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The evolution of bilateral investment treaties, investment treaty arbitration and international investment law

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Introduction

National and international investment policies are shaped by a number of important factors. In an effort to realise multiple benefits from foreign direct investment (FDI), states are compelled to make simultaneous moves that potentially pull towards opposite directions. On one hand, in the wake of an intensified competition to attract FDI, states are compelled to liberalise domestic investment regimes to attract and promote inward foreign investments. On the other hand, they are required to regulate and harness FDI in pursuit of broader policy objectives.1 The present multi-faceted and multi-layered network of international agreements aimed at protecting rights of foreign investors and providing mechanisms for amicable dispute resolution is growing, alongside an increasing emphasis on the rights of the state to regulate foreign investments to protect essential public interests.2 The systemic evolution of the investment treaty arbitration (ITA) in its structure, procedures and substance is geared towards achieving greater coherence by balancing competing economic and human rights, interests and values.3

The present structure of the ITA system and the development of substantive norms of international investment law (IIL) are poised on a critical juncture to adopt a more balanced approach to resolve tensions between competing rights, interests and values; and prove itself as a legitimate system for rights adjudication.4 Where the normative adjustments and clarifications by the ITA tribunals are set to influence future policy directions at every relevant level, it is important to learn how the entire system has developed to its present form. Whether the development of the ITA system and the governing norms were in complete harmony of the policy objectives set by different international actors that were interested and actively involved in this development? Why there is no multilateral agreement on investment to organise and regulate international investments such as the WTO Agreements on trade? What were the factors that contributed to the present diffusion of bilateral and multilateral investment agreements? Any controversy on the present day investment protection standards would be resolved consistently with the historical understanding of the concepts and theories.5 The investigations into these questions would help better understand the present structure and operating mechanisms of the ITA system, and would also suggest future policy directions. These investigations would also help foreign investors and other actors involved in the present ITA system to develop a deep understanding of the subject and formulate an objective course of action in their choice to invest in a foreign country, and make informed and intelligent choices regarding the place of arbitration and the applicable laws.6

This article gives impartial details of developments in the formation of the customary FDI rules, dispute settlement systems, and their working mechanisms. After this introduction, the article is divided into six parts and gives a summary of assessments and conclusions in

the end. The first part explores the origins and historical evolution of bilateral investment treaties (BITs). While tracking down this evolution, it highlights and explains the persistent divide between the developed and developing world that existed throughout history over the norms comprising the customary FDI regime. It highlights the rights and protections allowed to foreign investors in the customary FDI regime. The second part gives a detailed account of salient efforts made from different platforms to harmonise the FDI regime in the colonial era starting from the late eighteenth century and ***Int. A.L.R. 190** continuing towards the end of the Second World War (for example by the League of Nations and the International Trade Organisation); and the postcolonial era that began after the Second World War (for example the UNO and the OECD).7 While discussing different platforms representing varying interests of the developed and developing states, the institution specific developments are narrated discretely instead of following a chronological calendar of events happening at different platforms. This is however done, without going into political discussions as to why an effort from a particular platform could not succeed.

The third part introduces basic concepts and types of investment treaty arbitration and its gradual rise as an alternative to the customary diplomatic protection for the settlement of disputes between foreign investors and host states. The fourth part gives a brief account of leading ITA institutions such as the International Centre for Settlement of Investment Disputes and the Arbitration Institute of the Stockholm Chamber of Commerce. The fifth part deals with the operational mechanism of ITA system, the criticisms lauded against it, and the implications of and expectations from the ITA as a system for resolution of investment disputes. The role in the ITA of municipal laws of host states is also briefly discussed in this part. The sixth part explores how the substantive norms applicable to ITA might conflict with or run parallel to the international obligations of host states acquired from the WTO Agreements. The discussions in this article are intended to highlight the background and emerging design of the interplaying, overlapping and invariably contradicting yet embryonic substantive norms of international investment law (IIL). Any improper rationalisation and allocation of these norms may lead to a systemic crisis. This article is, therefore, only a prelude to further discussions on the appropriate readjustments and legally and politically plausible rebalancing of the interplaying substantive norms in investment arbitrations.

I have frequently used two expressions in this study that need be clarified here in the beginning. First the term "developing countries/states" is used as compared to the developed countries/states denoting those countries with a lower level of industrialisation and material wellbeing.8 Another frequently used term in this study is "foreign direct investment/FDI". The term FDI is generally understood as compared with foreign indirect investment or portfolio investment, and those interested to learn more on these distinctions are directed to an earlier comprehensive work completed by another eminent scholar.9 Although, the use of term FDI to encompass BIT regulated investments has been considered as misleading and controversial,10 nevertheless I have used the term implying all investments covered by BITs since investigations into different notions and technical concepts of foreign investments are beyond the scope of this study. Also, due to the shared jurisprudence of BIT based arbitrations and the arbitrations arising out of investment chapters of some free trade agreements (FTAs), I have preferred the collective expression "investment treaty arbitration" or "ITA" to refer to all types of treaty based arbitrations unless identified or explained otherwise.

The origin and evolution of contemporary BITs

Continuous FDI diffusion and divide over governing norms

Before the birth of contemporary BITs, the FDI regime was governed by customary international law that did not provide the kind of rules and standards of protection desired by foreign investors.11 States alleged to have a customary right to expropriate and the classical situation was the state's blatant seizure of the investor's assets while it implemented a general programme of economic reform12 ; or the state's highly visible acts of depriving the investor, with no or only a nominal compensation.13 In such extreme situations, the customary law provided for potentially hostile exhaustion of local remedies before an investor could motivate its home state to pursue the case through diplomatic channels.14 When the potential of FDI to contribute towards economic development in various forms was realised in the twentieth century, especially in its second half, developing countries started extensive campaigns to attract FDI from the developed countries. The priority agenda for developing countries remained more FDI, and for the developed more protection for their investors that was not available in customary norms. Developing countries, outraged by the perceptions of economic colonisation, collectively asserted their customary right to expropriate and the compensation for expropriation to be paid in accordance with their domestic calculus.15 On the other hand, the ***Int. A.L.R. 191*** developed countries lobbied for the prohibition on expropriation and full compensation that is prompt, adequate and effective.16

Protection of FDI by diplomatic channels

The present status of rights available to foreign investors has travelled a long way starting from absolute denial of legal capacity and rights in the early political communities.17 Foreigners and their properties were continuously considered as subject to a different treatment than the nationals of host states.18 The continuous association of foreigners with their home state developed the international custom of diplomatic protection where a state espouses the claim of its national against another state.19 Under customary international law, diplomatic protection:

"[C]onsists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".20

Permanent Court of International Justice (PCIJ) has declared that such espousal is an "elementary principle of international law".21 The diplomatic protection included a variety of measures available to an investor's home state including consular action, negotiations mediation, judicial and arbitral proceedings, reprisals, restoration, severance of diplomatic relations, economic pressure, and--as a final resort--even the use of force.22

The rules relating to nationality of claims, exhaustion of local remedies, and the discretionary character of the diplomatic protection (that whether a state will espouse its

national's claim depends on her own will) were developed.23 The traditional legacy of nationality of claims developed by the diplomatic protection continues to apply to the present time investment claims.24 The diplomatic protection resulted in the formation of claims tribunals or commissions where the early jurisprudence of state responsibility for injuries to aliens was developed.25 Diplomatic protection has served as tool for cross border movement of people, goods, services and investments for a long time although the state-state disputes had the potential to politicise disputes causing international frictions. The rules and principles of diplomatic protection were developed in the era of colonisation and imperialism,26 and all means, political, economic and even military, were considered permissible under international law in pursuit of claims of diplomatic protection.27 Gun-boat diplomacy (the threat to use force to substantiate diplomatic protection claims) was a frequent practice to coerce agreements for international arbitration and accept resulting awards.28 To address these problems, the rules of "minimum standards of treatment" based on the principle of equality before laws were introduced by the developed countries, corresponding to the so called civilised states' standards, to protect their nationals and their interests in foreign territories.29 In response, developing countries (particularly the Latin American countries) pressed in favour of the frequently cited Carlos Calvo's doctrine that there would be "no better treatment to foreigners than own citizens".30 The authors representing developed countries often narrate that the Calvo Doctrine never attained the status of customary international law.31 However, later in this article, we will see the reflections of the Calvo Doctrine in the collective stances taken by developing countries on an international plane.

Need for explicit protections for FDI: the beginning of the treaty based approach

The divide in the approach of the developed and the developing states resulted in an unsettled notion of customary norms on the right to expropriate and the nature and quantum of compensation to be paid for expropriation. To redress the unsettled customary regime, BITs were seen as an attractive alternative to document mutually agreed substantive rules. The balance in BIT negotiations obviously leant towards the developed, as they were offering immediate economic uplift, employment opportunities and transfer of technology in return for the developing state agreeing only on a remote full compensation for an impermissible expropriation. BITs also replaced the customary diplomatic protection ***Int. A.L.R. 192*** channels with the settlement of disputes between investors and host states by direct action at a supra-national arbitral tribunal, which is supposed to remain--unlike domestic courts of host states--influenced by the domestic policies or politics.

