The Emerging Global Regime for Investment

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Although the 3000 international investment treaties concluded since the end of World War II are separate and distinct international legal instruments, they constitute, as a group, an emerging global regime for investment. Drawing on regime theory from the field of international relations, this Article examines the elements of the international investment regime, the reasons for its development, the goals that it pursues, and the challenges that it faces. While having all the characteristics of other international regimes, the investment regime also has three unique features: it has been bilaterally, rather than multilaterally, constructed; it decentralizes and privatizes decisionmaking processes; and it is not based on a multilateral international organization. All of these features have significant consequences for the functionality and sustainability of the regime. The regime also faces four major challenges: (1) disappointing regime results; (2) perceived defective decisionmaking processes and unjustified constraints on national sovereignty; (3) divergence of participant expectations; and (4) the impact of national and global economic crises. On the other hand, certain other factors tend to give the regime a sticky quality that makes the departure of members difficult. Nonetheless, the international investment regime will require wise management and flexible leadership in the future if it is to withstand these challenges and achieve its potential.

INTRODUCTION: RECONCEPTUALIZING INVESTMENT TREATIES

Investment treaties, often referred to as “international investment agreements” (“IIAs”), are essentially instruments of international law by which states: (1) make commitments to other states with respect to the treatment they will accord to investors and investments from those other states, and (2) agree on some mechanism for the enforcement of those commitments. A

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fundamental purpose of investment treaties, as indicated by their titles, is to protect and promote investment.\(^1\)

Since the end of World War II, in what is certainly one of the more active efforts at international lawmaking in the last half-century, the nations of the world have negotiated and signed approximately 3000 investment treaties. During that time, three basic types of investment agreements have evolved: (1) bilateral investment treaties, commonly known as “BITs,” of which 2608 were in effect at the end of 2008, with 179 countries as parties to at least one such BIT;\(^2\) (2) some 254 bilateral economic agreements containing investment chapters, such as the free trade agreements pursued by the United States,\(^3\) and economic partnership and cooperation treaties advanced by Japan,\(^4\) which replicate many, if not most, of the provisions in bilateral

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investment treaties; and (3) other investment-related agreements involving more than two states, such as the North American Free Trade Agreement ("NAFTA"), a treaty among the United States, Canada, and Mexico, in which Chapter Eleven, itself an investment treaty, and the Energy Charter Treaty, a multilateral convention among fifty-one countries, set down rules for trade and investment in the energy sector.

The six decades since the end of World War II have thus witnessed a widespread treatification of international investment law. Today, unlike the situation that prevailed before World War II, "foreign investors in many parts of the world are protected primarily by international treaties . . . . For all practical purposes, treaties have become the fundamental source of international law in the area of foreign investment." Indeed, in 2003, an arbitral tribunal that included a former president of the International Court of Justice suggested that the 2000 BITs then in existence had shaped the customary international law with respect to the rights of investors.

But beyond the application of specific treaties to individual investors, one may well ask: what is the significance of this prodigious amount of treaty
making over the last six decades? To what does it all add up? Scholars have advanced three basic concepts with which to view the accumulated treaties. Some have argued that each of these 3000 treaties are lex specialis that do nothing more than define specific rules for regulating investments between pairs of countries that are parties to the treaties.\(^{11}\) According to this view, the whole is merely the sum of its parts. A second view holds that because of the strong similarities among treaties, the common concepts, the language, the structure, the processes employed in these treaties, and the large number of countries involved in the international investment agreement negotiation movement, these treaties constitute evidence of customary international law.\(^ {12}\) This debate is not new. Indeed, virtually since the beginning of the BIT movement, scholars have pondered the extent to which investment treaties constitute or form customary international law with respect to foreign investment. One argument is that investment treaties "establish and accept and thus enlarge the force of traditional conceptions" of the law of state responsibility for foreign investment.\(^ {13}\) Others have countered that, despite their prevalence, investment treaties have effect only between the parties to them because they are not sufficiently uniform to establish custom accepted by the international community.\(^ {14}\)

Yet a third characterization of the mass of investment treaties is that they constitute a "network"\(^ {15}\); however, observers who use that term usually do so without analyzing in depth the full meaning and significance of this concept in the investment domain. The problem with the term "network" is that it suggests the existence of a structural connection between the constituent parts of the network.\(^ {16}\) However, no structural connections exist among investment treaties; each is separate, independent, and freestanding. Consequently, using the term "network" to describe the work of nations in the investment field since the end of World War II would seem to be inappropriate.\(^ {17}\)

13. Mann, supra note 2, at 249.
17. It is true that in applying the most-favored-nation clauses in a particular investment treaty, tribunals examine whether investors from other countries are given more favorable treatment under other treaties; however, that act of referring to another treaty does not create a structural or network connection between the two treaties concerned. See, e.g., Maffezi v. Spain, 5 ICSID Case No. ARB/97/7 (Jan. 25, 2000), 387, 409–10 ¶ 61.
In the search for a way to understand and conceptualize the results of the last six decades of investment treaty making, this Article suggests another approach. Borrowing from international relations theory, it argues that the existing body of investment treaties, though separate and distinct, constitutes a regime. In developing this argument, Part I of the Article examines the nature of the regime concept and the possible utility of its application to international investment treaties. Part II considers the motivations and factors that gave rise to the international investment regime’s creation and its members’ participation. Part III discusses the general operation of this treaty regime. Part IV applies regime theory to the investment regime by analyzing its elements, notably its principles, norms, rules, and decisionmaking processes. Part V discusses the special nature of this emerging global regime and how it differs from other regimes in international relations. Finally, Parts VI and VII consider the challenges that it faces and its likely success in dealing with them.

I. A Regime for International Investment

An international regime is essentially a system of governance in a particular area of international relations. Focusing on the elements of a regime, a leading scholar of international relations has advanced a more particularized and widely accepted definition of an international regime as “. . .principles, norms, rules, and decisionmaking procedures around which actors’ expectations converge in a given area of international relations.” International regimes, according to two other scholars, “. . .constrain and regularize the behavior of participants, affect which issues among protagonists are on and off the agenda, determine which activities are legitimized or condemned, and influence where, when, and how conflicts are resolved.” Thus, one may argue that international investment treaties as a group represent a convergence of expectations by states as to how host governments will behave toward investments from other regime members. The norms and rules embodied in investment treaties are intended to constrain and regularize such behavior in order to fulfill those expectations.

One of the ways in which international law becomes a reality, in the sense of actually affecting the behavior of both states and private parties, is through the creation of international regimes. For nearly three decades, international relations scholars have worked to develop a theory of regimes to
explain the phenomenon of cooperation among states in an otherwise anarchic world. Although regime theory as a body of scholarly endeavor has been the almost exclusive province of political scientists rather than international lawyers, some of its insights and frameworks may be useful in explaining how and why international investment law works the way it does.

Although each of the 3000 investment treaties is legally separate and distinct, thus binding only the states that have concluded it, investment treaties as a group are remarkably similar with respect to structure, purpose, and principles. For example, nearly all international investment agreements cover the following nine topics: (1) definitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) monetary transfers; (5) expropriation and dispossession; (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications, and terminations; and (9) dispute settlement. In addition, the language used in expressing these principles is often identical, so that it is not uncommon, for example, to find that both counsel and arbitrators will refer to arbitral decisions in cases interpreting one type of investment treaty, such as the investment chapter of NAFTA, to interpret a similar provision in a totally separate and unrelated treaty, like a BIT between Chile and Malaysia. It is for this reason that one may view these agreements, despite individual differences in text, as constituting a single international regime for investment.

Two principal theoretical explanations have been advanced as to why states form regimes. For some scholars associated with the realist school, regimes are a means by which a hegemonic state asserts power in order to advance its own interests and thereby attain and preserve relative gains over other countries. According to this view, often referred to as the theory of hegemonic stability, a regime cannot exist without a hegemon. An initial problem with applying this theory to explain the existence of the invest-


23. See, e.g., MTD v. Chile, 12 ICSID Case No. ARB/01/7 (May 25, 2004) 3, 22, 110–11.

24. Professor Reuven S. Avi-Yonah has argued that the 2000 or more bilateral tax treaties also constitute an international tax regime because of their common principles, language, and similar policies. However, he does not define in depth the meaning of “regime,” nor does he rely on international relations and regime theory in making his analysis. See REUVEN S. A VI-YONA H, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME (2007).


ment regime is that it is difficult to identify the specific hegemon that has advanced and maintained the investment treaty system. Normally, a hegemon is a particular, dominant country, such as the United States, a country that, in the words of one scholar, “is powerful enough to maintain the essential rules governing interstate relations and willing to do so.” A history of the investment treaty movement reveals that many capital-exporting countries, through their individual and largely uncoordinated actions, have been active in its creation. No particular country has acted as a hegemon in its development and maintenance in order to advance its own particular interests and gain an advantage over all other countries. Thus, in the years immediately after World War II, the United States would initiate an effort to introduce investment protection provisions into its bilateral friendship, commerce, and navigation treaties. Although it would sign approximately twenty-three such agreements between 1946 and 1966, the effort lost momentum as developing countries, increasingly skeptical of the benefits of foreign investment, demonstrated growing reluctance to make the types of guarantees requested by the U.S. government to protect investments abroad by their nationals and companies. In 1959, Germany, which had lost all of its foreign investments as a result of its defeat in World War II, would launch the bilateral investment treaty movement by negotiating the first BITs with Pakistan and the Dominican Republic. Other European countries soon followed suit by establishing their own programs to negotiate BITs so as to protect the investments of their nationals and companies abroad, particularly in their former colonies. Spurred in part by the experience of the Europeans, the United States established its own BIT program in 1981. Subsequently, BITs involving two developing countries, what one may call ‘South-South’ BITs, would begin to emerge. By the end of 2005,

27. Id. at 34–35 (quoting Robert O. Keohane & Joseph S. Nye, Power and Interdependence: World Politics in Transition 44 (1977)).
30. Id.
31. See UNCTAD, BITs in the Mid-1990s, supra note 2, at 8.
the number of 'South-South' BITs had grown to 644, representing 26% of BITs overall. Non-western countries with large FDI outflows, such as China34 and the Republic of Korea, are among those with the highest number of BITs.35 As of 2008, the leading developing country among BIT signatories was China with 120 BITs, followed by Egypt with 100, many of which were signed with other developing economies.36

One could argue, of course, that capital-exporting countries have acted as a collective hegemon to create and maintain the investment regime and thereby maintain their global economic advantage, particularly in relation to developing, capital-importing nations. However, given the number and diversity of capital-exporting states, designating them as a "hegemon" would distort the usual meaning of that term, which traditionally has referred to a single state. On the other hand, the rhetoric of certain developing country leaders, particularly in Latin America, who have viewed the spread of bilateral treaties as a threat to their countries' sovereignty, suggests that they do indeed view capital-exporting countries as a collective hegemon that has put in place a system of international investment rules designed to preserve their dominance in the global economy vis-à-vis developing countries.37 For these leaders and many of their followers, the investment treaty regime is a clear manifestation of an effort at hegemonic stability.

