THE IMPACT OF INTERNATIONAL INVESTMENT TREATIES ON DOMESTIC ADMINISTRATIVE LAW

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I. INTRODUCTION

A. *Investment Treaties, Administrative Sovereignty, Economic Progress, and Good Governance*

This Article addresses the duties that a host state to a foreign investment undertakes when binding itself to an investment treaty. As with every international agreement, an investment treaty reduces the scope of sovereignty for all parties to the treaty. In particular, an investment treaty will limit the sovereign right of a state to subject foreign investors to its domestic administrative legal system. All the main clauses typically included in an investment treaty operate in various ways to define and narrow the types of domestic administrative regulation to which foreign investors must subject themselves. This is a response to investors' concern for the predictability and stability of the legal framework governing their investments. Foreign investors' expectations of administrative stability and the host state's expectations of the sovereignty to control its administrative law are brought into a balance by an investment treaty that essentially favors the interests of foreign investors when compared to the general rules of international law applicable in the absence of a treaty.

In a globalizing economy, this basic framework of investment treaties may be seen as a key instrument to promote the flow of investment between countries party to these agreements. Or they may be seen as legal mechanisms standing in the way of international legal diversity based on the sovereignty of each host state. From a systemic point of view that sees foreign investment as a key component to promote growth and reduce poverty, bilateral investment treaties are an agreed set of rules that serve to attract foreign investment by reducing the space for unprincipled and arbitrary actions of

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the host state and thus contribute to good governance, which is a necessary condition for the achievement of economic progress in the host state.

B. *The Nature of Foreign Investment Treaties*

Foreign investment treaties are based on the presumption that the guarantees provided to foreign investors by the domestic legal system of the host country may be—or may turn out to be—insufficient for the special purpose intended by those treaties, which is primarily the creation of an investment-friendly climate designed to attract the foreign investment desired by the host state. This underlying rationale applies equally to classical bilateral investment treaties and to the recent generation of free trade agreements containing investment rules.[1]

Typically, the guarantees provided in these treaties are granted in addition to those contained in the host state's national system, the latter being extended by way of reference on the basis of a national treatment clause.[2] The treaties address the treatment of foreign investors alone and are inherently indifferent to issues of the legal system that relate to the nationals of the host state. They may even result in reverse discrimination to the detriment of investors who are nationals of the host state. Whether or not the legal system is changed by the host state so as to avoid such a discrepancy is a matter for the host state alone to decide.

Against this background, this Article aims to explain why foreign investment treaties contain only rights for foreign investors and very limited rights, if any, for investors from the host country. The special focus of this Article lies not on the legal status of investors, but on the reverse perspective: namely, the duties of the host state giving rise to rights for

1. *See, e.g.*, United States – Chile Free Trade Agreement ch. 10, U.S.-Chile, June 6, 2003, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

2. *See, e.g.*, U.S. MODEL BILATERAL INV. TREATY art. 3, ¶ 1 (2004) ("Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.").

investors, and the resulting limitations on the sovereignty of the host country.

Such a "reverse perspective" is rare and unusual from a contemporary standpoint, although it would not have been in the international economic climate of three decades ago. The dominant debate in capitals of the third world today is no longer about sovereignty,[3] but rather about competition for foreign capital and technology, and thus about the necessary ingredients of a national investment policy which will serve to attract the foreign investor.

The legal regime created by an international investment agreement is only one element among many that states use to reach out to foreign investors, but it has become an important—in some respects inevitable—component of such efforts. The impact on domestic law that follows from the acceptance of such a regime is today normally perceived as a necessary consequence of an investment-friendly climate rather than a negative aspect which should be avoided in principle. Thus, the priority of states has shifted from sovereignty to attracting foreign investment. But, of course, the impact of this paradigm change on the domestic law of host states remains real and still must be examined, if for no other reason than because domestic rules applicable to foreign investors must be adjusted to accord with the obligations imposed by the international treaty.