Before the advent of contemporary BITs, bilateral commercial treaty practice began during the 1920s to 1930s by the US Friendship, Commerce and Consular Relations Treaties (FCCRs) containing explicit protections for investors and then from 1940s to 1960s Friendship, Commerce and Navigation Treaties (FCNs) providing state-state dispute resolution by the International Court of Justice (ICJ).32 The contemporary BITs are very close to the pattern of the US commercial treaties.33 The language and concepts of FCN treaties on the issues of investments, namely, the establishment, expropriation, national treatment, most favoured nation treatment or the international law standard for capital

transfers reflect to a great extent in the contemporary BITs.34 The divide on customary norms and failure of international community to agree on universal rules to govern foreign investment led to further expansion of bilateralism and to some extent pluralatrism in the shape of regionalisation of the investment regimes and many BITs and FTAs containing investment chapters have been concluded in the last few decades.35

Efforts to harmonise the customary FDI regime

Responding to the divide between developed and developing countries over the customary rules governing FDI, several efforts were made to bridge this gap and bring the customary regime to a position that is acceptable to all. A brief overview of the harmonisation efforts will help to understand the views of both developed and developing countries, and to better comprehend and analyse the present structure of BIT arbitration and its normative framework.

Efforts by the league of nations and the Latin American response

Efforts to harmonise the FDI regime were initiated by the UN predecessor, the League of Nations in 1924. A Committee of Experts for the Progressive Codification of International Law submitted the research topic, "Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners".36 In the Hague Codification Conference in 1930, the Draft Convention prepared by Edwin Borchard of Harvard Law School (Harvard Draft, 1929) was presented. The Draft failed due to disagreements between developed and developing countries on the notions of "equal treatment" and "minimum standards".37 In the same year another similar codification effort by the Council of the League at a Diplomatic Conference, this time on the initiatives of International Chamber of Commerce (ICC), also suffered the same fate.38

Three years later Latin American countries adopted the Convention on the Rights and Duties of States providing that the foreigners have no right to better treatment than the nationals of host state.39 This Convention also suffered from difference of opinion and was adopted with reservations on equal treatment provisions from the Chairman of the US delegation Secretary of State, Cordell Hull.40 Cordell Hull during his correspondence with the Mexican Government later in 1938 (the year of demise of the League of Nations) presented his famous formula of an "adequate, effective and prompt payment" for the properties belonging to foreigners seized by Mexico known as the "Hull Rule".41 The Hull Rule, though rejected by Mexico, flagged the view of developed countries, and provided a basis for future discussions on the standards of compensation for expropriation of foreigners' property.42

Efforts by the International Trade Organisation

The subject of foreign investment attracted significant attention and interest in the International Trade Organisation (ITO). The Havana Charter negotiations included the aspects of national treatment, most favoured nation (MFN) treatment and just compensation for expropriation but again ended up in disagreements.43 The Havana

Charter nevertheless gave the ITO a specific task to make recommendations for bilateral or multilateral investment agreements.44 The establishment of the ITO itself could not materialise, and the General Agreement on Tariffs and Trade (GATT) dealing with the subjects of trade alone was provisionally adopted. This was an ***Int. A.L.R. 193*** important event in the historical developments of FDI regime that separated the hitherto coalesce development of intertwined subjects of trade and investment.45

Significant miscellaneous efforts by some NGOs and other forums

In 1949, the ICC's Committee on Foreign Investment again proposed an International Code of Fair Treatment for Foreign Investment (ICC Code) providing for the national treatment and MFN treatment, freedom of capital movement, and most importantly "fair compensation according to international law".46 The ICC Code further provided for a state-state dispute resolution before the ICC International Court of Arbitration.47 In the same vein in 1948-1949, the International Law Association (ILA) proposed Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Code (ILA Statute) that provided an impartial tribunal for resolution of FDI disputes without outlining any standards of treatment.48 Both these efforts remained unsuccessful in winning the agreement of all states.49

In 1957, a West Germany based Society called "Advance the Protection of Foreign Investments" drafted the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries,50 that later in 1959 developed into the Draft Convention on Investment Abroad by the duo of German banker Herman Abs and former UK Attorney General, Lord Shawcross.51 This draft introduced for the first time the direct investor-state arbitration, in addition to the standards of "fair and equitable treatment of foreign investment" and "just and effective compensation for expropriation".52 This Draft Convention remained under consideration for adoption by the Organisation for European Economic Co-operation but failed.53

The United Nations General Assembly (UNGA) resolutions

The end of the Second World War gave birth to the UN as well as many newly independent states. Economic reforms in the newly independent states triggered many expropriations and cancellation of concessions granted by the past colonial powers.54 In the same era, the rise of socialist economic theory in Eastern European countries also resulted in many takings of foreigners' properties.55 The newly independent, least developed and developing countries asserted that they have a right to review concessions granted to foreign companies by colonial powers and will pay compensation in accordance with their domestic standards.56 The UNGA was an attractive forum for the collective voice of least developed and developing countries where they enjoyed abundant majority. In 1952, Uruguay introduced a draft resolution proposing that Member States would respect the right of each country to nationalise and freely exploit its natural wealth as an essential factor of economic independence.57 The developed countries strongly opposed this resolution, deeming it as unbalanced for it did not recognise any reciprocal responsibility of states towards private investors.58 The draft was amended several times during

negotiations and several options including international arbitration for dispute resolution and rules on compensation for expropriation were discussed.59 Finally, UNGA adopted this first resolution on the subject of foreign investments with a very soft statement of the right of states to freely use and exploit their natural wealth and resources whenever desired for their own progress and economic development.60 The strong words "right to nationalise" with serious legal implications, as suggested by Uruguay in the first draft, were omitted in the final draft.

The UN Commission on Permanent Sovereignty over Natural Resources (CPSNR) was established in 1958 with a task to study the questions of national control over natural resources.61 The CPSNR conducted detailed studies on the subject of natural resources that led to the recommendation that the sovereign right of every state ***Int. A.L.R. 194*** to dispose of its wealth and its natural resources should be respected.62 By that time, due to the obvious conflict of interests and resulting continuous divide on customary rules, developed countries started realising that instead of the customary or any multilateral investment regime, tailor made arrangements in the form of bilateral treaties were more suitable for protection of their citizens' investments abroad.63

Again in 1961, on the request of the UN Secretariat the Draft Convention on International Responsibility of States for Injuries to Aliens was prepared by two professors (again from the Harvard Law School) following the patterns of the 1929 Harvard Draft and presented to the International Law Commission (ILC).64 Article 1 of the Draft provided that a state is internationally responsible for an act that is wrongful under international law. Article 2 gave primacy to international law and international minimum standards over municipal law when determining state responsibility. Article 10 declared regulatory taking as wrongful unless it is for public purpose and is not in violation of any existing treaty. Article 10 also envisaged the rules of "prompt" and "just" compensation in case of regulatory taking and art.22 entitled a foreigner to present investment claims directly to a competent international tribunal. Although the main features of this draft were very close to the present day BITs provisions, it was never adopted.

The landmark work of CPSNR is reflected in its eight-point principles concerning the permanent sovereignty of peoples and nations over their wealth and resources that, in 1962, led to the second resolution on "Permanent Sovereignty over Natural Resources".65 After repeated assertions of permanent sovereignty over natural resources, the resolution maintained a balance between the interests of the developed and developing countries by recognising that, "capital imported … shall be governed by the terms thereof, by the national legislation in force, and by international law."66 Discarding the US proposed "prompt, adequate and effective compensation" for expropriation; the resolution provided for an "appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law."67 For settlement of disputes, the resolution provided for the exhaustion of local remedies but recommended international arbitration with mutual agreement of disputing states.68 The resolution further provided that, "[f]oreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith".69 In all, inter alia, by recognising that the treatment of foreign investment was subject to international as well as national law, this was a relatively balanced resolution and represented an effort to accommodate the distinct positions of the developed and developing countries.70

The CPSNR continued work on its task and submitted various reports to the UNGA through Secretary General of the Economic and Social Council.71 By this time the potentials in FDI for economic progress and other benefits were extensively advertised and marketed by the developed countries both inside and outside the UN. In 1965 a draft resolution was proposed suggesting that:

"[T]he Assembly would recognise that many developing countries desired a greater inflow of private investment capital but that uncertainty and anxiety on the part of both investors and capital recipient countries constituted a major impediment to this."72

Until this time, the conceptual divide between the developed and developing world over the costs and benefits of FDI appeared to be closing further in towards a harmonised FDI regime. Then something happened that widened this divide instead of closing it. It was the UNGA resolution 3171 of 1974 declaring that:

"[E]ach state is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which might arise should be settled in accordance with the national legislation of State carrying out such measures."73

The resolution further disapproved the use of force in order to impede a state to exercise these sovereign rights.74

Departing from the 1962 resolution,75 this resolution excluded the role of international law in determination of the standards of treatment and quantum of compensation and naturally attracted opposition from developed countries. Yet another resolution 3201 of 1974 entitled Declaration on the Establishment of a New ***Int. A.L.R. 195*** International Economic Order (hereinafter referred to as "the Order") reiterated the same notion of full permanent sovereignty of every state over its natural resources and all economic activities.76 Likewise, resolution 3281 of 1974 entitled as Charter of Economic Rights and Duties of States (hereinafter referred to as "the Charter") reiterated the exclusion of international law in determining the standards of treatment and taking of foreign property and asserted the sole governance of FDI under domestic laws of host states as interpreted and applied by domestic courts.77 The Charter further provided that no state can be compelled to give preferential treatment to foreign investors.78 The developed countries voted against both the Order and the Charter. Both resolutions have been viewed as in conflict with the customary international law by the scholars from developed countries.79

The Organisation for Economic Co-operation and Development (OECD) Efforts

First effort by the OECD was the 1962 Draft Convention on the Protection of Foreign Property revised and approved by OECD in 1967.80 Being a forum for capital exporting developed countries, the OECD Draft should have clearly narrated the principles those countries had campaigned for in the UNGA resolutions. On the contrary, in addition to the provisions for fair and equitable treatment and most constant protection and security, only "just compensation" paid effectively and without delay was preferred.81 Investors were given a right to direct claim against host states subject to separate declaration of consent by defending states.82 The Draft failed to win support even from within the OECD countries.