The debate over whether the investment regime is an act of hegemonic stability or an act of cooperation to advance the interests of all regime participants may grow sharper in the future. The ultimate resolution of that debate may have significant consequences for the legitimacy of the regime in the eyes of the world.

A second explanation for the creation of an investment regime is that countries build regimes because they believe that such a cooperative arrangement will advance their individual interests. Regimes, according to this explanation, are instances of international cooperation in an otherwise anarchic world of independent sovereign states.38 States form international regimes in order to deal with problems in a manner that advances their interests. Their stated aim in building a global investment regime has been to facilitate the flow of capital and related technology among states so as to promote economic development and prosperity,39 often by solving the problem of for-

36. Id. at 15.
39. Investment treaty preambles, which state the contracting party’s goals, often provide that the aim of the treaty is to promote “economic cooperation” between the concerned states. See, for example, the
eign investment insecurity due to the risk of adverse actions by governments in host countries. The basic building block for this emerging international investment regime has been the investment treaty.

Nations create and join regimes out of a desire to reduce the relative costs of desired transactions. Thus, capital-importing states have been led to sign investment treaties in the belief that the treaty commitments they make to protect foreign investment will reduce the perceived risks associated with investing in their territories and thereby lower their costs of obtaining needed foreign capital and technology. Capital-exporting countries, for their part, have joined the regime in hopes of reducing the foreign investment transaction costs associated with adverse actions by host country governments, such as expropriation without compensation and negative governmental interference with enterprises owned by their nationals. In a similar vein, international regimes, while lowering the costs of transactions that are considered legitimate, also raise the costs of those that are deemed illegitimate. Thus, the investment regime, through its dispute resolution mechanisms and particularly investor-state arbitration, secures compliance with regime norms and rules by imposing costly payments in the form of damage awards on regime members who engage in actions that violate regime norms and rules.

The use of regime theory as a lens to examine the mass of investment treaties negotiated over the last sixty years would seem to have several potential advantages. First, it offers an analytical framework to understand and


Similarly, the preamble of the BIT between Argentina and Spain expresses that the states are “[d]esiring to intensify economic cooperation for the economic benefit of both countries. . . .” Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina [Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic], Arg.-Spain, Oct. 3, 1991, 1699 U.N.T.S. 188, translated in 1699 U.N.T.S. 202.

41. See Guzman, supra note 40; see also Salacuse, supra note 8, at 158–63.
42. Kenneth J. Vandevelde, A Brief History of International Investment Agreements, in The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows 3, 13 (Karl P. Sauvant and Lisa E. Sachs eds., 2009). The average number of nationalizations of foreign investor property per year rose steadily from 1960, the year when many former colonies became independent, when such measures averaged slightly more than fifteen, until 1975, when they reached over fifty, resulting in significant losses to foreign investors. 1 U.N. Conference on Trade and Development, Investor-State Disputes Arising From Investment Treaties: A Review, UNCTAD/ITE/IIT/2005/4 (Feb. 1, 2005).
capture the essential, common elements of the 3000 legally separate and distinct treaties and to understand the systemic nature of what states have created through the treaty making process. Second, it may enable observers and scholars to better understand the dynamics of the relationships established by these treaties among states and between states and foreign investors. Examining the accumulated treaties through the lens of traditional treaty analysis alone, on the other hand, often yields a static picture that does not fully reflect the dynamism and fluidity of the system that such treaties have created. Traditional treaty analysis tends to concentrate on investor rights under individual treaties rather than on the international relationships that treaties have created among states. Third, regime theory may make more visible the political nature and dimensions of these treaties, for political issues are often at the heart of investment relationships between states and are also deeply imbedded in investor-state disputes, regardless of their applicable legal superstructures. Strictly legal analyses of treaty provisions and investor-state disputes often overlook this important dimension. And finally, one might also suggest that while lawyers and arbitrators do not normally use the term “regime” in referring to investment treaties, they implicitly treat investment treaties as constituting a regime in that they regularly refer to prior decisions applying one treaty in order to interpret a wholly separate treaty.44 Regime analysis may make explicit what has heretofore been implicit.

II. Motivations and Factors for Regime Creation and Member Participation

A. Background

States form and participate in international regimes in order to protect and advance their national interests. What then are the interests that have led states to conclude the investment treaties that make up the emerging global investment regime? In order to understand this phenomenon, one must distinguish the interests of capital-exporting states from those of capital-importing states.

B. The Interests of Capital-Exporting States

Capital-exporting states have been the primary force driving the negotiation of investment treaties and the resulting creation of an international investment regime. They undertook this effort to build an international regime for investment because they believed that the existing international law at the end of World War II—what one might call the “ancien régime” —failed to adequately protect the foreign investments of their nationals from

44. See, e.g., MTD v. Chile, 12 ICSID Case No. ARB/01/7 (May 25, 2004) 3, 22 ¶ 110–11.
injurious actions by host country governments, such as the expropriation of investor property rights or the cancellation of investor contractual rights.\textsuperscript{45} The need for such protection was heightened by the prospect of post-War economic expansion and the decolonization of territories that had previously been under the control of capital-exporting states. At that time, foreign investors and their home governments seeking “the protection of international investment law encountered an ephemeral structure consisting largely of scattered treaty provisions, a few questionable customs, and [some] contested general principles of law.”\textsuperscript{46} As I noted in an article with Nicholas P. Sullivan, foreign investors judged the existing international legal structure to be seriously deficient in several respects.\textsuperscript{47}

“First, applicable international law failed to take account of contemporary investment practices [and needs, and did not] address important issues of concern to foreign investors.”\textsuperscript{48} “For example, customary international law had virtually nothing to say about the right of foreign investors to make monetary transfers from [a] host country\textsuperscript{49} or to bring foreign managers and technicians into a host country to operate their investments.\textsuperscript{50} “Second, the principles that did exist were often vague and subject to varying interpretations. [For example,] although there was strong evidence that customary international law required the payment of compensation upon nationalization of an investor’s property, no specific principles had crystalized as to how that compensation was to be calculated.”\textsuperscript{51}

Third, the existing international legal framework was a topic of strong disagreement between industrialized countries and capital-importing developing nations.\textsuperscript{52} For example, while the governments of capital-exporting countries claimed that international law imposed an obligation on host countries to accord foreign investors a minimum standard of protection and required that states expropriating the property of foreign investors pay adequate compensation, many non-Western governments denied the existence of such international rules.\textsuperscript{53} The Soviet Union’s massive nationalizations without compensation of foreign investments at the time of the Russian Revolution,\textsuperscript{54} and Latin America’s Calvo Doctrine, which held that foreign

\textsuperscript{45} See Vandevelde, supra note 42, at 5, 13.
\textsuperscript{46} Salacuse & Sullivan, supra note 2, at 68.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 68. As recently as 2004, one scholar of international investment law stated that “[t]here are few customs in this sense in the field of foreign investment.” Sornarajah, supra note 11, at 89.
\textsuperscript{49} Salacuse & Sullivan, supra note 2 at 68.
\textsuperscript{50} See, e.g., Salacuse & Sullivan, supra note 2; Surya P. Subedi, The Challenge of Reconciling the Competing Principles Within the Law of Foreign Investment With Special Reference to the Recent Trend in the Interpretation of the Term “Expropriation,” 40 INT’L LAW. 121, 123–31 (2006).
\textsuperscript{51} Salacuse & Sullivan, supra note 2 at 68–69; Subedi, supra note 50.
\textsuperscript{52} Salacuse & Sullivan, supra note 2 at 69.
\textsuperscript{53} Id.
\textsuperscript{54} See SAMY FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 17–23 (1953) ("The Decree of October 26 (November 8), 1917, promulgated by the Second All-Russian Congress of Soviets, abolished private property in land without compensation . . . . [T]he Decree of December 14, 1917, completed by
investors had no more rights than nationals, were subject only to the laws and courts of the host country alone, and were not entitled to seek the diplomatic protection of their home states, represented long-standing challenges to Western views on the content of international investment law. With the advent of decolonization after World War II, many newly independent countries, asserting that they had played no part in the development of Western conceptions of international law and believing that existing international rules served only to maintain their poverty, also challenged Western views of international investment law. They demanded that the international legal order take account of their particular needs and circumstances. Their position on foreign investment was incorporated into Article 2 of the 1974 U.N. Charter of Economic Rights and Duties of States, which was adopted by the U.N. General Assembly over the opposition or abstention of developed countries.

Finally, existing international law offered foreign investors no effective enforcement mechanism for pursuing claims against host countries that seized investments or refused to respect contractual obligations. As a result, investors had no assurance that investment contracts and arrangements...
made with host country governments would not be subject to unilateral change at some later time. Despite its status as an affiliate of the World Bank, the International Centre for Settlement of Investment Disputes ("IC-SID"),\(^{60}\) formally established in 1966 by an international convention to resolve disputes between host countries and foreign private investors, required the specific consent of the parties for an ICSID tribunal to exercise jurisdiction over an investor-state dispute, something that most countries were reluctant to give at the time. As a result, the Centre did not hear its first case until 1972.\(^{61}\) Injured foreign investors who were unable to negotiate a satisfactory settlement, secure an arbitration agreement with a host government, or find satisfaction in the local courts had few options other than to seek diplomatic protection, by which their home country governments sought to obtain some redress from offending host governments. By its very nature, the process of diplomatic protection was more political than legal and, in any event, yielded results that were always uncertain and invariably slow.\(^{62}\)

In sum, as global economic expansion began to accelerate in the years following World War II, the existing international law on foreign investment was, for most foreign investors, incomplete, vague, contested, and without an effective enforcement mechanism. Indeed, one may say that the ancien régime for investments under international law was not an international regime at all. If one accepts Robert Keohane’s definition of cooperation as the "co-ordinated mutual adjustment of states’ policies yielding benefits to participants,"\(^{63}\) one may also say that institutionalized cooperation in the field of foreign investment did not really exist. Because of these defects, investors and their home governments needed to find another means to protect foreign investments from the injurious actions of host country governments. To protect the interests of their companies and investors, capital-exporting countries sought to build an international regime for investment that, to the furthest extent possible, would be complete, clear, specific, uncontestable, and enforceable. The means to achieve that end would lie in negotiating investment treaties. Beginning in the late 1950s, individual capital-exporting countries prepared bilateral investment models or prototypes\(^{64}\) often after significant consultation with domestic interest groups, and then embarked on a program of negotiating individual BITs with those


\(^{63}\) Robert Keohane, The Analysis of International Regimes, in REGIME THEORY, supra note 21, at 23.

countries in which their nationals had actual or potential investments.65
These models, from which they were not usually willing to depart signifi-
cantly, gave capital-exporting countries distinct advantages in their treaty
negotiations,66 and can therefore be viewed as an important foundation of
the regime-building effort. The process of regime building through bilateral
treaties continues unabated today.