Most of the roughly 2300 bilateral investment treaties currently in force have been negotiated with developing countries at the request of traditional capital-exporting countries. However, such treaties are increasingly concluded exclusively among developing states. Also, within NAFTA, the United States and Canada, as well as Mexico, have been willing to accept international review of their actions towards foreign investors from the other two countries.[4] The United States and Ca-

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3. For examples that reflect the 1960s' and 1970s' jargon of the "permanent sovereignty over national resources," see G.A. Res. 1803 (XVII), U.N. Doc. 1803 (Dec. 14, 1962); G.A. Res. 3281 (XXIX), U.N. Doc. 3281 (Dec. 12, 1974).

4. For another example, *see* The Dominican Republic – Central America – United States Free Trade Agreement ch. 10, § B, Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (including special rules on settlement of investment related disputes).

nada have already found themselves as defendants before international NAFTA tribunals within this multilateral framework on various occasions—a situation that has not yet occurred under typical bilateral treaties. While the United States has never been found to be in violation of a rule, different groups within the United States have expressed concerns that the effect of foreign investment treaties on the domestic legal system may be so severe as to be unacceptable.[5]

The scope of foreign investment treaties *ratione materiae* applies essentially to all economic activities of foreign investors; this results from the broad definitions of the term "investment" found in practically all of the treaties.[6] As a result, nearly every aspect of the host state's legal system is potentially affected and may be subjected to international review in accordance with the treaty's system of dispute settlement.

II. The Right of the Foreign Investor to Sue the Host State

Inasmuch as foreign investment treaties promote the interests of the foreign investor, it is consistent with the purpose of the treaties that they all depart from a traditional principle of international law in allowing not just the state parties to the treaties, but the investors themselves to directly bring a claim before an international tribunal. Also, a number of treaties are drafted to ensure that contracts concluded by the host state and a foreign investor under the laws of the host state are also subject to the international guarantees provided by the treaty, including the dispute settlement mechanism. For purposes of ICSID proceedings, for example, the states have, as a rule, agreed in advance, on the basis of Art. 25 and 26 of the ICSID Convention, to refrain from requesting that local remedies be pursued.[7] In turn, the investor's home state agrees not

5. *See, e.g.*, Luke E. Wilson, Inst. For Sustainable Dev., Bilateral Investment Treaties and Development Policy-Making 21-22 (2004); Carlos G. Garcia, *All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration*, 301 Fla. J. Int'l L. 313 (2004).

6. *See* Rudolf Dolzer, *The Notion of Investment in Recent Practice*, *in* Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano 261, 263-66 (Charnovitz et al. eds., 2005).

7. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 26, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, *available at* http://www.worldbank.org/icsid/

to grant diplomatic protection.[8] Because the guarantees contained in the treaty are placed outside of the realm of diplomatic negotiations on the state-to-state level, the laws of the host state are subject to international review at the will of a foreign investor. At the same time, the classical stance of international law as inter-state law is modified in the field of foreign investment by lifting individuals onto the international plane vis-à-vis the host state.

III. Substantive Guarantees for the Foreign Investor: the Corollary of Reduced Sovereignty

The various substantive rules contained in investment treaties bearing upon domestic legal systems of the host countries emanate from different sources of international law. In part, they are based on autonomous treaty law specifically negotiated among the parties to the treaties. Other aspects of the treaties merely restate customary international law that would be applicable even in the absence of a treaty. In all of these treaties, both types of substantive rules are subject to interpretation and application by international tribunals, and thus become part of a more rule-oriented institutionalized system of compliance than exists under classical international law. As a result, the power to identify, apply, and enforce the rules has been shifted away from the free will of states, because of their voluntary acceptance of these rules.

In practice, three types of clauses typically contained in investment treaties have the most severe impact on domestic legal systems. These are: (a) clauses providing for rules on indirect expropriation; (b) clauses on fair and equitable treatment of foreign investors; and, (c) clauses on the protection of investment agreements concluded between a foreign investor

basicdoc/ICSID_English.pdf ("Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.").

8. *Id.* art. 27 ("No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.").

and the host country ("umbrella clauses"). While other provisions—such as those governing admission of an investment or concerning the cross-border transfer of payments by the investor—will also be of practical significance, the everyday life of the investment will mainly be affected by the understanding and the operation of these three rules. Thus, the interpretation and application of the relevant clauses and their variations deserve special examination in attempting to understand the effect of investment treaties on the host country's ability to determine its own administrative regulatory system.

