.1787/5jrl71rqj30-en (“Overall, it is clear that governments have been very reluctant to seek to use [state-to-state dispute settlement] under investment treaties. There are very few cases where governments have sought to invoke [state-to-state dispute settlement] provisions.”); see also NEWCOMBE & PARADELL, supra note 8, at 35–36 (indicating that the ICJ has “played a minimal role in resolving foreign investment disputes,” hearing just six cases since the court’s establishment in 1945 and dismissing three of those cases for lack of jurisdiction).

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

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

C. Bilateralism: The Second Wave as Defensive Crouch

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

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233 See Montt, supra note 16, at 117.
234 See id. at 118 (contending that “the BIT programs launched by Germany in 1959 and Switzerland in 1960 clearly serve as focal points for countries that later wished to . . . signal their commitment to property rights and liberalization . . . .”).
235 Not surprisingly, the most active early adopters from the developing world included states that were highly interested in attracting foreign investment, that had relatively strong commitments to liberal economic principles, or both. Id. at 116–17. That roster includes Egypt with twelve BITs, Singapore with seven BITs, South Korea with seven BITs, and Malaysia with six BITs from 1959 to 1979. Id. at 117.
236 Between 1959 and 1979, Germany, Switzerland, the Netherlands, and Belgium concluded 101 of the 167 BITs concluded by all countries during the same period. See id. at 117 (listing the numbers of BITs concluded by the most frequent users during the relevant period); Vandevenlede, supra note 8, at 59 (listing the total numbers of BITs concluded by all states during the relevant period).
238 See Denza & Brooks, supra note 119, at 910.
239 Vandevenlede, supra note 8, at 59.
principles of state responsibility regarding the protection of foreign investment, particularly the Hull standard of compensation for expropriation. To that end, they promoted treaty texts with more detailed substantive disciplines and direct rights of action for investors. The movement was essentially conservative in character: defense of the traditional mechanisms for disciplining exceptional failures of the nightwatchman and the rule-of-law states.

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


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

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

\textsuperscript{244} Gunawardana, supra note 211, at 545; see also Vandevelde, supra note 146, at 628; Vandevelde, supra note 18, at 386 n.96.

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

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

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

\textsuperscript{248} See Vandevelde, Brief History, supra note 44, at 171.

\textsuperscript{249} KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 26, 31 (2009); Gudgeon, supra note 229, at 111; Vandevelde, supra note 80, at 210, 258; Vandevelde, Fifteen-Year Appraisal, supra note 241, at 534; see also Bilateral Investment Treaties with the Czech and Slovak Federal Republic, The Democratic Republic of Congo, The Russian Federation, Sri Lanka, and Tunisia,
expropriation, the measure of compensation, and the modalities of compensation had become focal points for virtually all debates on the topic of foreign investment, efforts tended to concentrate on giving effect to something like the Hull standard: prompt payment of market value in a recognized medium of exchange.

The protagonists of the second wave sought to weave other traditional standards of protection into their investment treaties. As a result, the instruments generally included an obligation to provide full protection and security, which closely tracks the obligation of diligence in protecting aliens and their property under international law. They also included an obligation to provide “fair and equitable treatment” to the investments of investors. In so doing, they drew on the OECD’s Draft Convention on the Protection of Foreign Property, which had used this phrase to incorporate the customary international law “minimum standard” of treatment for aliens and their property. That included a prohibition of discrimination against aliens...
with respect to the protection of persons and property, an obligation to curtail arbitrary state action, and access to independent, impartial, and effective channels for the administration of justice.\textsuperscript{256} The drafters used the phrase “fair and equitable treatment” as a placeholder for these principles because it lacked the political baggage of express references to an “international minimum standard.”\textsuperscript{257} It also blunted the likelihood of objections by negotiating partners who could hardly criticize demands for “fair and equitable treatment.”\textsuperscript{258}

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

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

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

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

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

\textsuperscript{257} NEWCOMBE & PARADELL, supra note 8, at 263, 269.

\textsuperscript{258} \textit{Id.} at 263.

\textsuperscript{259} See Denza & Brooks, supra note 119, at 911.

\textsuperscript{260} \textit{Id.}

\textsuperscript{261} \textit{Id.}
significantly more protection than the traditional principles that were already under attack.262

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

262 See MONTT, supra note 16, at 69.

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

264 See supra note 33 and accompanying text.

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

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

267 SALACUSE, supra note 54, at 197.

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

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

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

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

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\item NEWCOMBE & PARADELL, supra note 8, at 193–94; Gudgeon, supra note 229, at 117; Vandevelde, Fifteen-Year Appraisal, supra note 241, at 537. From time to time, some observers have contended that customary international law does in fact require MFN treatment. NEWCOMBE & PARADELL, supra note 8, at 193–94.
\item See Vandevelde, supra note 80, at 205, 216; Vandevelde, Brief History, supra note 44, at 158–59.
\item See supra notes 135–45 and accompanying text. National treatment in the pre-establishment phase also forbids the type of investment screening historically practiced by the communist governments of Eastern Europe. Propp, supra note 270, at 541.
\item DOLZER & SCHREUER, supra note 71, at 240; NEWCOMBE & PARADELL, supra note 8, at 72–73; Kapeliuk, supra note 275, at 51 n.13. The ICSID Additional Facility Rules apply if either the investor’s home state or the respondent state (but not both) have ratified the ICSID Convention. DOLZER & SCHREUER, supra note 71, at 240; NEWCOMBE & PARADELL, supra note 8, at 72–73; Brower, Empire Strikes Back, supra note 275, at 49; Brower, FTC Notes, supra note 275, at 350.
\item BORN, supra note 252, at 422; DOLZER & SCHREUER, supra note 71, at 241; NEWCOMBE & PARADELL, supra note 8, at 73; Kapeliuk, supra note 275, at 51 n.13.
\item Id.
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2023] Against Imperial Arbitrators 37

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

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

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

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280 BORN, supra note 252, at 422; NEWCOMBE & PARADELL, supra note 8, at 73; Kapeliuk, supra note 275, at 51 n.13.
281 VANDEVELDE, supra note 8, at 432; Vandevelde, Fifteen-Year Appraisal, supra note 241, at 534–35; Vandevelde Statement, supra note 249, at 67.
282 REDFERN & HUNTER, supra note 44, at 468; SALACUSE, supra note 54, at 387; Vandevelde, supra note 80, at 258; Vandevelde, Fifteen-Year Appraisal, supra note 241, at 535; Vandevelde Statement, supra note 249, at 67.
283 See Vandevelde, supra note 80, at 258 (discussing the goals for which drafters introduced direct rights of action into the U.S. BIT program, and explaining that recourse to arbitration would “over time . . . result in further elaboration of the substantive provisions of the BITs”).
285 See SALACUSE, supra note 54, at 138 (noting that direct rights of action force host states to “take their treaty responsibilities seriously”).
286 See Vandevelde, supra note 80, at 275 (emphasizing that the core provisions of U.S. BITs relating to fair and equitable treatment, full protection and security, national treatment, MFN treatment, and expropriation were “rooted in United States treaty practice dating back to the . . . nineteenth century”).
287 See MONTT, supra note 16, at 371 (explaining that “international law [historically] lacks experience in controlling the regulatory state”); see also Alvarez Remarks, supra note 241, at 550 (emphasizing that U.S. BITs were “designed to deal with the problems of the 1970s”).
that left states free to exercise police powers (meaning taxation, as well as regulation of health, safety, and morals),\textsuperscript{288} unless performed in a manner that violated the basic obligations of the nightwatchman or rule-of-law states.

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

\section*{D. Bilateralism: The Third Wave as Tsunami}

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

\begin{footnotesize}
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\item \textsuperscript{288} During the 1920s, the future Judge of the International Court of Justice, Phillip C. Jessup emphasized the lawfulness of uncompensated interference with property rights short of direct takings, if performed as “a reasonable measure taken by the state in the interests of the public welfare.” See \textit{Paparinskis}, supra note 29, at 220 (quoting Phillip C. Jessup, \textit{Confiscation}, 21 \textit{Am. Soc’y Int’l L. Proc.} 38, 39–40 (1927)). Endorsement of this principle, at least as applied to measures involving taxation, public health, safety, and other exercises of police powers appears in the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, the American Law Institute’s Second Restatement on the Foreign Relations Law of the United States, the Third Restatement on the Foreign Relations Law of the United States, and Sir Ian Brownlie’s standard work on international law. See \textit{Louis B. Sohn et al., Draft Convention on the International Responsibility of States for Injuries to Aliens}, art. 10.5, 55 \textit{Am. J. Int’l L.} 548, 554 (1961); \textit{Restatement (Second) of Foreign Relations § 197} & cmt. a, illus. 1, 3 (1965); \textit{Restatement (Third) of Foreign Relations § 712} cmt. g (1987); \textit{Ian Brownlie, Principles of Public International Law} 511–12 (6th ed. 2003).
\item \textsuperscript{289} Perhaps one reason for the slow growth, the United States only negotiated BITs with “friendly” developing countries where the substantive treaty provisions aligned with “existing policy.” Vandevelde, \textit{supra} note 80, at 211. Evidently, skepticism about the relevant principles remained prevalent among developing countries at the time. \textit{Vandevelde}, \textit{supra} note 8, at 59.
\item \textsuperscript{290} \textit{Vandevelde}, \textit{supra} note 8, at 59.
\item \textsuperscript{291} The first investment treaty award was not handed down until 1990. \textit{See infra} note 303 and accompanying text.
\item \textsuperscript{292} \textit{Newcombe & Paradeell}, \textit{supra} note 8, at 48–49; \textit{Sornarajah}, \textit{supra} note 8, at 215; \textit{Vandevelde}, \textit{supra} note 8, at 59–61; Gudgeon, \textit{supra} note 229, at 130; Vandevelde, \textit{supra} note 18, at 387–88.
\end{itemize}
\end{footnotesize}
investment became the primary source of development, and states had to compete for it. Second, with the demise of communism and the disintegration of the Soviet Union, former client states and newly emerging states lost traditional sources of income, and reoriented their policies towards the enhancement of political and economic freedom. Under these circumstances, BITs became powerful tools for emerging states to signal their thirst for investment, their break from the past, and their commitment to Western values. Third, Latin American states began to abandon the dependencia theory and economic nationalism, which had led to economic stagnation across the region. And fourth, the contrasting successes of East Asian “tigers” reignited interest in economic liberalization as a fast track to development.

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

The phenomenon of investment treaty arbitration also got its start during the 1990s, with the first award rendered in 1990. The total number of investment treaty claims continued as a trickle of just six cases over the next
five years, with the parties settling in three cases and the claimants prevailing in three cases.\textsuperscript{304} During the second half of the 1990s, that trickle grew into a stream with a cumulative total of 40 investment treaty claims, ten of which were brought under NAFTA’s investment chapter.\textsuperscript{305} In later years, that stream became a torrent. By the end of 2010, investors had brought a cumulative total of 407 investment treaty claims.\textsuperscript{306} By the end of 2020, the cumulative total of investment treaty claims had grown to 1,104, with 740 concluded cases, 354 pending cases, and the status of 10 cases unknown.\textsuperscript{307} For reasons developed in Part IV, investment treaty arbitration came to develop a “toxic” reputation starting in the mid-2010s,\textsuperscript{308} with the result that even the architects of the first and second waves turned against their own creations.

V. IMPERIAL ARBITRATORS

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

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

\textsuperscript{304} Investment Dispute Navigator, \textit{supra} note 302.
\textsuperscript{305} \textit{Id.}
\textsuperscript{306} \textit{Id.}
\textsuperscript{307} \textit{Id.}
\textsuperscript{309} See \textit{supra} notes 234, 249–62, 286–88 and accompanying text. As suggested above, the third wave did not involve any change in the goals of capital exporting states. \textit{See Vandevelde Statement, \textit{supra} note 249, at 68 (opining that the U.S. “BIT program has not changed in any fundamental way since 1990”). The third wave simply involved a fortuitous coalescence of political and economic circumstances that facilitated the successful pursuit of BIT programs on a global scale. \textit{See supra} notes 292–98 and accompanying text.
problem of modern investment treaty practice. As explained below, this means the rise of arbitrators who do not merely police exceptional lapses of the nightwatchman and rule-of-law states, but who have transformed investment treaty arbitration into a form of governance in which tribunals routinely second-guess the normal operations of modern regulatory states, virtually without checks or balances.

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

A. Structural Constraints on the Role of Tribunals

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


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

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

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

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


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

\textsuperscript{316} As stated by a law professor from Duke University, who worked in the Investment Division at the Office of the United States Trade Representative during the early years of the U.S. BIT program, “[f]rom the United States’ standpoint, the rights and duties under the BITs are redundant because investments in the United States already receive substantial and nondiscriminatory protection.” Pamela Gann, The U.S. Bilateral Investment Treaty Program, 21 STAN. J. INT’L L. 373, 374 (1985).
upholding traditional principles of state responsibility. But from the drafters' perspective, tribunals were unlikely to become frequent players, to look beyond the horizon of the particular case, to engage in a conscious and robust program of lawmaking, or to impose liability for the normal actions of normal states during normal times.

B. NAFTA and the Rise of Imperial Arbitrators

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

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

317 See supra note 283.
318 See supra notes 295–98 and accompanying text.
319 Alvarez Remarks, supra note 241, at 555.
320 See supra notes 239, 289–90 and accompanying text.
321 Investment Dispute Navigator, supra note 302.
322 Id.
323 Id.
four investor-state arbitrations commenced in the history of investment treaties, with each case brought under a different treaty.\(^\text{324}\) Over the next five years, investors commenced another forty investment treaty arbitrations.\(^\text{325}\) Investors commenced ten of those arbitrations under NAFTA’s investment chapter, with six of those arbitrations commenced against Canada or the United States.\(^\text{326}\) Investors commenced three more arbitrations under the U.S.-Argentina BIT, and two arbitrations under the German-Poland BIT.\(^\text{327}\) Each of the remaining twenty-five arbitrations was brought under a different treaty.\(^\text{328}\) Only one of the thirty non-NAFTA arbitrations was brought against a developed, capital-exporting state.\(^\text{329}\) As explained below, the cluster of disputes under NAFTA’s investment chapter (particularly against Canada and the United States) had important implications for how investors sought to use investment treaties, and how tribunals understood and performed their roles.

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

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\(^{324}\) Id.

\(^{325}\) Id.

\(^{326}\) Id.

\(^{327}\) Id.

\(^{328}\) Id.


\(^{330}\) See supra notes 72–108 and accompanying text.


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

The claims brought by Cargill, Archer Daniels Midland, and Corn Products all related to Mexico’s tax on soft drinks that used high fructose corn syrup as a sweetener. See Cargill Award, supra note 334, at para. 1; Corn Prods. Decision on Responsibility, supra note 334, at para. 3; ADM Award, supra note 334, at para. 2.
were substantial in those three cases and arguably substantial in a fourth, but disappointingly small to investors in the other two. Turning to claims against Canada and the United States, one would expect investors to have significantly lower chances of success, at least when judged by the standard of fundamental security guarantees provided by the nightwatchman and rule-of-law states. Of course, one might find examples of disgraceful lapses in the administration of justice, shockingly vindictive harassment by regulators, and even uncompensated takings. However, such examples would be extremely rare in jurisdictions like Canada and the United States, which rank near the top of every rule-of-law index.

336 The damages award in *Corn Products Int’l Inc. v. Mexico* is not publicly available, but UNCTAD’s Investment Dispute Settlement Navigator reports that the tribunal awarded the investor $58 million. UNCTAD, *Corn Products v. Mexico*, INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/166/corn-products-v-mexico.


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


Against Imperial Arbitrators

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

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

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

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

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

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


347 See generally Feldman Award, supra note 334.

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

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


\textsuperscript{351} \textit{Metalclad Award}, supra note 334, at para. 103.