C. The Interests of Capital-Importing Countries

The interests of capital-importing countries in joining the investment re-
gime seem less clear and distinct than those of capital-exporting countries,
whose fundamental drive was to protect the investments of their nationals
from certain negative effects of host country actions, policies, and laws. In-
deed, one may say that the widespread, though uneven, participation of de-
veloping and capital-importing countries in the emerging investment
regime presents a puzzle:67 why do developing countries, who usually have
few national investors in need of protection abroad, sign investment treaties
whose effect is to restrain their own governments in their dealings with
foreign investors?68 Concluding and sustaining a treaty, like any agreement,
requires the existence of a basic bargain between the parties, a bargain from
which both sides believe they will derive benefits. An investment treaty
between two developed states, each of whose nationals expect to invest in
the territory of the other, would be based on the notion of reciprocity and
mutual protection. One side promises to protect the investments of the
other side’s nationals in return for the protection of its own nationals’ invest-
ments in the other side’s territory. But that basic bargain would not seem to
exist in a bilateral investment treaty between a developed, capital-exporting
state and a poor developing country whose nationals would be unlikely to
invest abroad. One may therefore ask why poor countries, whose nationals
have little prospect in the near future, if ever, of undertaking their own
foreign investments, would sign investment treaties designed to protect the
investments of foreigners? Why would it be in these developing countries’
interest to constrain their own sovereignty by concluding treaties with the
very purpose of limiting the freedom of host governments to take whatever
legislative or administrative action that they may find necessary to advance
and protect national interests?

One can identify five possible motivations to explain this treatification
puzzle: (1) encouraging foreign investment in capital-importing countries;
(2) relationship building; (3) economic liberalization; (4) encouraging do-

65. For examples of such BIT models, see Dolzer & Schreuer, supra note 64, at 352–417.
67. On the distribution of treaties among the countries of the world, see generally UNCTAD, World
68. See Guzman, supra note 40.
2010 / The Emerging Global Regime for Investment

mestic investment; and (5) improving governance and strengthening rule of law. Let us examine each one briefly.

1. Encouraging Foreign Investment

The most common explanation for the BIT puzzle is that developing countries sign investment treaties in order “to promote foreign investment, thereby increasing the amount of capital and associated technology that flows to their territories.”69 The basic assumption of this explanation is that an investment “treaty with clear and enforceable rules to protect and facilitate foreign investment reduces risks that the investor would otherwise face and that such reductions in risk, all things being equal, encourage investment.”70

In the 1980s and 1990s, as other forms of development finance from commercial banks and official aid institutions became more difficult to obtain, “developing countries increasingly felt the need to promote foreign investment in order to foster economic development.”71 They saw their participation in investment treaties “as one means of pursuing a campaign of investment promotion, and [they] therefore signed [such treaties] in increasing numbers.”72 Thus, an investment treaty “between a developed and a developing country is founded on a grand bargain: [the] promise of protection of capital in return for the [future] prospect of more capital.”73 The dual objective of investment promotion and investment protection is clearly evident.

69. Salacuse & Sullivan, supra note 2 at 77; see also Andrew T. Guzman, Explaining the Popularity of Bilateral Investment Treaties, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT 73, supra note 42, at 85–86.
70. Salacuse & Sullivan, supra note 2, at 77.
71. Id. at 77. Up to 1981, loans, primarily from foreign commercial banks, were the primary sources of foreign capital inflows to developing countries, accounting for approximately 85% of such flows, while foreign direct investment accounted for only approximately 8%. Immediately after the debt crisis of 1982, when many developing countries became unable to service those loans, total capital flows to developing countries dropped dramatically and loans only accounted for less than 38% of that amount. Barry P. Bosworth et al., Capital Flows to Developing Economies: Implications for Saving and Investment, 1999 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 143, 151 (1999). After developing countries recovered from the debt crisis, direct foreign investment increased steadily both in absolute terms and as a percentage of total capital inflows. Thus in 2009, total direct foreign investment in developing countries exceeded US$400 billion, while other private flows were negative, and official development assistance was slightly more than US$100 billion. U.N. Conference on Trade and Development, World Investment Report 2009: Transnational Corporations, Agricultural Production, and Development, at 5, U.N. Doc. UNCTAD/WIR/2009 - E.09.II.D.15 (Sept. 17, 2009).
72. Salacuse & Sullivan, supra note 2, at 77; see U.N. Conference on Trade and Development, supra note 71 at 34. The coincidence of increased foreign investment and increased numbers of BITs during this period does not establish the existence of a causal connection between the two, an issue that has been the subject of significant research and debate. See, e.g., Salacuse & Sullivan, supra note 2, at 97–111. See generally THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, supra note 42.
73. Salacuse & Sullivan, supra note 2, at 77.
in the full title of most BITs: “Treaty Concerning the Reciprocal Encouragement and Protection of Investments.”

2. Relationship Building

A second explanation for the puzzle is that developing countries sign investment treaties with developed countries in order to strengthen their relationships with those countries and thereby obtain other benefits and favors. Such strengthened relationships could lead to increased trade, foreign aid, security assistance, technology transfers, or other benefits. For example, when a left-of-center government came to power in Uruguay in 2005 after a previous government had signed but not yet ratified a BIT with the United States, the new government renegotiated and ultimately ratified the BIT, justifying its actions on the grounds that the agreement would protect and strengthen Uruguay’s important export markets in the United States. Thus, even though a developing country may not be guaranteed to see increased investment flows from its developed-country treaty partner as a result of signing a BIT, it may have strong expectations that the BIT will result in other benefits.

3. Economic Liberalization

A third explanation is that developing countries have signed BITs as part of their efforts to liberalize their economies and thereby promote economic growth. Beginning in the late 1980s, many developing countries that had previously built their economies on state planning, state enterprises, heavy regulation of the private sector, and restricted economic interactions with other countries began to abandon those policies in favor of the neo-liberal economic model, known as the “Washington Consensus.” This model looks to markets rather than to state plans in resource allocation, focuses on the private sector rather than on state corporations as the primary engine of economic growth.


75. Foreign aid to developing countries has been a function of numerous factors, including strategic, commercial, political, and humanitarian considerations. Peter Hjertholm & Howard White, Foreign Aid in Historical Perspective: Background and Trends, in FOREIGN AID AND DEVELOPMENT: LESSONS LEARNT AND DIRECTIONS FOR THE FUTURE 99–100 (Finn Tarp ed., 2000). As a result, it is difficult to know precisely the impact of a donor country’s aid policies on its BIT negotiations with a specific aid recipient. From the point of view of a recipient country, one indicator of the quality of aid is the percentage that is “untied,” i.e. not required to be spent on goods and services from the donor country. It is interesting to note that those European countries whose aid was the least “tied” were among the countries that had concluded the largest number of BITs in 1981. In that year, when the percentage of untied aid given by the United States, which had yet to launch a program to negotiate BITs, was only 35%, Germany, with untied aid of 74%, had signed 49 BITs; Switzerland (50% untied aid) had signed 33 BITs; the Netherlands (57% untied aid) had signed 16 BITs; and Sweden (84% untied aid) had signed 8 BITs. Id. at 96; see also UNCTAD, BITs in the Mid-1990s, supra note 2, at 159–217.

economic activity, and emphasizes deregulation of economies and openness to international economic transactions, including direct foreign investment. Such developing countries viewed investment treaties as one instrument among many others that could be used to achieve more liberal economies.

Some developed countries, and the United States in particular, also saw investment treaties as a means to facilitate the liberalization of developing country economies. Thus, they sought to encourage or induce investment and market liberalization in their negotiating partners. In their view, investment treaties, by facilitating the entry of a treaty partner’s investments and creating conditions favoring its operations, would have the effect of liberalizing that country’s economy as a whole. As developing countries have reformed their economies to foster private enterprise, creating favorable conditions for foreign investment has been a significant part of that process. Although the goal of investment and market liberalization is not usually mentioned explicitly in investment treaties themselves, that goal has clearly been in the minds of developed country negotiators and is sometimes reflected in background documents.

4. Encouraging Domestic Investment

Related to the objective of economic liberalization is the goal of encouraging domestic entrepreneurs, who may be skeptical of their governments’ intentions toward private capital, to undertake productive investments. An

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78. The Deputy U.S. Trade Representative stated the United States’ goals in negotiating BITs as follows:

The BIT program’s basic aims are to: 1) protect U.S. investment abroad in countries where U.S. investors’ rights are not protected through existing agreements; 2) encourage adoption in foreign countries of market-oriented domestic policies that treat private investment fairly, and 3) support the development of international law standards consistent with these objectives.


79. One exception to this is the Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion, and Protection of Investment, S. Korea-Japan, Mar. 22, 2002, ¶ 4, available at http://www.unctad.org/sections/dite/iia/docs/korea_japan.pdf, which in addition to including the word “liberalisation” in its title also states in its Preamble that the contracting parties recognize “. . . the growing importance of progressive liberalisation of investment for stimulating private initiative and for promoting prosperity in both countries.”

80. For example, in the Message from the President of the United States Transmitting the Treaty Between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, Signed at Washington on January 11, 1995, President Clinton stated that “[t]he bilateral investment Treaty with Albania will protect U.S. investment and assist the Republic of Albania in its efforts to develop its economy by creating conditions more favorable for U.S. private investment and thus strengthen the development of its private sector.” TREATY DOC. 104–19, Sept. 6, 1995; see also USTR Focus on Investment, supra note 78.
investment treaty therefore serves as a "signaling device" to the domestic private sector that the government’s intentions toward private capital, both foreign and domestic, are benign because of the international commitments it has made in treaties to protect the capital of foreigners.

5. **Improved Governance and a Strengthened Rule of Law**

The fifth and final explanation for the treaty puzzle is that developing countries have signed investment treaties to remedy the deficiencies in their own governance institutions and in their own abilities to enforce the rule of law. Investment treaties thus serve as international substitutes for domestic institutions. The basis of this explanation is that developing country authorities and institutions that, by virtue of an investment treaty, have prevented themselves from acting in an arbitrary or abusive fashion toward foreign investors will also be induced to avoid the arbitrary and abusive treatment of their own nationals. Over time, these authorities and institutions will experience improved governance and a heightened respect for the rule of law. Thus, as the Minister of Finance of Uruguay explained in a private conversation with a journalist when his country ratified its BIT with the United States, “We are not signing this treaty for them [i.e. the United States], we are signing it for us.”

The precise roles that each of these interests has played in capital-importing countries’ decisions to sign investment treaties and thereby join the investment regime have no doubt varied from country to country and have depended on a host of factors, including the political, economic, and social contexts of the countries concerned. Nonetheless, it is important to note that in many cases the interests pursued by capital-importing countries have been highly tentative, indeed speculative, and that countries’ eventual disappointed expectations may undermine their commitment to the investment regime in the future.

### III. THE GENERAL OPERATION OF THE INVESTMENT REGIME

Although each of the 3000 investment treaties is legally separate and distinct, thus binding only those states that have signed it, investment treaties as a group share remarkably similar structures, purposes, and principles. It is for this reason that one may view them, despite their textual differences, as constituting a single international regime for investment. Each treaty, and therefore the entire regime, rests on two basic operational pillars: (1) promised standards of investment treatment and (2) applicable enforce-

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82. Reported confidentially to the author.
ment mechanisms in the event that the host government fails to grant the promised treatment.

