FOREIGN DIRECT INVESTMENT:
HAZARD OR OPPORTUNITY?

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I. Introduction

The procedural trappings associated with the regulation of Foreign Direct Investment (FDI), measured attempts at increased transparency, expanded public participation in international investment, and improvements in private investors' access to international investment are profoundly different in international investment law today as compared to decades past.

The attempts by states to extend their regulation of FDI beyond that allowed to them under customary international law and the newly developed rights of foreign investors to protection from such assertions of state power are challenging in the dynamic world of international investment. The evolving right of investors to participate in FDI within a liberalized international regime and the sovereignty of states to protect domestic interests from the exigencies of FDI is an ongoing concern. An important issue is the need for

1. For recent publications focusing on these concerns, see generally Wenhau Shan, Penelope Simons & Davinder Singh, Redefining Sovereignty in International Economic Law (2008); Christine Tietje, International Investment, Protection and Arbitration (2008); David Collins, Constitutionalizing Economic Globalization Investment Rules and Democracy's Promise, 69 Cambridge L.J. 231 (2009); Robert Stumberg, Sovereignty by Subtraction: The Multilateral Agreement on Investment, 31 Cornell Int'l L.J. 491 (1998); Jonathan Chrystal, Sovereignty and the International Regulation of Foreign Direct Investment, Paper Presented at the Annual Meeting of the American Political Science Associa-
international investment law to address conflicts arising out of this tension between state sovereignty and the liberalization of investment in a manner that is principled, transparent, and even-handed. Accommodating the equitable treatment of FDI while preserving the natural resources and other public interests of host states requires careful balancing.2

Though the conflict between state and investor interests appears significant, these interests are often compatible. Sovereign states are interested not only in regulating FDI on public policy grounds, but also in avoiding the flight of investor capital from states whose regulatory regimes investors may consider unclear, arbitrary, or capricious. Investors are interested not only in protecting their rights, but also in establishing long-term investment relationships including relationships with host states.

Equally doubtful is the overstated contest between fixed rules governing FDI and wholly malleable ones. Neither alternative is sustainable over time. To be secure, the regulatory regime governing FDI needs to be not only stable, but also sensitive to sociocultural and economic change in FDI. Profound investment opportunities may wane as uncertainty trammels the profitability of otherwise sound investment decision-making that is not subject to stable FDI regulation. Yet, the process of international investment may well regress into an endless cycle of flux without flexibility.


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TRAL), 3 and the decisions of international investment tribunals such as under the International Centre for Settlement of Investment Disputes (ICSID). 4 A central purpose of this Article is to evaluate the extent to which international investment law protects the procedural and substantive rights of foreign investors while also being responsive to the sovereignty of states including their police and related powers. 5 The Article pays particular attention to the development of free trade agreements (FTAs) and bilateral investment agreements (BITs). Chapter 11 of the North American Free Trade Agreement (NAFTA) 6 illustrates dispute resolution mechanisms in FTAs.

Part II addresses the meaning of FDI, the alleged contest between state sovereignty and FDI, and the regulation of FDI. It also discusses the legal treatment of FDI in the post–World War II era, including treaties of friendship, commerce, and navigation (FCN treaties), multilateral investment agreements of the World Trade Organization (WTO), and BITs. Part III considers different options in regulating international investment disputes and arguments in support of each. Part IV isolates specific institutions used to resolve investor-state disputes under the United Nations Convention on the Settlement of Disputes, the ICSID Additional Facility, and the UNCITRAL. Part V studies the regulation of FDI specifically under Chapter 11 of NAFTA. Finally, Part VI argues for a distinctive and functional investment jurisprudence governing international investment law.


II. FOREIGN DIRECT INVESTMENT

A. What is Foreign Direct Investment?

Foreign Direct Investment (FDI) ordinarily occurs when an entity, usually a corporation, from one state, the home state, makes a physical investment in another state, the host state. Typically, such investment involves building a factory and investing in machinery, equipment, and related corporate assets. FDI is distinguished from foreign indirect investment consisting primarily of portfolio investments by foreign entities in local companies. These investments are “indirect” because portfolio investments ordinarily do not entail control of the local investment.⁷

At the outset, it is important to note that FDI does not ensure economic growth. Actually, economic studies suggest that, as far as developing states are concerned, FDI has not accounted for accelerated economic growth.⁸ It is equally true, however, that FDI can promote growth; much will depend on the state in issue, the nature of FDI, the manner of its use, and the regulations imposed on it.⁹

The volume of global FDI had expanded geometrically in recent decades, only to contract in 2009.¹⁰ For example, the total annual global flow of FDI rose from $55 billion in 1985 to $315 billion in

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FDI has also given rise to a significant increase in the share of gross domestic production (GDP) in high-income countries from between 0.5 percent to 1.0 percent in the 1980s to more than 5 percent in 2000. This percentage, however, then declined to 1.4 percent in 2003, rebounded, and then declined significantly in 2009. While the increase in FDI inflows was less drastic in low- and middle-income countries, the percentage of FDI in GDP remained at more than 2 percent after the year 2000, indicating a slightly higher significance of FDI flows in developing countries.

Sales by multinational corporations (MNCs) of foreign affiliates, sales that exceeded the value of world trade in goods and services, was particularly instrumental in the growth of FDI. In rough terms, intra-firm trade among MNCs today constitutes approximately one-third of world trade, MNC exports to non-affiliates account for another third, and one-third consists of trade among national (non-MNC) firms.

The growth of investment in start-up companies, such as in software production, further accounts for this increase in FDI. Such investments often entail limited start-up costs and do not require extensive outlays on plant and equipment. While many often fail to produce profits, they often represent high-risk, high-return investments.