\textsuperscript{352} See supra note 288 and accompanying text. Some writers have observed that the \textit{Metalclad} tribunal’s focus on effects and its failure consider the exercise of police powers coincides with the award in \textit{Compañía del Desarrollo de Santa Elena}, S.A. v. Republic of Costa Rica (\textit{Santa Elena}) and the jurisprudence of the Iran-U.S. Claims Tribunal. See Julianne J. Marley, \textit{Note, The Environmental Endangerment Finding in International Investment Disputes}, 46 \textit{N.Y.U. J. INT’L L. & POL.} 1003, 1018 (2014); Anderson, supra note 201, at 2954; Rudolf Dolzer, \textit{Indirect Expropriations: New Developments?}, 11 \textit{N.Y.U. ENV’R L.J.} 64, 86–90 (2002). In the \textit{Santa Elena} case, the tribunal famously stated:

\begin{quote}
While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That
exercise of police powers relating to health, safety, and the environment might play as a counterweight to liability. The Metalclad tribunal went on to impose liability for expropriation based on the municipality’s denial of a construction permit and the Mexican state’s incorporation of the property into

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

Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award, para. 71 (Feb. 17, 2000) [hereinafter Santa Elena Award], https://www.italaw.com/sites/default/files/case-documents/italaw6340.pdf. In reaching that conclusion, the Santa Elena tribunal relied on the following statement by the Iran-U.S. Claims tribunal: “The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.” Id. para. 77 (quoting Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, Award No. 14 1-7-2 (June 22, 1984), reprinted in 6 Iran-U.S. Cl. Trib. Rep. 219, 226 (1986)).

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

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

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

353 MILES, supra note 9, at 158.
a natural area directed at the protection of rare cacti. A reviewing court in British Columbia commented that the tribunal’s definition of indirect expropriation was broad enough to include zoning ordinances.

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

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354 *Metalclad Award*, supra note 334, at paras. 29–54, 59, 104–11.
356 *Pope & Talbot Interim Award*, supra note 346, at paras. 90, 99.
357 *Id.* at para. 99. The tribunal made no effort to explain what the exercise of “special care” might entail. BONNITCHA, supra note 355, at 252.
358 *Pope & Talbot Interim Award*, supra note 346, at para. 99 (emphasis added).
359 *Id.* (emphasis added).
360 *Id.* at paras. 100–05; BONNITCHA, supra note 355, at 251.
361 See Gilbert M. Bankobeza et al., *Public International Law: Environmental Law*, 35 INT’L LAW 659, 711 (2001) (“Decisions to date in Chapter 11 disputes raise significant questions for environmental lawmaking in North America. Elimination of the police-powers carve-out from the scope of expropriation, as seen in *Metalclad* and *Pope & Talbot*, could make all environmental laws effectively subject to Chapter 11 disciplines, and compensation required for any significant interference with the operation of a covered foreign investor.”).
362 See supra notes 288, 352 and accompanying text; see also infra note 420 and accompanying text.
363 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992) (holding that regulatory action does not constitute a taking if it prohibits conduct that would fall within common law understandings of nuisance, even if the regulatory action has the effect of destroying all economically productive or beneficial uses of land); see also Anderson, supra note 201, at 2953 (asserting that “[c]ritics of NAFTA worry that within Chapter 11 proceedings, a . . . liberal definition of takings is emerging that threatens to go beyond domestic law in all three NAFTA countries”).
responsibility on its head by imposing liability for the evenhanded exercise of police powers, which constitutes the performance (and not the failure to perform) one of the core functions of the nightwatchman and rule-of-law states.

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

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

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

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


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

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


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

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

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

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373 Id. at para. 118.

374 See Robert Wisner, “The Modern View of the ‘Fair and Equitable Treatment’ Standard in the Review of Regulatory Action by States,” 20 Int’l L. Practicum 129, 131 (2007) (lamenting the fact that “the Pope & Talbot tribunal gave little indication as to the content of the independent fairness standard beyond the rather vague, ordinary meaning of ‘fair and equitable’”); Courtney C. Kirkman, Note, “Fair and Equitable Treatment: Methanex v. United States and the Narrowing Scope of NAFTA Article 1105, 34 Law & Pol’y Int’l Bus. 343, 355 (2002) (observing that the Pope & Talbot tribunal “interpreted fair and equitable treatment as encompassing more than the traditional customary law notion of fair and equitable treatment” and “subject[ed] the NAFTA Parties to greater liability”); see also Pope & Talbot Award on the Merits of Phase 2, supra note 372, at para. 109 (recounting the investor’s argument that fair and equitable treatment requires compliance with domestic principles relating to the exercise of regulatory authority).
against efforts to regulate in the public interest. Although the warning sounded shrill and possibly exaggerated, it captured the occurrence of a real shift. Investors were no longer using investment treaties just for protection against exceptional failures of the nightwatchman and rule-of-law states. They were inviting tribunals to develop a jurisprudence that could open the door to second-guessing the routine operations of modern regulatory states, and they were succeeding.

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

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

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

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

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

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

When interpreting and applying the “minimum standard”, a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy . . . for errors in modern governments is through internal political and legal processes, including elections. . . .

The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. 380

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

379 S.D. Myers Partial Award, supra note 344, at paras. 281–82.
380 Id. at paras. 261, 263.
381 Id. at para. 264.
extend the direct right of action to violations of the WTO’s Agreement on Trade Related Investment Measures or provisions on transparency covered by NAFTA but not incorporated directly into the treaty’s investment chapter.382

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

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

384 See id. at para. 258.
385 See infra notes 449–59 and accompanying text (describing the subsequent emergence and popularization of an interpretation that measures fair and equitable treatment by reference to the legitimate expectations of investors, which are deemed to incorporate compliance with exacting standards of transparency); see also Maffezini Award, supra note 329, at para. 83 (opining that “the lack of transparency with which [a] loan transaction was conducted was incompatible with Spain’s commitment to ensure the investor a fair and equitable treatment”); DOLZER & SCHREUER, supra note 71, at 149 (explaining that “[t]ransparency is closely related to protection of the investor’s legitimate expectations”); Chen, supra note 313, at 85 (noting that fair and equitable treatment “has been invoked to address . . . lack of transparency”).
386 Brower, supra note 199, at 191; Brower, supra note 2, at 165–66.
387 See Waste Mgmt. (II) Award, supra note 332.
389 See Methanex Award, supra note 345.
Mississippi state court. The amounts in controversy for those two cases alone exceeded $1.7 billion. The three NAFTA Parties must have understood that investors and tribunals had already broken the seal on the use of investment treaties to second-guess the routine operations of modern regulatory states. They must have feared the path dependence that opened for pending and future claims.

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

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390 Id.; Loewen Award, supra note 338.
393 See Anderson, supra note 201, at 2953 (explaining that the direction of NAFTA jurisprudence suggested by the Metalclad and Pope & Talbot awards explained “subsequent nervousness regarding the Methanex case”); John H. Knox, The 2005 Activity of the NAFTA Tribunals, 100 AM. J. INT’L L. 429, 432 (2006) (observing that investors have continued to cite Metalclad, and critics have expressed concern that later tribunals, including Methanex, would follow it).
394 See supra notes 325–26 and accompanying text.
Brower, Empire Strikes Back, supra note 275, at 44 n.4; Brower, Fear, supra note 331, at 48 n.34.
396 See David A. Gantz, Settlement of Disputes Under the Central-America-Dominican Republic-United States Free Trade Agreement, 30 B.C. INT’L & COMPAR. L. REV. 331, 352 (2007) (describing the NAFTA experience and explaining that “both the investor and the host state will cite prior decisions that tend to support their arguments before the tribunal”); Questions for Mark Clodfelter and David Gantz, 42 S. TEX. L. REV. 1303, 1306 (2001) (asserting that “earlier Chapter 11 cases are already being widely cited
As decisions came down in *Metalclad*, *Pope & Talbot*, and *S.D. Myers*, and were communicated to arbitrators in other disputes, a tribunal member in the *Methanex* case was reliably (though privately) reported to have remarked that it was like sitting in several different arbitrations at once. Given the obligation to consider the submissions of the parties, arbitrators could not ignore the materials from other cases.

Slowly but surely, it became clear that a de facto doctrine of precedent had begun to emerge. Arbitrators could no longer focus only on finding in later proceedings by counsel on both sides”); David MacArthur, Comment & Note, *NAFTA Chapter 11: On an Environmental Collision Course with the World Bank?*, 2003 *Utah L. Rev.* 913, 930 (indicating that “the lawyers representing the various parties [in NAFTA Chapter 11 arbitrations] have likewise turned to those decisions to shore up their respective arguments”).

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

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

the facts and applying agreed standards to a single dispute. They were engaged in a form of collective lawmaking and had to take a wider frame. This created incentives for some arbitrators to write awards that would establish the definitive standards for emerging and poorly understood topics, thereby enhancing the influence and stature of those who wrote the awards.

In addition, observers were quick to point out the emergence of inconsistent awards on important and recurring legal issues, as well as the danger that this phenomenon posed to the legitimacy of NAFTA’s investment chapter and to the broader universe of investment treaties. Although not provable, these observations likely increased the incentives for arbitrators to engage in a loose form of collaboration, monitoring each other’s work and striving to achieve relatively consistent lines of jurisprudence on key topics where possible.

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

401 Chen, supra note 313, at 51, 63–64, 77.
402 Id. at 64, 77–79.

404 Brower, Structure, supra note 349, at 66–68; Franck, supra note 312, at 1558–87.
405 See Chen, supra note 313, at 56 (“The actors in the [investment treaty arbitration] context were in fact motivated to use precedent to increase the predictability of the system and thereby promote its long-term legitimacy.”).

406 Anthea Roberts has written a number of extremely thoughtful articles highlighting the role of states as the primary lawmakers for investment treaties and the need to enhance their formal role in the development of norms in the context of adjudications. See generally Roberts, supra note 313; Anthea Roberts, Triangular Treaties: The Extent and Limits of Investment Treaty Rights, 56 HARV. INT’L L.J. 353 (2015). Though not expressly cast in these terms, one can view those works as exploring the absence of, and calling for the introduction of, meaningful checks and balances on the work of tribunals. See George Kahale, III, Rethinking ISDS, 44 BROOK. J. INT’L L. 11, 47 n.77 (2018) (“At some point, starting with a clean slate based on a well-defined set of legal principles, a new ISDS might emerge, with all
anticipated structural constraints relating to the frequency and scope of investment arbitration practice, the only remaining check available for every investment treaty arbitration involved the limited remedy of set-aside proceedings, in which either a national court or a second tribunal could police awards for fundamental errors relating to consent, jurisdiction, procedural integrity, and public policy. A provincial court in British Columbia used that opportunity to order partial set-aside of the *Metalclad* award on the (likely accurate) grounds that fair and equitable treatment did not incorporate any obligation of transparency. However, the decision came under severe criticism as a thinly veiled effort by a national court to review the merits of an investment treaty award. No other court has attempted a similar move in subsequent practice under NAFTA’s investment chapter.

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

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

407 Compare supra notes 312–16 and accompanying text.


409 *Metalclad Judgment*, supra note 355, at paras. 70–72; *see also Cargill Award*, supra note 334, at para. 294; *Feldman Award*, supra note 334, at para. 113; *Glamis Gold Award*, supra note 348, at paras. 568–82, 619–22; *Kingsbury & Schill*, supra note 71, at 22.


411 Anderson, supra note 201, at 2955.

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

Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

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

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

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413 FTC Notes of Interpretation (2001), supra note 412.
415 See infra notes 429–30 and accompanying text.
416 DOLZER & SCHREUER, supra note 71, at 32; Brower, FTC Notes, supra note 275, at 355.
418 Brower, supra note 199, at 191–92.
“too great a readiness to step from outside into the domestic arena” and to impose liability even for serious “local error[s].” In other words, tribunals should feel reluctant to infringe on the customary prerogatives of host states and should apply investment treaties to provide relief only in extraordinary cases. Over the next two years, tribunals operationalized the principle in the specific contexts of indirect expropriation and fair and equitable treatment.

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

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

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

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

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

419 Loewen Award, supra note 338, at para. 242.
420 Methanex Award, supra note 345, at Part IV, ch. D, para. 7.
421 Waste Mgmt. II Award, supra note 332, at para. 98 (emphasis added).
422 See Glamis Gold Award, supra note 348, at para. 614 (regarding “the abundant and continued use of adjective modifiers throughout arbitral awards” as evidence of a “strict standard”).
of state responsibility for injuries to aliens,\textsuperscript{423} and to eliminate possibilities for second-guessing the normal operations of modern regulatory states.\textsuperscript{424}

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

\textsuperscript{423}Id.

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

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

\textsuperscript{426}See \textit{Glamis Gold Award}, supra note 348, at paras. 631, 616.

\textsuperscript{427}One observer has referred to the \textit{Glamis} award as an “outlier.” José E. Alvarez, \textit{A Bit on Custom}, 42 N.Y.U. J. INT’L L. & POL. 17, 36 n.73 (2009). Claimants and advocacy organizations, usually at opposite ends of the spectrum when it comes to investment treaties, have echoed this view. See \textit{Occidental v. Ecuador Award Spotlight Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used “Egregious” Damages Logic to Hit Ecuador with $2.4 Billion Penalty in Largest Ever ICSID Award}, (Nov. 21, 2012), https://www.citizen.org/wp-content/uploads/oxy-v-ecuador-memo.pdf. But see \textit{Cargill Award}, supra note 334, at para. 293 (closely tracking the holding in \textit{Glamis}; \textit{Lion Award}, supra note 334, at para. 397 (also requiring evidence of “egregious” procedural conduct that “shocks” the sense of judicial propriety).

\textsuperscript{428}See \textit{Merrill & Ring Award}, supra note 346, at para. 200 (citing the \textit{Glamis} award as evidence that NAFTA jurisprudence had stiffened since the FTC issued its Notes of Interpretation). Following the Notes of Interpretation, only the award in \textit{Clayton/Bilcon v. Canada} arguably involves second-guessing of regulatory decisions relating to surface mining, environmental protection, and the preservation of community core values. See \textit{Clayton/Bilcon v. Canada}, Dissenting Opinion of Professor Donald McRae at paras. 2, 30–31, 34–37, 40, 43–51 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf (asserting that the tribunal found a denial of fair and equitable treatment based
Although the FTC’s action proved to be effective, the gambit was controversial and politically costly. In the view of many observers, and even some tribunals, the Notes of Interpretation probably constituted an unauthorized amendment of NAFTA.\(^{429}\) In fact, even those tribunals that purported to apply the Notes of Interpretation actually ignored them to the extent that they purported to exclude consideration of general principles of law as a source for determining the scope of fair and equitable treatment.\(^{430}\) Others criticized the NAFTA Parties’ heavy-handed effort to alter the outcome of pending matters brought against them.\(^{431}\) In any event, the episode was distasteful and has never been attempted a second time.\(^{432}\)
C. BITS and the Entrenchment of Imperial Arbitrators

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

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

preserves, restrictions on mining activities for environmental reasons, and regulatory action aimed, at least in part, at cultural preservation. With the passage of time, new themes emerged, including challenges of measures relating to affirmative action, minimum-wage requirements, fines and tariff limitations directed at distributors of contaminated water supplies, restrictions on water exports, failure to authorize electricity rate increases and to control rampant electricity theft by impoverished ratepayers, and changes to privatization programs involving key players in sensitive industries such as insurance and rail transport. Prescient observers predicted that investors would eventually challenge measures designed to mitigate climate change.
Mirroring the experience of early NAFTA cases, tribunals rendered awards that included a substantial degree of lawmaking. As under NAFTA, tribunals had to decide whether to consider the regulatory character of government activities or only the magnitude of their effects when determining whether they rose to the level of indirect expropriations. Increasingly, tribunals reached the conclusion that indirect expropriation only required consideration of effects.\footnote{See Miles, supra note 9, at 187; see also Sinclair, supra note 433, at 24; Stuart Braun, Multi-Billion Euro Lawsuits Derail Climate Action, DEUTSCHE WELLE (Apr. 19, 2021), https://www.dw.com/en/energy-charter-treaty-ect-coal-fossil-fuels-climate-environment-uniper-rwe/a-57221166; Poulsen & Gerz, supra note 308, at 2; Weghmann & Hall, supra note 279, at 3.} However, in a break for host states, tribunals rarely concluded that the effects of regulatory interference rose to the level of indirect takings.\footnote{See, e.g., Tecmed Award, supra note 436, at para. 121 (“We find no principle stating that regulatory . . . actions are per se excluded from the scope of the Agreement, even if they are beneficial to society . . . such as environmental protection—, particularly if the negative economic impact of such actions . . . is sufficient to neutralize in full the value, or economic or commercial use of its investment . . . .”); Azurix Award, supra note 442, at para. 310 (“For the tribunal, the issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim.”); see also Dölzer & Schreuer, supra note 71, at 112 (“The effect of the measure upon the economic benefit and value as well as upon the control over the investment is the key question when it comes to deciding whether an indirect expropriation has taken place.”); Julian Arato, Corporations as Lawmakers, 56 HARV. INT’L L.J. 229, 262 (2015) (“Many tribunals have adopted a ‘sole effects’ test, looking only at the burden imposed by regulation.”).}