A. *Indirect Expropriation*

Investment treaties use different formulas to define indirect expropriation.[9] Some treaties refer to measures "equivalent" to expropriation,[10] others to measures having the "same effect."[11] The NAFTA rules, for instance, additionally refer to measures tantamount to expropriation.[12]

While there has not been much discussion on this point, it has been assumed that at least some of these treaty clauses are meant to represent the same standard as the parallel rule of customary international law. However, as in domestic legal orders on this point, the long-standing jurisprudence on the content of customary law has not led to a clearly defined dis-

9. *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 98, 100-01 (1995).

10. *See, e.g.*, U.K. MODEL BILATERAL INV. TREATY art. 5 (2005) ("Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation . . . .").

11. Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investment, Swed.-Arg., art. 4-1, Nov. 22, 1991, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_sweden.pdf ("Neither of the Contracting Parties shall take any direct or indirect measure of nationalization or expropriation or any other measure having the same nature or the same effect against investments . . . .").

12. North American Free Trade Agreement art. 1110, ¶ 1, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) ("No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . . .").

tinction that would provide for a hard and fast rule on what, exactly, constitutes indirect expropriation.[13]

In the context of bilateral investment treaties (BITs), a similar degree of uncertainty characterizes the jurisprudence of international investment tribunals on indirect expropriation. Some tribunals have focused on the expected benefit of the use and enjoyment of the investment property as the test for indirect expropriation.[14] Others have focused in a similar way on the disputed measure's effect as the sole criterion (sole effect doctrine).[15] Yet another group of decisions have attempted a balancing approach that takes into account the larger context surrounding a measure allegedly constituting indirect expropriation.[16] Remarkably, the 2004 U.S. draft of a model bilateral investment treaty also points to context as one factor to be considered when determining whether a given measure constitutes an indirect expropriation.[17]

13. For various efforts to summarize or codify the state of international law concerning the concept of indirect expropriations, see Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 69-72 (2002); L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It or Caveat Investor*, 19 ICSID REVIEW–FOREIGN INVESTMENT L. J. 293 (2004).

14. *See* Metalclad Corp. v. Mexico, 40 I.L.M. 36, ¶ 103 (ICSID (W. Bank) 2000) ("Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.").

15. *See, e.g.*, Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran, 6 Iran–U.S. Cl. Trib. Rep. 219, 225-226 (1984) ("The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.").

16. *See, e.g.*, Técnicas Medioambientales TECMED S.A. v. Mexico, 43 I.L.M. 133, ¶ 122 (ICSID (W. Bank) 2003) ("There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.").

17. U.S. MODEL BILATERAL INV. TREATY, *supra* note 2, annex B ("The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an invest-

The *Metalclad* decision, for instance, set forth the view that the absence of a timely and orderly process of governmental decision-making affecting the foreign investor may lead to the conclusion that an indirect expropriation has occurred.[18] On the other hand, as an illustration of the sole effect doctrine, the *Santa Elena* case focused strictly on the measure's effect on the investor, without placing any emphasis on the environmental context of the measure.[19]

However an individual case may be assessed, in my view it would not be accurate to characterize the existing jurisprudence as being out of step with the earlier jurisprudence and with the literature on customary international law regarding indirect expropriation. Nevertheless, it is clear that the host state's sovereign right to legislate—not just in economic matters, but also in such domains as environmental, tax, and even labor law—is placed under significant restrictions by clauses on indirect expropriation and by the uncertainties and vagaries of their application by arbitral tribunals.

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ment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.").

18. Metalclad v. Mexico, *supra* note 14, ¶ 107 ("These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation.").

19. Compañia del Desarrollo de Santa Elena S.A. v. Costa Rica, 39 I.L.M. 1317, ¶ 71 (ICSID (W. Bank) 2000) ("While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid."). *But see* CMS Gas Transmission Co. v. Argentina, Case No. ARB/01/8, ¶ 260-64 (ICSID (W. Bank) 2005), *available at* http://www.investmentclaims.com/decisions/CMS-Argentina-FinalAward-12May2005.pdf.