In 1976, OECD passed the Declaration on International Investment and Multinational Enterprise.83 The Declaration was based on voluntary guidelines and affirmed the application of international law standards without elaborating the contents of those standards.84 The guidelines are considered as a response from the developed countries to the 1974 UNGA resolutions (the Order and the Charter) denying the application of international law on the FDI regime.85 The latest effort by the OECD was its 1995 proposal for a multilateral agreement on investment (MAI) leading to draft Multilateral Agreement on Investment in 1998, with the objectives to harmonise the FDI regime and bring the international community to a collective forum.86 The developing countries were not involved in the MAI negotiations. The idea was that the developing countries would join the agreement as fait accompli after successful completion of negotiations and agreement among OECD member states. Main features of the MAI were liberalisation and protection of investment, and effective dispute settlement mechanism. The effort failed when differences on the substantive and procedural issues could not be resolved by the negotiating states.

The gradual diffusion of BITs

When the divide between developed and developing countries over the customary norms governing FDI could not be resolved on multilateral forums, they started negotiating BITs on mutually acceptable terms. The first ever BIT was signed between Germany and Pakistan in 1959 and entered into force in 1962. It contains provisions for non-discrimination, full protection and security, compensation on expropriation, free transfer of capital and state-state dispute settlement by the ICJ with mutual agreement of disputing parties failing which, by an arbitral tribunal on request of either of the disputing party.87 Other states quickly followed the German-Pakistan example and many BITs were signed during the 1960s on a similar pattern.88 In the beginning, BITs were believed to be useful only where they are concluded between a developed and a developing country.89 The paradigm then shifted and now we have many BITs between two developing countries as well as between two developed countries.90 Individual BIT negotiations gradually intensified resulting in numerous BITs and FTAs containing investment chapters.91 The BIT practice, however, has been blamed for inciting unhealthy competition within developing countries to offer more favourable BITs, extending opportunities of forum ***Int. A.L.R. 196*** shopping and treaty abuse to the ever-opportunistic investors,92 and compromising on sustainability and public interest objectives.93

Investment disputes resolution by international arbitration

International investment disputes are disputes between a state and the national of another state in investment matters.94 The resolution of investment disputes by a supra-national arbitral tribunal has taken three different forms in the last century.

State-state arbitration with mutual consent after the accrual of dispute

Arbitral tribunals and claims commissions established to resolve foreign investment

disputes prior to the First World War invariably resulted from an agreement of host and home states after the accrual of investment related disputes.95 There are 10 known cases that dealt directly with investment disputes before the advent of the Permanent Court of International Justice in 1920.96 The most recent example of state-state arbitration is the establishment of the Iran-US Claims Tribunal in 1981. The jurisprudence and awards of these tribunals are widely cited in the present day ITAs due to the similar nature of disputes and the applicable laws.97

Investor-state arbitration under an investor-state agreement

International arbitration was seen as a neutral and reliable forum by the foreign investors, although developing countries were sceptical about it in the beginning.98 The practice of investor-state arbitration started with the inclusion of international arbitration clauses in the investor-state agreements (ISAs).99 There are 31 known investor-state disputes before the advent of the International Centre for Settlement of Investment Disputes (ICSID) in 1961.100 The investor-state dispute settlement under ISAs gave rise to the debate whether or not the international law is an overarching law for such agreements.101 Without an indisputable application of international law as governing law to remedy breaches of ISAs, legal risk for the application of investor unfriendly domestic laws of the host states continued to haunt this arrangement.102 Now, the ICSID has emerged as a leading forum to facilitate ISA based arbitrations and has developed special rules applicable to these arbitrations.103 In more recent BITs, investors may have a right to opt out of the dispute resolution provisions (domestic courts of the host state or otherwise) provided by their ISA, and turn to the BIT designated arbitration mechanisms.104 Where an ISA provides no dispute settlement mechanisms, foreign investors may initiate direct investor-state arbitration under the applicable BIT.105

Nevertheless, international lawyers have propagated the "internationalisation" of ISAs in an effort to bring the application of international law to the ISA based arbitrations.106 The basic argument in favour of the internationalisation of ISAs is that the arbitral tribunals are without a *lex fori* on the basis of which they could exercise a choice between domestic or international law as applicable law while dealing with a dispute under an ISA. By comparing international arbitration with adjudication at the domestic courts, the proponents of this theory argue that the contracting party's choice for a supra-national tribunal for resolution of disputes necessitates the internationalisation of the ISA and excludes the application of domestic laws on its subject matter. They further argue that subjecting contracts with foreign investors in entirety to the national legal system of party states would subordinate investors to the freewill of their co-contractors. If the contractual rights held by the investors under ISAs are affected in a way not in conformity with the principle of *pacta sunt servanda,* and national laws do not provide an adequate remedy, an arbitral tribunal is left with no option than to resort to the international law for proper adjudication of the rights and duties of disputing parties.

*Int. A.L.R. 197 *Investor-state arbitration under BITs*

The right of a state to give consent in a treaty to arbitrate future disputes was recognised

for the first time during the 1965 discussions on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).107 It was also recognised during those discussions that an investor could accept such consent by submitting a claim to ITA.108 This replaced the investor-state arbitration under an ISA with the one that is acclaimed from a treaty. The investors' right in investment treaties to direct supra-national arbitration against a state was innovative because foreign investors do not have privity of contract in such treaties.109 The Indonesia-Netherland BIT concluded in 1968 appears to be the first investment treaty containing such an investor-state arbitration clause, although it subjected such arbitration to the state consent subsequent to the accrual of an investment dispute.110 One year later, ICSID published *Model Clauses Relating to the Convention on Settlement of Investment Disputes Designed for Use of Bilateral Investment Treaties.*111 The Chad-Italy BIT concluded in 1969 included the investor-state arbitration clause with no conditions of subsequent state consent.112 The most significant development in investment treaty arbitration, however, is the expansive interpretation of so called "umbrella clauses" allowing individual investors to initiate arbitral proceedings at supra-national arbitral tribunals.113 The paradigm created by arbitration clauses in BITs without privity of contract where state consent to submit to arbitration can be established on the basis of the BIT-ISA combination can be understood by the following example:

Let's suppose WÄRTSILÄ Finland Oy concludes a concessions contract (ISA) to build and operate an independent power plant in Pakistan. The ISA is between WÄRTSILÄ and Pakistan. WÄRTSILÄ begins its work by investing major finances into the project. Subsequently, a changed Pakistani Government launches arbitrary and politically motivated investigations into WÄRTSILÄ's compliance with the legal and regulatory requirements and enjoins payments arising under the ISA. The ISA was concluded in accordance with the Pakistani laws and investments are made within the territorial jurisdiction of domestic courts of Pakistan. WÄRTSILÄ has no trust in Pakistani courts for being susceptible to the domestic political influence and policy constraints. Let's suppose that Finland and Pakistan have concluded a BIT that contains an "umbrella clause" for investor-state arbitration providing that "each party shall observe any obligation it may have entered into with regard to investments". WÄRTSILÄ has a choice to opt for arbitration under the BIT instead of pursuing its case at the domestic courts of Pakistan.

An ICSID tribunal in its first BIT arbitration award in 1990 confirmed the validity of prior state consent given in a BIT to arbitrate future investment disputes.114 If there is no ISA between the investor and home state, the investor may initiate international arbitration directly under the dispute resolution provisions contained in the applicable BIT. Since the early 1990s BIT based arbitrations have continuously grown at all arbitration forums. Similarly, investor-state arbitration clauses form part of some sectoral agreements like the Energy Charter Treaty and investment chapters of some plurilateral and regional FTAs such as NAFTA Ch.11. The regional FTAs and resulting investor-state arbitrations co-escalate with BIT arbitrations sharing the same jurisprudence and normative framework. According to UNCTAD,115 the total cumulative number of known treaty-based cases reached 290 by the end of 2007; 182 of these disputes were filed with the ICSID (or the ICSID Additional Facility), 80 cases under the arbitration rules of the UNCITRAL, 14 cases before the Stockholm Chamber of Commerce, 5 before the International Chamber of Commerce (ICC), and 5 before ad hoc arbitrations. One further case was filed with the Cairo Regional

Centre for International Commercial Arbitration, one was administered by the Permanent Court of Arbitration and for two cases the exact venue was kept confidential. At least 73 governments, 44 of them in the developing world, 15 developed countries and 14 in South-Eastern Europe and the Commonwealth of independent states have faced ITA.