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

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

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

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

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

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

449 Tecmed Award, supra note 436, at para. 154 (emphasis added).
450 Metalclad Award, supra note 334, at paras. 70–71, 74–76; Brower, supra note 410, at 468–70.
451 See Douglas, supra note 403, at 28 (observing that “no authority was cited by the tribunal in support of its obiter dictum”); see also Chen, supra note 313, at 87 (acknowledging that “commentators have shown flaws in Tecmed’s thin reasoning”).
453 See Chen, supra note 313, at 87 (discussing the tendency of the Tecmed standard to open the door to claims against states for good-faith regulatory changes not involving any abusive or exploitative behavior on the part of states); see also James Crawford, Foreword to ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS xxi (2009) (“Ad hoc tribunals have produced an erratic pattern of decisions, with reasoning often impressionistic and displaying a certain disregard for state regulatory prerogatives.”). One cannot overstate the importance of setting the fair and equitable treatment standard on this trajectory, given that it constitutes the standard most frequently invoked by claimants and most frequently applied by tribunals when imposing liability on host states. UNCTAD, Special Update on Investor-State Dispute Settlement: Facts and Figures, IIA ISSUES NOTE, at 5 (Nov. 2017), https://unctad.org/system/files/official-document/diaepcb2017d7_en.pdf; Chen, supra note 313, at 85.
met across the range of functions performed by modern regulatory states. \footnote{See Brownlie’s Principles, supra note 11, at 615; McLachlan et al., supra note 201, at 315; Douglas, supra note 403, at 28.}


Four years later, a doctoral dissertation at Cambridge University confirmed that “Mondev and Tecmed . . . have remained [the most cited precedents] up to this day: when looking at the most popular precedent each quarter of a year, one of these two awards top the ranking of most-cited precedents 75% of the time.” \footnote{Rishab Gupta & Katrina Limond, Who Is the Most Influential Arbitrator in the World?, Global Arb. Rev., Jan. 1, 2016.}

As should be evident from statements regarding the popularity of Tecmed and other awards, the de facto system of precedent became entrenched in BIT practice. \footnote{Damien Charlotin, “Authorities” in International Dispute Settlement: A Data Analysis 148–49 (June 2020) (Ph.D. dissertation, Corpus Christi College), https://www.repository.cam.ac.uk/bitstream/handle/1810/312324/DamienCharlotin_Thesis%20-%20Final.pdf?sequence=1.}

Even in awards that warned against
overreliance on previous awards, some tribunals devoted pages and pages to consideration of previous awards on contested topics.\footnote{Compare Rentia 4 SVSA v. Russian Fed’n, SCC Case No. Arbitration V 024/2007, Award on Preliminary Objections, para. 91 (Mar. 20, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0714.pdf (warning against overreliance on statements in previous awards as precedent), with id. paras. 22–25, 34–35, 47–49, 57, 79–80, 89, 95–101 (extensively discussing previous decisions of tribunals, international courts and domestic courts); \textit{see} Weeramantry, \textit{supra} note 399, at 113–14 (2010) (recounting with irony an award in which the tribunal asserted the absence of any formal system of precedent and immediately cited a previous decision to support that proposition).} In so doing, they often left the impression they framed discussion in a manner calculated to leave their mark on the development of international investment law.\footnote{See Karl-Heinz Böckstiegel, \textit{Commercial and Investment Arbitration: How Different Are They Today?}, 28 \textit{Arb. Int’l} 577, 588 (2012) (lamenting the tendency of “esteemed” and “eminent” colleagues to focus on the development of international law in framing awards and to “write treatises on international law into their awards though their relevance for the decision reached is hard to understand”).} In awards and academic writing, a leading arbitrator recognized the absence of any formal system of precedent, but then called for tribunals to “adopt solutions established in a series of consistent cases” as part of a broader “duty . . . to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.”\footnote{\textit{See} Saipem S.p.A. v. People’s Republic of Bangl., ICSID Case No. ARB/05/7, Award, para. 90 (June 30, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0734.pdf; Kaufmann-Kohler, \textit{supra} note 457, at 377; \textit{see} Noble Energy, Inc. v. Republic of Ecuador, ICSID Case No. ARB/05/12, Decision on Jurisdiction, para. 50 (Mar. 5, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0563.pdf.} Although the source of the duty may have been perplexing,\footnote{While generally referring to the “legitimate expectations of the community of States and investors,” the \textit{Saipem} award engages in no rigorous effort to identify the source of the purported duty or the specific entities to which the duty is owed. \textit{See Saipem Award, supra note 463}, at para. 90. In fact, the purported duty seems difficult to reconcile with the actual mandate textually imposed on tribunals by treaty: to resolve a specific dispute and nothing more. \textit{See} Patrick M. Norton, \textit{The Use of Precedents in Investment Treaty Arbitration Awards}, 25 AM. REV. INT’L ARB. 167, 176 (2014); \textit{see also} Gill, \textit{supra} note 314, at 88; Reed, \textit{supra} note 314, at 99.} and the goal of doctrinal harmony may have seemed quixotic for hundreds of tribunals formed under hundreds of treaties,\footnote{\textit{See} Roberts, \textit{supra} note 313, at 189 n.44 (observing that the ad hoc character of investor-state arbitration, and the bilateral nature of most investment treaties makes the field particularly ill-suited to any system of precedent); \textit{see also} Bjorklund, \textit{supra} note 314, at 265; Chen, \textit{supra} note 313, at 55.} the message seems clear: the person described as the world’s “most influential arbitrator” actively sought to increase the influence of awards by introducing an obligation to consider previous awards and to
adhere to the ones that had already gained some purchase in the field.\textsuperscript{466} It should be obvious that, this so-called duty to follow precedent simultaneously “camouflages lawmaking while enabling it.”\textsuperscript{467}

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

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

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

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

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

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

\textsuperscript{470} A small but important body of awards questions or criticizes the grandiose aspirations of tribunals to transform a decentralized patchwork of treaties and an ad hoc system of dispute settlement into an integrated system of international investment law. See Romak S.A. v. Republic of Uzb., PCA Case No. AA280, Award, para. 171 (Nov. 26, 2009), https://www.italaw.com/sites/default/files/case-
Summarizing and crystallizing many of the points made above, tribunals regularly engaged in a form of collective lawmaking. In so doing, they often developed standards that invited arbitral second-guessing of the normal operations of modern regulatory states. Given that shift, decisions increasingly affected regulatory measures adopted by developed states. Understandably, critics, supporters, and reformers all came to describe investment treaty arbitration as a form of “global administrative law.” In performing that role, tribunals mostly listened to each other and operated without meaningful checks or balances. A small group of elite arbitrators dominated the field, both in terms of the frequency of their appointments and the influence of their awards. In effect, they had become imperial arbitrators, or the supreme authorities in administrative matters that often had fiscal significance for respondent states.

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

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


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

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

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

475 According to one study, investors have received more than $100 million in over 50 awards and more than $1 billion in eight awards. Jonathan Bonnitcha & Sarah Brewin, Compensation Under Investment Treaties: What Are the Problems and What Can Be Done?, IISD Policy Brief, at 1 (Dec. 2020),
During the early 2000s, governments expressed concerns about investment treaties, though on a limited scale and with limited effects. In 2004, Canada and the United States, two capital-exporting states that had defended significant numbers of investment treaty claims, revised their model investment treaties. Longer and more detailed treaty provisions aimed to limit the discretion and lawmaking authority of tribunals, while preserving somewhat more regulatory space for states. Strictly speaking, those models would only affect the trajectory of future treaty practice and would not alter the substance of investment treaties already in place.

However, it is possible that Canada and the United States hoped that new models and new treaties would come to influence the “ordinary meaning” of concepts like indirect expropriation and fair and equitable treatment for purposes of treaty interpretation. At the time, Western European states had little experience in defending investment treaty claims and, therefore, little interest in reforms.

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


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


480 See Alschner, supra note 476, at 38 (observing that “few non-experts knew about investment arbitration in Europe” long after NAFTA claims against Canada and the United States began to stir public controversy in those countries); id. at 45–46 (mentioning that two investment treaty arbitrations were brought against the German state in the 2000s, discussing Germany’s failure to reform its investment
Respondent states in other parts of the world pushed back in different ways. Starting in 2008, Venezuela denounced one BIT, and Ecuador denounced nine. Ecuador denounced another seventeen investment treaties between 2011 and 2017, Indonesia terminated twenty-five investment treaties between 2014 and 2017, and India sent notifications of termination regarding investment treaties to sixty-one states. Likewise, South Africa terminated investment treaties with Western states, and Russia withdrew from the Energy Charter Treaty, a sectoral investment treaty that had served as the vehicle for massive claims against Russia relating to its dismemberment of the Yukos oil company. While treaty terminations can send sharp political messages, lengthy survival clauses meant that the denunciations had few legal effects in the short to medium term.

As another avenue of reform, one prominent observer called for states to make greater use of agreed interpretations, and for tribunals to give them appropriate weight. However, the practice never gained traction and was unlikely to do so except in the unusual situations where the interests of treaty practice as a result of those experiences, and attributing German inaction to the fact that the proceedings were conducted in secret, with the result that the "claims were almost completely unknown outside the Ministry of Economics".


482 Id. at 7–9.


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

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

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

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

489 See Poulsen & Gertz, supra note 308, at 6.
the relevant states coincided as likely respondents in a substantial number of claims under the same treaty.\footnote{See Roberts, supra note 313, at 196, 224.} As suggested by the foregoing discussion, a “backlash” had begun to grow against imperial arbitrators,\footnote{See generally \textsc{Michael Waibel et al., The Backlash Against Investment Arbitration: Perceptions and Reality} (2010); Malcolm Langford & Daniel Behn, \textit{Managing Backlash: The Evolving Investment Treaty Arbiter?}, 29 EUR. J. INT’L L. 551 (2018); Asha Kaushal, \textit{Note, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime}, 50 HARV. INT’L L.J. 491 (2009).} but states had few effective tools to manage that phenomenon. As a result, imperial arbitrators continued their ascent until things reached a crisis point.

The reckoning for investment treaty arbitration began to arrive in the 2010s as a result of claims involving sensitive regulations brought mostly against capital-exporting states. In 2010, Phillip Morris brought an investment treaty claim against Uruguay. According to Philip Morris, measures requiring the use of graphic “pictograms,” and measures prohibiting the use of phrases like “light,” on tobacco packaging amounted to an indirect expropriation and a denial of fair and equitable treatment.\footnote{Philip Morris Brands Sarl v. Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, paras. 77(b)–(c), 82–85 (Feb. 19, 2010); see \textsc{Miles, supra note 9}, at 184; \textit{Philip Morris Sues Uruguay over Graphic Cigarette Packaging}, NPR (Sept. 15, 2014, 4:35 AM), https://www.npr.org/sections/goatsandsoya/2014/09/15/345540221/philip-morris-sues-uruguay-over-graphic-cigarette-packaging.} In 2011, Philip Morris brought a similar claim against Australia.\footnote{Philip Morris Asia Ltd. v. Australia, Notice of Arbitration, paras. 1.5, 7.2(a)–(b), 7.3–7.8 (Nov. 21, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0665.pdf; see \textsc{Miles, supra note 9}, at 185.} The optics of a foreign multinational corporation using investment treaties to fight tobacco control provoked outrage,\footnote{Vera Korzun, \textit{The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs}, 50 VAND. J. TRANSNAT’L L. 355, 357 (2017).} particularly because Philip Morris initially did not just request damages, but also sought injunctive relief.\footnote{Philip Morris Brands Sarl v. Uruguay, Request for Arbitration, supra note 492, paras. 88, 91–92; Philip Morris Asia Ltd. v. Australia, Notice of Arbitration, supra note 493, paras. 7.1, 7.2; see \textsc{Miles, supra note 9}, at 184; Stephanie Hartmann, \textit{When Two International Regimes Collide: An Analysis of the Tobacco Plain Packaging Disputes and Why Overlapping Jurisdiction of the WTO and Investment Tribunals Does Not Result in Convergence of Norms}, 21 UCLA J. INT’L L. & FOREIGN AFF. 204, 224–25 (2017); Julie A. Maupin, \textit{Public and Private in International Investment Law: An Integrated Systems Approach}, 54 VA. J. INT’L L. 367, 391 (2014). Phillip Morris later withdrew the request for injunctive relief. Korzun, supra note 494, at 381 n.117.} For a time, Australia became the first developed Western state to declare that it would no longer consent to direct rights of action for investors under its investment treaties.\footnote{Shafruddin, supra note 4, at 459; see Anderson, supra note 201, at 2938; Korzun, supra note 494, at 357; Michael Nolan, \textit{Challenges to the Credibility of the Investor-State Arbitration System}, 5 Am. U. BUS. L. REV. 429, 431–32 (2016).} Meanwhile, the prospect of massive claims
Against Imperial Arbitrators

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

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


\textsuperscript{500} Olivet & Villareal, supra note 498.

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


\textsuperscript{504} Stephan Schill, A Question of Democracy: The German Debate on International Investment Law, KLUWER ARBITRATION BLOG, Mar. 2, 2015, http://arbitrationblog.kluwer arbitration.com/2015/03/02/the-german-debate-on-investor-state-dispute-settlement/?print=print (observing that \textit{Vattenfall I} did not have “significant political repercussions” in Germany).
2010.\textsuperscript{505} According to the settlement, subsequently incorporated into an award on agreed terms,\textsuperscript{506} Germany dropped the restrictive permitting terms.\textsuperscript{507}

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

2023] Against Imperial Arbitrators 77

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

_Vattenfall II_ touched a nerve in Germany and across Europe. German officials were shocked to be on the receiving end of another investment treaty claim. The image of a foreign multinational challenging the country’s decision to phase out nuclear power provoked outrage.

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516 Why Vattenfall Is Taking Germany to Court, supra note 513.
517 Id.
520 See Schill, supra note 504; see also Chan & Crawford, supra note 507, at 700; Weghmann & Hall, supra note 279, at 9.
521 See TAYLOR ST. JOHN, THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES 2 (2018) (“The Vattenfall cases surprised German officials and citizens—in the German press there was a sense of incredulity that a foreign corporation could challenge German environmental regulations before an international tribunal, which might award billions of euros in compensation to the foreign firm.”); Weghmann & Hall, supra note 279, at 12 (opining that “the furious public and governmental response” to _Vattenfall II_ “has to be partly explained by the historical expectation that treaties such as the ECT would be used by Germany, not against it”).
522 Laura Yvonne Zielinski, “Legitimate Expectations” in the Vattenfall Case: At the Heart of the Debate over ISDS, KLUWER ARB. BLOG (Jan. 10, 2017), http://arbitrationblog.kluwerarbitration.com/2017/01/10/legitimate-expectations-in-the-vattenfall-case-at-the-heart-of-the-debate-over-isds/; see also Roberts & St. John, supra note 6, at 144 (noting that “[t]he filing of a controversial, high-profile case, like . . . Vattenfall . . . may significantly alter the stock of support for the system”); Stefanie Rosskopf, Investor-State Dispute Settlement (ISDS), Germany and the
growing opposition to investment treaty arbitration played out in the context of the EU’s negotiations for a Comprehensive Economic and Trade Agreement (CETA) with Canada and for a Trans-Atlantic Trade and Investment Partnership (TTIP) with the United States, which had been concluded and launched in 2013, respectively. By early 2014, German officials signaled that they might block ratification of CETA if not revised to eliminate ISDS. Likewise, they signaled that they would oppose any version of TTIP that included ISDS. Facing a growing sense of opposition from governments in other EU member states, and recognizing growing concerns about the Vattenfall and Philip Morris claims, the European Commission froze TTIP negotiations on ISDS and conducted a three-month consultation to assess EU attitudes on the topic.