The scope of FDI has also expanded in recent decades to include the acquisition of a continuing management interest in a corporation or enterprise outside the investing corporation’s home country.
state. Such “direct” investment includes a corporation acquiring a
foreign corporation directly, constructing a facility, making an
investment in a joint venture, or forming a strategic alliance with a
local corporation, such as through the licensing of technology and
intellectual property.19

The readiness of many nation states, albeit cautiously, to
encourage FDI in order to grow their domestic economies is key to
the liberalization of FDI. Nation states are able to support such
developments by reducing trade tariffs and duties and by develop-
ing communication and technology.20

FDI has also gained from liberalized domestic, regional, and
global trade policies, reduced tariff barriers, loosened restrictions
on both foreign investment and acquisition, and deregulated and
privatized industries across the globe.21 The result includes inno-
vations in regulatory frameworks governing investment in enter-
prises and capital markets leading to ever larger, more diverse
investment structures and operations. FDI has further evolved in
response to new technologies, advances in global communication,
and developments in the management of foreign investment.22

A significant part of FDI today is identified with global mergers
and acquisitions.23 Such cross-border acquisitions arise when the
control of assets and operations are transferred from local to for-
egn entities, or vice versa. In effect, local entities become affiliates
of foreign entities, or the converse. The benefits of mergers and
acquisitions include profits from expanding productivity in foreign
markets, reduced production and supply costs, and increased oper-

June 30, 2010).
20. On whether FDI promotes development generally, see Moran, Graham & Blom-
strom, supra note 8. On FDI growth strategies, see Thomas L. Brewer & Stephen Young,
Implications for Multinational Business Strategy, in The Oxford Handbook of International
Business 269, 269 (Alan M. Rugman ed., 2009). On openness to FDI by foreign telecom-
nunication companies aimed at modernizing domestic telecommunication services, see A
21. See Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties xi
(1995)
22. See id.
23. Until around 1997, mergers and acquisitions constituted almost 90 percent of the
FDI flow into the United States. Significantly derived from mergers and acquisitions and
the internationalization of production, FDI into developed countries last year rose from
Direct Investment to Exceed $1 Trillion, UNCTAD Predicts (Oct. 5, 2000), available at
ational efficiencies. Pitfalls of mergers and acquisitions arise when domestic entities cannot compete effectively against merged or acquired entities and when foreign investors channel profits from mergers offshore.

FDI also includes a growing variety of investment opportunities, such as licensing and technology transfers, reciprocal distributorship agreements, and international portfolio management.

“Greenfield” investments are another significant part of FDI. They consist of direct investments in new facilities or in acquiring existing ones. They are used to promote research and development in host states and to facilitate linkages to global investment markets. The risk to host states is that greenfield investments can reduce the market share of domestic competitors that cannot operate as efficiently or that produce inferior quality products or services. The profits from greenfield investments may also be channeled away from host states to investor home states. Such risks, however, are endemic to FDI generally.

2007 was the last full year of growth in FDI, given the global financial crisis that arose in 2008. The growth of FDI and mergers and acquisitions in 2009 was distinctly negative. The strong growth in mergers and acquisitions in prior years receded in 2009 due to declining credit, falling equity markets, deteriorating global economic outlook, and deteriorating public confidence. A number of major developed countries went into recession, and growth in emerging countries also declined. Total global mergers and acquisitions in 2008 was $3.1 trillion, down from $4.4 trillion in 2007. That figure declined to $2 trillion in 2009. The decline may also extend into 2010, depending on the extent of distress in the financial sector and bankruptcies across major industries.

24. See id.
25. See id.
environment in which negative economic growth is predicted to continue, FDI may nevertheless become part of the solution as investors seek new and safer opportunities and as FDI moves from the sidelines into full-on investment resourcing.29

Finally, it is important to note that, while this Article is restricted to FDI, modern day BITs often conceive of “investor,” “investment,” “asset,” and “enterprise” sufficiently expansively to include indirect investment as well. This not only highlights the wide expanse of foreign investment, but also introduces controversy over the questionable public benefit arising from looser forms of capital such as portfolio investment.30

B. State Sovereignty and Foreign Direct Investment

Nation states, understandably, are cautious about permitting foreign entities to establish profitable beachheads on their soil when capital outflows might exceed inflows. Despite FDI’s ability to provide nation states with needed infrastructure and the capability to develop economically, FDI may also intrude on domestic economies and threaten local investors and domestic interests.31 As a result, states may restrict FDI selectively in order to protect particular local industries from foreign competition on domestic public policy grounds. Their justification in containing FDI may include their alleged exercise of sovereign power. Their means of regulating FDI may encompass resort to trade and investment legislation, administrative regulations, and procedures governing FDI.32


29. See generally Busse & Groizard, supra note 9.


as states have liberalized FDI beyond narrow customary grounds based on their “essential security interests,” the states have invented new ways of regulating it. In as much as they have identified institutions and established procedures to protect the substantive and procedural rights of investors, the states have established regulatory regimes to circumscribe the due process claims of foreign investors in the domestic interest.

Historically, resistance to FDI has emanated from developing states. Their rationale has been that FDI represents economic exploitation by investors from developed states, notably MNCs. Their modus operandi has been to selectively erect barriers to FDI, insisting that such barriers render them more self-reliant economically, more self-confident culturally, and more self-sufficient politically. They have expressed their resistance through multilateral entities such as the WTO. At the same time, they have concluded FTAs and BITs selectively with other states, including developed ones, on strategic political and economic grounds.

The ambivalence of states towards the liberalization of FDI now also includes developed states. In decades past, the primary preoccupation of developed states was to find new homes abroad for their burgeoning investment capital. Today, investment exporters have become investment importers, and historical global exporters of investment, like the United States, have become destinations for

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33. On this narrow plea of “necessity” that states are entitled to assert as a basis for a “taking” under customary international law, see Jurgen Kurtz, Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis 13-19 (Jean Monnet Working Paper 06/08, 2008), available at http://www.jeanmonnetprogram.org/papers/08/080601.pdf. See also discussion infra Part IV.

34. See also discussion infra Part III.A.2.


37. See infra Part II.D.1.

investment from Europe, Japan, and China. Once the bastion of liberalized trade and investment, developed states increasingly place an armory of restrictions around FDI. Notably among these are limits the United States has placed on the free inflow of investment capital, such as in regulating sovereign wealth funds. Such restrictions on FDI are likely to grow as both developed and developing states attempt to limit their exposure to financial and related risks worldwide.