With a right to bring a direct claim against host states under investment treaties, investors are now able to avoid the common problems faced by their home states in the exercise of diplomatic protection, although the so called "fork in the road" principle may still result in the application of customary exhaustion of local remedies in BIT claims.116 This revolutionary paradigm shift has effectively replaced the traditional ways of diplomatic ***Int. A.L.R. 198*** protection for settlement of investment disputes, where the investor itself could not be a party in the dispute, with the direct investor-state arbitration. However, even if a contemporary BIT has been concluded between an investor's home and the host state, the investor is not barred from pursuing their home state to engage in the customary diplomatic protection of investments.117

Development of institutional and non-institutional arbitration for settlement of investment disputes

Institutional arbitration

There is now a variety of arbitration forums available on the international arena offering services for settlement of investment disputes through arbitration. These forums administer arbitration proceedings and have designed either their own arbitration rules or have adopted, with or without modifications, the UNCITRAL Arbitration Rules.118 Additionally, non-institutional or ad hoc ITA facilities are also available depending upon the choice of disputing parties within the bounds of their BITs or ISAs. An arbitral award is recognised and is enforceable in nearly all countries worldwide through the New York Convention.119 Both the ISA and BIT based awards are enforceable under the New York Convention, and the Convention has also limited the grounds upon which local courts could refuse to recognise or enforce the arbitral awards.120 The Court of Arbitration of the International Chamber of Commerce (ICC),121 the American Arbitration Association (AAA),122 the London Court of International Arbitration (LCIA),123 are, of course, some of the best known examples of arbitration institutions dealing with commercial nature disputes. The International Centre for Settlement of Investment Disputes,124 (ICSID) and the Arbitration Institute of the Stockholm Chamber of Commerce,125 (SCC) are perhaps the most popular arbitration institutes for the settlement of investment disputes. The Cairo Regional Centre for International Commercial Arbitration,126 (CRCICA) and the Kuala Lumpur Regional Centre for Arbitration,127 (KLRCA) are two examples of arbitration institutions in the developing world that offer to provide arbitration services for both commercial and investment disputes. A brief overview of these investment arbitration forums is presented in the following section.

International Centre for Settlement of Investment Disputes (ICSID)

ICSID is one of the leading ITA forums with 180 concluded and 121 pending cases at the time of this writing.128 It was established as part of the World Bank Group in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). To date, 144 countries are ICSID members. The Centre aims to provide a neutral international forum for the resolution of disputes between governments and foreign investors. The ICSID Convention provides procedures for the settlement of such disputes by arbitration in cases where both the home and the host countries are ICSID members. The Additional Facility Rules adopted in 1978 gave the rules of administration of certain types of proceedings between governments and foreign nationals where either the home or the host country of the investor concerned is not an ICSID member. In addition to dispute settlement under its own rules of procedure, the Centre also offers to appoint arbitrators, and administer dispute settlement proceedings conducted under the UNCITRAL Arbitration Rules.

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

SCC was established in 1917 as an autonomous part of the Stockholm Chamber of Commerce. It was recognised in the 1970s by the United States and the Soviet Union as a neutral centre for the resolution of East-West trade disputes and since then it has expanded its services in international commercial arbitration including arbitration on investment disputes. SCC offers to administer both domestic and international disputes in accordance with the SCC Arbitration Rules and the SCC Rules for Expedited Arbitrations entered into force on January 1, 2007. The disputing parties may also request their arbitrations under other procedures or rules such as the UNCITRAL Arbitration Rules. The SCC Arbitration Rules provide arbitration procedures fully in line with the best practices in international arbitration and are not governed or otherwise influenced by Swedish national politics, municipal laws or courts. SCC caseload includes ***Int. A.L.R. 199*** both domestic and international arbitrations. Almost 50 per cent of the cases at SCC are international in the sense that they involve at least one non-Swedish party.129

The Cairo Regional Centre for International Commercial Arbitration (CRCICA)

CRCICA is an international dispute settlement organisation operative in Egypt since 1979. It was established by the conclusion of an international agreement signed between the Government of Egypt and the Asian African Legal Consultative Organisation (AALCO) that has more than 45 Member States. CRCICA has adapted the UNCITRAL Arbitration Rules with slight modifications and offers to administer domestic and international disputes, both on trade and investment matters, between parties from all around the globe. It also provides non-UNCITRAL based institutional arbitration services on request of the disputing parties. CRCICA continues to witness a remarkable increase in its case referrals, reaching 440 cases by mid-May 2005. CRCICA has maintained a list of more than 1,000 eminent international arbitrators, and is increasingly approached by disputing parties to appoint arbitrators in various types of disputes.130

Kuala Lumpur Regional Centre for Arbitration (KLRCA)

KLRCA was established in 1978 in the capital of Malaysia, again under the auspices of the inter-governmental international law body AALCO. KLRCA offers a neutral system for settlement of disputes in trade, commerce and investment within the Asia-pacific region. Its dispute resolution services are open for governments, individuals or bodies corporate. KLRCA is principally governed by the Malaysian Arbitration Act 1952 (MAA 1952). In 1980, a provision (s.34) was inserted in the MAA 1952 that excludes arbitrations conducted by KLRCA from supervision or intervention of the Malaysian domestic courts. The latest Malaysian Arbitration Act 2005 also maintains the independence of KLRCA from the domestic courts' supervision or interference. KLRCA offers to administer arbitration through its own Arbitration Rules formed in 2008. These Rules are divided into two parts: Pt I includes Specific Arbitration Rules and Pt II includes the UNCITRAL Arbitration Rules.131 However, arbitrations conducted under both parts are governed by the UNCITRAL Arbitration Rules.132

Non-institutional or ad hoc arbitration

Some BITs contain arbitration clauses that provide for the resolution of dispute by an ad hoc arbitration organised under the UNCITRAL Arbitration Rules, or other rules agreed upon by the disputants. An ad hoc arbitration is, for the purposes of this article, the one that is not administered by an institution such as the ICSID or SCC. In an ad hoc arbitration, parties determine all aspects of the arbitration proceedings by themselves, such as the number of arbitrators, manner of their appointment, framing of rules, applicable laws and procedures, administrative support, and other procedures for conducting the arbitration. Ad hoc proceedings can be more flexible, cheaper and faster than an institutionally administered arbitration provided the disputing parties have approached it in a spirit of co-operation.133 The absence of an administrative fee charged by the arbitration institutes alone makes ad hoc arbitration an attractive choice. Ad hoc arbitration proceedings, however, need not be entirely detached from its institutional counterpart. Oftentimes the appointment of a qualified and impartial arbitrator constitutes a sticking point in ad hoc proceedings. In such case, the parties can agree to designate an institutional provider as the appointing authority such as International Chamber of Commerce (ICC) that appoints arbitrators in accordance with the UNCITRAL Arbitration Rules or in accordance with any other procedure agreed by the parties.

Further, parties can at any time in the course of an ad hoc proceeding decide to engage with an institution to administer the arbitration proceedings. For an ad hoc arbitration, the arbitration agreement may be concluded before or after the accrual of dispute and might simply state that any dispute between the parties will be resolved through arbitration.134 The parties can then negotiate and agree on further details on arbitration proceedings. To initiate arbitration proceedings, it is usually sufficient if the parties have an agreement on the place of arbitration.135 If the parties fail to agree on further details, all unresolved problems and questions relating to arbitration, for example how the arbitral tribunal will be appointed, how the proceedings will be conducted or how the award will be enforced can be determined by the law of the place designated for the arbitration, i.e. the law of the seat of arbitration.136 Therefore, the choice for the seat of arbitration is very important in ad hoc

arbitrations because ***Int. A.L.R. 200*** this abbreviated dispute settlement device will work only if the selected jurisdiction has an established arbitration law.137

How the ITA system works?

Private tribunals--public interests

The ITA tribunals are traditionally regarded as private tribunals constituted to resolve commercial nature disputes.138 These tribunals are not permanent courts and the tribunal members or the arbitrators are untenured, that is, they are appointed only for a particular dispute by the disputing host state and the foreign investor.139 The ITA tribunals also lack transparency and accountability, the characteristics that are considered essential qualifications of an adjudication forum deciding on matters of public interests.140 There is little disagreement on the fact that the ITA procedural and substantive rules have been designed on the model of private arbitration primarily focussed on the protection of commercial interests.141 The ITA tribunals have also been designated as the "businessman's courts" for their apparent preference to foreign investors' interests while adjudicating on the matters having implications for public policy.142 The commercial character of ITA tribunals has alarmed many scholars for the compelling reasons that the investor-state disputes have serious public interest implications.143 At least five embarking reasons have been identified to demonstrate a clear public interest in investor-state disputes:144

1. disputes often arise in public service sectors such as water, oil and gas, transport, waste disposal or telecommunications;

2. disputes may concern government regulations aimed at the protection of public welfare, for example, human rights, health and safety, labour standards or the environment;

3. the threat of a dispute may have a "chilling" effect on government policy;

4. international arbitration is costly and has implications for the public purse; and

5. case law may determine the future development of investment law, that in turn may have implications for not only later cases on the same forum but also on other public interest forums.

However, there are indications in some recent ITA awards that the tribunals are willing to balance the conflicting investors' interests with the public interests.145 Moreover, every state on the globe is a party to one or more of the eight major UN or other human rights treaties.146 Human rights treaties also interact with BITs in at least two distinct ways.147 First, the jurisprudence on expropriation and standards of treatment is entwined in both BITs and human rights treaties, where the same important and frequently questioned theoretical notions of expropriation and standards of treatment are analysed and interpreted in the purview of international law and general principles of law. In this context, human rights regimes play an explanatory role in the ITAs and interact ancillary with the norms of international investment law. Secondly, and perhaps more importantly, the public interest exception to the exercise of state power to expropriate necessarily involves human

rights, where states seek to justify expropriations or breach of investment treaty standards in pursuit to protect their citizens' rights, such as civil or political rights, social economic and cultural rights, right to health and safety and a healthy environment, and economic development. In this context, human rights regimes play a supervisory and governing role; influencing the ITA, affecting and limiting the rights of foreign investors, and dictating the development of international investment law.148

Procedure without substance

It is common sense that any dispute settlement system would be based on a defined set of substantive rules.149 The ITA system, however, was developed on the notion of "procedure before substance".150 The divide between developed and developing countries was clearly evident regarding the substantive rules on standards of treatment and the quantum of compensation to be paid for expropriation during the 1950s and 1960s. Due to this fierce disagreement, the authors of the ICSID Convention considered it more appropriate to provide an impartial ***Int. A.L.R. 201*** dispute resolution platform without attempting to seek an agreement on the substantive rules.151 For this *raison d'être,* the creation of the ICSID as an independent and depoliticised forum for settlement of investment disputes is considered as the "boldest innovative step in the modern history of international co-operation concerning the role and protection of foreign investment."152 Now, as we are aware, quite a few other ITA forums exist on the ICSID pattern following the same notion of procedure without substance.