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

523 See generally Rosskopf, supra note 522.

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

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

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


528 See Armanovica & Bendini, supra note 527, at 13 (“Emblematic cases, in which investors have sought hefty compensation from governments (e.g., Philip Morris from Australia, and Vattenfall from Germany), have reinforced concerns that ISDS mechanisms may not always serve the public interest.”).
Released in January 2015, the European Commission’s report disclosed that the public consultation generated nearly 150,000 responses,\(^{530}\) which literally overwhelmed the EU’s computer servers\(^{531}\) and registered widespread opposition to the inclusion of ISDS in TTIP.\(^{532}\) Contemporaneously, the German and French governments declared that they would present a united front against the incorporation of investment treaty arbitration in TTIP.\(^{533}\) By autumn, hundreds of thousands took to the streets of German cities to protest against ISDS,\(^{534}\) and the EU’s Trade Commissioner Cecelia Malmström declared ISDS to be the “most toxic acronym in Europe.”\(^{535}\)

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

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\(^{531}\) EU CONSULTATION REPORT, *supra* note 530, at 10–11.

\(^{532}\) *Id.* at 14; Chan & Crawford, *supra* note 507, at 697; Barbiere, *supra* note 530.

\(^{533}\) Barbiere, *supra* note 530.

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

\(^{535}\) See Ames, *supra* note 308.

\(^{536}\) *Vattenfall II*, Decision on the *Achmea* Issue, *supra* note 519, at para. 9.

\(^{537}\) See *supra* note 3.

Ironically, the pioneers of the first and second waves of investment treaties had become leading antagonists of investment treaty arbitration.539 Since 2016, the momentum against investment treaty arbitration has remained strong. The EU has declared that ISDS is “dead” in its treaty practice,540 and observers have begun to write credibly about the future of ISDS in similar terms.541 Due at least in part to cases like Vattenfall II,542 and scores of subsequent cases involving the sustainable energy programs of member states,543 twenty-three of twenty-seven EU member states agreed to


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


543 Wegmann & Hall, supra note 279, at 11.

544 See ISDS and Climate Change Policies: A Barrier, Facilitator, or Neither, 114 AM. SOC’Y INT’L L. PROC. 18, 20 (2020) (remarks by Kasturi Das) (referring to a spike in renewable energy cases during 2013-2016, involving a total of 46 arbitrations brought against Spain, 10 against Italy, and fewer against the Czech Republic); see also Energy Charter Treaty Secretariat, Statistics of ECT Cases (as of 9/10/2020) at 2,
2023] Against Imperial Arbitrators 81

terminate intra-EU BITs.545 With the support of the European Union,546 the United Nations Commission on International Trade Law (UNCITRAL) gave its Working Group III a mandate to consider possible reforms to investor-state dispute settlement starting in 2017.547 According to one observer, many of the states participating in Working Group III share a common perspective on one topic: they “view investor-state arbitration as akin to a horse that has bolted from the barn.”548 In other words, imperial arbitrators have to some significant degree blown past the limits of the strategic space that states envisioned for investment treaty tribunals.

Yet, even when starting with shared premises and under the capable leadership of a Canadian chair,549 the members of Working Group III “have not . . . converged on which reforms to pursue.”550 A group of “incrementalist” states, including Chile, Japan, and Russia view criticisms of
investor-state arbitration as “overblown” and prefer to focus on modest reforms that address specific concerns.\textsuperscript{551} A group of “systemic reformers,” led by the European Union and Canada, view investor-state arbitration as a seriously-flawed process, and would replace it with a multilateral investment court and appellate body—\textsuperscript{552}—in other words, a public-law model with greater checks and balances, including greater control over the membership of those judicial bodies, and the development of a stable jurisprudence more likely to respect the regulatory prerogatives of respondent states.\textsuperscript{553} A third group of “paradigm-shifting” states, such as Brazil and South Africa, reject any form of direct action for investors against host states, but have no blueprints for a competing approach towards the protection of foreign investment.\textsuperscript{554}

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

\textsuperscript{551} Roberts, supra note 548, at 410, 415.
\textsuperscript{552} Id. at 410, 416.
\textsuperscript{553} See Shafruddin, supra note 4, at 451 (opining that one of the “key objectives” of a permanent investment court is “to adopt a more ‘public law approach’ . . . by increasing . . . the institutionalization of the process,” including the introduction of first-instance and appeals bodies with publicly appointed members); Stephan W. Schill, The European Commission’s Proposal for an “Investment Court System” for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?, ASIL INSIGHTS (Apr. 22, 2016), https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping (indicating that the EU’s proposals for a permanent investment court entail a “‘public law approach’ to investor-state dispute settlement (ISDS),” with an “emphasis on the right to regulate, and increased institutionalization.”).
\textsuperscript{554} Roberts, supra note 548, at 410, 416–17.
\textsuperscript{556} Lisa Sachs et al., The UNCTRAL Working Group III Work Plan: Locking in a Broken System?, COLUM. CTR. ON SUSTAINABLE INV. (May 4, 2021), https://ccsi.columbia.edu/news/unctral-working-group-iii-work-plan-locking-broken-system; see also Roberts & St. John, supra note 6, at 146 (noting that “[s]ome academics and civil society observers emphasize that small-scale corrective action may lock in the existing system”).
VI. STUMBLING TOWARDS BRILLIANCE

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

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

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

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

559 See infra notes 674–719 and accompanying text; see also 2019 Consultation Report and FIPA Review, GOV’T OF CAN. (June 5, 2020), https://www.international.gc.ca/trade-commerce/consultations/fipa-apie/report-rapport.aspx?lang=eng (expressing the view that the “best” way to protect public interest regulation “is through clear drafting of the substantive obligations in FIPAs”); Langford et al., supra note 547, at 172 (“Many claim that the core concerns with the [procedural] system
can appreciate the particular brilliance of Canada’s new FIPA: a revision of substantive provisions that leaves almost no room for arbitrators to second-guess the normal operations of modern regulatory states.

A. The Drivers and Direction of Investment Treaty Reforms

Some observers deplore the extent to which investors have brought claims against, and extracted money from, Canada under NAFTA’s investment chapter.560 When the issue arises at conferences, this author emphasizes Canada’s enviable (if not perfect) record as a respondent in NAFTA claims.561 Over the course of more than 25 years, tribunals have rendered only five awards on the merits against Canada.562 The amounts awarded have always been modest, ranging from less than US$500,000 to just over C$25 million.563 In only two cases have tribunals awarded more than C$10 million.564 In all cases, tribunals have awarded a fraction of identified by WG III cannot be addressed without accompanying substantive reform to the underlying rules.”).


561 But see Lai, supra note 369, at 275 (describing Canada’s track record as “unenviable”).


563 See Clayton/Bilcon of Delaware, Inc. v. Canada, PCA Case No. 2009-04, Award on Damages, para. 400 (Jan. 10, 2019), https://www.italaw.com/sites/default/files/case-documents/italaw10377_0.pdf (awarding US$7,000,000); Windstream Energy Award, supra note 562, at para. 515 (awarding just over C$25,000,000); Mobil Inv. Can., Inc. v. Canada, ICSID Case No. ARB(AF)/07/4, Award, para. 178 (Feb. 20, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4399_0.pdf (awarding Mobil Investments of Canada, Inc. roughly C$13,900,000 and awarding co-claimant Murphy Oil Corp. roughly C$3,400,000); Pope & Talbot Award in Respect of Damages, supra note 339, at para. 91 (awarding just over US$461,000); S.D. Myers, Inc. v. Canada, Second Partial Award, para. 311 (Oct. 21, 2002), https://www.italaw.com/sites/default/files/case-documents/italaw0752.pdf (awarding just over C$6,000,000).

564 See Windstream Energy Award, supra note 562, at para. 515 (awarding just over C$25,000,000); Mobil Inv. Can., Inc. Award, supra note 563, at para. 178 (awarding Mobil Investments of Canada, Inc. roughly C$13,900,000 and awarding co-claimant Murphy Oil Corp. roughly C$3,400,000).
amounts claimed.\textsuperscript{565} Viewed against a landscape of some 30 to 44 claims,\textsuperscript{566} one might reasonably say that Canada rarely loses, and never loses big.

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

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

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

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

\textsuperscript{568} As of early 2015, one source ranked Canadian investors as the fifth most frequent users of ISDS, behind the United States, the Netherlands, the United Kingdom and Germany. Scott Miller & Gregory N. Hicks, Investor-State Dispute Settlement: A Reality Check (Report of the CSIS Scholl Chair in International Business), CTR. FOR STRATEGIC & INT’L STUD. 8 (Jan. 21, 2015), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf. Of the 58 claims currently listed by UNCTAD as brought by Canadian investors under investment treaties, only 17 were listed as brought against the United States under NAFTA’s investment chapter. UNCTAD, Investment Dispute Navigator, Canada, supra note 566. Sinclair lists 20 such claims and 1 threatened claim. Sinclair, supra note 433, at 21, 44–51. Again, Sinclair reaches this higher number by listing three “inactive” claims. See id. at 45–46 (listing claims by James Russell Baird, Doman, Inc. and Puget). Of the remaining 41 claims brought by Canadians, four were brought by Canadian investors against Mexico under NAFTA’s investment chapter. UNCTAD, Investment Dispute Navigator, Canada, supra note 566. The balance was brought largely against developing states in Latin America, developing states in Central Asia, and transitional states in Eastern Europe; though one claim was brought against Tanzania. Id. At least 20 of those claims relate to investments in the mining sector and at least five relate to the energy sector. Id. According to another source, 70% of investment treaty claims brought by Canadian investors outside North America involved the mining and energy sectors, and 86% of investment treaty claims brought by Canadian investors outside North America involved developing or transitional states. Mertins-Kirkwood & Smith, supra note 560, at 5, 18, 20.
claims (exclusively brought by U.S. investors) under NAFTA’s investment chapter, \textsuperscript{569} with somewhere between 30 and 44 claims depending on how one counts.

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

\textsuperscript{569} Mertins-Kirkwood & Smith, supra note 560, at 7.
\textsuperscript{570} See supra notes 562–64 and accompanying text.
\textsuperscript{571} See supra notes 356–66, 372–74, 381–85, 428 and accompanying text.
\textsuperscript{572} See Sinclair, supra note 433, at 28, 34, 36–37, 40–42 (discussing Canada’s settlement of NAFTA claims brought by Ethyl Corp., Dow AgroSciences LLC, AbitibiBowater, Inc., St. Mary’s VCNA, LLC, Mobil Investments Canada, Inc., Murphy Oil Corp., and OmniTrax Enterprises, Inc.)
\textsuperscript{573} Reviewing the worldwide stock of investment claims, one writer observes that settlements constitute one of the least transparent issues and one of the hardest to track. Tim R. Samples, \textit{Winning and Losing in Investor-State Dispute Settlement}, 56 AM. BUS. L.J. 115, 150 (2019). The same writer correctly notes that settlement payments constitute direct liabilities for states and amount to a non-trivial cost of ISDS. \textit{Id.} at 150–51, 159. To the extent that settlements result in payments to investors, another group of writers presumptively treats them as a partial win for investors. Daniel Behn et al., \textit{Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration}, 38 NW. J. INT’L L. \\& BUS. 333, 355 n.84 (2018). By the same token, one should bear in mind that the settlements also constitute partial wins for states, in the sense that they result in the termination of claims on terms more favorable than the state expects to achieve through adjudication. One should also bear in mind that some settlements involve no payment of value and no withdrawal of the challenged measures. See Sinclair, supra note 433, at 34 (discussing the settlement of Dow AgroSciences LLC’s claim against Canada, pursuant to which the Government of Quebec formally acknowledged that a product does not pose an “unacceptable risk” to human health, but paid no compensation and did not withdraw a measure banning application of the product to lawns in the province). Therefore, other writers do not presumptively treat settlements as losses for states. See Brower, supra note 534, at 287 & n.78 (treating settlements as separate from wins and losses).
\textsuperscript{574} According to Sinclair, the settlement with Ethyl Corp. required Canada to pay US$13 million, repeal the ban on a fuel additive, and apologize to the company. Sinclair, supra note 433, at 28. The settlement with AbitibiBowater, Inc. required Canada to pay C$130 million. \textit{Id.} at 36. The settlement with St. Mary’s VCNA, LLC contemplated a C$15 million payment from the Ontario government. \textit{Id.} at 37. The settlement with Mobil Investments Canada, Inc. required Canada to provide the investor with a credit of C$35 million to indemnify it for the cost of complying with provincial research and development guidelines previously found to violate NAFTA’s investment chapter. \textit{Id.} at 40.
\textsuperscript{575} \textit{Id.} at 10.
government appears to view its track record in similar terms.\textsuperscript{576} By contrast, as a home state to investors under NAFTA, Canada has seen its nationals bring 17 to 20 claims against the United States under NAFTA’s investment chapter,\textsuperscript{577} none of them successful.\textsuperscript{578}

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

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


\textsuperscript{577} See supra note 568.

\textsuperscript{578} See Mertins-Kirkwood & Smith, supra note 560, at 31; Sinclair, supra note 433 at 17. The United States did have a “close call” during the initial wave of NAFTA claims. Sinclair, supra note 433, at 8. In Loewen Group, Inc. v. United States, the tribunal held that certain judicial proceedings in a Mississippi state court constituted a “disgrace” by “any standard of treatment,” and that they violated the minimum standard of treatment required by NAFTA Article 1105. See Loewen Award, supra note 538, at paras. 119, 136–37. However, the tribunal went on to dismiss based on lack of jurisdiction because the claimant settled the domestic litigation without perfecting a petition for certiorari to the United States Supreme Court and, in any event, emerged from a bankruptcy reorganization as a U.S. entity, which eliminated the foreign nationality required to support jurisdiction for a claim against the United States under NAFTA’s investment chapter. Id. at paras. 200–04, 215–17, 234–40.

\textsuperscript{579} Thompson et al., supra note 558, at 872, 875.

\textsuperscript{580} Id. at 872, 875–76.

\textsuperscript{581} Id. at 876.

\textsuperscript{582} Id. at 873, 875–76.

\textsuperscript{583} See, e.g., Langford et al., supra note 547, at 173.

\textsuperscript{584} During the 1960s, the World Bank framed the ICSID Convention as a procedural vehicle for resolving investment disputes because the contentious atmosphere of that era would have prevented any multilateral agreement on substantive rules for the protection of foreign investment. Lim et al., supra note 43, at 63; Lowenfeld, supra note 68, at 536–37. More recently, the mandate for UNCITRAL Working Group III “is implicitly limited to procedural reforms,” due in part to the facts that there is “only a fragile consensus” on the need for such reforms, and “no agreement amongst states on whether there are substantive problems with the underlying treaties.” Langford et al., supra note 547, at 172–73.
point, Canada was not just the most frequently sued NAFTA Party, but the
developed country most frequently sued under investment treaties. It
remains one of the most frequently sued countries under investment
treaties. Canada may have lost only a small fraction of investment treaty
claims, but wins and losses appear not to weigh heavily among factors that
motivate states in the context of investment treaty reform. If they did, the
United States and Germany (which technically have not lost an investment
treaty case) might never have experimented with investment treaty reform.