In a postmodern world in which FDI has grown perceptibly more complex, nation states generally have devised more creative barriers to protect their homegrown industries from foreign investors. Coupled with these developments has been an identifiable shift from old to new investment wealth in the East, seeking access to previously unchartered investment waters in the West. A more recent phenomenon is host states’ appreciation that innovations in regulating trade and investment, including regulating shifts of cap-


40. On foreign investment in the United States, see Mack Ott, Foreign Investment in the United States, in The Fortune Encyclopedia of Economics 522 (David R. Henderson ed., 1993). The United States, arguably, has become increasingly protectionist and is likely to be increasingly so in the current recessionary climate. See infra Part V.H.


42. For the argument that democracies are more protective of FDI and less likely to expropriate than autocracies, see generally Quan Li, Democracy, Autocracy, and Expropriation of Foreign Direct Investment, 10 COMP. POL. STUD. 1177 (2009).

43. On the impact of national security concerns upon the regulation of FDI by the U.S. government, see generally Graham & Marchick, supra note 32.

44. See generally Gerald Chan, China’s Compliance in Global Affairs: Trade, Arms Control, Environmental Protection, Human Rights (2006); China Rising, supra note 39.
ital, represent important means of addressing the unfolding global economic crisis.\textsuperscript{45}

C. Regulating Foreign Direct Investment

In theory, the liberalization of FDI not only should benefit foreign investors, but also should help domestic economies share in the wealth derived from foreign investment. FDI, as a means of generating domestic revenue, may also serve as an effective means by which to redeploy those revenues into a nation's economic, social, and political infrastructures.\textsuperscript{46} Insofar as states restrict FDI in protected sectors, they may encourage it in less protected sectors. In regulating FDI strategically in the short term, states may also stabilize FDI's economic impact in the longer term, including for the benefit of foreign investors.

States inevitably make strategic choices in regulating FDI. Those choices include choosing among competing measures of reform ranging from reformulating tax and monetary policy to social law reform. States prioritize among domestic interests that are not necessarily compatible in selectively seeking to attract FDI. For example, they may encourage FDI to secure cheaper goods for sale in local markets, while recognizing the negative impact such FDI may have on domestic employment. They make strategic choices, not only in deciding whether to reduce regulatory restrictions on FDI, but also when and how to do so.

States may succumb to double talk in regulating FDI. Some states may apply their regulatory practices unevenly, embedding privileged constituencies at the expense of disadvantaged ones, regardless of whether they publicly declare their commitment to international standards of due process of law.\textsuperscript{47} States that initially present attractive foreign investment laws and regulations governing FDI, may subsequently subjugate FDI through nationalization and expropriation without due process of law. In expropriating FDI on public policy grounds, states may disappoint

\textsuperscript{45} For recent books exploring the principles underlying international investment law and the tensions between that law, state sovereignty, and international investment practice, see generally Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law (2008); Philippe Kahn & Thomas W. Walde, New Aspects of International Investment Law (2007); Oxford Handbook of International Investment Law (Peter Muchlinski et al. eds., 2008).


\textsuperscript{47} On the perceived virtues of FDI, see infra Part II.D.
the reasonable expectations of foreign investors by denying protection to legitimate property rights. By presenting FDI as “theft” of national resources, states may legitimate their “confiscation” of foreign investments.\footnote{48}

None of this is to suggest that states abuse their sovereign powers as a matter of course in regulating FDI. Though their actions may be intrusive, host states may use the revenues generated from taxing FDI to build economic infrastructures, including those that support FDI.\footnote{49} Far from denying foreign investors due process of law, states may act quite legitimately under international investment law. The tensions between states encouraging and restricting FDI are best understood in light of developments in FDI during the second half of the twentieth century.

D. \textit{The International Regulation of Foreign Direct Investment}

A new era of trade liberalization and investment began following World War II, heralded by the adoption of the General Agreement on Tariffs and Trade (GATT) in 1947.\footnote{50} The GATT’s purpose was to reduce protectionist barriers that had preceded World War II and to guide the liberalization of trade and investment.\footnote{51} In practice, the ambit of the GATT largely excluded the treatment of FDI.\footnote{52}

The contracting parties of the GATT, however, did adopt a resolution in 1955 on International Investment for Economic Development in which they “urged” member states to conclude bilateral investment agreements.\footnote{53} The issue of international investment

\footnote{48. See generally infra Part V.}
\footnote{49. See supra Part II.C.}
\footnote{50. See infra note 59.}
\footnote{51. The Havana Charter was intended to serve as an impetus for the multilateral community to agree upon an international trade and investment regime. The Havana Charter, a creation of the now defunct International Trade Organization (ITO), was signed on March 24, 1948, with fifty-three signatory states. It failed, however, to gain the support of the U.S. Congress and ultimately, had limited influence over international trade and investment generally. See U.N. Conf. on Trade & Employment, Final Act and Related Documents, U.N. Doc. E/CONF.2/78 (Mar. 24, 1948); see generally ANN CAPLING, AUSTRALIA AND THE GLOBAL TRADE SYSTEM: FROM HAVANA TO SEATTLE (2001); JAMES TANHAM, THE HAVANA CHARTER: GOOD OR BAD? (1949).
\footnote{52. This is despite the fact that investment was included in the “Havana Charter,” which was designed to create an ITO in the mid-1940s. Due to resistance from the U.S. Congress, however, the ITO never formed and the Havana Charter was abandoned. See SIMON LESTER ET AL., WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY 633-34 (2008).
was also addressed by a GATT Panel in *Canada—Administration of the Foreign Investment Review Act.*\(^{54}\) While Canada clearly had the right to regulate foreign investment, the issue was whether it had engaged in "trade distorting" measures through its local content and export performance requirements and whether such conduct violated the GATT.\(^{55}\) The panel held that Canada's local content requirements were inconsistent with its "national treatment" duties under Article III(4) of the GATT.\(^{56}\) In contrast, the panel held that Canada's export "performance requirements" were not inconsistent with its GATT obligations.\(^{57}\) In so determining, the panel also confirmed the GATT's limited scope in regulating FDI.\(^{58}\)

1. The WTO

Over the latter third of the twentieth century, the WTO evolved into a global mechanism capable of generally liberalizing trade and investment.\(^{59}\) The WTO inherited what the GATT began as a patchwork quilt in 1947.\(^{60}\) The WTO, however, has been reluctant to liberalize international investment in a comparable manner to its liberalization of trade. In particular, the WTO, dominated by developing states, opposed any comprehensive inclusion of foreign investment in multilateral talks.\(^{61}\) The limited recognition of FDI in the Uruguay Round of negotiations between 1986 and 1994, during which most of the WTO agreements were negotiated, exemplifies this.