A. Promised Standards of Investment Treatment

The substantive core of each investment treaty is the “treatment” that each treaty partner promises to give investments from other treaty partners. To protect foreign investors against the political risk resulting from placing their assets under a host country’s jurisdiction, an investment treaty will stipulate obligations regarding the “treatment” that the host country must give to investors and their investments. Although the treaties do not usually define the meaning of “treatment,” that term in its ordinary dictionary sense includes the “conduct or behavior towards another party (as a person, thing, or group).” In other words, by entering into an investment treaty, a state makes promises about the actions and behaviors it will take toward investments and investors of treaty partners. As is the case with regimes generally, the treaty provisions on investor and investment treatment are intended to restrain host country government behavior and impose a discipline on governmental actions. To achieve this goal, treaties define standards to which host countries must conform in their treatment of investors and investments.

Investment treaties normally contain treatment provisions with respect to numerous matters that investors consider important. One may categorize the various treatment standards included in treaties as “general” or “specific.” General standards of treatment apply to all facets of investment activity in the host country. These include host government commitments to grant investors and investments “fair and equitable treatment,” “full protection and security,” “national treatment,” “most-favored-nation treatment,” and “treatment in accordance with international law,” among others. Specific treatment standards concern particular matters relating to an investment, such as monetary transfers, expropriation, and investor rights in times of war, revolution, or civil disturbance.

It is interesting to note that investment treaties rarely expressly state the specific consequences to a host country of its failure to grant a protected

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84. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).

85. In the ICSID case of Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, the tribunal defined ‘treatment’ as follows: “The word ‘treatment’ is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.” Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, Decision on Jurisdiction, ICSID Case No. ARB/03/19, ¶ 55 (2006).

investment the promised treatment. While one might argue that such an omission in treaty provisions means that treatment standards are merely hortatory in nature, arbitral tribunals have uniformly held that states subject to investment treaties are liable to compensate investors for breaches of treatment standards that result in their injury. They have arrived at this conclusion by finding that customary international law governs the question of liability and compensation. In particular, they have relied on the Chorzów Factory Case, in which the Permanent Court of International Justice stated that, according to customary international law, if a state has committed a wrong it is liable to pay reparations. The amount of such reparations must be sufficient to eliminate the consequences of the illegal act and to place the wronged party in the situation it would have been had the illegal act not taken place. For example, in the case of MTD v. Chile, the tribunal accepted "the classic standard enounced by the Permanent Court of Justice in the Factory at Chorzów: compensation should 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed.'" The potential application of this principle by tribunals creates an incentive for host governments to respect their treaty commitments.

B. Enforcement Mechanisms

The effectiveness of the treaty as a constraint on governmental behavior is not limited to bland statements of promised treatment. In order to impose a discipline on host country government behavior with respect to protected foreign investments, investment treaties provide various dispute resolution mechanisms, one of the most important of which is international investor-state arbitration which entitles an injured investor to sue the host government for damages because of a violation of treaty standards and rights. It is through the dispute resolution process that substantive treaty commitments toward investments and investors from other treaty countries are given meaning and made a reality. An important support mechanism for this emerging international investment regime has been the International Centre for Settlement of Investment Disputes, an international organization created by a multilateral convention, which has become a significant, though not the sole, institution for international investment dispute resolution. In

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89. MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, Award, ICSID Case No. ARB/01/7, 12 ICSID 3, ¶ 238 (2004).
those cases in which host governments have failed to abide by their com-
mittments to investors, governments have found themselves involved in in-
ternational arbitration proceedings (at least 288 cases at the end of 2007),92 and
in many cases arbitral tribunals have held them liable to pay substantial
damage awards to injured investors.93 The decisions in investor-state arbitr-
dataions are also becoming an increasingly important source of international
jurisprudence on the respective rights of foreign investors and the states in
which they invest. On the other hand, the precise number of cases and the
specific nature of their decisions are difficult to determine because of the
number of potential arbitral forums open to investor-state disputes and the
varying degrees of confidentiality with which the forums cloak their
operations.94

Nonetheless, international investment treaties and related arbitral deci-
sions are playing and will continue to play a growing role in international
business and economic relations. An intensified knowledge of international
investment treaties and related jurisprudence is therefore vital for govern-
ment officials who negotiate, interpret, and apply them, as well as for those
who manage relations with actual and prospective foreign investors in their
territories. Many officials and their governments have learned at significant
cost that international investment treaties are not just “expressions of good
will” but are binding instruments of international law that impose enforcea-
ble legal obligations on host country governments.

Investment treaties not only influence the behavior of governments but
also the behavior of the numerous private actors involved in the foreign

93. One notable example is the case of CME Czech Republic B.V. v. Czech Republic, an UNCITRAL
arbitration under the Netherlands-Czech Republic BIT, which resulted in an award and payment of U.S.
$355 million to an injured investor in 2003, one of the largest awards ever made in an arbitration
proceeding up to that time. CME Czech Republic B.V. v. Czech Republic, Final Award, UNCITRAL
Arbitration (March 14, 2003); Peter S. Green, Czech Republic Pays $355 Million to Media Concern, N.Y.
Times, May 16, 2003, at W1; see also ADC Affiliated Limited and ADC & ADMC Management Ltd v.
Republic of Hungary, Award of October 2, 2006, ICSID Case No. ARB/03/16 (2006) (awarding ADC
Affiliated U.S. $55,426,973 and ADC & ADMC $20,773,027); CMS Gas Transmission Company v.
Republic of Argentina, Award of May 12, 2005, ICSID Case No. ARB/01/8, 14 ICSID 158, 237 (2005)
(awarding CMS U.S. $133.2 million, upheld by ICSID Annulment Committee Decision of Sept. 25,
2007).
94. Note, for example, that even ICSID, an international organization, is bound by its governing
Convention and Rules, to hold certain aspects of the arbitral process confidential. Under Rule 32 of the
ICSID Arbitration Rules, the proceedings of the arbitration are closed to the public, and under Article 48
of the Convention, ICSID may not publish an award rendered by a tribunal in a case without the consent
With regard to the problem of determining with precision the exact number and nature of investor-state
claims, see generally Susan D. Franck, Empirically Evaluating Claims About Investment Treaty Arbitration, 86
N.C. L. Rev. 1 (2007). For an excellent unofficial compendium of decisions by arbitral tribunals in
investor-state cases, see http://ita.law.uvic.ca/.
investment process. Thus, international business executives, bankers, and their lawyers must take account of relevant investment treaty provisions in planning, executing, and managing foreign investment projects. International investment treaties have become, and will remain, vital elements in evaluating political risk in any country in which such professionals hope to operate. When, as a result of changes in circumstance or policy, conflict arises between investors and host countries, international investment treaties usually play a significant role in their resolution. The treaty enforcement provision whereby individual foreign investors are given the right to initiate arbitration against host countries has also led to the development of an increasingly important area of legal practice. Law firms and practicing lawyers need to understand, interpret, and apply international investment treaties in order to effectively advise clients and represent them before arbitral tribunals and in some cases, national courts. Thus, international investment agreements have a growing significance for the conduct of international business, finance, and legal practice.

IV. THE APPLICATION OF REGIME THEORY TO INVESTMENT TREATIES

A. Regime Elements

Following the “consensus definition” quoted above, a regime consists of four elements: (1) principles; (2) norms; (3) rules; and (4) decisionmaking processes. Each of these elements is examined below in connection with the regime created by investment treaties.

1. Regime Principles

The first element of a regime is principles. Whereas lawyers and legal scholars usually understand principles as referring to legal doctrine, regime theorists give a different meaning to this term. Within the context of international regimes, principles may be defined as “beliefs of fact, causation, and rectitude.” Regimes are based on a belief by their participants that cooperation in a particular area will lead to some desired outcome. Thus, for example, one may say that a regime for the prevention of nuclear proliferation is based on the principles that the proliferation of nuclear arms increases the likelihood of nuclear war and that a regime to control proliferation will achieve the desired outcome of reducing that likelihood. What then are the principles upon which the international investment regime is based? An
examination of investment treaty texts indicates a set of five more or less common principles that the participants adhered to in negotiating them.

A first principle is the belief that increased investment between and among contracting states will increase their prosperity, economic development, and business activity and will lead to heightened economic cooperation among them. Thus, the treaties' ultimate goal, as envisioned by their contracting states, is broader than merely increasing the flow of capital and protecting individual investors.

A second regime principle is that favorable conditions in host states will lead to increased investment. The reference to “favorable conditions” does not merely mean the natural state of things; it refers in particular to conditions that can be affected by host government actions, and it recognizes that such actions can either encourage or discourage investment. Thus, the titles of virtually all investment treaties state that the agreement is to “promote” or “encourage” investment and that the targets of that promotion are investors of the other contracting party.

A third principle of the investment regime is that law and administrative decisions of host states can influence investment by giving increased predictability to rules under which investors make their investments and conduct their activities. In determining the ideas underlying this principle, one may cite the work of the noted German scholar Max Weber, who sought to understand why capitalism arose in Europe. Weber emphasized the role that law plays in raising the probability that contemplated actions will take place. Calculability, according to Weber, encourages investment transactions. For Weber, three conditions were necessary for law to be calculable: (1) the legal text must lend itself to prediction; (2) the administration and application of the legal text must not be arbitrary; and (3) contracts must be enforced. Similarly, the goal of investment treaties has been to increase the calculability of foreign investment transactions.

A fourth principle underlying the investment treaty regime is that the means to promote investment is to protect it. The promise of investment protection results in investment promotion. Thus the titles of nearly all investment treaties state that their purpose is not only promotion but also protection. The connection between promotion and protection lies in in-
vestor perceptions of risk and predictability. The general premise of investment treaties is that investment promotion is to be achieved by the host country’s creation of a stable legal environment that favors foreign investment. The basic working assumption upon which investment treaties rest is that clear and enforceable rules that protect foreign investors reduce investment risk and that a reduction in risk, all other things being equal, promotes investment. Investment treaties, on the other hand, do not generally bind a home country to encourage its own nationals and domestic companies to invest in the territory of a treaty partner.102

The risk for any foreign investor is that once the investment is made the host state may change the rules. A sudden, unexpected change in the rules is a principal form of political risk, perhaps its very essence. In order to encourage investment within their territories, host states make various kinds of commitments to investors, including the provisions of foreign investment codes,103 investment agreements,104 development contracts,105 public service concessions,106 and tax stabilization agreements.107 Such instruments contain important commitments upon which investors rely in deciding whether to invest their capital in a host country. The continuing respect by the host government of such commitments is usually crucial for the profitability of the investment and sometimes for its very survival. Since these arrangements are governed by the law of the host country and therefore subject to the actions of its institutions, their continued stability faces the risk that the host government will unilaterally modify or terminate them at some later time, a phenomenon that has in fact taken place on numerous occasions.108

102. UNCTAD, BITs in the Mid-1990s, supra note 2. But see Article 2(3) of the Convention between the Belgo-Luxembourg Economic Union and the United Republic of Cameroon Concerning the Reciprocal Promotion and Protection of Investments, March 27, 1980, 1284 U.N.T.S. 2115. This article states: "Aware of the importance of investments for the promotion of its development and cooperation, the Belgo-Luxembourg Economic Union shall adopt measures to encourage its economic agents to participate in the development of the United Republic of Cameroon, in accordance with its priority objectives." While one interpretation of this provision might lead to the conclusion that the Belgo-Luxembourg Economic Union is encouraging its own companies and nationals to invest in Cameroon, an equally plausible interpretation is that the Union is only obligated to encourage governmental agencies to participate in Cameroon development.