B. *Fair and Equitable Treatment*

The requirement of fair and equitable treatment of foreign investments has long been a standard feature in modern investment treaties.[20] Such clauses appear in two different versions. Whereas countries such as Germany, Switzerland and Sweden draft the rule in such a way that creates an autonomous, treaty-based standard, a second group, including the United States, France and the United Kingdom, prefers to require "fair and equitable treatment in accordance with international law," thus indicating that they require a standard of treatment that corresponds to the rules of customary international law.[21]

As to the content of customary law in this regard, however, an intense debate has evolved recently over whether the relevant rules will only be violated if the conduct of the host state is outrageous and shocks the legal conscience,[22] or whether it is sufficient that the conduct can be characterized as grossly unjust.[23]

Whereas a difference between the two positions certainly exists as an abstract matter, it seems to be an open question whether the difference is as significant in practice as the fierce debate seems to suggest. In my view, it is possible that tribunals will not be inclined to differentiate according to any abstract difference that may or may not be inherent in the two positions. Instead, they may well reach their judgment based on their sense of what is, under the specific circumstances, still acceptable from a contemporary perspective.

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20. *See* Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INVESTMENT & TRADE 357 (2005); Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87 (2005).

21. *See* ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW 2-3 (2004).

22. *Cf.* Neer v. Mexico, 4 Rep. of Int'l Arb. Awards 60, 61-62 (U.S.-Mex. Gen. Claims Comm'n 1926) ("The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.").

23. *See* Waste Mgmt., Inc. v. Mexico, 43 I.L.M. 967, ¶¶ 171, 175 (ICSID (W. Bank) 2004), *available at* http://www.state.gov/documents/organization/34643.pdf.

Identifying the content of fair and equitable treatment may be more complex when it comes to interpreting a version of the clause that is strictly treaty-based, such as the approach utilized by the first group of states discussed above. Efforts to spell out the content by way of a shorthand formula as a way to elaborate the ordinary meaning of the clause will not be very useful, given that dictionaries are not very helpful in this context and in fact often refer to "equitable" when explaining the term "fair" and refer to "fair" when discussing the meaning of the term "equitable." What seems more sensible is to classify, in a casuistic way, certain types of conduct as being acceptable or unacceptable. Indeed, the more recent jurisprudence seems to move in this direction.

Along these lines, tribunals have recently emphasized themes such as stability, consistency, and transparency of administrative conduct. Two recent ICSID cases may illustrate the direction of the jurisprudence. In *TECMED v. Mexico*,[24] the conduct of various Mexican public officials was held to be inconsistent and insufficiently transparent and thus contrary to the principle of fair and equitable treatment of foreign investors. In this case, the renewal of the license for the operation of a hazardous waste landfill by a Spanish investor in Mexico was refused on different grounds, following a period of strong local protests and political changes on the municipal level. Considering the behavior of the Mexican authorities in the light of the standard of fair and equitable treatment embodied in the Spanish-Mexican bilateral investment treaty, the tribunal found:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of

24. TECMED v. Mexico, *supra* note 16. R

> the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved there under, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.[25]

On the facts, the Tribunal found that the "ambiguity" of the Mexican behavior with regard to the investor "in spite of the expectations created"[26] conflicted with "what a reasonable and unbiased observer would consider fair and equitable."[27]

In the second case, *MTD v. Chile*,[28] the modification of an urban development scheme necessary for the construction of a township was refused, although the project had already been approved by the Chilean Foreign Investment Commission (FIC). The arbitral tribunal emphasized the "inconsistency of action between two arms of the same Government *vis-à-vis* the same investor even when the legal framework of the country provides for a mechanism to coordinate."[29] After recalling that "[u]nder international law, . . . the State of Chile needs to be considered by the Tribunal as a unit,"[30] and that Chile has "an obligation to act coherently and apply its policies consistently,"[31] the tribunal concluded "that approval of an investment by the FIC for a project that is against the urban policy of

25. *Id.* ¶ 154.

26. *Id.* ¶ 164.

27. *Id.* ¶ 166.

28. MTD Equity Sdn. Bhd. v. Chile, Case No. ARB/01/7 (ICSID (W. Bank) 2004), *available at* http://www.asil.org/ilib/MTDvChile.pdf.

29. *Id.* ¶ 163.