\(^{55}\) *See* supra note 51 and accompanying text.

\(^{56}\) *See* supra note 51 and accompanying text.

\(^{57}\) *See* supra note 51 and accompanying text.

\(^{58}\) *See* supra note 51 and accompanying text; World Trade Organization [WTO], Trade and Investment—Technical Information, www.wto.org/English/tratop_e/invest_e/invest_info_e.htm (last visited Dec. 21, 2009).


\(^{61}\) On this resistance in the WTO, see *infra* notes 63 & 64.
plified this reluctance to liberalize international investment regulation, initially spearheaded by the Soviet Union and its allies.\textsuperscript{62} The open hostility to liberalizing FDI at successive ministerial WTO meetings in Singapore, Doha,\textsuperscript{63} and especially Cancun,\textsuperscript{64} further imbedded this reluctance.

The resistance of the developing world to liberalized FDI was also audible before the United Nations. The United Nations passed General Assembly Resolution 1803 in 1962.\textsuperscript{65} This resolution formally protected the “permanent sovereignty of states over natural resources and sanctioned ‘nationalization, expropriation or requisitioning’” on “grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests.”\textsuperscript{66} Resolution 1803 transformed the protection of natural resources into paramount domestic public policy.\textsuperscript{67}

Other steps to entrench state sovereignty over foreign investors followed Resolution 1803. The otherwise obscure U.N. Charter of Economic Rights and Duties of States also recognized the states’ right to expropriate foreign investment.\textsuperscript{68} That Charter is notable for omitting uniform international standards of due process to govern “government takings” and compensation. The result, again,

\begin{itemize}
  \item \textsuperscript{62} On the nature and applications of the Uruguay Round, see generally \textit{Implementing the Uruguay Round} (John H. Jackson & Alan O. Sykes eds., 1997). \textit{But see} Graham Dunkley, \textit{The Free Trade Adventure: The WTO, the Uruguay Round and Globalism – A Critique} (1997).
  
  \item \textsuperscript{63} Multilateral investment negotiations were conducted under the auspices of the WTO in the Doha Round, but with scant results. \textit{See} WTO, Ministerial Declaration of 14 November 2001, \textsection \textsection 20-22, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).
  
  \item \textsuperscript{64} On the conflict between developing states’ collective interest in opposing multilateral negotiations on investment and individual states’ readiness to negotiate such agreements bilaterally in competition with other developing states, see \textit{infra} Part II.D.5. \textit{See generally} Guzman, \textit{supra} note 38.
  
  
  \item \textsuperscript{66} \textit{Id.}
  
  \item \textsuperscript{67} \textit{See id.} \textsection 13 (“Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law . . .”). \textit{id.} \textsection 16 (“Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.”).
  
\end{itemize}
was the United Nation’s affirmation of host states’ paramount public interest in regulating foreign investments including, but not limited to, those of MNCs.69

Two countervailing movements offset the pervasive resistance by the WTO to the liberalization of international investment: the first was the selective liberalization of FDI by the WTO; and the second was the liberalization of FDI by individual WTO members.

2. Piecemeal Liberalization

Despite the WTO’s resistance to the liberalization of FDI in the Uruguay Round of trade talks, the WTO reached several limited agreements on investment. Most pronounced among these was the Agreement on Trade-Related Investment Measures (TRIMs Agreement).70 The TRIMs Agreement interpreted and clarified the GATT’s provisions on “national treatment” in the importation of goods (Article III) and quantitative restrictions on imports and exports (Article XI) as investment measures.71

The WTO, however, construed the scope of the TRIMs Agreement restrictively. In particular, the WTO focused on trade in goods as distinct from FDI.72 It prohibited specific trade distorting performance requirements on foreign investments without attempting to harmonize the regulation of foreign investment.73 It also ignored specific regulatory measures such as local equity requirements, technology transfers, licensing requirements, personnel entry restrictions, and local manufacturing and employment requirements.74

Three additional international agreements relating to investment were also concluded. The General Agreement on Trade in Services (GATS) dealt with trade-related services including, among others, investment services.75 The Agreement on Trade Related Intellectual Property Rights (TRIPS) imposed duties on states to

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71. See id.

72. See id.

73. See id.

74. See id.

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Finally, the Agreement on Subsidies and Countervailing Measures regulated government conferred benefits and included selected prohibitions and actionable remedies.

3. Free Trade and Bilateral Investment Agreements

Developing states that collectively resisted liberalized international investment through the WTO and the United Nations sometimes have pursued selected trade and investment partnerships, including with developed states. Eastern European states that ardently resisted FDI as capitalist exploitation prior to the Cold War, have since endorsed bilateral investment agreements (BITs) and free trade agreements (FTAs) to prop up their fragile economies. China's historical ideological opposition to FDI has mutated into an affirmation of FDI, albeit strictly regulated on national interest grounds.

This selective liberalization of FDI has been far from seamless. An unavoidable tension has evolved between the common interests of developing states not to liberalize FDI through the WTO and their individual interests to conclude BITs with developed states. As a result, developing states have had to weigh their need to maintain their fealty to the WTO agreement, while pursuing strategic investment treaties with states like the United States and regional entities like the European Union. An uncomfortable consequence has been that the same developing states that have voted against FDI in multilateral forums have concluded a splattering of regional and bilateral investment agreements that favor FDI.

80. On the evolving influence of developing states over international trade and investment, see generally Developing Countries and the WTO: A Pro-active Agenda (Bernard Hoekman & Will Martin eds., 2005) [hereinafter Developing Countries].
Developing states that support FDI in this manner have taken calculated risks. Often they have built expensive social and economic infrastructures which they could ill afford in order to present themselves to prospective investment partners as economically sustainable.\(^8\) Such nations have sometimes repressed political dissent\(^8\) and distributed the benefits of FDI inequitably to appease powerful local interests,\(^8\) to create a sense of political stability, and also to attract FDI.