105. Id.

106. See generally CAN PRIVATIZATION DELIVER? INFRASTRUCTURE FOR LATIN AMERICA (Federico Bansanes et al. eds., 1999); Louis T. Wells, The Evolution of Concession Agreements (1968).


108. For example, in the case of Dabhol Power Project, the largest foreign investment in India as of 1995, a government newly elected in the Indian state of Maharashtra cancelled a power purchase agree-
Such obligations made by host states to foreign investors are, in the oft-quoted words of the late Professor Raymond Vernon of the Harvard Business School, “obsolescing bargains” between the investor and the host country.\textsuperscript{109} The cause of their obsolescence has much to do with the decline in bargaining power of the investor during the life of the investment and with changes in circumstance within the host country.\textsuperscript{110} At the time that an investor is proposing an investment to a country, the investor has a certain amount of bargaining power with the host government to secure favorable treatment and conditions for its investment. However, once the investor makes the investment and thereby places its capital under the sovereignty of the host state, its bargaining power diminishes, and the commitments received risk becoming obsolete in the eyes of the host government.\textsuperscript{111}

The fifth principle of the investment regime is that international rules with effective enforcement mechanisms will deal with the problem of the obsolescing bargain by restraining the actions of the host government toward foreign investment in its territory. These international rules achieve this restraint by imposing a cost on the host state in the form of an arbitral award of money damages for taking actions that violate its treaty commitments. The prospect of such costs will presumably lead to restraint by the host government in its dealings with protected foreign investors. International rules and enforcement mechanisms not subject to the control or manipulation of host governments are seen, therefore, as a basic means to protect investment and have been made an integral part of investment treaties.

Thus one may summarize the structure of the principles underlying the investment treaty regime as follows:

(1) Increased international investment fosters economic development and prosperity.

(2) Favorable conditions in host countries lead to increased investment.

(3) Appropriate host country laws and institutions create favorable conditions for investment by increasing the predictability of economic transactions.

(4) Increasing the predictability (“calculability” in Weber’s terms) of transactions has the effect of reducing perceived risk and therefore promoting investment.

(5) Enforceable international rules that restrain host country governmental actions protect and therefore promote investment.


\textsuperscript{110} Id.

\textsuperscript{111} See Avnish Dixit & Barry J. Nalebuff, Thinking Strategically 21 (1991) (“Once you make a commitment your bargaining power is weakened.”).
2. Regime Norms

Norms are the second element of a regime. Regime theory defines norms as "standards of behavior defined in terms of rights and obligations." 112 Within the domain of international investment treaties, the principal focus of concern is the behavior of host governments toward the investments from other regime members. 113 Accordingly, investment treaties specify standards of "treatment" (a term of art used in all investment treaties) that host states are obligated to accord to investors and investments from their treaty partners. 114 Such promised treatment creates rights under international law that foreign investors may invoke in their relations with the host country. Therefore, it is intended to serve as a constraint on host government action that otherwise would be subject only to domestic law and policy.

The norms of the investment regime reside primarily in the treatment standards promised by individual investment treaties. Together, they form part of the regime because, as noted above, they are expressed in almost identical language, such as “fair and equitable treatment,” 115 “full protection and security,” 116 “most-favored-nation treatment,” 117 and “national treatment.” 118 At the same time, it should be emphasized that treatment standards in treaties are almost always expressed in general and even vague terms. As a result, they have a flexible quality that allows their application to a wide variety of situations that may arise during the life of the treaty and

112. Krasner, supra note 19.
114. Id.
115. E.g., Agreement Between the Swiss Confederation and the Kingdom of Thailand on the Promotion and Reciprocal Protection of Investments, Switz.-Thail., art. 4(1), Nov. 11, 1997, Ministry of Foreign Affairs of the Kingdom of Thailand, http://www.unctad.org/sections/dite/iia/docs/bits/thailand_switzerland.pdf: “Investments and Returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment . . . .”
1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
118. European Energy Charter Conference art. 10(7), Dec. 17, 1994, 34 I.L.M. 360 (“Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors . . . .”).
in ways that treaty negotiators may not have contemplated. At the same time, their very generality and vagueness renders difficult the task of applying them to concrete, complex conflicts that usually arise in investor-state disputes. Indeed, for a lawyer trained only in the domestic law governing investment transactions, the stated norms of the regime seem breathtaking in their generality, vagueness, and lack of specificity. What exactly is “fair and equitable treatment?” And when precisely does a state fail to give a foreign investor “full protection and security?” The treaties themselves rarely define, explain, or elaborate on these basic treatment standards. For example, if a host government grants a foreign investor protected by treaty a renewable unlimited license to operate a landfill and in response to a request for a license renewal, only grants a renewal for a limited duration, is such treatment of the investor to be considered “fair and equitable” or a violation of that treaty standard? As a result, the application of these vague norms in investment treaties has been the work of investor-state arbitration tribunals, the primary decisionmaking bodies of the international investment regime. Such tribunals not only engage in investor-state dispute resolution but also norm elaboration and even norm creation.

One norm in particular appears consistently in investment treaties and has become “an almost ubiquitous presence . . . in investment litigation”: fair and equitable treatment. Indeed, it is so prevalent that one may say the term “fair and equitable treatment” is viewed by contracting states as the basic standard of treatment to be accorded to investors. To borrow the terminology of Hans Kelsen, the obligation of a host state to accord fair and equitable treatment to foreign investors is the grundnorm or basic norm of the international investment regime. The basic purposes of investment treaties, as stated in their titles, are to promote and protect investments. Certainly, neither of those purposes could be achieved if treaties promised foreign investors treatment that was less than fair and less than equitable.

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119. For example, in the case under the Spain-Mexico BIT, Técnicas Medioambientales Técnmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (May 29, 2003), the tribunal found such treatment to have violated the fair and equitable treatment standard in the BIT.

120. See Saluka Investment BV (Netherlands) v. Czech Republic, Partial Award, Mar. 17, 2006, http://ita.law.uvic.ca/documents/Saluka-PartialawardFinal.pdf. This case illustrates the struggles of tribunals in interpreting vague treaty standards. For example, it stated at ¶ 297:

The “ordinary meaning” of the “fair and equitable treatment” standard can only be defined by terms of almost equal vagueness. In MTD, the tribunal stated that: “In their ordinary meaning, the terms ‘fair’ and ‘equitable’ [. . .] mean ‘just,’ ‘even handed,’ ‘unbiased,’ ‘legitimate.’” On the basis of such and similar definitions, one cannot say more than the tribunal did in S.D. Meyers by stating that an infringement of the standard requires “treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective.”


3. **Regime Rules**

Rules are the third element of a regime. For purposes of regime theory, rules are defined as “specific prescriptions or proscriptions for actions.” It is through rules that the regime seeks to regularize and constrain the behavior of its members. Although the difference between a “norm” and a “rule” is not always clear, one finds rules in the form of prescriptions for action in two places in the investment regime.

First, the treaty texts contain many specific prescriptions for action. Thus, in addition to norms, the treaties express rules about such matters as expropriation, monetary transfers, and procedures for dispute settlement between investors and host countries.

The second source of rules lies in the decisions of arbitral tribunals that apply regime norms to specific fact situations. For example, fair and equitable treatment, according to many investment tribunals, means that the host government must respect “the legitimate expectations” which it has created in the investor. Indeed, one cannot fully know or understand the rules of the investment regime without studying the decisions of the arbitral tribunals that have applied often vague treaty norms to concrete fact situations. Thus, one may conclude that the deliberate use by contracting states of vague and general norms in investment treaties, coupled with the well known tendency of lawyers and arbitrators to be guided by previous arbitral decisions, has the effect of creating an implicit system of delegated rule-making within the investment regime. From this perspective, arbitrators do not merely settle disputes; they also make rules for the regime.

4. **Regime Decisionmaking Processes**

a. **In General**

The fourth and final regime element is decisionmaking processes, which are defined as “prevailing practices for making and implementing collective choice.” The international regime for investment as a whole has no centralized governing council with the power to administer and apply its rules or the authority to make and implement collective choice of regime mem-

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123. Krasner, supra note 19.


128. Krasner, supra note 19.
bers on issues relating to foreign investment. In that respect, it is unlike other international regimes such as the European Union, the World Trade Organization ("WTO"), or the United Nations. Instead, decisionmaking processes and authority are decentralized and diffused throughout the investment regime by individual treaties. Basically, it is through dispute settlement procedures defined in individual treaties that regime members make and implement collective choice. Investment treaties generally provide for such decision making in four ways: (1) by consultation between the states parties to the applicable treaty; (2) by interstate arbitration between states parties in cases where they are unable to resolve conflicts through consultation and negotiation; (3) by consultations and negotiations between the treaty-protected foreign investor and the state; and (4) by investor-state arbitration. Each of these four decisionmaking processes is examined below.

b. State-to-State Consultations

Most investment treaties contain a separate article on dispute settlement between contracting parties.129 That article usually provides that the resolution of disputes concerning the interpretation and application of a treaty should first proceed by "negotiation," "consultations," or "diplomatic means."130 A common formulation of this requirement is found in article 11 of the 1989 BIT between the United Kingdom and Ghana which states "[d]isputes between the Contracting Parties concerning the interpretation and application of this Agreement should, if possible, be settled through the diplomatic channel."131

Even if an investment treaty does not have a similarly specific provision on dispute settlement, by virtue of customary international law and article 33 of the U.N. Charter, the contracting states have a duty to seek peaceful solutions to their disputes and engage in good faith negotiations to that end.132 In fact, contracting states do not appear to resort to this decision-making process very frequently, except in the case of multilateral invest-

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129. UNCTAD, BITs in the Mid-1990s, supra note 2, at 99.
130. See, e.g., Article 10(1), Les Différends entre Parties Contractantes [Disputes Between the Contracting Parties] of the 1987 Switzerland-Bolivia BIT, Accord Entre la Confédération Suisse et la République de Bolivie Concernant la Promotion et la Protection Réciproques des Investissements [Agreement Between the Swiss Confederation and the Republic of Bolivia Concerning the Promotion and Protection of Reciprocal Investments], Switz.-Bol., Nov. 6, 1987, http://unctad.org/sections/dite/iia/docs/bits/suisse _bolivie.pdf ("Les différends entre Parties Contractantes au sujet de l’interprétation ou de l’application des dispositions du présent Accord seront réglés par la voie diplomatique." [The disputes between contracting parties regarding the interpretation or the application of the provisions of the present Agreement will be resolved by diplomatic means].)
132. U.N. Charter art. 33, para. 1 ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").
ment treaties, such as NAFTA and the Energy Charter Treaty. One of the most elaborate consultation mechanisms for contracting parties is the Free Trade Commission created by NAFTA.133 The NAFTA Free Trade Commission, endowed with its own secretariat, is composed of cabinet-level representatives of the three contracting states. It is authorized, among other things, to supervise the implementation of the NAFTA treaty, oversee its further elaboration and resolve disputes regarding its interpretation or application. Moreover, under article 1132(2) of the treaty, the Commission can issue “interpretations” of NAFTA provisions that are binding on arbitral tribunals deciding investor-state disputes.134 In exercising this power the Commission has issued interpretations concerning access to documents in Chapter 11 investor-state cases, the meaning of article 1105, which requires a minimum standard of treatment in accordance with international law,135 and the transparency and efficiency of Chapter 11 arbitrations.136 NAFTA arbitration tribunals have considered themselves bound to apply such interpretations in deciding investor-state disputes.137