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

585 Sinclair, supra note 433, at 10.
586 Sunny Freeman, NAFTA’s Chapter 11 Makes Canada Most Sued Country Under Free Trade
Tribunals, HUFFINGTON POST (Jan. 14, 2015), https://www.huffpost.com/archive/ca/entry/canada-sued-
investor-state-dispute-cepa_n_6471460; Kyla Tienhaara, Canada Has an ISDS Clause with The US. It
Has Faced 35 Challenges. Is This Australia’s Future?, THE CONVERSATION (Oct. 8, 2015, 3:23 PM),
https://theconversation.com/canada-has-an-isds-clause-with-the-us-it-has-faced-35-challenges-is-thin-
australias-future-48757; Lee Williams, This Secret UK-Eurotunnel Tribunal Reveals Something
Disturbing About Refugees and TTIP, INDEPENDENT (Feb 2, 2016, 6:26 PM),
https://www.independent.co.uk/voices/secret-tribunals-where-companies-sue-governments-reveal-
587 An empirical study of investment treaty arbitration ranks Canada as the sixth-most-sued-state
for the period 1987–2017, ranking behind Argentina, Venezuela, Spain, the Czech Republic, and Egypt.
Roberto Echandi, The Debate on Treaty-Based Investor-State Dispute Settlement: Empirical Evidence
588 See supra notes 562–66 and accompanying text.
589 See supra note 581 and accompanying text.
590 See Sinclair, supra note 433, at 17 (“The U.S., as its State Department likes to boast, has never
lost a NAFTA case.”). Germany has been the target of five investment claims as of this writing. In 2000,
an investor sued Germany under that country’s BIT with India. Alschner, supra note 476, at 45. In 2009
and 2012, Vattenfall commenced the two investment treaty arbitrations discussed above. See supra notes
502–19 and accompanying text. All three claims were settled. Alschner, supra note 476, at 45–46; see
supra notes 505–07, 519 and accompanying text. In 2019, three related Austrian investors commenced
a fourth arbitration against Germany under the Energy Charter Treaty, and in 2021 six related Irish and
German investors commenced a fifth arbitration against Germany under the Energy Charter Treaty. Lisa
Bohmer & Eric Peterson, UPDATED: As Vattenfall Nuclear Case Sees New Round of Submissions,
Germany Faces Another Energy Charter Treaty Arbitration Following Modification of Renewables
Incentive Regimes, INV. ARB. REP. (Sept. 22, 2019), https://www.iareporter.com/articles/as-vattenfall-
nuclear-case-sees-new-round-of-pleadings-germany-faces-another-energy-charter-treaty-arbitration-
following-modification-of-renewables-incentives-regime; Lisa Bohmer, Germany Round-Up: A New
ICSID Case, a New Bifurcation Decision, a Newly Disclosed Tribunal, and an Update on Other
Arbitration-related Developments, INV. ARB. REP. (May 14, 2021),
https://www.iareporter.com/articles/germany-round-up-a-new-icsid-case-a-bifurcation-decision-a-
591 See supra notes 341, 566 and accompanying text.
B. CETA: Procedure as an Indirect and Partial Solution

As suggested above, one can regard the TPP as a baseline for Canada’s investment treaty practice before the introduction of reforms during the legal “scrub” of CETA in February 2016. With negotiations concluded in October 2015 and the final text signed in February 2016, the TPP closely resembled the U.S. and Canadian model BITs of 2004. Substantively, all three documents recognize the possibility that states may commit indirect expropriations and require compensation for indirect takings, while clarifying that bona fide measures to protect health, safety, and the environment do not constitute expropriations “except in rare circumstances.” In other words, they discouraged arbitral second-guessing of such measures but left the door ajar. Echoing the FTC’s Notes of Interpretation, all three clarified that fair and equitable treatment means the customary international law minimum standard of treatment for aliens. The TPP added that the standard “includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world,” but excludes “the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor’s expectations . . ., even if there is loss or damage to the covered investment as a result.” In other words, the disappointment of legitimate expectations would not be sufficient,
but might be relevant, in finding a denial of fair and equitable treatment.\(^{599}\) Procedurally, all three instruments contemplated traditional investor-state arbitration as the means for resolving disputes,\(^{600}\) though generally with modest refinements involving things like statutes of limitations,\(^{601}\) transparency,\(^{602}\) and the ability of tribunals to order summary dismissal of claims that are “manifestly without legal merit” or otherwise not claims for which an award can be made as a matter of law.\(^{603}\)

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

A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

(a) Denial of justice in criminal, civil or administrative proceedings;

(b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) Manifest arbitrariness;


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

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

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

\(^{603}\) TPP, supra note 595, art. 9.23(4); U.S. Model BIT (2004), supra note 595, art. 28(4).


\(^{606}\) Leaked Final CETA Text of 2014, supra note 605, Annex X.11(3).
(d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(e) Abusive treatment of investors, such as coercion, duress and harassment; or
(f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.\textsuperscript{607}

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

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

\textsuperscript{607} Id. art. X.9(2).
\textsuperscript{608} Id. art. X.9(4).
\textsuperscript{611} Van Harten, supra note 609, at 154–55.
\textsuperscript{612} Id. at 156.
\textsuperscript{613} See supra notes 449–53 and accompanying text.
poorly defined weighing of claims.\textsuperscript{614} One might add that even if the list were exclusive or strongly indicative of the threshold for establishing claims, the undefined concept of “manifest arbitrariness” leaves tribunals with substantial leeway in resolving regulatory disputes.\textsuperscript{615} Turning from substance to procedure, the supposedly final text of CETA contemplated traditional investor-state arbitration, with modest refinements involving statutes of limitations, provisions on transparency, and summary dismissal of claims that are manifestly without legal merit or claims that are unfounded as a matter of law.\textsuperscript{616}

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

Consistent with views expressed in response to the EU’s 2014 public consultation about TTIP and CETA,\textsuperscript{619} the legal scrub introduced a new substantive provision on “Investment and Regulatory Measures”:

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

\textsuperscript{614} Van Harten, \textit{supra} note 609, at 156–57.

\textsuperscript{615} See Hush, \textit{supra} note 609, at 158; see also Susan L. Karamanian, \textit{The Place of Human Rights in Investor-State Arbitration}, 17 \textit{Lewis \\& Clark L. Rev.} 423, 444 (2013) (noting that fair and equitable treatment standards, even when interpreted to mean “manifest arbitrariness” are “‘vague general clauses’ and thus act as ‘gateways for the integration of arguments based on norms of other spheres of the international legal system’”).


\textsuperscript{617} See \textit{supra} note 428 and accompanying text.

\textsuperscript{618} Post-Scrub CETA, \textit{supra} note 3, art. 8.10(7); see also José E. Alvarez, \textit{Is the Trans-Pacific Partnership’s Investment Chapter the New “Gold Standard”?}, 47 \textit{Victoria U. Wellington L. Rev.} 503, 532 n.133 (2016) (drawing a connection between Professor McRae’s dissent in \textit{Bilcon} and the insertion of this provision in CETA).

\textsuperscript{619} EU CONSULTATION REPORT, \textit{supra} note 530, at 4 (identifying “the protection of the right to regulate” as one of “four areas where further improvements should be explored”).
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.\textsuperscript{620}

The provision appears roughly halfway through the substantive provisions of CETA’s investment chapter, a placement that seems odd except for the fact that it appears just before the provision on fair and equitable treatment, and the drafters may have wanted to ensure that the right to regulate would catch the eye of anyone considering the obligation to provide fair and equitable treatment.

As explained by an EU legal officer, the new provision does not constitute a treaty exception for regulatory action,\textsuperscript{621} and it seems inconceivable that the parties would introduce a broad substantive exception in the context of a legal “scrub.” On the contrary, the provision constitutes an interpretive guide that has the same effect as references to the right to regulate in preambular language,\textsuperscript{622} except that the placement of this provision in the investment chapter reminds adjudicators that the right to regulate has relevance when interpreting and applying that particular chapter’s provisions on the obligations of host states.\textsuperscript{623} In essence, the interpretive guide invites adjudicators to find some balance between the rights and the obligations of host states.\textsuperscript{624} In so doing, it emphasizes that merely interfering with an investor’s expectations does not “by itself” constitute a denial of fair and equitable treatment.\textsuperscript{625} But as already noted, the provision on fair and equitable treatment expressly invites tribunals to “consider” the “legitimate expectations” of investors as part of an overall weighing of claims.\textsuperscript{626} In short, the truly final text of CETA does not establish any clear substantive carveouts for regulatory action. On the contrary, it permits adjudicators to review the normal regulatory acts of states under standards that invite a discretionary weighing of the right to regulate, legitimate expectations of investors, and “manifestly arbitrary” state action,

\textsuperscript{620} Post-Scrub CETA, supra note 3, art. 8.9(1)–(2); see also Hush, supra note 609, at 123 (describing the introduction of this “entirely new article” in the final version of CETA).

\textsuperscript{621} Puig, supra note 610, at 123.

\textsuperscript{622} Id.

\textsuperscript{623} See Hush, supra note 609, at 123.

\textsuperscript{624} Id. at 104, 136–37; see also Van Harten, supra note 609, at 161–62.

\textsuperscript{625} Puig, supra note 610, at 130; Hush, supra note 609, at 144.

\textsuperscript{626} See supra notes 608–09 and accompanying text.
unconstrained by the customary international law minimum standard of treatment for aliens. 627

Although the truly final text of CETA did not introduce substantive provisions likely to establish real checks and balances on imperial arbitrators, it introduced procedural refinements clearly calculated to have that effect. Principally, these include the creation of a 15-member permanent investment court, appointed jointly by the states parties for five-year terms with the possibility of a single reappointment, as well as a six-member permanent appellate body to be appointed jointly by the parties to nine-year, non-renewable terms. 628 In so doing, the EU and Canada aimed to replace imperial arbitrators with a more public-law model of adjudication that has greater checks and balances—including greater control over the membership of judicial bodies—and the development of a stable jurisprudence more likely to respect the regulatory prerogatives of host states. 629 They also undertook to “pursue” the “establishment” of a multilateral investment court and appellate body with other trading partners, 630 signaling that they view procedural refinements as the backbone of a broader program of investment treaty reform.

The foregoing discussion raises the question of why the EU and Canada chose a procedural route and how much it accomplished in dealing with the problem of imperial arbitrators. With respect to the selection of a procedural route, context surely matters. To begin with, Germany objected to investor-state arbitration and not to the inclusion of any particular substantive obligation in CETA. 631 That alone set the parties on a procedural route. Perhaps more importantly, that was arguably the only path open to the parties at the time. They had reached a supposedly final agreement on CETA’s text

627 See Van Harten, supra note 609, at 154–57.


629 See supra note 553 and accompanying text.

630 Post-Scrub CETA, supra note 3, art. 8.29. It is interesting to note that the parties to CETA only promised to “pursue” with other trading partners the “establishment” of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Id. They made no express undertakings regarding the post-establishment incorporation of a multilateral investment tribunal and appellate body into their treaty practice. It is possible that Canada views promotion of a multilateral investment court system in UNCITRAL Working Group III as sufficient to satisfy its obligations under CETA. See supra note 552 and accompanying text; see also Langford et al., supra note 547, at 172 (emphasizing UNCITRAL as the “multilateral arena” selected to “pursue” the EU’s program of structural reforms). It is also possible that Canada feels no obligation to incorporate a multilateral investment court system into its treaty practice beyond consideration of the possibility should such a system ever come into being. See infra notes 673–74, 703, 705 and accompanying text; see also Canadian Model FIPA, supra note 5, art. 46 (only requiring states parties to “consider whether, and to what extent” to avail themselves of such an institution for disputes arising under the FIPA).

631 See supra note 525 and accompanying text.
in 2014, subject to a legal “scrub.” While surprising to many, the transformation of dispute settlement procedures as part of a legal “scrub” was at least conceivable. The introduction of major substantive amendments following the completion of treaty negotiations was not.

Turning to the effects of procedural reforms, one can say that they address the problem of imperial arbitrators only indirectly. To be sure, procedural reforms take arbitrators off the table and replace them with a permanent bench. But on the substance, nothing prevents international adjudication regarding the normal operations of modern regulatory states. One simply hopes that institutional continuity and control over the membership of the bench provide the checks and balances needed to encourage a standard of review that more systematically aligns with the regulatory interests of host states. Put one way, the approach retains investment treaty adjudication as a form of global administrative law but aims for a process unlikely to visit liability on “reasonable” regulatory states. This is essentially the outcome endorsed by Santiago Montt. Put in more cynical terms, the EU and Canada were content with the basic rules of the game but tilted the playing field and the sympathies of the referees to their advantage.

632 See supra notes 3, 536–37 and accompanying text.
633 See David A. Gantz, The CETA Ratification Saga: The Demise of ISDS in EU Trade Agreements, 49 LOY. U. CHI. L.J. 361, 377 (2017) (observing that “there was no public discussion of a modification of the completed text with the traditional investment provisions, which apparently took place during the extended period of legal scrubbing[;] the extensively revised investment chapter in the final CETA text was closely held until the revised CETA was released to the public in February 2016”).
634 Political context made Canada’s agreement to procedural refinements particularly conceivable. As a smaller trading partner seeking better access to a more diversified range of markets, Canada’s main objective was to conclude a free trade agreement with the European Union, period. Hush, supra note 609, at 110–11. Canada’s newly elected Liberal government was particularly intent on concluding the process and doing what was necessary to smooth the way for ratification in Europe. David Schneiderman, International Investment Law’s Unending Legitimation Project, 49 LOY. U. CHI. L.J. 229, 249–50 (2017).
635 Cf. VanDuzer, supra note 3, at 459 (“Possibly it was considered inappropriate to go further when reviewing CETA, the context of which was only to be a ‘legal scrub’ of an agreed text rather than a renegotiation.”).
636 See Catherine A. Rogers, The Politics of International Investment Arbitrators, 12 SANTA CLARA J. INT’L L. 223, 251 (2013) (explaining that proponents of a permanent international investment court appear to operate on “the assumption that members might be more likely to demonstrate deference to States and their legitimate State interests”); Schill, supra note 350, at 1109 (discussing aspirations for a permanent international investment court that would oversee the development of a jurisprudence constante that strikes an appropriate balance between the interests of investors and States); Hush, supra note 609, at 122 (describing the structure of CETA’s investment court system as an effort “to gain more control over the interpretation of CETA”); Lai, supra note 369, at 293–94 (describing the concern of investors that the structure of CETA’s investment court system “would fill the permanent tribunal with pro-state judges”); see also supra notes 553, 629 and accompanying text.
637 See MONTT, supra note 16, at 21, 367 (asserting that “investment treaty tribunals must limit themselves to defining minimum thresholds of what is expected from a ‘reasonably well-behaved regulatory state’”).
The limitations of this approach should be obvious. To the extent that one accepts international adjudication of the normal operations of modern regulatory states, and to the extent that one merely wants to see more frequent wins for states, the procedural reforms chosen for CETA directly address the problem and probably do the trick. But to the extent that one views the root problem as international adjudication of disputes regarding the normal operations of modern regulatory states (as opposed to international adjudication of disputes regarding extraordinary failures of the nightwatchman and rule-of-law states), the procedural path operates only indirectly.638 It allows the game to continue, at great cost, with a small group of international adjudicators still engaged in collective lawmaking, and still having the final say on the obligations of reasonable regulatory states, but probably with more favorable outcomes for respondent states.639 From this perspective, the procedural reforms chosen in CETA address the fundamental problems indirectly and incompletely.640 Perhaps for this reason, Van Harten refers to the investment court system as the “Zombie ISDS” and declares that he sees ISDS in virtually all the alternative processes currently under consideration for investment treaty reform.641

Viewed from the perspective of many investors, and measured by the standards that normally apply in international arbitration, the procedural reforms chosen for CETA deserve condemnation. This is because CETA provides for the appointment of adjudicators solely by states (who are always respondents), meaning that only one set of stakeholders participates in the constitution of the tribunal. That imbalance arguably violates the public policy requiring equality of opportunity in the appointment of arbitrators.642 One might also view it as predisposing arbitrators towards the respondent states who wield the sole power of appointment.643 Especially when

638 See Eberhardt, supra note 542, at 9 (asserting that the proposed investment court system the “would still empower thousands of companies to circumvent national legal systems and sue governments in parallel tribunals if laws and regulations undercut their ability to make money”).

639 See Van Harten, supra note 609, at 144 (suggesting that CETA clears the way for “the same small group” of adjudicators to continue to dominate the elaboration of international investment law).

640 See Van Harten et al., Phase 2, supra note 557, at 15 (opining that “procedural reforms are . . . not sufficient” to resolve “deep-seated concerns about the democratic accountability and legitimacy of the international investment regime as a whole”); see also Langford et al., supra note 547, at 186 (noting that the procedural ISDS reforms pursued at UNCITRAL, while structural, “do not directly or necessarily address substantive concerns with treaties”).