30. *Id.* ¶ 165.

31. *Id.*; *see also* JÖRG PAUL MÜLLER & THOMAS COTTIER, *Estoppel*, *in* ENCYCLOPEDIA OF PUB. INT'L LAW VOL. 2 116-19 (1995) (describing concept of estoppel in general international law).

the Government is a breach of the obligation to treat an investor fairly and equitably."[32]

A few other decisions have added the requirement of due process, without explaining its content in this context,[33] and a recent decision has set forth the requirement of candor.[34] As to the judicial process, one tribunal reviewed the workings of the jury system in the state of Mississippi in the United States, and refused to countenance the trial in question.[35]

Certainly, the principle of fair and equitable treatment may, in practice, have wide-ranging repercussions for the sovereignty of the host state to determine and apply its administrative law, as it covers all phases of the investments and extends to all areas of domestic law affecting foreign investment. Depending upon how it is interpreted and applied by the tribunals, the principle has the potential to reach further into the traditional *domaine réservé* of the host state than any one of the other rules of the treaties.

C. *Umbrella Clauses*

Many investment protection treaties include a special provision by which the contracting states guarantee to respect any contractual arrangements they may enter into with foreign investors. For instance, Art. 2 (2) *in fine* of the 1999 British model bilateral investment treaty states:

> Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.[36]

Although the specific terms of the clause may differ from treaty to treaty—and thus may have to be interpreted and ap-

32. *Id.* ¶ 166.
33. *See, e.g.*, S.D. Myers, Inc. v. Canada, 40 I.L.M. 1408, ¶ 143 (NAFTA Arb. Trib. 2001) ("Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice.").
34. Waste Mgmt. v. Mexico, *supra* note 23, ¶ 98. R
35. Loewen v. United States, 42 I.L.M. 811, ¶ 119 (ICSID (W. Bank) 2003) ("By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.").
36. U.K. MODEL BILATERAL INV. TREATY art. 2, ¶ 2 (1999).

plied differently from case to case—the overall aim of the clause is to transform the breach of a contract between a state and a foreign investor into a breach of the bilateral investment treaty concluded with the home state of the investor, thus giving rise to the international responsibility of the host State and opening the way to international dispute settlement procedures provided for in the bilateral investment treaty.

The emergence of the clause in modern investment protection treaties must be seen in the broader context of efforts to "internationalize" the legal framework applicable to international concession contracts. Whereas many capital importing countries used to emphasize the exclusive applicability of their domestic legislation to concession contracts concluded with foreign investors, various efforts have been made to withdraw these contracts from the unilateral regulatory power of the host State.[37] Along these lines, the idea[38] of an "umbrella clause" is to prevent the host State from unilaterally modifying the terms of a contract or the applicable legislation, thus placing the concession contract under the protection (the "umbrella") of the state-to-state bilateral investment treaty.

In practice, however, the application of the clause to specific contractual arrangements has turned out to be less straightforward than its drafters may have originally envisaged. In particular, the question has arisen whether every breach of a concession contract—even a minor breach of a purely com-

37. *See, e.g.*, Stephen M. Schwebel, *International Protection of Contractual Agreements*, 53 AM. SOC'Y INT'L L. PROC. 266, 273 (1959); F. A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 572 (1960); R. Y. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 156 (1961); Prosper Weil, *Problèmes relatifs aux contrats passés entre un état et un particulier* [*Problems Related to Contracts Between a State and a Private Party*], 128 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 95, 101-02 (1969) (Fr.); Karl-Heinz Böckstiegel, DER STAAT ALS VERTRAGSPARTNER AUSLÄNDISCHER PRIVATUNTERNEHMEN [THE STATE AS CONTRACT PARTNER OF FOREIGN BUSINESS COMPANIES] 136-40 (1971) (F.R.G.); Jean-Flavien Lalive, *Contrats entre états ou enterprises étatiques et personnes privées* [*Contracts Between States or State Enterprises and Private Persons*], 181 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9, 37-38 (1983) (Fr.).