Occasionally, when faced with particular problems arising out of a bilateral treaty, the concerned states will also consult with each other. For example, the governments of the Czech Republic and the Netherlands consulted to modify their regime after a partial award was made in the case of CME v. Czech Republic.138 Dissatisfied with the way the tribunal in that case had interpreted the Czech-Netherlands BIT, the Czech government, as provided for in the text of the treaty,139 called for consultations with the Netherlands.140 Delegations from the two countries met at The Hague in April 2002, to arrive at a common understanding of the three issues of treaty interpretation that arose out of the partial award.141 The two sides agreed on a “common position” and incorporated it into Agreed Minutes that were

137. See Mondev Int’l, supra note 10, ¶ 120–22.
139. Agreement on the Encouragement and Reciprocal Protection of Investment between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech & Slovk. Fed. Rep., art. 9, Apr. 29, 1991 (“Either Contracting Party may propose the other Party to consult on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to and shall afford adequate opportunity for such consultation.”).
141. Id.
signed on July 1, 2002, which the Czech Republic then submitted to the tribunal as a binding statement of the meaning and application of the treaty.\textsuperscript{142} The tribunal considered itself to be bound by the common position of the two contracting parties. Although the procedure engaged in by the two governments did not result in a formal modification of the text of the BIT, this subsequent agreement, embodied in the Agreed Minutes, had the effect of modifying the treaty in that the BIT before and the agreement after the Hague meeting was not the same.

c. State-to-State Arbitration

In the event that states are unable to settle a dispute through negotiations and diplomacy, nearly all investment treaties give disputing states the right to invoke arbitration to settle their conflict.\textsuperscript{143} Interstate arbitration is a traditional method for the peaceful resolution of interstate disputes. While some of the United States’ friendship, commerce and navigation treaties provided for the settlement of interstate disputes by the International Court of Justice,\textsuperscript{144} nearly all investment treaties today provide for interstate arbitration as a means to resolve disputes between the contracting parties. Moreover, nearly all follow the same interstate arbitration model.\textsuperscript{145} Thus, investment treaty arbitration is ad hoc, rather than institutional, and tribunals consist of three arbitrators: one appointed by each contracting party and a third party, a national of a third country, who is agreed upon by the other two arbitrators.\textsuperscript{146} If the arbitrators cannot agree on a third member, or if one of the parties refuses to appoint an arbitrator, the treaty provides for an “appointing authority,” such as the President of the International Court of Justice, the Secretary-General of the United Nations, or some other distinguished international figure, to make the appointment.\textsuperscript{147} Many treaties require a minimum period of negotiation between the contracting parties before one of them may resort to arbitration.\textsuperscript{148} As a general rule, the tribunal is free to determine its own rules of procedure, but nearly all treaties provide that decisions must be made by a majority in order to avoid the

142. Id. at ¶¶ 87–89.
143. UNCTAD, BITs in the Mid-1990s, supra note 2, at 98.
144. See, e.g., The Treaty of Friendship, Commerce and Navigation Between the United States of America and the Italian Republic, U.S.-Italy, art. 26, Feb. 2, 1948, 63 Stat. 2255 (effective July 26, 1949) (“Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.”). Under this treaty, a dispute between the United States and Italy concerning an alleged expropriation gave rise to Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 3 (July 20).
145. Id.
146. Id. at 100.
147. Id. at 100–101.
148. Id. at 100.
paralysis that a rule requiring unanimity might create. The decision of the arbitrators is final and binding on the contracting parties to the treaty.

While all investment treaties provide for interstate arbitration, it appears that only one state has actually invoked arbitration to settle a treaty dispute with another state. In 2003, Peru, in response to an ICSID claim against it by Chilean investors, instituted an interstate arbitration against Chile and requested the ICSID tribunal to suspend proceedings until the interstate arbitration was resolved. The tribunal declined the request, and Peru ceased its case against Chile. The paucity of interstate cases is likely due to the fact that most treaties give investors a distinct remedy against an offending host state, a mechanism that relieves their home states of the need to seek redress for them through interstate arbitration.

d. Investor-State Consultations

Consultations are relatively common in disputes between investors and states.

Many disputes between foreign investors and host countries are resolved through negotiation. Indeed, nearly all investment treaties provide that in the event of a dispute . . . the two parties are to engage in consultations and negotiations, often for a specified period of time (six months in many cases), before the investor may seek other remedies. . . . As a result, it is safe to say that virtually all such disputes go through a period of negotiation before reaching settlement or advancing to formal investor-State arbitration. Because of the confidentiality usually surrounding such settlements, accurate [and] comprehensive statistics on [these] negotiated settlements are not available.

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149. Id. at 101–102.
150. Id. at 102.
152. Id.

(1) With a view to an amicable solution of disputes between a Contracting Party and an investor of the other Contracting Party consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months from the date of request for settlement, the investor may submit the disputes: either to the competent tribunal of the Contracting Party in whose territory the investment was made; or to international arbitration of the International Centre for the Settlement of Investment Disputes (ICSID).
Negotiations may precede or follow the commencement of arbitration.\textsuperscript{154} For example, in a 2006 ICSID case by the Western NIS Enterprise Fund against Ukraine,\textsuperscript{155} the parties agreed to terminate the case through a settlement in which Ukraine reimbursed the Fund for certain loans it had made.\textsuperscript{156} It is estimated that thirty percent of all cases registered at ICSID are settled through negotiations rather than binding awards by arbitral tribunals.\textsuperscript{157} “Approximately two-thirds of all arbitration cases filed with the International Chamber of Commerce Court of Arbitration are settled by negotiation . . . .”\textsuperscript{158}

e. Investor-State Arbitration

Most, but not all, investment treaties grant protected foreign investors the right to sue host countries for damages before international investment tribunals for violation of treaty standards of protection.\textsuperscript{159} The contracting states usually achieve this result by consenting in the treaty to submit any disputes arising between a contracting state and a national of the other contracting state concerning an investment of that national covered by the treaty to arbitration under ICSID auspices or other designated arbitral forum.\textsuperscript{160} Treaties normally authorize protected investors to take such action on their own initiative without the necessity of securing approval from their home government or from the host government. This fourth decisionmaking procedure of the investment regime has become the most important of the four because it is the primary mechanism for the enforcement and development of regime norms and rules. It is a unique feature among international regimes for two reasons. First, there are few instances in the international

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\textsuperscript{154} Id. at 166.

\textsuperscript{155} Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2 (Mar. 16, 2006).


\textsuperscript{159} RUDOLPH DOLZER & CHRISTOPH SCHREUER, \textit{PRINCIPLES OF INTERNATIONAL INVESTMENT LAW} (2008).

\textsuperscript{160} The first BIT to take this approach was the 1968 Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment, which provided:

\begin{quote}
Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for the Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.
\end{quote}

system where international law gives private persons and companies the right to compel a sovereign state to appear before a tribunal and defend its sovereign actions ostensibly taken to protect the public interest. The World Trade Organization, for example, has dispute resolution processes to judge complaints of violations by states of international trade law, but states, and states alone, are participants in those processes.161 Thus, the global investment regime has granted a private right of action to investors. It has thereby privatized the decisionmaking process to a large extent. Not only are private parties involved as litigants, but also as arbitrators—the decision makers in the process—who are private persons compensated by the disputants, not officials of governments or international organizations.

Second, it is within investor-state arbitrations that the most important decisions about the investment regime are decided. The decisions of arbitral tribunals in the approximately 300 investor-state disputes that have arisen under investment treaties have not only resolved a vast array of investor-state conflicts but have also shaped the rules and norms of the regime. Their number will continue to grow in the years ahead.162 International law contains no doctrine of binding precedent making the decisions of an international judicial or arbitral body in one case binding upon international judicial or arbitral bodies deciding similar, future cases.163 Article 59 of the Statute of the International Court of Justice specifically states that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”164 Similarly, article 1136(1) of NAFTA, in virtually identical language, makes clear that decisions of investment arbitral tribunals under Chapter 11 do not constitute binding precedent for the future. It states, “[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.”165 Neither the ICSID Convention nor individual investment treaties contain a similarly specific prohibition, but neither do they expressly recognize that investment arbitration awards constitute precedent.166 On the

162. Jeswald W. Salacuse, Explanations for the Increased Recourse to Treaty-Based Investment Dispute Resolution: Resolving the Struggle of Life Against Form, in APPEALS MECHANISMS IN INTERNATIONAL INVESTMENT DISPUTES 105, 125 (Karl P. Sauvant ed., 2008).
166. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 53(1), opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (stating that an “award shall be binding on the parties.”). Schreuer and Weiniger suggest that this provision may be interpreted as “excluding the applicability of the principle of binding precedent to successive ICSID cases.” They also note that there is nothing in the preparatory work of the Convention suggesting that the doctrine of precedent should be applied to ICSID arbitration. Christophe Schreuer & Matthew
other hand, article 38(d) of the Statute of the International Court of Justice, in defining the sources of international law, recognizes “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”167 Thus, in applying international law, courts and tribunals may refer to previous judicial decisions and arbitral decisions to determine the applicable rules of international law.

In international investment arbitration, counsel for the parties regularly cite prior cases in support of their positions.168 Moreover, tribunals, while always reaffirming that they are not bound by previous arbitral decisions and awards, nonetheless constantly refer to earlier awards and decisions in interpreting investment treaty provisions and deciding investment disputes.169 Various factors have supported this trend. First, the vague and general language of many investment treaties coupled with the fact that treaties employ common legal concepts and phrases naturally leads lawyers and tribunals to refer to decisions in other cases to determine how such provisions should be interpreted. Second, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor which causes tribunals to pay attention to previous decisions on similar issues.170 Third, tribunals, like courts, are motivated by the underlying moral consideration that “like cases should be decided alike,” unless a strong reason exists to distinguish the current case from previous ones.