641 See Eberhardt, supra note 542, at 9 (quoting Van Harten).


643 See Ian A. Laird, TPP and ISDS: The Challenges from Europe and the Proposed TTIP Investment Court, 40 CAN.-U.S. L.J. 106, 120 (2016) (noting that “judges may make decisions to curry favor with those who appointed them (and will reappoint them)”; Robert W. Schwieder, TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication, 55 COLUM.
combined with the secrecy and furtiveness surrounding the legal “scrub,” the procedural reforms adopted in CETA’s final text could drive large and powerful investors to skirt the process by negotiating directly for agreements providing for commercial arbitration under traditional standards, with all of the proceedings taken in confidence and behind closed doors.

The possible counterargument to condemnation of CETA’s procedural reforms is that states parties should not be held to the standards normally applied in arbitration. This is because the states parties were trying to move away from an ad hoc process, in which appointments by specific disputing parties embroiled in specific disputes results in a situation where arbitrators are often seen as “hired guns.” To prevent that from happening, the states parties moved towards a more institutionalized process, in which collective appointments by all treaty parties outside the context of any particular dispute increases the chances that “they will be perceived as acting legitimately as treaty parties trying to create an appropriate regulatory balance between investment rights and sovereign prerogatives.”

While the argument has merit, the response is that investors manifestly have concerns about the independence of arbitrators appointed solely by states. Authorities such as Judge James Crawford lend weight and credibility to their views. And if
powerful investors are not convinced about the independence and legitimacy of CETA’s procedural reforms, there remains a real risk that they will vote with their feet.  

Also, even if members of the European Union feel comfortable with routine supranational adjudication of regulatory acts by permanent institutions based on their experience with the European Court of Justice and the European Court of Human Rights, it remains to be seen whether states having other traditions will feel so keen about the prospect. Given the tremendous rise of populism and economic nationalism since 2016, one could justifiably harbor doubts.  

In short, unless one accepts the continued development of investment treaties as a form of global administrative law (and lawmaking), the procedural solution chosen for CETA seems to address the problem of imperial arbitrators only indirectly and incompletely. It is not clear that key stakeholders would support this model. However, in a context like UNCITRAL Working Group III that only has a mandate to consider procedural reforms, the view might be that some progress in curtailing imperial arbitrators would be better than no progress at all.

C. USMCA: Procedure as Blunt Instrument

In negotiating the USMCA, the Canadian and Mexican governments reportedly sought to preserve investor-state arbitration in the agreement’s investment chapter. But as mentioned, the United States Trade Representative appointed by the Trump administration publicly attacked

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650 See supra note 645 and accompanying text.
651 See KATIA FACH GOMEZ, KEY DUTIES OF INTERNATIONAL INVESTMENT ARBITRATORS: A TRANSNATIONAL STUDY OF LEGAL AND ETHICAL DILEMMAS 3 n.15 (2019) (quoting EU Trade Commissioner Cecilia Malström) (“What I’m setting out here [in the investment court system] is a public justice system—just like those we’re familiar with in our own countries, and the international courts which Europe has so actively promoted in the past.”).
652 See Gantz, supra note 633, at 368–69.
653 See Elizabeth Trujillo, Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime, 59 B.C. L. REV. 2735, 2757 (2018) (discussing “the return of populism and a retreat from the desire to come under international governance structures,” which “was reflected . . . during the negotiations of the Transatlantic Trade and Investment Partnership (“TTIP”) where [even] several European nations reacted negatively to the idea of an investment court with appellate capacities”); see also Thompson et al., supra note 558, at 860, 862 (mentioning that ISDS has drawn “the ire of populist politicians . . . around the world” and provoked a “‘backlash’ . . . driven by populism and economic nationalism”).
655 Lai, supra note 369, at 275, 278.
Against Imperial Arbitrators

Investor-state arbitration on three grounds. 656 First, it privileges foreigners by giving them access to remedies not available to domestic investors. 657 Second, it undermines U.S. sovereignty. 658 Third, effective treaty protection for U.S. investors in other countries encourages them to invest abroad instead of at home. 659 In the end, negotiations for the USMCA resulted in a hybrid solution whereby Canada opted out of investor-state arbitration in relations with the United States and Mexico, 660 and the United States and Mexico opted into investor-state arbitration in their bilateral relations, but only for claims alleging denials of national treatment and MFN treatment in the post-establishment phase, as well as claims for direct expropriation, but only after exhaustion of local remedies or their pursuit for 30 months. 661 Even between the United States and Mexico, there would be no investor-state arbitration of claims for indirect expropriation or denials of fair and equitable treatment. 662 However, these limitations on causes of action and the requirement for exhaustion of local remedies do not apply to disputes involving government contracts in the oil, natural gas, power generation, infrastructure, and telecommunications sectors. 663

Viewed from Canada’s perspective, the complete elimination of ISDS from the USMCA situationally made sense. Investor-state arbitration with Mexico remained possible under the CPTPP. 664 The much more powerful United States wanted to eliminate investor-state arbitration with Canada. 665 Dozens of U.S. investors had brought investment treaty claims against Canada, sometimes successfully, sometimes extracting value on settlements, and always at significant cost. 666 By contrast, many Canadian investors had

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656 See supra note 539.
658 Brady-Lighthizer ISDS Exchange, supra note 657; Lai, supra note 369, at 280; Peterson, supra note 539.
659 Brady-Lighthizer ISDS Exchange, supra note 657; Lai, supra note 369, at 280; Peterson, supra note 539.
660 Galbraith, supra note 2, at 150, 155; Lai, supra note 369, at 277.
662 As noted by one observer, these limitations would prevent another ruling like the award handed down in Metalclad Corp. v. Mexico. See Lai, supra note 369, at 282–83 (making this observation in the context of the Metalclad tribunal’s ruling on indirect expropriation).
663 See USMCA, supra note 4, Annex 14-E, art. 2(a)(i), 2(b)(i), 6(b); see also Galbraith, supra note 2, at 155–56 (noting that the exhaustion of local remedies is not required for disputes involving state contracts in the specified sectors).
664 Lai, supra note 369, at 281; Sinclair, supra note 433, at 18.
665 Sinclair, supra note 433, at 4; see also Lai, supra note 369, at 277.
666 See supra notes 567, 569–76 and accompanying text.
brought investment treaty claims against the United States, never successfully and never extracting value through settlements. Based on that experience, Canadian officials might have seen the preservation of investor-state arbitration in the USMCA as having little value. Moreover, they could—and did—portray the elimination of investor-state arbitration as a crowning achievement in the preservation of state regulatory space.

As a procedural reform, the elimination of ISDS solves the problem of imperial arbitrators. Without any recourse to investor-state dispute settlement, there can be no second-guessing of the normal operations of modern regulatory states. But as a side effect, there can be no use of investor-state dispute settlement to police exceptional failures of the nightwatchman and the rule-of-law states. In this respect, the elimination of ISDS constitutes a blunt instrument that eliminates the problem of imperial arbitrators, but only by sacrificing the original objective of investment treaties.

As suggested by Australia’s investment treaty practice, the complete elimination of ISDS may be situationally acceptable between stable, law-abiding, developed states, where such lapses are likely to be few and far between. However, it is unlikely to be an appealing across-the-board solution in the treaty practice of states like Canada, whose national companies have made significant investments in the energy and mining sectors in developing and transitional states that may be less stable and rank much lower on rule-of-law indexes.

See supra notes 577–78 and accompanying text.

Alternatively, Canada might have seen investor-state arbitration as having some value as a bargaining chip that it could trade away in exchange for concessions elsewhere in the treaty. Lai, supra note 369, at 277.

See Trudeau and Freeland Speaking Notes, supra note 576 (statement of Minister Freeland); Sinclair, supra note 433, at 4.

See Shafruddin, supra note 4, at 471 (observing that elimination of ISDS eliminates the risk of being sued by investors on treaty provisions).

See id. at 469 (emphasizing the need for some form of ISDS because “no country has a perfect domestic legal system”).

Australia has eliminated ISDS in its FTAs with Japan, Malaysia, and the United States. Brower & Ahmad, supra note 483, at 1147. It has also used side letters to eliminate ISDS with New Zealand in the TPP. Kawharu & Nottage, supra note 594, at 476, 498; Shafruddin, supra note 4, at 462–63; Tania Voon & Elizabeth Sheargold, Trans-Pacific Partnership, 5 BRIT. J. AM. LEGAL STUD. 341, 349–50 (2016). However, Australia has consented to ISDS in its BITs with China and South Korea. Brower & Ahmad, supra note 483, at 1147. Under these circumstances, several observers have described Australia as taking a case-by-case approach to ISDS, often foregoing it in relations with other developed states. Shafruddin, supra note 4, at 460–62, 472–73; see also Nolan, supra note 496, at 432; Voon & Sheargold, supra, at 349.

See supra note 568 and accompanying text; see also Sinclair, supra note 433, at 4 (concluding that “the Canadian government remains committed to ISDS in other negotiating venues”).
2023] Against Imperial Arbitrators 101

D. Canada’s New FIPA: The Particular Brilliance of Substantive Reform

After seeing Canada lurch from investor-state arbitration towards an investment court system in CETA and then towards the complete elimination of ISDS in the USMCA, and after seeing Canada spearhead calls for “systemic” procedural reform in the multilateral forum of UNCITRAL Working Group III, one wondered about the path Canada would choose in the first major overhaul of its model investment treaty since 2003–2004.674

In 2018, the Canadian government launched a public consultation relating to the development of a new model investment treaty.675 That process involved meetings with stakeholders and generated over 280 written responses from individuals, indigenous groups, scholars, civil society, labor organizations, business associations, pension funds, and legal practitioners on the topics of ISDS, the concerns of small and medium enterprises, corporate social responsibility, indigenous rights, women’s empowerment, and public interest regulation.676 The following year, Global Affairs Canada issued a balanced and insightful report on the consultations. In so doing, it acknowledged that civil society and NGOs generally had negative views of ISDS, that the academic community was split on ISDS, and that certain comments had expressed the view that “ISDS puts public interest regulations in jeopardy.”677 However, the report also emphasized that “the traditional ISDS mechanism protects Canadian investors from the risks of investing abroad by providing access to a neutral forum.”678 It further emphasized the view that “[i]t is important to maintain a robust ISDS mechanism in the FIPAs as this provides greater predictability and certainty for businesses investing abroad.”679 When it came to the topic of public-interest regulation, the report highlighted the view that “[g]overnments need to retain the ability to regulate in the public interest . . . , and the best way to achieve this is

675 2019 Consultation Report and FIPA Review, supra note 559.
676 Id.
677 Id.
678 Id.
679 Id.
through clear drafting of the substantive obligations in FIPAs.680 In other words, the protection of public regulatory space constitutes a substantive issue best and most directly addressed by substantive reforms.681

In May 2021, Canada revealed its new model FIPA, 682 which closely adheres to the balance struck in the consultation report. Consistent with that report and with the empirical study mentioned above, the new model FIPA focuses on substantive reforms while calling for resolution of disputes through investor-state arbitration. As explained below, the particular brilliance of that approach lies in the way that it substantively eliminates almost any possibility for second-guessing the normal operations of modern regulatory states, while preserving investor-state arbitration as a vehicle for investors to police exceptional failures of the nightwatchman and rule-of-law states. In other words, it directly and more fully resolves the problem of imperial arbitrators without sacrificing the original objectives of investment treaties.

Substantively, Canada’s new model FIPA includes three provisions likely to cut off efforts to second-guess the normal operations of modern regulatory states. Like CETA, the new model FIPA contains a provision reaffirming the right of states to regulate.683 As in CETA, the provision probably functions more as an interpretive aid than as an exception to the treaty or a defense to liability.684 But unlike CETA, the model FIPA specifically designates that provision “Right to Regulate” and, unlike CETA, it places the provision front and center—in the third article, immediately following the provision on scope of the treaty.685 The text of the FIPA omits the qualifications that claim to provide “greater certainty,” but create the impression that they blunt the force of the right to regulate.686

680 Id. (emphasis added).

681 See Shafruddin, supra note 4, at 468 (urging developed states not to abandon ISDS, but to “address their substantive concerns . . . with more comprehensive drafting of substantive protections”).


683 Canadian Model FIPA, supra note 5, art. 3.

684 See supra notes 621–24 and accompanying text.

685 Compare Canadian Model FIPA, supra note 5, art. 3, with supra text accompanying note 620.

686 Compare Canadian Model FIPA, supra note 5, with supra text accompanying note 620. In the context of CETA, the relevant article clarifies “for greater certainty,” that “the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment
FIPA adds a range of topics recognized as “legitimate policy objectives,” including climate change, the rights of indigenous peoples, and gender equality. Like CETA, the FIPA’s text may invite a degree of balancing by tribunals, but it seems to impose a broader and more emphatic mandate for tribunals to respect the rights of states to regulate within their borders.

After recognizing the right to regulate, the FIPA’s provision on expropriation provides that “a non-discriminatory measure . . . that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety, and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation.” Evidently, this eliminates the possibility that tribunals could regard legitimate public welfare regulations as indirect takings even if they have the effect of completely destroying the value of investments. Unlike CETA, there is no exception for “rare circumstances.” One might still challenge supposedly legitimate public welfare measures as discriminatory or adopted in bad faith. However, those situations involve fundamental breaches of the nightwatchman and rule-of-law states and, so, would not involve the second-guessing of the normal operations of modern regulatory states.

In addition, the model FIPA includes a provision that addresses the “Minimum Standard of Treatment.” Unlike CETA, the text of the model or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of [fair and equitable treatment] under this Section.” Post-Scrub CETA, supra note 3, art. 8.9(2). Likewise, it clarifies, “for greater certainty,” that “a Party’s decision not to issue, renew or maintain a subsidy” does not constitute a violation of fair and equitable treatment in the absence of “any specific commitment under law or contract to issue, renew, or maintain that subsidy.” Id. at art. 8.9(3)(a). In the author’s view, the effect of these clarifications is to emphasize a small number of situations in which regulatory action clearly does not amount to a treaty violation, thereby casting doubt on the legal treatment of the much larger universe of situations likely to arise.

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687 Canadian Model FIPA, supra note 5, art. 3.
688 See supra note 624 and accompanying text.
689 Crowell & Moring, supra note 5 (predicting that a “broadly worded provision like this one may be useful for defending against claims and may shape how arbitral tribunals view States’ conduct, not least because Article 3 does not require compliance with obligations elsewhere in the FIPA Model”). In this context, another observer notes that the relevant provision seems much more emphatic than NAFTA Art. 1114, which recognized the freedom of states parties to protect “environmental concerns” but only through measures “otherwise consistent with this Chapter,” a formulation that left the impression of merely paying “lip-service” to environmental values. See Djanic, supra note 682 (emphasizing the novelty of the provision on the right to regulate, as well as its breadth of scope when compared to NAFTA Art. 1114); Elyse M. Freeman, Note, Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights, 42 COLUM. J. TRANSNAT’L L. 177, 204 (2003) (suggesting that NAFTA Article 1114 only pays “lip service” to environmental values).
690 Canadian Model FIPA, supra note 5, art. 9.3 (emphasis added).
691 See supra notes 33–34, 40 and accompanying text.
692 Canadian Model FIPA, supra note 5, art. 8.1.
FIPA does not even mention “fair and equitable treatment.” Like CETA, the text of the model FIPA does not invite tribunals to consider any form of “legitimate expectations” in applying the minimum standard. Unlike CETA, the FIPA specifies that it only requires “treatment in accordance with the customary international law minimum standard of treatment of aliens.” Like CETA, the text of the FIPA contains a list of state actions that violate that minimum standard. However, unlike CETA, the provision states that a “Party breaches this obligation only if a measure constitutes” one of the enumerated actions, thereby expressly establishing a closed list. In reviewing that closed list, one finds significant overlap with CETA, but also significant examples of narrowing, emphasized in italics below:

(a) denial of justice in criminal, civil or administrative proceedings;
(b) fundamental breach of due process in judicial and administrative proceedings [with no mention of transparency];
(c) manifest arbitrariness [clarified by footnote to explain that “[a] measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact”];
(d) targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs;
(e) abusive treatment of investors, such as physical coercion, duress and harassment; or
(f) a failure to provide full protection and security [with both parts of that phrase clarified to mean “only the physical security of an investor and their covered investment”].