The procedure before substance approach has, however, created two systemic problems. First, the theoretical basis of the arbitral jurisdiction is problematic. The right of private investors to initiate international arbitration avoiding national courts collides with the principles of state sovereignty to regulate within its territory. This right of the foreign investor makes an innovation in the customary norms where only states are allowed to avail the jurisdiction of supra-national dispute settlement bodies that apply and interpret international law such as the ICJ or the WTO.153 Secondly, the inconsistent interpretations of BIT provisions and standards by the ITA tribunals in the application and interpretation of the rules of public international law are resulting in the fragmentation of the customary international law.154 BITs provide substantive rules that impose binding obligations on the parties enforceable through ITA. These rules are often imprecise, open and wide in the scope of their application and usually give expansive interpretive choices to the ITA tribunals. Internal inconsistency in the ITA awards is likely when precedents are not binding for subsequent tribunals.155 The procedure without substance may also lead to the abuse of the ITA process. The so called "Treaty shopping" is a common practice where investors tend to acquire preferred nationality for the purposes of BIT claims by selling or assigning their claims to entities incorporated in other countries having more favourable BITs with their host countries.156

Remedies at ITA

The primary remedy available to a foreign investor against expropriation or breach of standards of treatment provided by BITs is monetary compensation.157 The rules on

assessments and determination of the quantum of compensation are generally recognised as problematic.158 There are distinctions between different forms of compensation such as compensation by way of damages when the expropriatory act was unlawful;159 by way of payment for lawful nationalisation when the expropriatory act was triggered by public purpose;160 by way of indiscriminate or no less favourable financial reparation or indemnification for losses caused by force majoure161 ; by way of repayment where expropriation has resulted in an unjust enrichment of the tortfeasor host state162 ; or by way of restitution (reversing the act of expropriation) or annulment (declaring the expropriation void) when the expropriation was a procedurally flawed decision.163 The appropriate kind of compensation not only depends upon the nature of expropriatory act and its intended aims and objectives but also on the feasibility and effectiveness of the mode of compensation.164 The frequently cited *Chorzow Factory* case165 discusses the hierarchy inter se of different kinds of compensation that is to be determined on a case to case basis.166 Theoretically, restitution of legal framework to the pre-expropriation or breach of BIT standards position can also be a possible remedy; there is no publically available ITA decision that has awarded such restitution. A recent ICSID tribunal has nevertheless asserted that restitution might be an appropriate remedy ***Int. A.L.R. 202*** in a BIT dispute.167 If such restitution can be awarded, it would have far reaching implications for the obligations that host states have acquired under the European Union or the WTO Agreements that are incompatible with their BIT obligations.168

Domestic laws of the host states

The customary rules on territorial sovereignty of states provide that property or assets within the sovereign boundaries of a state are governed by its municipal laws.169 It is generally believed that by consenting to the supra-national arbitration for investor-state disputes, a host state has agreed that foreign investments are excluded from the application of its municipal laws.170 The expression "investment" used in BITs is most often very broad intending to cover every possible foreign interest and asset. Investments in a foreign state could, however, only be made in accordance with the municipal laws of a host state such as any mandatory requirements for permits and licensing etc.171 If there is a concessions contract or ISA, the agreed terms of such ISA defining rights and obligations of parties remain the subject matter of municipal laws of the host state, and within the jurisdiction of the domestic courts.172 The supra-national arbitration clauses included in BITs become operative only after an alleged foreign investor has acquired some kind of property rights in the host state in accordance with its municipal laws, unless the relevant BIT provides otherwise.173 A BIT based foreign investment averts the jurisdiction of domestic courts of host states to adjudicate upon any disputes on investments. In addition, any law or regulation of the host state causing loss or damage to foreign investor's property would be subject to review by the ITA tribunal.174 By concluding a BIT, party states open a forum for judicial review by a supra-national tribunal of all public administrative decisions made to regulate their own subjects.175

The role of regional and global state obligations in investment arbitration

In the multi-layered and multi-dimensional international workspace, states have concluded many international agreements designed to satisfy different and sometimes opposing ends. It is important to know how various kinds of treaty obligations of a state other than BITs might affect its BIT obligations? There are significant incompatibilities between the EU Treaty176 and the BITs concluded by the EU member states that I have discussed elsewhere.177 In the following section, I will discuss obligations of a state arising from the WTO Agreement that may interact, overlap, and sometimes contradict with BIT obligations. The BIT-WTO incompatible obligations raise important questions of priority inter se; and the BIT-WTO parallel obligations may result in duplication of remedies or questions of double jeopardy. Some areas of the potential BIT-WTO interactions are highlighted here to explain their implications for the ITA and the emerging norms of international investment law.

BITs-WTO Interactions

Investment per se was never included in the last round of WTO negotiations (the Uruguay Round); however, the Agreement on Trade Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) concluded in the Uruguay Round indirectly provided regulations for FDI.178 Other WTO Agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) also indirectly impact upon investments, although this is not their primary focus.179

BITs-TRIMs Interactions

TRIMs apply only to investment measures related to trade in goods.180 States may impose conditions on foreign investors to direct investments in accordance with certain national priorities, and when such conditions affect trade, they are called trade related investment measures. Under ***Int. A.L.R. 203*** art.2 of TRIMs, a Member State is prohibited from applying any trade related investment measures that are inconsistent with art.III (National Treatment) or art.XI (Quantitative Restrictions) of GATT 1994. Examples of inconsistent measures as provided in the Illustrative Annex include local content, trade balancing or technology transfer requirements, and remittance restrictions.

TRIMs interplay with BITs in two possible ways. First, some measures that fall within the purview of TRIMs are also covered by BITs; therefore TRIMs obligations may run parallel to BITs obligations. TRIMs, however, contain transitional arrangements allowing members to maintain notified measures for a limited time following the entry into force of the WTO (two years in the case of developed Member States, five years for developing Member States, and seven years for least-developed Member States) with the possibility of further extension on individual application by a state. Incompatibility issues would arise when foreign investors in BIT arbitrations might want to challenge these transitional arrangements or interfere and attempt to restrict their extensions on the basis of BIT or ISA provisions. Where the extensions are already in place, foreign investors may contest their validity on the basis of their incompatibility with their ISAs or the host state's BIT

obligations. Secondly, host states may have concluded need specific ISAs containing technology transfer, local content or any other clauses that potentially contradict with TRIMs obligations. Foreign investors, under their ISAs or under BITs, would have no locus standi to avail the jurisdiction of WTO Dispute Settlement Body.181 However, on the basis of equal treatment and most favourable treatment clauses in their ISAs or brought into action on the basis of BIT provisions, they appear to be able to benefit in the investment treaty arbitrations from the TRIMs obligations not included in their ISAs, or where the ISAs provide obligations that are inconsistent with the TRIMs obligations.

BITs-GATS interactions

Apparently, GATS has considerably extended the scope of the WTO's regulatory power in the field of FDI. Investment provisions in GATS relate both to matters of investment liberalisation and investment protection with differing degrees of comprehensiveness that regulate many instances of FDI in services.182 GATS provide four different forms of trade in services in the territory of another Member State, most importantly the supply of services through direct "commercial presence".183 The other three modes of supply of services are, cross-border supply, movement of supplier and movement of consumer.184 GATS contain almost all of the provisions necessarily found in BITs like the most favoured nation treatment, the national treatment, transparency of laws, and the regulations and free transfer of funds. These provisions overlap with similar substantive BIT provisions.185 The WTO jurisprudence in this respect can potentially be imported in the investment treaty arbitration.

Assessments and conclusions

The normative framework of customary international law for FDI has remained disputed among the developed and developing countries throughout history. Developed countries insisted on full protection and security for their citizens' assets abroad, and prompt, adequate and effective compensation for any expropriations. On the other hand, developing countries have asserted their right to expropriate and payment of compensation in accordance with their domestic standards. The customary rules of diplomatic protection of citizens' assets abroad were also problematic and inadequate. The UN General Assembly (UNGA) and the Organisation for Economic Co-operation and Development (OECD) and several other forums made unsuccessful efforts to bring the international community to an agreement on the substantive norms governing FDI. An analysis of all those efforts, however, reveals that they all, in one way or the other, tried to bring the application of international law as governing law to determine the rights and obligations of foreign investors and the host states.

Despite these differences on the customary norms, the world has witnessed a huge increase in FDI in the past few decades before the current economic crisis. By documenting the standards of treatment and rules on compensation, BITs have played a pivotal role in this enormous flow of FDI. The BIT jurisprudence has innovated investor-state arbitration that provides foreign investors with a readily available and potent dispute resolution forum and has reduced the risk of mutual tensions and the burden of diplomatic protection on the

BIT party states. Several institutions have emerged to provide international investment arbitration services. These institutions follow independent rules of procedure and provide impartial dispute resolution services, uninfluenced by the domestic policies or politics of the host states. The ITA system, however, has been blamed for compromising public interest and sustainability objectives in favour of foreign investors. These allegations pose the biggest challenge to the ITA system to prove itself as a legitimate system of rights adjudication. The abundance of BITs and ensuing ITAs, the increasing pressure on the arbitrators to protect public interests, the variety of parallel and conflicting state obligations, and ***Int. A.L.R. 204*** the nature of the stakes involved are making up the basic structure of the ITA system and its substantive norms. The procedure without substance creation of ITA has entrusted greater responsibility on the ITA tribunals for the development of international investment law as a balanced, reliable and responsible system.