The growth in investor-state arbitration in recent years has led to a significant expansion in the jurisprudence of investment treaties. The commonality of language and provisions among investment treaties makes an understanding of judicial and arbitration decisions important to the inter-

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170. See, e.g., *Saipem v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07, ¶ 67 (Mar. 21, 2007). It provided in part that:

[The Tribunal] also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

pretation and application of investment treaties. Accordingly, this essentially private method of decisionmaking has played a crucial role in the development and maintenance of the regime set in place by investment treaties. On the other hand, the confidentiality which in varying degrees applies to investor-state dispute settlement and appears to be derived from the processes and culture of international commercial arbitration would seem to weaken the role of investor-state arbitration as a mechanism for regime decisionmaking. Regime decisions need to be widely and publicly diffused for the regime to operate effectively. Indeed, the free flow of information is a key factor in the maintenance and evolution of any international regime.171

On this point, the goals of dispute settlement and those of regime rulemaking may be in conflict. While confidentiality may facilitate dispute settlement between the immediate parties, it weakens regime rulemaking, which requires wide and public dissemination of rules set down by regime decisionmaking bodies. The World Trade Organization publishes all decisions of WTO dispute settlement bodies,172 but ICSID, by virtue of its Convention, may only publish investor-state arbitration decisions with the consent of the parties to the dispute.173

Why have states chosen to privatize this important method for implementing collective choice of regime members concerning the investment regime? No doubt capital-exporting countries believed that granting investors a private right of action for violation of regime rules would be an effective way of assuring that regime rules were respected. But investor-state arbitration as a decisionmaking procedure has another advantage for home countries: it is a way for capital-exporting governments to reduce governmental transaction costs arising out of the investments made by their nationals. Prior to the institution of investor-state arbitration, governments had to deal with their nationals seeking diplomatic protection and other forms of interventions against offending host country governments.174 That method potentially entailed significant diplomatic, political, and economic costs for home governments because of its likely negative impact on and complication of important multifaceted international relationships with host

171. Peter M. Haas, Epistemic Communities and the Dynamics of International Environmental Cooperation, in REGIME THEORY, supra note 21, 168, 169.
174. JOSEPH CUTHBERT, NATIONALITY AND DIPLOMATIC PROTECTION 1 (1969). It provided in part that:

In precise language, diplomatic protection can be defined as a procedure for giving effect to State responsibility involving breaches of international law arising out of legal injuries to the person or property of the citizen of a State. With the expansion of economic and commercial intercourse between nations, diplomatic protection evolved into a rule of customary international law.
country governments. For example, one can imagine the conflicting pressures on the U.S. government when it decided to sue Italy, a NATO partner with significant U.S. bases and substantial trading relationships, in the International Court of Justice over alleged injuries amounting to a few million dollars to the investments of Raytheon, a U.S. defense contractor, in Italy, a case which the United States eventually lost.\textsuperscript{175} Investor-state arbitration relieves home countries of those costs. In effect, it allows them to say to their nationals and companies aggrieved by host government acts that “you have your own remedy in the treaty. Use it if you wish. Go away and don’t bother us.”

V. A Different Kind of Regime

While the approximately 3000 investment treaties together would seem to meet the definition of an international regime, one must acknowledge that this emerging regime for international investment has significant differences from other international regimes. Three of the most important are: (1) that the regime has largely been constructed bilaterally, rather than multilaterally; (2) that it gives broad scope to private and decentralized decision making; and (3) that no multilateral international organization supports the investment regime.

A. Bilateral Construction

First, the investment regime has been constructed largely through bilateral negotiations, rather than multilateral ones. Most other international regimes, like the WTO, the International Criminal Court, the international human rights regime, and the nuclear non-proliferation regime, have been the product of multilateral, indeed global, negotiations. For example, at the same time that the nations of the world have been building a global regime for investment, they have also been hard at work developing an international trade regime—primarily through the General Agreement on Tariffs and Trade,\textsuperscript{176} and since 1995, the World Trade Organization.\textsuperscript{177} While the trade regime has been developed on a multilateral basis through a succession of multilateral negotiating rounds leading to multilateral conventions resulting in the creation of a relatively robust multilateral organization with a near-global membership, the investment regime has been built largely on a bilateral basis as numerous pairs of countries have negotiated similar rules and enforcement mechanisms that apply to their nationals and their investments in the territory of the other country. On the other hand, efforts to

\textsuperscript{175} Elettronica Sicula S.P.A. (ELS) (U.S. v. Italy), 1989 I.C.J. 3 (July 20).
negotiate a global treaty on investment, such as the OECD initiative to conclude a Multilateral Investment Agreement, 178 or to create a global organization with jurisdiction over international investment, like the one envisioned by the 1948 Havana Charter, 179 have failed.

An interesting question is why the nations of the world have been willing to conclude bilateral investment treaties in growing numbers over the last fifty years but have generally resisted global agreements on investment. There is both a technical and a political explanation for this result. The technical explanation is that a bilateral treaty must accommodate the interests of only two parties and is therefore far less complicated to negotiate than a multilateral, global treaty, which must accommodate the interests of many countries. 180 The political explanation is that, given the asymmetric nature of bilateral negotiations between a strong, developed country and a usually much weaker developing country, the bilateral setting allows the developed country to use its power more effectively than does a multilateral setting, where that power may be much diluted. For example, in multilateral negotiations, developing countries have the opportunity to form blocking coalitions with like-minded states to enhance their power in the negotiations, something that is impossible in bilateral negotiations. Moreover, the prospects of investment capital from specific developed countries, along with other political and economic benefits arising from a definite bilateral relationship, may make a developing country more willing to enter into a BIT with a specific developed country than it would a multilateral agreement where those benefits may seem more tenuous and theoretical. Furthermore, whereas developed countries would be willing to enter into bilateral treaties with developing countries for investment liberalization, knowing full well that few if any enterprises from the developing country would ever invest in the developed state, they have been unwilling to enter into treaties that would grant such liberalization to investors from other developed states, who could become strong competitors to the host countries’ own enterprises. 181

Viewed from a different perspective, one may also say that the 2600 bilateral investment treaties, although bilateral in form, have not really been


negotiated on a strictly bilateral basis. It is possible to consider them as the product of what one might call "serial multilateralism," instead of the traditional "conference multilateralism" that has produced most of the world’s international regimes. That is to say, capital-exporting states, which have driven the treaty making process, have done so on the basis of prepared models or prototypes which they then proceeded to negotiate with many individual countries, showing little willingness to deviate significantly from the model they had prepared. Thus, from the outset, those capital-exporting states contemplated engaging in a multilateral process of negotiating with other states one at a time.

The similarity in models used by capital-exporting states has of course led to a similarity in treaties actually concluded and ultimately to the creation of the regime. What explains the similarity of the models that states have used to negotiate BITs? Do they represent a grand conspiracy among capital exporting countries? Certainly there has been communication among countries over the years as they have developed and refined their treaty models. But an even more important factor has helped to shape the investment treaty regime: the epistemic community of international lawyers and scholars. Epistemic communities are defined as "networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue area." Epistemic communities are vital to regime creation and maintenance because, according to one scholar, they "are channels through which new ideas circulate from societies to government as well as from country to country." Since the movement to negotiate investment treaties began, the epistemic community of international lawyers, scholars, jurists, and arbitrators has, through their advising, writing, advocacy, and judicial, and arbitral decisions, shaped the regime. For example, important ideas and concepts embedded in the regime find their origin not just in the work of diplomats and state officials but also in the thinking and recommendations of members of this epistemic community. Thus, the private initiative in 1959 known as the Abs-Shawcross Draft Convention on Investment Abroad has influenced the form and substance of provisions later adopted in bilateral investment treaties and the "umbrella clause" in investment treaties, which

183. Id. at 27.
184. The Draft was prepared under the leadership of Herman Abs (Director-General of the Deutsche Bank) and Lord Shawcross (the U.K. Attorney General). Herman Abs & Lord Shawcross, The Proposed Convention to Protect Foreign Investment: A Round Table Comment on the Draft Convention by its Authors, 9 J. Pub. L. 119 (1960).
obligates states to respect their obligations to investors, can be traced to a recommendation by the eminent international law scholar Elihu Lauterpacht.186 Today, that epistemic community continues to play a crucial role in the continued maintenance, operation, and development of the investment regime.

B. Privatized, Decentralized Decisionmaking

A second important difference from other international regimes is the strong role that nonstate actors play in formulating, elaborating, and applying the rules of the regime. In effect, the investment regime "privatizes" decisionmaking, whereas in other regimes, such as the WTO, decisionmaking remains firmly in the hands of member states. Moreover, decisionmaking is decentralized and diffused throughout the regime.

In most other regimes, states and their representatives are entrusted with the crucial function of elaborating and defining the rules of the regime. For example, state representatives may meet periodically to negotiate new rules and institutions under the control of states and are usually entrusted with the task of applying those rules to specific cases. Thus, the World Trade Organization consists of an elaborate set of institutions including a Ministerial Council, a Dispute Settlement Body, a Trade Policy Review Body, and numerous specialized committees, supported by a well-staffed secretariat and bureaucracy, through which member states make decisions for the international trade regime.187 A similar model of decisionmaking does not prevail in the international investment regime. Instead, the regime, through investment treaties, has delegated decision making to private persons—arbitrators—who are not representatives of states, and are not, unlike diplomats, authorized to pursue state policy. Indeed, arbitral rules of conduct require arbitrators to decide and act "independently,"188 which means that they may not be influenced by states, governments, the parties, or anybody else. Other private parties—lawyers and law firms representing investors and states—also play important roles in the decisionmaking process. Through

188. The ICSID Convention states the qualities that ICSID arbitrators must possess as follows: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment." Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 14(1), opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (emphasis added). The Convention further provides that a person may be disqualified as an arbitrator "on account of any fact indicating a manifest lack of the qualities required in paragraph (1) of Article 14." Id. art. 57. Similarly, the UNCITRAL Arbitration Rules state: "1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 12(3), U.N. Doc. A/RES/31/98, art. 10 (Dec. 15, 1976).
their advocacy, they strongly influence both the process of decisionmaking and its end result. Thus, to a significant extent, regime elaboration and operation are largely in the hands of private parties who are not accountable to the states that have created the regime.

In theory, of course, arbitrators only decide disputes. They have no authority to make rules, and their decisions do not formally constitute legal precedent. In practice, however, the approximately 300 decisions that have emanated from tribunals are consistently cited by lawyers and other tribunals and have a powerful influence on the making of future regime decisions.

Despite the decentralized and privatized decisionmaking processes of the regime, the resulting decisions by arbitral tribunals demonstrate a surprisingly high degree of uniformity and consistency. Three factors seem to explain this phenomenon. First, the norms and rules applied by tribunals are significantly similar, if not identical, among investment treaties. Second, arbitrators are conscious of and influenced by the decisions of other investor-state tribunals. Although they are not bound by the decisions of other tribunals, arbitrators are concerned that arbitral decisions create a consistent jurisprudence of international investment law. Third, arbitrators are very much a part of an international epistemic community with similar training and, in many cases, comparable backgrounds.

C. Lack of a Multilateral International Organization

Normally, an international regime is supported by a multilateral international organization. For example, the global trade regime rests upon the WTO, a robust international organization, which as of July 2008 consisted of 153 states as members, a staff of 700 persons, and a budget of U.S. $180 million. It has a broad mandate to oversee the implementation of multilateral trade agreements and to serve as a forum for consultation and negotiations among states with respect to international trade. The international investment regime has nothing similar. Individual international organiza-

189. Schreuer & Weiniger, supra note 166, at 1189.
190. Id.
191. As of December 31, 2009, a total of 1004 appointments of arbitrators and conciliators had been made in the 305 cases registered with ICSID since its inception. (It should be noted that several individuals were appointed in more than one ICSID case.) Although they represented 72 different nationalities, 43% (435) of the arbitrators and conciliators were nationals of only five countries: America (120), France (106), Britain (94), Canada (75) and Switzerland (70). Ten nationalities accounted for 607 appointments (60.45% of the total), of which only Mexicans (32 appointments) were from a developing country. ICSID, The ICSID Caseload—Statistics (Issue 2010–11) 7, 8, 17 (2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=true&language=english.
192. Keohane, supra note 63, at 34.
tions—such as ICSID, which only facilitates the resolution of investor-state disputes; the Energy Charter Treaty organization and secretariat, which only concern trade and investment in the energy sector; and the North American Free Trade Commission, which only deals with the application of the NAFTA—serve to support parts of the regime but do not do so in a comprehensive fashion similar to that of the WTO. Nonetheless, the very existence of the international investment regime indicates that a multilateral international organization is not a necessary condition for the creation of a regime. On the other hand, the absence of such an organization with its associated resources, knowledge, and structures mayimpede the future development of the regime and reduce its ability to withstand challenges.