Such ambivalence towards the liberalization of FDI is not limited to developing states. Developed states that historically proclaimed their commitment to liberalization have increasingly faced pressure from domestic interests to regulate FDI.\(^8\) These pressures have grown as investment inflows have exceeded investment outflows and as domestic investors have lost their competitive advantage to foreign investors.\(^8\)

The result sometimes has been to dislocate, rather than stabilize, the balance between liberalized and regulated FDI. Developed states, on occasion, have tacitly supported regulatory abuses by developing states, including human rights violations, due to their pervasive interest in attractive beachheads for their investors in those states.\(^8\) The result, all too often, has been to accentuate rather than temper the inequitable distribution of resources that FDI is sometimes supposed to address.\(^8\)

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81. On these issues facing developing states, see generally Foreign Investment in Developing Countries (H.S. Kehal ed., 2004); John M. Rothgeb, Jr., Foreign Investment and Political Conflict in Developing Countries (1995).


83. See Caroline Dommen, Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies, 24 Hum. RTS. Q. 1, 14 fig. 2 (2002); c.f., John Hilary, The Wrong Model: GATS, Trade Liberalization and Children's Right to Health 14 (2001) (observing that “even where FDI does bring increased returns to labour . . . those returns are not likely to go initially or principally to households with children”).

84. This pressure is most pronounced under NAFTA, where member states not limited to the United States are under intense pressure from domestic lobbying groups, among others, to constrain FDI that is perceived to threaten local investment. See generally infra Part VIII.


86. See generally Developing Countries, supra note 80.

87. A typical, but often costly, means of attracting foreign investment is for developing states to build their IT infrastructures. See generally Sam Lubbe, IT Investment in Develop-
Continual changes in the conception of FDI have further impeded FDI's progress. Once restricted to the direct investments of MNCs, FDI has expanded to include an array of foreign investors and investments not limited to those of subsidiaries, affiliates, and other strategic partners of MNCs. These developments have not only widened the category of "foreign investor," but have complicated the regulation of increasingly diverse FDI practices.

4. Early Efforts at Liberalization

A pre- and early post–World War II incantation of the liberalization of international investment was the development of various treaties under the guise of treaties of friendship, commerce, and navigation (FCN treaties). In the postwar era, nation states used FCN treaties in part to protect their investors operating in foreign markets under the umbrella of the GATT. The underpinnings of FCN treaties lay in the dual bulwarks of investment equality, notably in "most favored nation treatment" and "national treatment" accorded to investors from foreign states.

FCN treaties usually provided for dispute resolution. Ordinarily investors were required to first exhaust local remedies in the courts of the host state. After having done so, however, provision was made for submitting disputes to the International Court of Justice with the consent of the host state.

FCN treaties were perceived as reflecting the interest of investors from developed states. As a result, the Soviet Union and its allies firmly resisted FCN treaties as illustrations of exploitative capitalism.
The passing of the U.N. General Assembly's Declaration of the New International Economic Order in 1974, which recognized state sovereignty over natural resources and other economic activities, also undermined FCN treaties. The result was the rather brief span of influence of FCN treaties, as well as the failed quest to reach agreement on a multilateral investment treaty.

5. Free Trade and Bilateral Investment Agreements in Operation

FCN treaties overlapped in part with the early development of modern BITs and FTAs. Starting in 1959, with an investment agreement between West Germany and Pakistan, BITs grew steadily into a substitute for a global agreement on FDI, which the WTO and United Nations were unwilling to deliver. Today, there are close to 3,000 BITs and FTAs, mostly concluded in the past two decades.

BITs and FTAs are distinguishable from one another by these attributes: their variety; the uneven economic clout of their parties; the variable manner in which they define "investor," "investment," "asset," and "enterprise"; and the different standards of treatment they accord to foreign "investors" and "investments." BITs and FTAs also use different mechanisms to resolve international investment disputes.

The earliest BITs were concluded principally between developed Western states, offsetting in part the collective economic and political will of developing states over the multilateral trade and investment system. Modern BITs are far more widespread, including both developed and developing states. Key principles contained...
within BITs as a class include the following: applying national or most-favored nation treatment to foreign investment, setting out standards to govern the expropriation of investments and the payment of adequate compensation, and providing for the transfer of funds for investment at reasonable exchange rates.\textsuperscript{100} BITs also delineate "performance requirements" that host states can impose on foreign investors, such as prohibiting the requirement that foreign investors hire domestically.\textsuperscript{101}

BITs provide two primary mechanisms for the resolution of investor-state disputes—through investment arbitration, or less frequently, by submitting disputes to the domestic courts of host states.\textsuperscript{102}

States diverge in choosing between BITs and FTAs according to their strategic interests. For example, the United States initially sought to build a free market through FTAs for U.S. trade and investment abroad.\textsuperscript{103} It adopted its most important FTA, the NAFTA with Canada and Mexico, in 1992.\textsuperscript{104} The United States only began to actively conclude BITs globally in 1998 as part of its global strategy.\textsuperscript{105}

The most pronounced provisions in BITs and FTAs relate to expropriation. Some such provisions include the requirement that signatory parties agree not to expropriate FDI so long as the measures adopted are nondiscriminatory; the parties apply them for a public purpose; they accord host investors with due process of law; and they make payment of prompt, fair, and adequate compensation in consequence of a legitimate "taking."\textsuperscript{106}

\textsuperscript{100} See generally Hamilton & Rochwerger, supra note 89, at 8; Guzman, supra note 38. See also Carlos Garcia, All The Other Dirty Little Secrets: Investment Treaties, Latin America and the Necessary Evil of Investor-State Arbitration, 16 Fla. J. Int'l L. 301, 311-12 (2004).

\textsuperscript{101} See Investment Instruments Online, supra note 97.

\textsuperscript{102} On these mechanisms, see infra Part IV.B-C.

\textsuperscript{103} See generally Hamilton & Rochwerger, supra note 89.


\textsuperscript{105} See Vandevelde, supra note 99, at 172 (noting that there were only seventy-five Bilateral Investment Treaties (BITs) in 1968 and that in the 1970s, nine BITs were negotiated each year; that rate doubled in the eighties and has been increasingly geometrically ever since). See generally UNCTAD, Recent Developments in International Investment Agreements (2005), available at http://wwwunctad.org/en/docs/webiteit20051_en.pdf [hereinafter UNCTAD, Recent Developments].