It will be interesting to see how the ITA tribunals find solutions for colliding norms and whether any supervisory or proactive role to international law is assigned at ITAs, amongst the interplaying domestic law and substantive BIT provisions. It will also be interesting to see how the interpretive arguments in the shape of human rights and global obligations such as the WTO Agreements influence BIT interpretations at ITAs. Nonetheless any overarching principles stemming from these interactions will make the normative framework of international investment law affecting the quantum of compensation to be paid to foreign investors for loss or damage caused to their investments. It depends on the ITA tribunals to develop as a system protecting rights of foreign investors by balancing their rights with those of the citizens of host states.186

The real issue, therefore, is whether we can ever expect to have a situation where legitimate business interests of foreign investors are reconciled with legitimate development and public interest concerns of the host states? Is it really right, a belief that there will be no business or profit at all, unless all the traditional business imperatives of foreign investors are embraced? My understanding is that, although the ITA system in its current form cannot be sold as a perfect system of rights adjudication, one should not underestimate the genuine possibility of accommodation by using the available sophisticated ways in which the traditional rules of international engagement have been modified to the satisfaction of all concerned, including for the achievement of community objectives and collective values.187

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1. World Investment Report 2010: Investing in a Low-Carbon Economy, United Nations Publication, Sales No.E.10.II.D.2, Ch.III, p.75.

2. See, e.g. Ahmad A. Ghouri, "Investment treaty arbitration and the development of International Investment Law as a 'Collective Value System': A synopsis of a new synthesis" (2009) 10(6) *Journal of*

World Investment and Trade 921.

3. See for e.g. Ahmad A. Ghouri, "Positing for Balancing: Investment Treaty Rights and the Rights of Citizens" (2011) 4(1) *Contemporary Asia Arbitration Journal* 95.

4. See, for example Ernst-Ulrich Petersmann, "Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication?" in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration,* (New York: Oxford University Press, 2009), pp.3-20.

5. Julian Davis Mortenson, "The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law" (2010) 51(1) *Harvard International Law Journal* 257 (University of Michigan Public Law Working Paper No.249), available at SSRN: *http://ssrn.com/abstract=1911364* [Accessed November 10, 2011].

6. See, e.g. Wenhua Shan and Sheng Zhang, "FDI in China and the Role of Law: An Empirical Approach" (2011) 12(4) *Journal of World Investment and Trade* 457. Based on two empirical studies (2001 and 2008) Wenhua Shan and Sheng Zhang have discussed the role of investment agreements and applicable laws--domestic and international--when foreign investors decide whether or not to invest in a foreign country.

7. Cf. Kenneth J. Vandevelde, "A Brief History of International Investment Agreements" (2005) 12(1) *U.C. Davis Journal of International Law & Policy* 157.

8. On detailed distinctions between the notion of developed and developing countries, see the World Bank guidelines available at: *http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20420458%EBmenuPK:64133156%EBpagePK:64133150%EBpiPK:64133175%EBtheSitePK:239419,00.html* [Accessed November 10, 2011].

9. M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2004), pp.7-18.

10. Gus Van Harten, *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press, 2007), pp.77 and 78.

11. See, e.g. Kenneth J. Vandevelde, "A Brief History of International Investment Agreements" (2005) 157.

12. I. Brownlie, *Principles of Public International Law,* 6th edn (New York: Oxford University Press, 2003), p.509.

13. Campbell MeLachlan, Laurance Shore & Mathew Weiniger, *International Investment Arbitration-Substantive Principles* (Oxford: Oxford University Press, 2008), pp.265 and 266.

14. Kenneth J. Vandevelde, "A Brief History of International Investment Agreements" (2005) 157.

15. See the General Assembly Resolutions No.3201 (S-VI) and No.3281; cf. Kathigamar V.S.K. Nathan, "The role of ICSID in development of rules of international economic law" (1999) 2(3) *International Arbitration Law Review* 90.

16. See *OECD Report of the Drafting Group on Selected Topics Concerning Investment Protection,* DAFFE/MAI/DG1(95)3, available at: *http://www.oecd.org/daf/mai/htm/1-3b.htm* [Accessed November 10, 2011].

17. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (The Netherlands: Kluwer Law International, 2009), p.3.

18. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p 4.

19. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment*

(2009), pp.4 and 5.

20. Article 1 of the draft Articles on Diplomatic Protection adopted by the International Law Commission (ILC) at its Fifty-eighth Session (2006).

21. *The Mavrommatis Palestine Concessions* (1924) PCIJ Ser. A, No.2 at 12.

22. See International Law Commission, *First Report on Diplomatic Protection,* 15, UN Doc, A/CN.4/506 (2000).

23. ICJ in its recent Ahmadou Sadio Diallo Case (*Republic of Guinea v Democratic Republic of the Congo*) (summary of the judgment of May 24, 2007) referred to its earlier judgments reconfirming these customary international law rules.

24. See, e.g. *International Investment Law: Understanding Concepts and Tracking Innovations* (2008), Ch.1. Available at: *http://www.oecd.org/dataoecd/3/7/40471468.pdf* [Accessed November 10, 2011].

25. Starting from the Jay Treaty of 1794 (Treaty of Amity, Commerce and Navigation between Great Britain and United States). For details, see text and footnotes in Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.7.

26. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.8.

27. J.B. Moore, *International Law Digest* (Washington: Government Printing Office, 1906) Vol. VII, pp.103-135. Cf. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.9.

28. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.8.

29. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), pp.11 and 12.

30. See D. R. Shea, *The Calvo Clause, A Problem of Inter-American and International Law and Diplomacy* (Minnesota: University of Minnesota Press, 1955), p.18.

31. See *e.g.* Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.13.

32. Won-Mong Choi, "The Present and Future of Investor State Dispute Paradigm" (2007) 10(3) *Journal of International Economic Law* 731.

33. See comments made by Detlev F. Vagts in "Avoidance and Settlement of International Investment Disputes" (Proc. 38, April 12-14, 1984), 78 *American Society of International Law Proceedings,* pp.46 and 47.

34. See comments made by Detlev F. Vagts in "Avoidance and Settlement of International Investment Disputes" (Proc. 38, April 12-14, 1984), 78 *American Society of International Law Proceedings,* pp.46 and 47.

35. For example, NAFTA Ch.11, Energy Charter Treaty (1996), Pt 3 art.10.

36. *League of Nations Official Journal,* Special Supplement 53, p.9.

37. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.16

38. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.16

39. Article 9 of the Convention on Rights and Duties of States (Montevideo Convention), 1933 entered into force on December 26, 1934, available online at *http://www.molossia.org/montevideo.html* [Accessed

November 10, 2011].

40. See the reservation endorsed by the Secretary of State Cordell Hull, chairman of US delegation annexed to the Montevideo Convention.

41. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.18.

42. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.18.

43. Havana Charter for International Trade Organisation, 24 March 1948, UN Doc. No.E/CONF. 2/78, Sales No.1948.II.D.4.

44. Article 11(1)(b) of the Havana Charter.

45. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.20.

46. *International Code of Fair Treatment for Foreign Investment* (ICC Code), ICC publication No.129 1949.

47. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.21.

48. Reprinted by UNCTAD in *Internal Investment Instruments: A Compendium,* Vol.III, p.207 available online on the UNCTAD website *http://www.unctad.org/en/docs/dtci30vol3_en.pdf* [Accessed November 10, 2011].

49. For further analysis and information, see Arthur S. Miller, "Protection of Private Foreign Investment by Multilateral Convention" (1959) 53(2) *The American Journal of International Law,* pp.371-378.

50. Arthur S. Miller, "Protection of Private Foreign Investment by Multilateral Convention"(April 1959) 53(2) *The American Journal of International Law,* pp. 371-372

51. Reprinted by UNCTAD in *Internal Investment Instruments: A Compendium,* Vol.V, p.332, available online on the UNCTAD website *http://www.unctad.org/en/docs/dtci30vol3_en.pdf* [Accessed November 10, 2011].

52. Article VII(2) of the Draft Convention.

53. See the comments added by UNCTAD to the reprint in *Internal Investment Instruments: A Compendium,* Vol.V, p.332 available online on the UNCTAD website *http://www.unctad.org/en/docs/dtci30vol3_en.pdf* [Accessed November 10, 2011].

54. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.18.

55. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.18.

56. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.19.

57. *Year Book of the United Nations,* 1952, p.387.

58. *Year Book of the United Nations,* 1952, p.389.

59. *Year Book of the United Nations,* 1952, p. 387-390.

60. UNGA Res. 626 (VII) 1952, *Year Book of the United Nations,* 1952, p.390.

61. UN Resolution 1314(XIII) of December 12, 1958. *Year Book of the United Nations,* 1959, (Pt 1 s.4 Ch.5

Other Legal Questions), p.416.

62. UNGA Res. 1515 (XV) of December 15, 1960, para.5.

63. See generally the US Mutual Security Act of 1954 (68 Stat. 847) as amended in 1956 (70 Stat. 555, 558). Cf. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.19.

64. The text of the Draft is published in (July, 1961) 55(3) *American Journal of International Law* 548, 548-584.

65. UNGA Res. 1803 (XVII) of December 14, 1962

66. UNGA Res. 1803 (XVII) of December 14, 1962, para.3. Cf. Judge Stephen M. Schwebel, "The Overwhelming Merits of Bilateral Investment Treaties" remarks at Suffolk University Law School (October 31, 2008) 32 Suffolk Transnat'l L. Rev. 264.