38. For a study concerning the origins of the umbrella clause see Anthony C. Sinclair, *The Origins of the Umbrella Clause in The International Law of Investment Protection*, 20 ARB. INT'L 411 (2004); Thomas W. Wälde, The "Umbrella Clause" in Investment Arbitration – A Comment on Original Intentions and Recent Cases, 6 J. WORLD INVESTMENT & TRADE 183 (2005).

mercial nature which would not by itself amount to a breach of one of the substantial standards of a bilateral investment treaty—may also constitute a breach of the umbrella clause and thus trigger the international responsibility of the host State. The issue is made more complex by the fact that many contracts concluded between states and foreign investors confer exclusive jurisdiction on the national courts of the host state for contractual disputes.

The first arbitral awards which addressed this issue did not lead to a clear and consistent line of jurisprudence. In the ICSID case of *SGS v. Pakistan*,[39] the arbitral tribunal adopted a very narrow interpretation of the umbrella clause contained in the applicable Swiss-Pakistani bilateral investment treaty. Although the clause was formulated in the broad terms found in most modern bilateral treaties,[40] the tribunal held that its effect could not be to "elevate" breaches of contract to breaches of the bilateral investment treaty.[41] One of the main arguments of the tribunal was that any other interpretation would lead to a situation in which breaches of "an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments"[42] would amount to breaches of the bilateral investment treaty and lead to the international responsibility of the host State. In the tribunal's view such a restriction of the State's sovereignty could not be construed in the absence of a express agreement to that effect.[43]

Six months later, another umbrella clause was invoked by the same plaintiff in a dispute with the Republic of Philippines

39. *See* SGS Société Générale de Surveillance S.A. v. Pakistan, Dec. on Objections to Jurisdiction, 18 ICSID Review 307 (ICSID (W. Bank) 2003).

40. Article 11 of the Swiss-Pakistani Bilateral Investment Treaty (BIT) states: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." *Id.* at 361, ¶ 163.

41. *Id.* at 362, ¶ 165.

42. *Id.* at 364, ¶ 168.

43. *Id.* at 365-66, ¶ 171 ("We believe, for the foregoing considerations, that Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. The appropriate interpretive approach is the prudential one summed up in the literature as in *dubio pars mitior est sequenda*, or more tersely, in *dubio mitius*.").

before a different ICSID tribunal.[44] Although the terms of the clause differed from the umbrella clause at issue in the proceedings against Pakistan, the arbitrators in this case clearly expressed their disapproval with the narrow interpretation applied by their colleagues in the Pakistan proceeding. For the tribunal in *SGS v. Philippines*, the umbrella clause "means what it says,"[45] making "it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments."[46] Yet, in the specific circumstances of the case, the tribunal in *SGS v. Philippines* also refused to apply the clause in a manner that would have given it its fullest effect in accordance with its textual understanding.[47] Indeed, as the contract between SGS and the Republic of Philippines conferred exclusive jurisdiction on the national courts of the Philippines, the ICSID tribunal decided to stay its proceedings pending the determination of the contractual issues by the Philippine judiciary.[48]

Some other relevant issues concerning the scope of umbrella clauses still remain to be clarified through future arbitral practice. Thus, it is not clear at present whether the effect of an umbrella clause may also extend to contracts concluded between foreign investors and sub-state entities,[49] or whether a distinction will be made according to the public- or private-law character of the state action at stake.[50] In any event, state officials will have to keep in mind the relevant clauses of bilateral

44. SGS Société Générale de Surveillance v. The Philippines, Dec. on Objections to Jurisdiction, Case No. ARB/02/6 (ICSID (W. Bank) 2004), *available at* http://www.worldbank.org/icsid/cases/awards.htm. The relevant umbrella clause of the applicable bilateral investment treaty reads: "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party." *Id.* ¶ 115.

45. *Id.* ¶ 119; *see also* Eureko B.V. v. Poland, ¶¶ 244-260 (ICSID (W. Bank) 2005), *available at* http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf.

46. SGS v. The Philippines, *supra* note 41, ¶ 128.

47. *Id.* ¶ 169 (stating that Article VIII(2) of BIT does not override Article 12 of CISS agreement).

48. *Id.* ¶ 155.

49. *See, e.g.*, Salini Costrutorri S.P.A. v. Morocco, 42 I.L.M. 609, ¶ 61 (ICSID (W. Bank) 2003).