BITs and FTAs also diverge significantly in their manner of regulating FDI. For example, they impose different standards of compliance on investors and grant dissimilar concessions that reflect a variable body of international norms governing FDI. They also offer uneven guidance on the permissible nature and limits of a "government taking."  

In addition, BITs and FTAs provide different formulas and mechanisms for resolving investor-state disputes. Those BITs and FTAs that stipulate for the resolution of investor-state disputes by investment tribunals ordinarily rely to varying degrees on the ICSID, ICSID Additional Facility, or UNCITRAL Rules. These mechanisms that provide for investor-state dispute resolution are distinctive in two important respects. First, they diverge from customary international law by which states, not private investors, are parties to international investment disputes. Second, they have produced a growing ad hoc jurisprudence on investment law that, while lacking the binding force of common law precedent, has added to the international opinio juris on investment law.

Some BITs are also dictated by the dominant party. In effect, developed states present them to developing states as a fait accompli for formal endorsement, and the BITs are concluded in the absence of extensive bargaining over the terms, including over investor-state mechanisms governing dispute resolution.

Despite these controversies, the number and variety of BITS and FTAs have grown geometrically. BITs and FTAs ordinarily require resolution of state-investor conflicts by either domestic courts of host states, or more pervasively, by state-investor arbitration. State-investor arbitration is adopted, variously, because it is devised specifically to resolve investment disputes; it usually functions under the rules and procedures of established institutions like the ICSID or UNCITRAL Rules and by tribunals with consider-

107. See generally Porterfield, supra note 106.
110. On the difference between dispute resolution under customary international law and modern BITs, see Kurtz, supra note 33, at 28-29. On the limits associated with ad hoc state-investor decision-making, see infra Part III.A.2.
111. On BITs and developing states, see Malij, supra note 78, at 5. See generally Guzman, supra note 38.
112. See Vandevelde, supra note 99, at 172; see generally UNCTAD, Recent Developments, supra note 105.
113. See infra Part III.A.2.
able expertise on FDI. A few BITs, including those between developed states like the United States and Australia, refer disputes to domestic courts on grounds of the confidence of the state parties in each other’s judicial systems, or less overtly, due to reluctance to submit investor-state disputes to tribunals that are not ordinarily accountable to domestic courts.

Notwithstanding their perceived limitations, BITs have become influential in regulating investment disputes. At the same time, BITs continue to reflect imbalances in the economic and political power of the signatory parties; such imbalances are reflected in both the formulation and application of BITs and FTAs that dot the global landscape. Of particular note is the growth of sovereignty enhancing features in more recent BITs, notably by the United States, but also by other states like Norway.

The lack of harmonization in the nature and treatment of BITs and FTAs can lead to uncertainty over how courts and investment tribunals might apply them. Further confusion can arise over differences in both dispute resolution mechanisms in BITs and FTAs and over the manner in which investment tribunals might construe them in practice.

States also do not necessarily receive what they intend in concluding BITs. On occasions, they may conclude BITs and FTAs that give greater strategic advantage to partner states and investors than to themselves and their own investors. They may select strategies to negotiating and applying BITS and FTAs that backfire. Such miscalculations are implicit in any process of negotiation; they are calculated risks that governments take in concluding investment agreements. They also reflect choices that states make based on the perceived political, economic, and social benefit at

114. On the predisposition favoring investor-state arbitration, see infra Part II.B.2.
118. See also infra Part III.A.
the time, but which, with the benefit of hindsight, may prove to be faulty.

A final global-strategic concern is that BITs may erode the authority of multilateral institutions like the WTO. In particular, the global community has less incentive to reach a multilateral accord on FDI given the growth and influence of BITs and FTAs. It is also easier for states to reach bilateral and regional accord than to arrive at global consensus under the banner of the WTO. The failure of the Organisation for Economic Co-operation and Development (OECD) Draft Multilateral Agreement on Investment typifies this lack of global accord. Despite its uniform principles and standards governing FDI, the OECD abandoned the draft agreement in the face of opposition to it by its member states.

III. THE REGULATION OF INTERNATIONAL INVESTMENT DISPUTES

A. Resolving Investor-State Disputes

However much states are interested in FDI, host states have devised different ways in which to regulate FDI by such diverse investors as MNCs and foreign individuals. Various issues arise for consideration: What options do private investors have in responding to state regulation including the confiscation of investor assets? How might they so act, and with what legal consequences?

1. The Options

Various methods of resolving investment disputes have been considered at different stages since World War II. States can engage in diplomatic measures, particularly when the home states’ economic interests are significantly impacted by the treatment of their investors by host states. Failing diplomatic measures, a

119. See generally Trakman, supra note 104.
121. See supra Tielemans, note 120.
122. On diplomatic measures to resolve state-on-state disputes not limited to FDI, see UNCTAD, Project on Dispute Settlement Home Page, http://r0.unctad.org/disputesettlement/index.htm (last visited Dec. 21, 2009).
123. On the efficiency of public versus private enforcement of norms of international law including in relation to investment, see generally Alan O. Sykes, Public Versus Private
state can proceed against a host state before the International Court of Justice, although such resort is unlikely given that states’ rights are not themselves directly at issue. Another alternative is for home states to resort to the WTO appellate dispute resolution process, such as under an investment specific agreement like the TRIMs Agreement.2

A more probable course of action is for foreign investors to proceed against host states without relying on their home states to act on their behalf. One such resort, notable in recent BITs, is for foreign investors to bring claims against host states before domestic courts of those states. Another option is for foreign investors to bring claims before investment tribunals established by a BIT or FTA, such as under Chapter 11 of the NAFTA. Those institutions function outside the purview of the host state; they are established under distinctive legal regimes such as the UNCITRAL Rules and the ICSID Convention.

Each has its own mechanisms for dispute resolution by international conventions which signatory states recognize. Each also has distinctive rules and procedures governing the appointment of tribunal members and the conduct of hearings. Each can also appoint special investment tribunals whose decisions are binding on the parties and enforceable in law.


124. However, Article 64 of the ICSID Regulations and Rules provides for disputes between states that cannot be resolved by negotiation "shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement." ICSID Regulations and Rules, supra note 4, art. 64.