67. UNGA Res. 1803 (XVII) of December 14, 1962, para.4. Judge Stephen M. Schwebel, "The Overwhelming Merits of Bilateral Investment Treaties" remarks at Suffolk University Law School (October 31, 2008) 32 Suffolk Transnat'l L. Rev. 264.

68. UNGA Res. 1803 (XVII) of December 14, 1962, para.4.

69. UNGA Res. 1803 (XVII) of December 14, 1962, para.8. Judge Stephen M. Schwebel, "The Overwhelming Merits of Bilateral Investment Treaties" remarks at Suffolk University Law School (October 31, 2008) 32 Suffolk Transnat'l L. Rev. 264.

70. Judge Stephen M. Schwebel, "The Overwhelming Merits of Bilateral Investment Treaties" remarks at Suffolk University Law School (October 31, 2008) 32 Suffolk Transnat'l L. Rev. 264.

71. See for example, E/3840, *Year Book of the United Nations,* 1963, Pt 1 s.4 Ch.7 Other Legal Matters, p.258; E/3840, "Permanent sovereignty over natural wealth and resources and Report of Secretary-General"; E/3960, "Report of Economic Committee" *Year Book of the United Nation* s, 1964, Pt 1 s.4 Ch.7 Other Legal Questions, p.469.

72. *Year Book of the United Nations,* 1965, Pt 1 s.2 Ch.5 The Economic Development of Developing Countries, p.334

73. UNGA Res. 3171, 1973, para.3.

74. UNGA Res. 3171, 1973, para.4.

75. UNGA Res. 1803 (XVII) of December 14, 1962.

76. UNGA Res. 3201, 1974, para.4(e)

77. Article 2(2)(c).

78. Article 2(2)(a) second sentence.

79. Judge Stephen M. Schwebel, "The Overwhelming Merits of Bilateral Investment Treaties" remarks at Suffolk University Law School (October 31, 2008) 32 *Suffolk Transnat'l L. Rev.* 265; Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.32.

80. The Draft Convention on the Protection of Foreign Property is available at *http://www.oecd.org/dataoecd/35/4/39286571.pdf* [Accessed November 10, 2011].

81. See art.1(a) and art.3 of the Draft Convention on the Protection of Foreign Property, available at *http://www.oecd.org/dataoecd/35/4/39286571.pdf* [Accessed November 10, 2011].

82. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.30.

83. Available online at *http://www.oecd.org/document/53/0,3343,en_2649_34887_1933109_1_1_1_1,00.html* [Accessed November 10, 2011].

84. See para.8. Cf. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.34.

85. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.33.

86. For detailed information on OECD's MAI, see *http://www.oecd.org/daf/mai/* [Accessed November 10, 2011] and *http://www.oecd.org/document/35/0,3343,en_2649_33783766_1894819_1_1_1_1,00.html* [Accessed November 10, 2011].

87. Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), signed at Bonn, on November 25, 1959.

88. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.43.

89. See, e.g. Deborah L. Swenson, "Why Do Developing Countries Sign BITs?" (2005) 12(1) *Journal of International Law and Policy* 131.

90. See for example, "South-South Investment Agreements Proliferating" IIA Monitor No.1 (2005), UNCTAD/WEB/ITE/IIT/2006/1, available at: *http://www.unctad.org/en/docs/webiteiit20061_en.pdf* [Accessed November 10, 2011].

91. The North American Free Trade Agreement (NAFTA) and Southern Common Market of Latin American Countries (MERCOSUR) are prominent FTAs and the Energy Charter Treaty is a prominent sectoral treaty containing provisions on investment.

92. On treaty abuse, see George Kahale III, "The new Dutch sandwich: The issue of treaty abuse" (October 10, 2011), 48 *Columbia FDI Perspectives,* available at: *http://www.vcc.columbia.edu/content/new-dutch-sandwich-issue-treaty-abuse* [Accessed November 10, 2011].

93. See example, Ahmad Ali Ghouri, "Investment treaty arbitration and the development of International Investment Law as a 'Collective Value System': A synopsis of a new synthesis" (2009) 10(6) *Journal of World Investment and Trade* 921.

94. Some may call it rather a "transnational" dispute since both of the parties are not states. See Gerhard Wegen in "Avoidance and Settlement of International Investment Disputes" (Proc. 38, April 12-14, 1984), 78. *American Society of International Law Proceedings,* p.49.

95. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.24.

96. See. Gerhard Wegen in "Avoidance and Settlement of International Investment Disputes" (Proc. 38, April 12-14, 1984), 78 *American Society of International Law Proceedings,* p.50. "Some of these continued to have impact after World War II, as in the Socobel case, the basis of which were two awards by an arbitration tribunal and one by the Permanent Court of International Justice, culminating in an attempt to execute and enforce those awards in municipal courts in the 1950s."

97. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.39.

98. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.25.

99. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.25.

100. See. Gerhard Wegen in "Avoidance and Settlement of International Investment Disputes" (Proc. 38, April 12-14, 1984), 78 *American Society of International Law Proceedings,* p.50.

101. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.26.

102. For some cotemporary discussion on the internationalisation of concessions agreement, see Ole Spiermann, "Applicable Law" Ch.3 in Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press 2008), p.92.

103. For more details, see Matthew Wendlandt, "SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes" (2008) 43(3) *Texas International Law Journal* 523, available at: *http://tilj.org/docs/08_Wendlandt_PUB.pdf* [Accessed November 10, 2011].

104. See for example art.VII of 1983 Haiti-U.S BIT (has not come into force to date).

105. K. Scott Gudgeon in "Avoidance and Settlement of International Investment Disputes" (Proc. 38, April 12-14, 1984) 78 *American Society of International Law Proceedings,* p.48.

106. Ole Spiermann, *The Oxford Handbook of International Investment Law* (2008), p.92.

107. Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001), pp.257 and 258.

108. Christoph Schreuer, *The ICSID Convention: A Commentary* (2001), pp.257 and 258.

109. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.44.

110. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.44.

111. September 1969, 8 ILM 1341.

112. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.45.

113. For detailed discussion on umbrella clauses, see Katia Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements" (Number 2006/3) *OECD Working Papers on International Investment,* available at *http://www.oecd.org/dataoecd/3/20/37579220.pdf* [Accessed November 10, 2011].; Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes" (2006) 14 *George Mason Law Review* 135; Stephan W. Schill, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties" (2009) 18 *Minnesota Journal of International Law* 1.

114. *Asian agricultural Products Ltd v Sri Lanka,* Final Award, June 27, 1990.

115. See "Latest developments in investor-State dispute Settlement", UNCTAD/WEB/ITE/IIA/2008/3, available at *http://www.unctad.org/en/docs/iteiia20083_en.pdf* [Accessed November 10, 2011].

116. See for example, "Investor-State Disputes Arising from Investment Treaties: A Review" UNCTAD Series on International Investment Policies for Development, (2005) United Nations Publication Sales No. E.06.II.D.1, p. 20, available online at: *http://www.unctad.org/en/docs/iteiit20054_en.pdf* [Accessed November 10, 2011].

117. International Law Commission, *Draft Articles on Diplomatic Protection,* UN Doc. A/CN.4/L.647 (2004)

118. United Nations Commission on International Trade Law, approved by the General Assembly of the United Nations by resolution No. 31/98 on December 15, 1976 (UNCITRAL Rules).

119. Convention on the Recognition and Enforcement of Foreign Arbitral Awards done on 10 June, 1958. To date 144 countries have signed the Convention, available at *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html* [Accessed November 10, 2011].

120. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.25.

121. For details, visit *http://www.iccwbo.org/court/* [Accessed November 10, 2011].

122. For details, visit *http://www.adr.org/* [Accessed November 10, 2011].

123. For details, visit *http://www.lcia.org/* [Accessed November 10, 2011].

124. For details, visit *http://icsid.worldbank.org/ICSID/Index.jsp* [Accessed November 10, 2011].

125. For details, visit *http://www.sccinstitute.com/* [Accessed November 10, 2011].

126. For details, visit *http://www.crcica.org.eg/* [Accessed November 10, 2011].

127. For details, visit *http://www.klrca.org.my/* [Accessed November 10, 2011].

128. With 180 concluded and 121 pending as per the date of this writing, for text of the ICSID Convention and Additional Facility Rules and other details, see online at *http://icsid.worldbank.org/ICSID/Index.jsp* [Accessed November 10, 2011].

129. For details, see online at: *http://www.sccinstitute.com/hem-3.aspx* [Accessed November 10, 2011].

130. For details, see online at: *http://www.crcica.org.eg/home.html* [Accessed November 10, 2011].

131. Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration came into force on the March 3, 2009 and are available at *http://www.rcakl.org.my/GUI/pdf/KLRCA-Rules-2008.pdf* [Accessed November 10, 2011].

132. Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration Pt I r.(1)(1), come into force on the March 3, 2009, available at *http://www.rcakl.org.my/GUI/pdf/KLRCA-Rules-2008.pdf* [Accessed November 10, 2011].

133. Harry L. Arkin, "International Ad Hoc Arbitration: A Practical Alternative" (1987)15(1) *International Business Lawyer* 5, 6.

134. See for example, Peter Katona, "Ad hoc arbitration rules: similarities and differences: A comparative review" in H. Bokor-Szego and Dordrecht (eds) *Questions of international law. Hungarian perspectives* (Nijhoff, 1986), Vol.3, pp.93-110.