50. Wälde, *supra* note 35, at 183.

investment treaties when modifying their contractual relationships with foreign investors. A unilateral change of existing contracts may be lawful under domestic law and yet still give rise to international responsibility under international investment protection treaties.

D. *The Law at the Time of the Investment: The Basis and Limitations of Legitimate Expectations*

One aspect of recent decisions underlying the themes of both legal stability and national sovereignty relates to the focus of the tribunals on the law in the temporal dimension—that is, the state of the law at the time when the investment is made. According to this point of view, the investor is entitled, in principle, to rely on the legal rights granted to him by the law as it stands at the time of the investment. By the same token, the investor may not subsequently claim rights not found in the law at that time. Thus, tribunals have generally been inclined to point out that laws that may be unwise or deficient cannot form the basis of a claim as long as they were in place and known to the investor at the time of the investment. In *Gami Investments v. Mexico*,[51] for instance, the arbitral tribunal highlighted the principle as follows:

> To repeat: NAFTA tribunals have no mandate to evaluate laws and regulations that predate the decision of a foreign investor to invest . . . . The duty of NAFTA tribunals is rather to appraise whether and how preexisting laws and regulations are applied to the foreign investor.[52]

Consequently, in this case, the tribunal refused to examine the content and practicability of a complex Mexican sugar industry decree, focusing solely on the manner in which the relevant regulation was applied to the foreign investor.[53] Indirectly, this approach places a significant burden on the foreign investor who is made responsible for the knowledge of the relevant national law himself. However, such a holding is justified, since most foreign investors will have means available to make themselves aware of applicable norms, and can there-

51. GAMI Investments, Inc. v. Mexico (NAFTA Arb. Trib. 2004), *available at* http://www.state.gov/documents/organization/38789.pdf.
52. *Id.* ¶ 93.
53. *Id.* ¶ 94.

fore be trusted to make only those investments they expect to benefit from under the regulatory regime in place at the time. At the same time, the state of the law of the host country at the time of the investment may also serve as the benchmark for the assessment of further regulatory changes. Thus, the host state should take into consideration the legitimate expectations created by a specific piece of legislation when any new changes are made to its regulatory framework.

IV. Towards a Multilateral System of Investment Protection?

In the current negotiating round of the World Trade Organization (WTO), which began in Doha in Qatar in 2001, an effort was made by developed states to reach an agreement on a multilateral investment treaty. This attempt failed, but the same initiative may be taken again in the future.[54] What is of interest for the present discussion is that developing states such as Brazil, India, Malaysia, and even China spoke out against the proposal.[55] These countries argued that they had reason to fear that such a multilateral treaty would significantly curtail their control over their domestic regulatory space and that future studies would be necessary to examine the impact on their national legal order.

It is not clear at the moment whether and under what circumstances the effort to create a multilateral investment system will be revived inside or outside the WTO framework. It is clear that a certain ambivalent attitude prevails when, on the one hand, more and more developing states are willing to negotiate bilateral investment treaties among themselves, such as the recent agreement between China and India, but when, on the other hand, the same countries nevertheless object to a corresponding multilateral treaty because of an allegedly undesirable reduction of regulatory space and other potential effects of such treaties.

54. In the mid-1990's the OECD was unable to agree on a Multilateral Investment Agreement (MIA).

55. *See, e.g.*, Fiona MacMillan, *If Not This World Trade Organisation, Then What?*, 15 Int'l Company & Com. L. Rev. 75. 76-79 (2004) (U.K.), *available at* http://eprints.bbk.ac.uk/archive/00000011/01/FM1.pdf.

V. Administrative Sovereignty, Legal Stability, and Good Governance: Towards a Transnational Regime for Foreign Investments?

In conclusion, it should be noted that the jurisprudence of investment tribunals as a whole contains ingredients of a growing system of international administrative law for foreign investment. The rules are developed on the basis of very generally worded clauses in virtually all areas of administrative law, ranging from tax law to bankruptcy issues, from the law of governmental immunity to export rules and, in particular, the requirements of permit processes. The appropriate time for filing an appeal, the process of determining a relevant fact, and the judicial administration of justice in general have all been subject to review by this growing jurisprudence.