125. On this resistance, see supra Part II.D.1. See generally Guzman, supra note 38.

126. On such resort to resolve FDI disputes, see infra Part III.A.

127. See infra Part III.B.2.

128. See id.

129. See id.

130. See generally Christopher Dugan et al., Investor-State Arbitration (2008); McLachlan et al., supra note 5; Kahn & Walde, supra note 45; Gus Van Harten, Investment Treaty Arbitration and Public Law (2007); R. Doak Bishop et al., Foreign Investment Disputes: Cases, Materials and Commentary (2005); International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Todd Weiler ed., 2005); Arbitrating Foreign Investment Disputes (Norbert Horn & Stefan Kröll eds., 2004). See generally Leon E. Trakman, Arbitrating Options: Turning a Morass into a Panacea, 31 U. NEW S. WALES L.J. 292 (2008);
In practice, most BITs and FTAs refer disputes to investor-state arbitration. A limited alternative is for investment disputes to be referred to the host states’ domestic courts.\textsuperscript{131}

2. Domestic Courts of State-Investor Tribunals?

An underlying tension exists between submitting investment disputes to domestic courts or to international investment tribunals. Each has its protagonists and antagonists. Some states that favor domestic courts are reluctant to “cede” sovereignty, identified with the territorial jurisdiction of their courts, to independent arbitral tribunals.\textsuperscript{132} Their motivations may include the following: mistrust of international arbitral procedures; concern over the application of investment law that is inconsistent with domestic law; and conflicts with local interests, past practice, and commercial expediency.\textsuperscript{133} Their preference may be either to avoid reliance on international investment tribunals, or to stipulate for extensive powers of judicial review before their domestic courts.\textsuperscript{134} The enactment of the 2002 Trade Act in the United States typifies the preference among developed states for domestic courts to regulate

\textsuperscript{131} While the argument in favor of arbitration tribunals deciding investment disputes is usually couched as side stepping domestic courts, critics have argued that tribunal decisions could prevail over local courts, notably under Chapter 11 of the NAFTA. See Loewen Group, Inc. v. United States, ICSID (W. Bank) Case No. ARB (AF)/98/3 (June 26, 2003) (Final Merits Award), reprinted in 42 I.L.M. 811 (2003) [hereinafter Loewen]; Mondev International Ltd. v. United States, ICSID (W. Bank) Case No. ARB (AF)/99/2 (Oct. 11, 2002) (Final Merits Award) [hereinafter Mondev]. See generally Dana Kruegar, The Combat Zone: Mondev International, Ltd. v. United States and the Backlash against Chapter 11, 21 B.U. INT’L L.J. 399 (2003) (arguing that, but for a technical time bar, two Tribunal decisions—Mondev and Loewen—might have prevailed over American judicial decisions). On the judicial review of the Loewen Chapter 11 decision, see generally Bradford K. Gathright, A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter 11, 54 EMORY L.J. 1093 (2005); William Dodge, Loewen v. United States: Trial and Error Under NAFTA Chapter 11, 52 DEPAUL L. REV. 563 (2002); see also infra Part V (on the NAFTA).

\textsuperscript{132} Arguably, this is the dilemma of the United States, Canada and Mexico in each “ceding” its sovereignty to arbitration tribunals under Chapter 11 of the NAFTA. See infra Parts V.A, V.D. On the virtue of investment arbitration generally, see generally Brower & Schill, Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law, 9 CHI. J. INT’L L. 471 (2009).

\textsuperscript{133} On the U.S.-Australia Free Trade Agreement, see generally Westcott, supra note 115.

\textsuperscript{134} Arguably, this concern includes that extra-judicial tribunals will take undue account of investors’ private economic interests at the expense of host states’ policy concerns. This concern is redressed, in part, by the requirement that arbitrators decide in accordance with law rather than \textit{ex aequo et bono}. See generally Leon E. Trakman, \textit{Ex Aequo et Bono: Demystifying an Ancient Concept}, 8 CHI. J. INT’L L. 621 (2008).
FDI. That Act reflects the U.S. government’s preference to extend the authority of domestic courts to review investment awards under its most recently concluded BITs. The Act also restricts due process protections that might otherwise be accorded to foreign investors in favor of the more restrictive regulatory authority of the U.S. government over foreign investment.

In some measure, reliance of states upon their domestic courts to resolve investment disputes in recent BITs also reflects a backlash against investor-state dispute resolution mechanisms. The U.S. government’s negative reaction to state-investor decisions in which investor-state tribunals have decided against the United States and in favor of foreign investors under Chapter 11 of the NAFTA exemplifies this backlash. A very different justification for reliance on domestic courts arises when BIT parties express mutual confidence in each other’s judicial system, as occurred under the U.S.-Australia Free Trade Agreement. In such cases, the preference for domestic courts is expressed as a “win” for mutual trust and confidence between signatory states and confidence that their respective domestic courts will apply the rule of law to investment disputes. Beneath these trappings, however, may lie disquiet over the perceived loss of state sovereignty over ‘domestic’ affairs to a non-domestic tribunal.

Developing states face a particular dilemma in choosing between domestic courts and independent investor-state tribunals. On the one hand, they worry that international investment tribunals may support foreign investors’ proclivities at the expense of the states’ fledgling economies and natural resources. On the other hand, they fret that foreign courts exercising jurisdiction might favor local interests over investors from developing states.

136. See generally infra Part V.F.
137. See generally infra Parts V.A & V.H.
138. On the negotiation of the U.S.-Australia Free Trade Agreement, see Westcott, supra note 115, at 80.
139. See id.
B. Dispute Resolution Institutions at Work

Conflicts over FDI can, theoretically, be resolved between states, for example under WTO provisions, or between investors and states through the host states' domestic courts or through investment arbitration. This Section addresses these different options, emphasizing the processes through which FDI disputes are resolved.