Taken together, the omission of any reference to “fair and equitable treatment” or “legitimate expectations,” the explicit limitation to the customary international law minimum standard of treatment for aliens, the introduction of an expressly closed list, and the narrowing of that list to omit transparency, to define arbitrariness in terms of “evident” irrationality, to prohibit only “physical” coercion, and to guarantee only physical (as opposed

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693 Canada Publishes 2021 Model Foreign Investment Promotion and Protection Agreement, supra note 682; Djanic, supra note 682; Prokic & Gore, supra note 682.
694 See Crowell & Moring, supra note 5 (opining that the provision “appears to preclude arguments based on the legitimate expectations of the foreign investor”).
695 Canadian Model FIPA, supra note 5, art. 8.1.
696 Id.
697 Id. (emphasis added).
698 Compare id., with Post-Scrub CETA, supra note 3, art. 8.2.
to legal) protection and security, virtually eliminate any possibility for second-guessing the normal operations of modern regulatory states. It marks a decisive return to the original objective of codifying traditional principles of state responsibility and policing exceptional failures of the nightwatchman and rule-of-law states. Reading the closed list, one can see how normal states should avoid liability in normal times.

The substance of the closed list also has the potential to alter the way that tribunals function and the roles that they perform. To begin with, the closed and narrowly tailored list of situations violating the minimum standard should have the effect of significantly curtailing the number of cases that investors submit to arbitration, particularly given the model FIPA’s adoption of the “loser pays” presumption with respect to the allocation of costs. Second, the limitation of the minimum standard to six relatively narrow, well-defined, and factually intensive causes of action means that tribunals can focus on the application of agreed standards to the facts of particular cases. They should have correspondingly less scope for lawmaking, should feel less temptation to formulate influential legal standards in their awards, and should see less need to cite and to follow other awards in other cases involving other facts. In other words, consistent with the original expectations for BITs, investor-state arbitration should again become more of an individual sport.

It is possible that one might level the same sort of criticism at the model FIPA’s substantive reforms that observers leveled against CETA’s procedural reforms: large and powerful investors might object to the changes and might use their leverage to conclude investment agreements directly with host states on more favorable terms. For the reasons stated below, however, investors seem less likely to raise such objections, or to raise them effectively, in response to Canada’s new model FIPA.

First, one should recall that CETA’s incorporation of an investment court system occurred only after the conclusion of negotiations as the result of strong-arm tactics directed at investors and ISDS, and in the shadow of a public consultation process that was not designed to give much

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699 See Crowell & Moring, supra note 5 (suggesting that this formulation counteracts the recent tendency of tribunals to require host states to provide not just physical, but also “commercial, legal, and regulatory security” to foreign investors).
700 Canadian Model FIPA, supra note 5, art. 40.3.
701 See supra note 313 and accompanying text.
702 See supra note 314.
703 See supra note 645 and accompanying text.
704 See supra notes 3, 524, 537 and accompanying text.
705 See supra notes 525–35 and accompanying text.
weight to the interests of investors.\footnote{See supra notes 527–35 and accompanying text. It should be recalled that the EU’s public consultation process was designed to take a sounding of the nature and intensity of public opposition to the EU’s longstanding commitment to investor-state arbitration. See supra notes 525–29 and accompanying text; Chan & Crawford, supra note 507, at 697 (opining that the EU initiated the public consultation “[i]n order to dampen and co-opt opposition”); see also Cynthia M. Ho, A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings, 6 UC IRVINE L. REV. 395, 465 (2016) (noting that the EU had “strongly defended investor-state disputes for years”). As a result of the consultation, the EU bowed to that public opposition and proposed a completely new, state-driven dispute settlement mechanism. See supra notes 537, 628–30 and accompanying text; see also Ho, supra, at 465 (opining that the EU “did bow to public concern and initiated public consultations in an attempt to address [those] concerns,” and that the “consultations were important to the EU’s recent inclusion of an investment court, as well as an appellate body in recent agreements”). Clearly, the consultation process was not designed to, and did not, give much weight to the interests of the investment community.} Given the exceptional and goal-oriented chain of events that led to the introduction of an investment court system, one can understand the strongly negative reaction of the investment community. By contrast, as explained above, the public consultation undertaken by Canada in anticipation of its new model FIPA sought out, and gave weight to, the interests of Canadian investors.\footnote{2019 Consultation Report and FIPA Review, supra note 559.} In particular, it emphasized the importance of “robust” investor-state arbitration to Canadian investors.\footnote{Id.} While acknowledging the need to protect public regulation, the report emphasized substantive reforms as the “best” way forward.\footnote{Id.} The concern for investors seems genuine and evident in the final text, where investors retained access to “robust” investor-state arbitration.\footnote{Crowell & Moring, supra note 5; see also Canadian Model FIPA, supra note 5, arts. 27–28.} Since that may be the most important right under investment treaties,\footnote{See supra notes 284–85 and accompanying text.} it seems relatively less likely that powerful investors would object to the balance struck by Canada’s new model FIPA. At the very least, that conclusion seems consistent with early commentary.\footnote{See Crowell & Moring, supra note 5 (opining that the new Canadian model FIPA provides a “vote of confidence to a modernized ISDS system . . . at a time when ISDS has faced criticisms from certain governments and political leaders”).}

Second, even if powerful foreign investors wanted to object to the balance struck in Canada’s new model FIPA, they would likely be less effective in making their case. In the context of CETA’s introduction of an investment court system, it was easy for investors and their advocates to object. The investment court system seemed to accept the basic substantive premises of the game while attempting to shift the slope of the playing field and the sympathies of officials.\footnote{See text following supra note 637.} Given that perception, leading writers could easily charge the unilateral appointment of all judges by states would
introduce a bias that loaded a legal process in favor of states.\textsuperscript{714} They could charge that the appointment of judges by states would become a political process unlikely to result in selection of the most qualified international lawyers.\textsuperscript{715} They could charge that the elimination of party-appointed arbitrators destroyed one of the most important, most consistently available, and long-standing rights of investors under investment treaties.\textsuperscript{716}

None of the foregoing arguments can be made in relation to Canada’s new model FIPA. It is possible that some powerful investors might not prefer the substantive changes introduced in the model FIPA, but they cannot argue that those substantive changes deprive investors of any intended, inherent, or long-standing right to second-guess the normal operations of modern regulatory states.\textsuperscript{717}

In short, Canada’s new model FIPA takes a more balanced, direct, and complete approach to the problem of imperial arbitrators. Instead of CETA’s procedural reforms, which operate indirectly and incompletely by allowing global administrative law and lawmaking to continue under the supervision of a more deferential permanent international court, Canada’s new model FIPA adopts substantive reforms that virtually eliminate the possibility for second-guessing the normal operations of modern regulatory states under any standard of review, that severely curtail opportunities for tribunals to engage in collective lawmaking, and that place corresponding limits on opportunities for development of a de facto system of precedent in international investment law. Instead of the USMCA’s procedural reforms, which operate by completely eliminating any form of ISDS in certain contexts,\textsuperscript{718} the new model FIPA preserves the traditional right of investors to demand arbitration of claims involving exceptional failures of the nightwatchman and rule-of-

\textsuperscript{714} See\textsuperscript{ supra notes 642–43 and accompanying text.}

\textsuperscript{715} Brower,\textsuperscript{ supra note 534, at 296; Brower & Ahmad,\textsuperscript{ supra note 483, at 1184.}

\textsuperscript{716} See Charles N. Brower & Charles B. Rosenberg, The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded, 29 ARB. INT’L 7, 9–11 (2013) (generally opining that the power to appoint an arbitrator constitutes one of the most longstanding, fundamental, and attractive rights for parties selecting arbitration). Observers and courts often connect the right of appointment to the right of equality of treatment for the parties. See S.I. Strong, The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?, 30 MICH. J. INT’L L. 1017, 1089 (2009). Equality of treatment arguably becomes an issue where one class of potential litigants (states) appoints all of the adjudicators for claims brought solely against members of the appointing class. See\textsuperscript{ supra notes 643, 648–49 and accompanying text.}

\textsuperscript{717} As noted above, the customary international law of state responsibility for injuries to aliens is addressed to upholding the fundamental values of the rule-of-law and nightwatchman states, customary international law took shape before the development of the modern regulatory state, investment treaties were developed to reinforce traditional principles of customary international law when the global consensus started to unravel, and international law lacks any significant experience in controlling the modern regulatory state. See\textsuperscript{ supra notes 31–40, 57–58, 241–58, 286–87 and accompanying text.}

\textsuperscript{718} See\textsuperscript{ supra notes 660–63 and accompanying text.}
law states. As stated in the report on Canada’s consultations with stakeholders, substantive reform constitutes the “best” way to protect public interest regulation. It also constitutes the best way to realign modern investment treaty practice with customary international law on state responsibility for injuries to aliens, and with the original objectives of modern investment treaties during the second wave of BITs.

E. Possible Criticisms of an Exclusive Emphasis on Substantive Reform

Before closing, one should pause to address two potential criticisms of a purely substantive approach to investment treaty reform. First, one might accept the need for substantive reform, but conclude that it should be pursued in combination with the establishment of a permanent investment court in order to eliminate every possible foothold for imperial arbitrators. Although plausible, the argument does not address the perceived imbalance of empowering states to appoint all tribunal members, or its tendency to drive powerful investors to vote with their feet. Nor does it address the likelihood that the broader universe of states will have little appetite for a new permanent supranational judicial body during a period of populism and economic nationalism.

One should add that a lack of need could further diminish the appetite for a permanent investment court. Assuming the adoption of substantive reforms that clearly limit arbitrators to policing exceptional failures of the nightwatchman and rule-of-law states, and assuming tribunals adhere to that narrow mandate, the universe of viable claims would probably shrink to the point where the maintenance of a two-tier permanent investment court would be unjustifiable.

This raises a second possible criticism of reliance exclusively on substantive reforms; perhaps arbitrators cannot be trusted to apply substantive reforms that preserve state regulatory space; perhaps imperial arbitrators will do their best to interpret treaties in ways that blunt or frustrate the goals of substantive reform. As evidence of this tendency, one might cite the recent award in *Eco Oro v. Colombia*, in which one observer asserts

719 See supra notes 680–81 and accompanying text.
720 See supra notes 643, 645, 648–49 and accompanying text.
721 See supra notes 652–53 and accompanying text.
722 See supra note 700 and accompanying text.
the tribunal “simply obliterated” a general exception for measures necessary for environmental protection and conservation. Although necessarily lengthy, one has to summarize the decision in order to understand the point.

In *Eco Oro*, the Canadian investor obtained a concession to explore for and extract silver and gold in a defined area, subject to regulatory approvals that included an environmental license. To some degree, the concession overlapped with a high-altitude wetland of ecological importance. That overlap led to intense divisions within the Colombian government and society, with some stakeholders favoring economic development of natural resources and others favoring protection of the environment. A critical component of the controversy involved the delimitation of the high-altitude wetland, which would have established the extent of overlap between the concession and the wetland. That step was critical because the investor claimed a minimal overlap, whereas others claimed nearly a 55% overlap. For a variety of reasons, Colombia actively promoted the mining project, but still failed to complete the delimitation over a period of years. At the same time, Colombia denied Eco Oro’s request to suspend its own obligations under the concession pending completion of the delimitation. Against this background, Eco Oro initiated arbitration against Colombia under the Canada-Colombia Free Trade Agreement, alleging that Colombia’s actions amounted to an indirect expropriation of the concession and a violation of the customary international law minimum standard of treatment for aliens.

The tribunal agreed that Colombia’s actions amounted to a complete deprivation of Eco-Oro’s rights under the concession. However, a majority of the tribunal (consisting of Colombia’s party-appointed arbitrator and the

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725 *Id.*; see also *Eco Oro Award*, supra note 723, at paras. 86, 101, 104, 176.

726 Heath, supra note 724.

727 *Id.*; see also *Eco Oro Award*, supra note 723, at paras. 718, 791, 795 (indicating that conflicting approaches taken by various arms of the Colombian government put Eco Oro on a “regulatory rollercoaster” and led to a state of “utter confusion”).

728 Heath, supra note 724.

729 *Eco Oro Award*, supra note 723, at paras. 568 & n.612, 570; Heath, supra note 724.

730 *Eco Oro Award*, supra note 723, at paras. 105, 154; Heath, supra note 724.

731 *Eco Oro Award*, supra note 723, at paras. 773–75, 803, 805; Heath, supra note 724.

732 *Eco Oro Award*, supra note 723, at paras. 801, 805.


734 *Eco Oro Award*, supra note 723, at para. 6; Heath, supra note 724.

735 *Eco Oro Award*, supra note 723, at para. 634.
presiding arbitrator) found that Colombia’s actions fell within Annex 811(2)(b) of the FTA. According to that provision, “non-discriminatory measures ... designed and applied to protect legitimate public welfare objectives, for example ... protection of the environment” do not amount to indirect expropriations “[e]xcept in rare circumstances when a measure ... is so severe ... that it cannot reasonably be viewed as having been adopted in good faith.”

In the majority’s view, Colombia’s actions were clearly bona fide and not so egregious as to fall within the “rare circumstances” justifying liability for expropriation.

Turning to the claim for violation of the minimum standard, a different majority (consisting of Eco Oro’s party-appointed arbitrator and the presiding arbitrator) held that Colombia’s “arbitrary vacillation and inaction,” its failure to delimit the wetlands over a period of years, and its concurrent denial of extensions of time for Eco Oro to perform its obligations under the concession amounted to a “wilful neglect of ... duty.” The majority also described Colombia’s actions as inflicting damage on Eco Oro “without serving any apparent purpose,” “without serving any legitimate purpose,” and in “flagrant disregard for the basic principles of fairness.”

As justification for its actions, Colombia invoked Article 2201(3) of the FTA, which adapts the “General Exceptions” set forth in Article XX of the GATT as follows: “nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary” for environmental protection and conservation, “subject to the requirement that such measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination between investment or investors, or a disguised restriction on international ... investment.” In a brief and convoluted section of the award, the majority suggested both that Article 2201(3) did and did not eliminate liability for a “breach” of the FTA.