The future evolution of this jurisprudence will mainly depend upon the methodology which tribunals use to apply the relevant rules of investment law. One approach they may use is to underline the host state's sovereignty over its legal system and to accordingly favor the state in case of doubt.[56] A different method is to emphasize the object and purpose of an investment treaty as set forth in the relevant preambles, and to conclude that the creation of an investment-friendly climate will typically require favoring the legal interests of the investor over that of the state.[57] Finally, in some circumstances, it may be possible to evade these two positions and to simply base a decision on the language of a treaty and its ordinary meaning.[58]

56. *See* SGS v. Pakistan, *supra* note 39, at 365-66, ¶ 171.

57. *See* SGS v. The Philippines, *supra* note 44, ¶ 116 ("The object and purpose of the BIT supports an effective interpretation of Article X (2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other.' It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.").

58. *See* ADF Group, Inc. v. United States, 18 ICSID Review 195, ¶ 147 (ICSID (W. Bank) 2003) ("We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph.").

Currently, variations of all three approaches can be found among the decisions of tribunals that have considered these questions, and this will continue as long as no institutional changes are implemented to provide for greater coherence in the investment arbitration system.

So far, states seem to have accepted—albeit sometimes grudgingly—the standard rules of investment treaties, as well as their interpretation and application by tribunals, in a way that is leading towards the creation of an emerging body of international rules of administrative law. The reaction of the NAFTA governments to the jurisprudence of arbitral tribunals regarding fair and equitable treatment remains the exception.[59] The United States model treaty of 2004 also mirrors the reaction of the U.S. government to previous rulings of arbitral tribunals. Of course, governments that have lost a major case, or even several cases, will be likely to frown on the practical side of the treaty, as has sometimes been the case. To a surprising extent, however, even those governments have been inclined to agree that the proceedings and the tribunals' findings have turned out to be helpful inasmuch as they may provide a powerful incentive to review and modernize their domestic legal systems.

On one level, states have accepted that the willingness to conclude investment treaties is recognized today as the passport to the global competition for foreign investments. While this recognition is accompanied by a partial loss of national sovereignty, reformers in developing countries nevertheless see these investment treaties as powerful tools for the modern-

59. On July 31, 2001, the NAFTA Free Trade Commission (FTC) adopted an authoritative interpretation of Chapter Eleven "in order to clarify and reaffirm the meaning of certain of its provisions." *See* Pope & Talbot, Inc. v. Canada, 41 I.L.M. 1347, ¶ 10 (NAFTA Arb. Trib. 2002) (citing NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions (2001)) ("B. Minimum Standard of Treatment in Accordance with International Law: 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

ization of the domestic administrative legal system, providing effective external checks and discipline on deficiencies and shortcomings which may be difficult to agree upon and to implement at the domestic level. The growing subjection of states to mechanisms of international dispute settlement is based on the acceptance by these states of the notion that international economic relations require internationally agreed rules and that these rules need to be enforceable. One cannot overlook the fact that while the law of international investment still has its foundations in domestic rules applied by national administrations, this domestic framework is continuously tightened by the decisions of international authorities.

The preceding remarks have shown that the treaty-based rules for foreign investment can be seen from a variety of different perspectives. Concerning the host state's sovereign rights (as traditionally understood), these rules will operate as significant barriers that may turn out to be costly to disregard, as some states have found in the past decade. For foreign investors, it is precisely this reduction of sovereign regulatory space that is indispensable for their investments to benefit from long-term legal stability and predictability, thus providing for a fair return that is consistent with their legitimate expectations. International financial institutions such as the World Bank, regional development banks, and the International Monetary Fund increasingly focus their work on good governance in recipient countries in order to promote economic growth and reduce poverty. Essentially, the obligations and the disciplines laid down for host countries in investment treaties amount to major ingredients of good governance. Obviously, under certain circumstances, the focus on administrative sovereignty will collide with the expectation of the foreign investor and with the notion of good governance. Although no single set of guidelines exists to direct each state as it seeks to strike a balance in these matters, the international trend is certainly to place higher emphasis on an investment-friendly climate leading to economic growth rather than on legal and political concepts of national sovereignty.