135. Robert Jennings, "The Differences between Conducting a Case in the ICJ and in an Ad Hoc Arbitration Tribunal: An inside View", in Nisuke Ando, Edward McWhinney, Rüdiger Wolfrum (eds) *Liber Amicorum Judge Shigeru Oda* ", (The Hague: Kluwer, 2002), Vol.2, p.893.

136. See for example, Peter Katona, "Ad hoc arbitration rules: similarities and differences: A comparative review" (1986), pp.93-110.

137. Harry L. Arkin, "International Ad Hoc Arbitration: A Practicle Alternative" (1987), 15(1) *International Business Lawyer* 5, 8.

138. Surya P. Subedi, *International Investment Law* (Portland: Hart Publishing, 2008), p.176.

139. Surya P. Subedi, *International Investment Law* (2008), p.176.

140. Gus van Harten, *Investment Treaty Arbitration and Public Law,* (New York: Oxford University Press, 2007), p.49.

141. See for example, Moshe Hirsh, "Investment Tribunals and Human Rights: Divergent Paths?" in *Human Rights in International Investment Law and Arbitration,* edited by Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (Oxford: Oxford University Press, 2009), pp.97-114.

142. Gus van Harten, *Investment Treaty Arbitration and Public Law,* (2007), p.152

143. Gus van Harten, *Investment Treaty Arbitration and Public Law,* (2007), p.49

144. F. Marshall and H. Mann, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required* (International Institute for Sustainable Development, 2006), available at *http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf* [Accessed November 10, 2011].

145. See, e.g. Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier" (2008-2009) 47 *Columbia Journal of Transnational Law* 72.

146. See, e.g. *http://www.bayefsky.com/tree.php/area/treaties* [Accessed November 10, 2011] for information and texts of UN Human Rights treaties.

147. See, e.g. C. Reiner and C. Schreuer, "Human Rights and International Investment Law" in *Human Rights in International Investment Law and Arbitration* (2009), pp.82-96.

148. Ahmad A. Ghouri, "Positing for Balancing: Investment Treaty Rights and the Rights of Citizens" (2011) 4(1) *Contemporary Asia Arbitration Journal* 95.

149. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* (Oxford: Oxford University Press, 2008), p.20.

150. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* (2008), p.20.

151. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* (2008), p.20.

152. Rudlolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* (2008), p.20.

153. Although particular instances exist for example during the formulation of the Hague Conventions of 1899 and 1907, a draft project emerged dealing with access of individuals to international tribunals. Similarly the Central American Court of Justice in 1907 provided for access of individuals. After World War I the Mixed Arbitral Tribunals dealing with after war consequences also allowed for access of the individual. See G. Wegen in "Avoidance and Settlement of International Investment Disputes" (1984), 78 *American Society of International Law Proceedings,* p.51.

154. See "Fragmentation of international law: Difficulties arising from the diversification and expansion of international law" Report of the Study Group of the International Law Commission, Finalised by M. Koskenniemi, UN General Assembly Doc A/CN.4/L.682.

155. *El Paso Energy International Co v Argentine Republic* ICSID Case No.ARB/03/15, Decision on Jurisdiction, April 27, 2006 at [39], available at: *www.worldbank.org/icsid/cases/ARB0315-DOJ-E.pdf* [Accessed November 10, 2011]; cf. G. Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity, or Excuse" Presentation at the Annual Freshfields Lecture (2007) *Arbitration International;* J. D'Agostino, I. Maxwell, M. McClure and D. Wilkie, "A Discussion on the Use of Precedents in International Investment Arbitration and its Consequences. Does the Evolving Practice of Relying on Previous Investment Arbitration Awards Represent the Birth of a Customary International Law on Investment?" (SCC Arbitration Institute, June 1, 2011), available at: *http://www.sccinstitute.com/filearchive/4/40956/Justin¨D ·· Agostino_Report.pdf* [Accessed November 10, 2011].

156. *Phoenix Action v The Czech Republic,* ICSID Case No. ARB/06/5 (Award on Jurisdiction, 15 April 2009) at [133]; On treaty abuse, see George Kahale III, "The new Dutch sandwich: The issue of treaty abuse" (2011), 48 *Columbia FDI Perspectives,* available at: *http://www.vcc.columbia.edu/content/new-dutch-sandwich-issue-treaty-abuse* [Accessed November 10, 2011].

157. See, e.g. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.377; M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2004), p.435.

158. See, e.g. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.377; M. Sornarajah, *The International Law on Foreign Investment* (2004), p.435; Campbell MeLachlan, Laurance Shore & Mathew Weiniger, *International Investment Arbitration-Substantive Principles* (Oxford University Press, 2008), p.315; Thomas W. Walde and Borzu Sabahi, *The Oxford Handbook of International Investment Law,* p.1052.

159. M. Sornarajah, *The International Law on Foreign Investment* (2004), p.436, "Where expropriations are unlawful, for example, where they are motivated by racial discrimination or are by way of reprisals, different considerations would apply, as international wrongs are involved." Cf. T.homas W. Walde and Borzu Sabahi, "Compensation, Damages, and Valuation" Ch.26 in *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), pp.1052 and 1053.

160. Most BITs allow nationalisation/expropriation for public purpose if compensation is paid according to the specific criteria provided by the individual BITs. See, e.g. art.4 of the 1994 Austrian Model BIT; art.13 of the 2004 Canadian Model BIT; art.5 of the 1991 Denmark Model BIT.

161. See, e.g. art.6 of the 1991 Denmark Model BIT; art.12 of the 2004 Canadian model BIT; art.7 of the 2007 Norwegian Model BIT.

162. Thomas W. Walde and Borzu Sabahi, "Compensation, Damages, and Valuation" Ch.26 in *The Oxford Handbook of International Investment Law* (2008), p.1053.

163. Thomas W. Walde and Borzu Sabahi, "Compensation, Damages, and Valuation" Chapter 26 in *The Oxford Handbook of International Investment Law* (2008), p.1053. Cf. Christoph Schreuer, "Non-Pecuniary Remedies in ICSID Arbitration" (2004) 20(4) *Arbitration International,* pp.325-332.

164. Thomas W. Walde and Borzu Sabahi, "Compensation, Damages, and Valuation" Ch.26 in *The Oxford Handbook of International Investment Law* (2008), p.1057.

165. Factory at Chorzow (*Germany v Poland*), merits, 1928 PCIJ (Series A) No.17.

166. Thomas W. Walde and Borzu Sabahi, "Compensation, Damages, and Valuation" Ch.26 in *The Oxford Handbook of International Investment Law* (2008), p.1057.

167. *ICSID* Case No.ARB/05/20, *Ioan Micula v Romania* (Decision on Jurisdiction and Admissibility) at [167] and [168].

168. Ahmad A. Ghouri, "Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options" (2010) 16(6) *European Law Journal* 806.

169. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.92.

170. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), p.92.

171. Andrew Newcombe & Lluís Paradell, *Law and practice of investment treaties: standards of treatment* (2009), pp.92-94.

172. Campbell McLachlan, Laurence Shore & Mathew Weiniger, *International Investment Arbitration-Substantive Principles* (Oxford: Oxford University Press, 2008), p.80.

173. For example the "fork in road" provisions, see Campbell McLachlan, Laurence Shore & Mathew Weiniger, *International Investment Arbitration-Substantive Principles* (2008), p.95.

174. Ahmad A. Ghouri, "Positing for Balancing: Investment Treaty Rights and the Rights of Citizens" (2011) 4(1) *Contemporary Asia Arbitration Journal* 95.

175. Gus Van Harten & Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17(1) *The European Journal of International Law,* pp.121-150.

176. Treaty Establishing the European Economic Community (signed on March 25, 1957 and entered into force on January 1, 1958) and Consolidated Version of the Treaty on the Functioning of the European Union, [2008] OJ C 115/47.

177. See Ahmad A. Ghouri, "Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options" (2010) 16(6) *European Law Journal* 806.

178. For discussion on the investment coverage in the Uruaguay Round see Suave P, "A First Look at Investment in the Final Act of the Uruguay Round" (1994) 28(5) *Journal of World Trade* 5.

179. Pippa Read, "International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI" (1999) 11(2) *Bond Law Review* 360, available at: *http://www.austlii.edu.au/au/journals/BondLRev/1999/22.html#fnB69* [Accessed November 10, 2011].

180. Agreement on Trade-Related Investment Measures (TRIMS); General Agreement on Tariffs and Trade (1994) Annex 1, available at *http://www.wto.org/wto/legal/finact.htm* [Accessed November 10, 2011].

181. TRIMs art.8 provides that disputes concerning TRIMs will be settled in accordance with the provisions of arts XXII and XXIII of GATT 1994, as elaborated in the Dispute Settlement Understanding. According to these provisions, only Member States have standing to pursue disputes through the WTO dispute resolution body.

182. Pippa Read, "International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI" (1999) 11(2) *Bond Law Review* 360, available at: *http://www.austlii.edu.au/au/journals/BondLRev/1999/22.html#fnB69* [Accessed November 10, 2011].

183. GATS art.1.2(c).

184. GATS art.1.2

185. Pippa Read, "International Investment in the WTO: Prospects and Challenges in the Shadow of the MAI" (1999) 11(2) *Bond Law Review* 360, available at: *http://www.austlii.edu.au/au/journals/BondLRev/1999/22.html#fnB69* [Accessed November 10, 2011].

186. Aron Broches in "Avoidance and Settlement of International Investment Disputes" (1984), 78 *American Society of International Law Proceedings,* p.55.

187. Inspirations from Samuel K.B. Asante in "Avoidance and Settlement of International Investment Disputes" (1984), 78 *American Society of International Law Proceedings,* p.56.