VI. REGIME CHALLENGES

Regime theorists recognize that regimes are not permanent. The fact that at a specific moment in time states’ expectations may have “converged” around a given set of principles, norms, rules, and decisionmaking processes in the investment area of international relations to form a regime does not mean that those expectations have converged permanently. Thus, despite the fact that the international investment regime is founded on 3000 treaties solemnly concluded by some 180 different states, one cannot assume that it will endure.

For regime theorists, the endurance of a regime depends on two factors: regime effectiveness and regime robustness.195 Regime effectiveness requires the continued willingness and ability of a regime’s members to abide by its rules and to pursue its objectives and purposes.196 Regime robustness refers to the ability of the regime to withstand external threats and challenges.197 The effectiveness and robustness of the international investment regime is by no means assured. It faces four salient challenges, two of which are internal to the regime and two of which are external to it.

A. Disappointing Regime Results

The investment regime has been founded on the assumption that it will increase international investment, which in turn will lead to increased prosperity and economic development. However, much research has questioned whether investment treaties have in fact increased investment flows to poor countries.198 The World Bank has publicly expressed the opinion that

195. Hasenclever et al., supra note 21, at 2.
196. Id.
197. Id.
“[e]ven the relatively strong protections in BITs do not seem to have increased flows of investment to signatory developing countries.”199 Other studies have concluded that only certain kinds of BITs have had an effect on capital flows.200 A far more difficult and thus far unanswered question is: even if investment treaties do increase the flows of capital, do they bring countries the kind of investment that advances their development and economic prosperity?201 If the investment regime is ultimately judged by its members not to have achieved its fundamental objective of promoting investment and ultimately economic prosperity, then the justification for its continued existence becomes problematic.

B. Perceived Defective Decisionmaking Processes and Constraints on Sovereignty

Certain governments, organizations, and officials have seriously called into question the fairness of investor-state arbitration and the wisdom of the constraints that particular treaty provisions place on the exercise of sovereignty by national governments.202 They have challenged investor-state arbitration as a regime decisionmaking process on many grounds: that it is not transparent, that it does not account for the disparity in economic situation of regime members, that arbitrators are not truly independent, that arbitrators have an investor bias, that arbitrators’ decisions infringe on the legitimate exercise of sovereignty by host countries, and that participation in the arbitral process is extremely costly for developing countries.203 For these alleged reasons, Bolivia in 2007 and Ecuador in 2010 formally withdrew from ICSID,204 an important pillar of the regime. These factors have also led Ven-

201. See Keven Gallagher & Lyuba Zarsky, Rethinking Foreign Investment for Development, 37 Post-Aut-},
{tistic Econ. Rev. (2006), http://www.paecon.net/PAEReview/issue37/GallagherZarsky37.htm (arguing that the benefits of foreign direct investment are exaggerated and that its centrality in development strategies is misplaced).
ezuela to terminate its BIT with the Netherlands; Ecuador to denounce nine of its BITs and announce its intention to renegotiate the remainder, and for Bolivia to declare its intent to renegotiate its BITs as well. More generally, governments have chafed at the constraints that treaty provisions impose on their exercises of national sovereignty, particularly on their ability to enact laws and regulations in the public interest that may negatively affect investor interests. It is for these reasons, for example, that the Russian Federation, one of the original members of the Energy Charter Treaty in 1994, decided to terminate provisional application in July 2009, thereby removing itself from the Treaty’s mandatory investor-state dispute settlement provisions, among other provisions.

C. Divergence of Expectations

The Washington Consensus—the shared belief, of many countries from the late 1980s until the end of the 1990s, that increased investment, open economies, privatization, and economic deregulation would result in increased global prosperity and economic development—was a powerful force for the spread of investment treaties and the development of the regime that they created. Many parts of the world have lost faith in the ability of the Washington Consensus to bring prosperity and therefore are looking for alternative means of economic development. The shattering of the Washington Consensus may constitute the loss of an important source of support for a global investment regime based on treaties.

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206. Id.
208. Government of the Russian Federation, Decree No. 1005-r: On Russia’s Intention Not to Become a Member of the Energy Charter Treaty (July 30, 2009) (approving a note verbale notifying the Portuguese Republic, the depository of the Energy Charter Treaty, that it does not intend to become a party to the Treaty and that “it did not apply provisionally any provision of the Treaty to the extent that such a provision was inconsistent with the Constitution, laws or regulations of the Russian Federation”).
209. The term “Washington Consensus” is said to have been coined by economist John Williamson in 1989. It consisted of ten broad reforms: (1) fiscal discipline; (2) reordering public spending priorities away from politically powerful groups, such as the military, and toward basic services and infrastructure; (3) tax reform; (4) financial liberalization; (5) competitive, stable exchange rates; (6) trade liberalization; (7) reduction in barriers to foreign investment; (8) privatization of state enterprises; (9) deregulation; and (10) property rights reform. See Salacuse, supra note 77; Stephanie Flanders, *Recipe for Reform Has Been Refined*, Fin. Times, Mar. 14, 1997, at 2.
D. The Impact of Crises

Serious regional and global economic crises, like the ones that struck Asia in 1997–98, Argentina in 2001, and the entire world in 2008, pose significant external threats to the international investment regime. Countries under great stress, faced with potential social and political upheaval as a result of rapidly declining standards of living, often seek radical solutions and are impatient with international investment rules that may restrict their latitude of action. For example, during times of economic crisis, governments may be unwilling to grant national treatment to foreign investors, to avoid changing regulations in the name of “fair and equitable treatment,” and to refrain from seizing vital national resources held by foreigners simply because they have made treaty promises not to expropriate. Thus Argentina, to cope with one the most serious economic and financial crisis in its history in 2001–02, took a series of measures that foreign investors believed violated their legal rights and economic interests, resulting in the initiation of numerous investor-state arbitration claims.211

VII. Conclusion: A Sticky Regime?

The actions of Ecuador, Bolivia, Venezuela, and Russia in withdrawing, at least to a limited degree, from the international investment regime, along with unofficial expressions of dissatisfaction in other countries, raise a question as to whether their initiatives are the beginning of an effort to change the nature of the regime or dismantle it entirely, or whether they are merely aberrations that will have no effect on regime robustness. It should be noted that it is not an easy matter for a state to completely withdraw from the investment treaty regime with no negative consequences. For one thing, a country’s withdrawal from or denunciation of an investment treaty, whose purpose, after all, is to reduce political risk to investors, may be seen by the international investment community as a negative signal, and may result in a slowing of the flow of foreign capital and technology needed by that country or by significantly raising their cost. Capital-importing countries sign investment treaties in order to promote investment by reducing their level of political risk as perceived by investors. Therefore, to withdraw from an investment treaty would seem to have the effect of increasing perceived political risk and impeding foreign investment. Moreover, because capital-importing states are often in competition with one another for foreign investment, and because they have signed investment treaties in order to gain an advantage in that competition, they may also fear that opting out of investment treaties will place them at a competitive disadvantage.

211. For a listing of the ICSID cases against Argentina, see List of ICSID Cases, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases.
Another important factor is that virtually all treaties contain provisions that inhibit their denunciation once approved by the contracting parties. Foreign investments are generally long-term transactions. To give foreign investors assurance of a predictable and stable legal framework, investment treaties: (1) establish an initial period for which the treaty will be in force without providing for a right to terminate the treaty during that period, and (2) specify how long the treaty will continue following the expiration of its initial period or its termination.

Investment treaties generally provide that they shall be in force for ten or fifteen years. Upon the expiration of this initial period, the treaty may continue either for a fixed additional period or until it is terminated by one of the parties. As a rule, a treaty may be terminated by the parties only after the end of the initial period or after the submission of advance written notice; however, the termination of a treaty usually does not result in the immediate denial of treaty protection for investments made while it was in effect. Most treaty termination provisions contain a continuing effects clause that provides that investments made, acquired, or approved prior to the date of the termination of the treaty will be protected by the treaty’s provisions for a further period of ten, fifteen, or twenty years. Thus, for example, on February 1, 2010, a tribunal hearing claims against Russia under the Energy Charter Treaty held that Russia’s termination of the Treaty’s provisional application did not affect the continuing protection of investment under its provisions, including dispute settlement, of investments made before the withdrawal of provisional application for another twenty years.


213. See, e.g., Agreement Between the Government of the Republic of Indonesia and the Government of the People’s Democratic Republic of Algeria Concerning the Promotion and Protection of Investments, Indon.-Alg., art. 13, March 21, 2000, http://www.unctad.org/sections/dite/iia/docs/bits/indonesia_algeria.pdf (providing that “[t]he present Agreement . . . shall remain in force for a period of ten years and shall continue in force thereafter for another period of ten years and so forth unless denounced in writing by either Contracting Party one year before its expiration” (emphasis added)).

214. See, e.g., Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Yemen on the Mutual Promotion and Protection of Investments, Jordan-Yemen, art. 10, May 8, 1996, http://www.unctad.org/sections/dite/iia/docs/bits/jordan_yemen.pdf (providing that “each Contracting Party has the right to terminate this agreement at the end of its duration or at any time after the expiry of the initial ten years period by a written notice served to the other Contracting party one year prior to the intended termination date”).

215. See, e.g., Agreement between Japan and the People’s Republic of Bangladesh Concerning the Promotion and Protection of Investment, Japan-Bangl., art. 14, Nov. 10, 1998, http://www.unctad.org/sections/dite/iia/docs/bits/bangladesh_japan.pdf (providing that “in respect of investments and returns acquired prior to the date of termination of the present Agreement, the provisions of Articles 1 to 13 shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement”).

216. Lovells, Tribunal Allows Claims by Yukos Shareholders Against Russia (Feb. 9, 2010), http://elovells.com/e/ZZ91913072699680604.
The investment regime therefore appears to have a “sticky” quality which causes a country that has denounced the treaty nonetheless to give treaty treatment to an investor that had made its investment while the treaty was in force. Thus, the realities of securing capital for development and prosperity and the treaty provisions themselves give some degree of robustness to the emerging investment regime. Nonetheless, the threats to the investment regime, which have been characterized as “clarion calls to roll back the foreign investment regime,” are real, and they may have the power to cause a divergence of state expectations and thus undermine the regime that has been painstakingly constructed over the last sixty years. The international investment regime will require wise management and flexible leadership in the future if it is to withstand these challenges. Its privatized and decentralized decisionmaking processes and its lack of a stabilizing multilateral international organization will complicate that task considerably.