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736 Eco Oro Award, supra note 723, at paras. 635, 642; Heath, supra note 724.
737 Canada-Colombia FTA, supra note 733, Annex 811(2)(b).
738 Eco Oro Award, supra note 723, at paras. 645, 675, 699; Heath, supra note 724.
739 Eco Oro Award, supra note 723, at paras. 820–21.
740 Id.
741 Canada-Colombia FTA, supra note 733, art. 2201(3).
742 See Eco Oro Award, supra note 723, at paras. 826–37 (spanning only four pages); see also Heath, supra note 724 (describing this section of the award as a "mess").
743 Compare Eco Oro Award, supra note 723, at para. 829 (noting that Article 2201(3) does not refer to claims for breaches of the FTA and contrasting this with Annex 811(2)(b)—which includes “an express stipulation as to the circumstances in which a measure is not to constitute a treaty breach”—and concluding that the states parties would not have “left such an important provision of non-liability to be implied” in Article 2201(3)), with id. at para. 830 (construing Article 2201(3) as permitting a state party to adopt certain measures “without finding itself in breach of the FTA”).
However, the majority was clear on one point: Article 2201(3) is only “permissive” in the sense that it ensures that the parties may adopt and enforce environmental and conservation measures free from claims for restitution of property, but it does not eliminate the obligation to provide compensation.744 In so doing, the majority compared Annex 811(2)(b) with Article 2201(3), noting that the former contained an express exclusion of circumstances amounting to a treaty violation, whereas the latter did not.745 Also, while the reasoning is somewhat hard to follow, the majority opined that if Article 2201(3) was deemed to exempt states from liability, there would be situations where it would come into conflict with Annex 811(2)(b) by excusing liability under circumstances in which the Annex required payment of damages.746 In other words, the decision layered a series of primary obligations, annexes, and exceptions in a way that allowed the majority to conclude that the article on “General Exceptions” ceased to function as an exception to liability.747 On the contrary, the majority improbably construed the “General Exceptions” as nothing more than a narrow exception to claims for restitution of property.748

Following publication, the Eco Oro award had certain stakeholders howling. The moderator of one webinar on the topic described the award as “so problematic, so contrary to the public interest of states and their citizens, [and] so fundamentally wrong that it reverberates around the international investment community and beyond.”749 Another observer opined that the Eco Oro award could be anulled based solely on the brevity of discussion, the messiness of reasoning, and a result that rendered useless a “key tool in the long-running effort to rebalance one-sided investment treaties.”750 He also expressed the hope that “the defects in this decision will make other tribunals hesitate to follow Eco Oro’s lead.”751

744 Eco Oro Award, supra note 723, at para. 829.
745 Id.
746 Id. at para. 831.
747 As noted above, one observer has opined that the majority “simply obliterated” Article 2201(3) as an exception to liability. See supra note 724 and accompanying text.
748 Eco Oro Award, supra note 723, at para. 829. The construction is improbable because the FTA already limits remedies to damages and restitution of property, and also gives the respondent state the option to pay damages in lieu of restitution, meaning that the FTA creates no right to maintain claims for restitution, and the purpose of Article 2201(3) cannot be to curtail the assertion of any such right. See Canada-Colombia FTA, supra note 733, art. 834(2).
750 Heath, supra note 724.
751 Id.
While sharing misgivings about the majority’s interpretation of Article 2201(3) in *Eco Oro*, this author does not see the decision as evidence that tribunals generally cannot be trusted to implement substantive reforms and are likely to frame their decisions in ways that blunt or frustrate the goals of substantive reforms. Three reasons support the author’s conclusion. First, the *Eco Oro* award is aberrant. It was decided by an unstable, shifting majority. The reasoning is convoluted. The outcome has an important group of stakeholders howling. The award is vulnerable to annulment. Even if it escapes that fate, it seems extremely unlikely to emerge as a precedent in the marketplace of ideas.

Second, the *Eco Oro* award may only serve as a cautionary tale about a particular approach to substantive reform. In *Eco Oro*, the interpretive problems arose because the relevant treaty drafters attempted substantive reform by “larding” the instrument with a layered and interlocking series of primary obligations, annexes, and exceptions. In so doing, they imported exceptions drawn from international law governing trade in goods, which “may be ill-equipped” to deal with investment disputes. They also failed to reckon clearly with the fundamental policy choices underlying substantive reform. As a result, the interactions among primary obligations, annexes, and exceptions were difficult to predict and understand. One doubts whether similar problems would arise under Canada’s new model FIPA, which focuses substantive reform solely on the elaboration of clear and narrowly defined primary obligations. One can see this in the way it frames the minimum standard of treatment exclusively to encompass denials of justice, fundamental breaches of due process, measures that lack any rational connection to legitimate policy objectives, targeted discrimination on manifestly wrongful grounds, physical coercion or harassment, and denial

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752 See supra notes 736, 739 and accompanying text.
753 See supra notes 742–48 and accompanying text.
754 See supra note 750 and accompanying text.
755 See supra note 751 and accompanying text.
756 See Heath, supra note 724 (criticizing this approach to treaty drafting).
757 Id.
758 Id.
759 See Wolfgang Alschner & Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, 2018 Y.B. INT’L INV. L. & POL’Y 365, 392 (2018) (explaining that the “increasingly popular strategy of layering regulatory flexibilities by (1) clarifying primary obligations, (2) adding right-to-regulate clauses, and (3) inserting general public policy exceptions creates more confusion than clarity where it is not accompanied by guidance to tribunals on how these novel elements relate to each other”).
760 See Heath, supra note 724 (describing the new model FIPA’s lack of reliance on layered and interlocking provisions on primary obligations and exceptions as “seemingly prescient given the ruling in *Eco Oro*”).
of physical security.\textsuperscript{761} The clarity of the substantive obligations, combined with the omission of layered and interlocking qualifications, leaves tribunals with little room to wander in directions that could blunt or frustrate the goals of substantive reform.\textsuperscript{762}

Third, one should take care to separate the reasoning from the outcome in \textit{Eco Oro}. It bears repetition that the majority described Colombia’s actions as a willful neglect of duty, as inflicting damage on the investor without any legitimate or even apparent purpose, and in flagrant disregard for basic principles of fairness.\textsuperscript{763} Given those findings, it seems unlikely that Article 2201(3) would have justified Colombia’s actions. Even if that article establishes general exceptions to liability and the obligation to pay compensation, it seems hard to imagine Colombia’s willful neglect of duty, infliction of damage without legitimate or apparent purpose, and flagrant disregard for basic principles of fairness were in any sense “necessary” for protection of the environment or conservation.\textsuperscript{764} It also seems hard to imagine that Colombia’s actions would satisfy the chapeau to Article 2201(3), which seeks to prevent an “abuse of right” by requiring that the measures not be applied in a manner that constitutes a disguised restriction on international investment.\textsuperscript{765} It also seems hard to imagine that Article 2201(3) was designed to provide investors with less protection than required by customary international law,\textsuperscript{766} meaning that it should provide no justification for the egregious failures of the rule-of-law state found by the majority in \textit{Eco Oro}.

\textsuperscript{761} See supra note 698 and accompanying text.

\textsuperscript{762} See supra notes 699–702 and accompanying text.

\textsuperscript{763} See supra notes 739–40 and accompanying text.

\textsuperscript{764} Canada-Colombia FTA, supra note 733, art. 2201(3); see also Heath, supra note 724 (observing that the “necessary” standard may be extremely stringent and concluding that if Colombia had to show that “‘arbitrary vacillation’ toward Eco Oro’s project was somehow ‘necessary’ for environmental protection . . . it is hard to see how the exception provides any additional security at all”).

\textsuperscript{765} See Robert Howse, \textit{The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate}, 27 COLUM. ENV’T L.J. 489, 505 (2002) (explaining that the chapeau to GATT Article XX, from which Canada-Colombia FTA Article 2201(3) was drawn, serves to police against abuse of rights by states when applying measures necessary to environmental protection and conservation); see also Heath, supra note 724 (observing that Canada-Colombia FTA Article 2201(3) “is modelled after a similar ‘general exceptions’ provision in Article XX of the General Agreement on Tariffs and Trade”). Put in slightly different terms, violations of the international minimum standard that involve arbitrary treatment are unlikely to be justified by an exception that uses a chapeau to ensure that the exception does not apply to measures that are “applied in an arbitrary or unjustifiable manner.” Alschner & Hui, supra note 759, at 379.

\textsuperscript{766} See Alschner & Hui, supra note 759, at 378 (quoting Celine Lavesque, \textit{The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy}, in \textit{PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY} 363–70 (Robert Echandi & Pierre Sauve eds., 2013)) (observing that “it would be surprising if countries such as Canada, Japan, and Singapore, by including general exceptions in their IIAs, ‘meant to provide their investors with less protection than what is provided by customary international law’”).
It seems equally unlikely that Colombia would have prevailed under the standards incorporated into Canada’s new model FIPA, which prohibits denials of justice, fundamental breaches of due process, and manifestly arbitrary measures that have no rational connection to legitimate policy objectives. Whatever one might say about the majority’s reasoning in *Eco Oro*, its award does not constitute an example of a tribunal imposing liability beyond exceptional failures of the nightwatchman and rule-of-law states. On the contrary, the findings support the conclusion that Colombia did not satisfy the fundamental guarantees of security demanded from a rule-of-law state.

For the reasons just stated, the author would not accept *Eco Oro* as evidence that arbitrators will generally seek to blunt or to frustrate the goals of substantive treaty reforms, particularly when pursued through the clear and narrow articulation of primary obligations chosen by the drafters of Canada’s new model investment treaty.

**VII. Conclusion**

It helps to view Canada’s recent investment treaty practice from an historical perspective and in relation to the central problem of modern investment treaty practice: the rise of imperial arbitrators who engage in collective lawmaking and who have developed important lines of jurisprudence that support arbitral second-guessing of the normal operations of modern regulatory states.

From the historical perspective, one learns that the customary international law on state responsibility for injury to aliens aimed to protect against the exceptional failures of the nightwatchman and rule-of-law states. When the customary international law standard came under attack following World War II as a result of decolonization, socialist revolution, and economic nationalism, two waves of investment treaties aimed to reinforce the traditional principles of customary international law, and later, to give investors direct rights of action against host states. In so doing, the drafters likely expected relatively small numbers of arbitrations, with tribunals focused on fact-finding, the application of agreed legal standards, and rendering awards that would have no precedential effect. There is no indication that drafters thought they were empowering tribunals to second-guess the normal operations of modern regulatory states, which would have amounted to a new frontier for international law, and could not have been launched by capital-exporting states who were in a defensive crouch, struggling just to maintain the status quo. Later, the simultaneous decline of communism, economic nationalism, commercial lending to developing

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767 *See supra* note 698 and accompanying text.
states, and foreign aid programs created a window for the proliferation of foreign direct investment and investment treaties. At that time, there was no discussion of investment treaties as tools for second-guessing the normal operations of modern regulatory states.

NAFTA marked a fortuitous turning point in modern investment treaty practice. Although directed at Mexico in light of that country’s history of agricultural and oil expropriations, NAFTA’s investment chapter unexpectedly spawned a large number of claims by U.S. investors against Canada, and by Canadian investors against the United States. Given the high rankings of those states on rule-of-law indexes, claims were unlikely to succeed when measured against the traditional expectations for the nightwatchman and rule-of-law states. Thus, the context invited claimants to focus on the normal operations of modern regulatory states, to test the linguistic play in the provisions on expropriation and fair and equitable treatment, and to convince tribunals to accept much broader understandings of those provisions. That strategy bore fruit in a handful of early NAFTA cases; tribunals experimented with lawmaking, and the unexpectedly large number of claims created incentives for litigants and tribunals to cite the decisions of other tribunals. The stage was set for a de facto system of precedent that claimants could use to leverage favorable decisions. Taken together, these fortuitous circumstances created an opening for the problem of imperial arbitrators.

In the NAFTA context, the FTC’s Notes of Interpretation effectively nipped the rise of imperial arbitrators in the bud. But after the initial cluster of NAFTA arbitrations revealed the types of claims that investors could bring, and the legal standards that tribunals might be persuaded to adopt, the number of new claims under BITs grew in following years. Those claims occurred in a context where few treaties had formal mechanisms like the FTC process, and in which there was no universal kill switch for claims brought under scores of different treaties. In that context, tribunals engaged in lawmaking, often articulating standards that supported arbitral second-guessing of the normal operations of modern regulatory states. Tribunals developed, and to some extent formalized, a system of precedent in which arbitrators competed for influence and, in any case, cited almost exclusively

\[768\] Writing at the relevant time, two leading scholars of international investment law opined that “BITs do not normally have institutional mechanisms to obtain authentic interpretations of their meaning,” though they recognized that U.S. investment treaty practice was heading in that direction. DOLZER & SCHREUER, supra note 71, at 32; see also Campbell McLachlan, Investment Treaties and General International Law, 57 INT’L & COMP. L.Q. 361, 372 (2008). Although states can issue joint interpretive statements even in the absence of institutional mechanisms, they have rarely done so. Report, UNCTAD, Interpretation of IIAs: What States Can Do, IIA Issues Note No. 3 (Dec. 2011), at 4, https://unctad.org/system/files/official-document/webdiaeia2011d10_en.pdf; Poulsen & Gertz, supra note 308, at 6.
to other arbitrators. Despite periodic expressions of concern, the process continued without meaningful checks and balances. The problem of imperial arbitrators had emerged full-blown, at least until the Phillip Morris and Vattenfall cases brought things to a crisis point.

Since that time, ISDS has become politically toxic even in states that pioneered investment treaty practice. Although some observers portray those states as malcontents who got exactly what they bargained for, it is hard to believe that the drafters of investment treaties foresaw the rise of imperial arbitrators or their emergence as the central problem of modern investment treaty practice. To some degree, members of the arbitration bar and arbitrators bear responsibility for exploiting opportunities that aligned with professional interests and could be logically justified, but had little foundation in the history of international law or the goals of investment treaties, and were likely to disturb the core interests of powerful states at some point.

Given the circumstances described above, investment treaty reform has been a hot topic for the past several years, including in the multilateral context of UNCITRAL Working Group III, where Canada and the EU are leading the charge for some package of systemic reform. In many ways, Canada’s recent investment treaty practice constitutes a microcosm of the options. Over the course of five years and under the influence of powerful negotiating partners, Canada has lurched from traditional investor-state arbitration in the TPP, to an investment court system in CETA, to the elimination of ISDS in the USMCA, and back to a robust version of investor-state arbitration in the new model FIPA—though in the last case accompanied by substantive reforms that eliminate the ability of tribunals to second-guess the normal operations of modern regulatory states.

Even though it may appear clumsy or perplexing at times, Canada’s uneven progress confirms Carville’s assertion that “[t]he only person who ever stumbles is a guy moving forward.” Though sometimes changing direction under pressure from powerful negotiating partners, Canada has

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769 See Brower & Steven, supra note 331, at 195 (describing “the distress felt by Canada and the United States . . . by the novel and disconcerting fact of having to live up to the same substantive and procedural guarantees that they have required of their BIT partners,” and observing that “the NAFTA Parties are getting precisely what they bargained for”).

770 See Poulsen & Gertz, supra note 308, at 4 (“The historical record suggests states did not necessarily intend to grant investors such extensive legal rights when signing on to investment treaties, and did not foresee the wide-ranging implications for other public policy areas.”); Thompson et al., supra note 558, at 862–63 (asserting that “it may have been difficult to assess the consequences of these treaties when they were originally signed and before they were interpreted via arbitration”); Yackee, supra note 349, at 309 (suggesting that “the sacrifice of sovereignty that BITs arguably represent is not the sacrifice that developed or developing states imagined it was going to be when they originally consented”).

771 See supra note 7 and accompanying text.
pursued a series of reforms that preserve state regulatory space in significant ways. Viewed in isolation, each step represents progress. Viewed as paradigms, each option has garnered political and academic support. But viewed against the perspective of history and the problem of imperial arbitrators, the new model FIPA stands out as Canada’s most brilliant step.

Viewed from the perspective of history, one sees that the relevant body of customary international law and the pioneers of investment treaties aimed to provide security against exceptional failures of the nightwatchman and rule-of-law states. They did not aim to encourage supranational review of routine regulatory action under any standard of review. Viewed from this perspective, procedural reforms of investment treaties often miss the mark. CETA’s investment court system enables the continuation of ISDS as a form of “global administrative law,” though in a forum thought to be more deferential to the regulatory interests of states. The USMCA’s elimination of ISDS between Canada and the United States eliminates the ability of investors and arbitrators to drive a system of “global administrative law.” But it also deprives investors of the ability to protect themselves against exceptional failures of the nightwatchman and rule-of-law states. By contrast, Canada’s new model FIPA uses substantive reform to eliminate the use of ISDS as a form of global administrative law, while preserving a robust version of investment treaty arbitration to protect investors against exceptional failures of the nightwatchman and rule-of-law states. Historically speaking, this constitutes a return to the strategic space that investment treaties were intended to occupy.

In other words, Canada’s new model FIPA rightly eliminates investment treaties and ISDS as tools of governance while ensuring that they will continue to play an important role in providing security in a chaotic and often dangerous world.

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772 Writers endorsing CETA’s introduction of an international investment court include VanDuzer, supra note 3, at 17. International organizations and states endorsing the establishment of an international investment court include the EU and Canada. See supra notes 546–47, 552–53 and accompanying text. Writers endorsing the USMCA’s elimination of ISDS as a model for future investment treaties include Lai, supra note 369, at 259, 294; Mertins-Kirkwood & Smith, supra note 560, at 32–33. States endorsing the elimination of ISDS from investment treaties include Brazil, Ecuador, New Zealand, and South Africa. See Mertins-Kirkwood & Smith, supra note 560, at 33; see also supra note 554 and accompanying text.