1. Regulation through the WTO

A limited number of WTO conventions govern international investment. Therefore, there exist limited prospects of reliance on intergovernmental agreements to resolve investment disputes. Nevertheless, WTO mechanisms theoretically can be invoked to resolve investment disputes between states, as distinct from between private investors and host states.141

The foundation of the WTO's dispute resolution mechanism lies in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), dubbed Annex 2 of the WTO Agreement.142 The DSU, in turn, consists of a rule-bound system of dispute resolution that purports to apply to all disputes falling under its aegis and embodied in its Appendix 1.143 The Agreements that constitute the DSU include the Multilateral Trade Agreements, signed by all WTO members, and the Plurilateral Trade Agreements, signed by some of them.144

An attempt to arrive at a body of law governing multilateral trade that is widely endorsed by states, clear in its rules of application, and efficient in its outcomes, lies at the core of the WTO dispute

141. On the significance of the WTO in resisting the liberalization of FDI, see infra Part II.D.1-2.


144. See id.
settlement system. The overriding goal is to encourage state compliance as well as the enforcement of WTO obligations. Only member governments receive standing as parties to its dispute resolving mechanisms, and private parties and nongovernmental organizations lack standing to appear as of right. The only means of access to WTO dispute resolution is through the action of governments adopting nongovernmental causes, or in limited cases, by a WTO grant of amicus curiae status to nongovernmental organizations.

The WTO dispute resolution mechanism in principle represents a global order used to regulate international trade and to a limited extent, FDI. Strategically, the WTO mechanism operates as a framework of principles, standards, rules, and procedures within which states can resolve disputes including those involving their subjects. The WTO, however, is distinctly limited in regard to disputes relating to FDI. In particular, WTO dispute resolution procedures are more readily applicable to trade than investment disputes because of the comparative paucity of WTO treaties on international investment, the resistance of developing states en masse to the liberalization of international investment, and concern among developed and developing states regarding the unchecked movement of capital across national boundaries.

Despite its limitations in liberalizing international investment, the WTO’s dispute resolution mechanism does apply to particular international investment treaties. These include the following: the TRIMs Agreement, regulating investment measures under principles of the GATT and the WTO, the TRIPS, limiting investment in trade-related intellectual property rights, and the Agreement on Subsidies and Countervailing Measures, redressing distortions in trade and investment arising from subsidies and countervailing measures. Nevertheless, states are unlikely to apply extensively the WTO’s dispute resolution mechanisms to disputes over FDI.

146. See supra note 142.
147. DSU arts. 3.2, 19.2.
148. The standing of NGOs in dispute resolution in WTO proceedings is determined ad hoc, as a result, the status of NGOs in proceedings is subject to different perceptions of both their per se “right” to be heard and to make representations and the perceived public interest served by their participation. See id.
149. See supra note 142.
150. On the resistance of the WTO to the liberalization of FDI, see supra Part II.D.1.
151. See supra Part IV.C.1.
largely because states can invoke general exceptions to avoid liability. For example, signatory states to the GATS can invoke the general exception contained in Article XVII to avoid liability for regulating investments in services, an exception which is replicated in more recent BITs.\textsuperscript{152}

In contrast, it is conceivable that states can invoke the dispute resolution measures of the WTO outside of the ambit of specific treaties like the GATS to resolve investment disputes with other states including on behalf of their home investors.\textsuperscript{153}

2. Investor-State Regulation

There are three primary arbitration facilities used to resolve international investment disputes between private investors and states: the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,\textsuperscript{154} the ICSID Additional Facility,\textsuperscript{155} and the UNCITRAL.\textsuperscript{156}

Discrete mechanisms established under particular regional agreements that provide for the resolution of private investor-state disputes also exist. Chapter 11 of the NAFTA is the most prominent such mechanism. Chapter 11 provides for arbitral tribunals to resolve investment disputes between a host NAFTA party and an investor from another NAFTA state.\textsuperscript{157} The NAFTA has its own peculiar procedural and substantive mechanisms for resolving investment disputes. Those disputes, however, are often addressed under the rules of existing arbitration facilities, including the UNCITRAL Rules, the ICSID, and the ICSID Additional Facility, depending on whether the NAFTA host state is a party to the applicable International Convention.\textsuperscript{158}


\textsuperscript{153} On the WTO's efforts to resist alleged corporate excesses over global trade and investment, see LORI WALLACH \& MICHELLE SFORZA, \textit{The WTO: Five Years of Reasons to Resist Corporate Globalization} (1999).


\textsuperscript{155} See ICSID Additional Facility, supra note 4.

\textsuperscript{156} See UNCITRAL Rules, supra note 3.

\textsuperscript{157} See infra Part V.B. On dispute resolution mechanisms under Chapter 11 of the NAFTA, see infra Parts V.C-H.

Each of these institutions for hearing international investment disputes will be discussed briefly, including, where applicable, the processes for reviewing their decisions.\textsuperscript{159}

a. The ICSID

The most significant multilateral development in the resolution of investor-state disputes traces back to the establishment of the ICSID in 1965.\textsuperscript{160} The ICSID not only provides multilateral legitimacy in the settlement of investment disputes; it also serves as a dispute resolution protocol that states can incorporate into their BITs without having to rely on the domestic courts of other states to resolve FDI disputes.\textsuperscript{161}

The ICSID, affiliated with the World Bank, also provides facilities for the conciliation and arbitration of investment disputes between foreign investors and host governments.\textsuperscript{162} Arbitration under the ICSID is administered through the Centre for the Settlement of International Disputes, located on the premises of the World Bank in Washington, D.C.\textsuperscript{163} The ICSID's principles and processes for the arbitration of investment disputes are key to the ICSID.\textsuperscript{164}

ICSID arbitrations are widely used and incorporated by reference into a variety of regional and bilateral investment agreements. ICSID arbitrations have also added to the jurisprudence on international investment law, such as by extending the meaning of a "government taking" to include a "taking" by contract.\textsuperscript{165} Some ICSID cases are also extensively publicized, including among par-

\textsuperscript{159} On international investment claims and decisions generally, see Investment Claims, http://www.investmentclaims.com (last visited Dec. 21, 2009).


\textsuperscript{161} Cf. infra note 180 and accompanying text (concerning the incorporation of UNCTAD rules in private FDI agreements).

\textsuperscript{162} See ICSID Convention, supra note 160, art. 1(2) ("The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes . . . .").


\textsuperscript{164} See generally ICSID Convention, supra note 160.

\textsuperscript{165} See Mondev, supra note 131, at ¶¶ 151-56. This case involved a claim by a Canadian investor that the assertion of sovereign immunity by the state of Massachusetts violated Chapter 1105 of the NAFTA and included contract claims. See id. But see Société Générale de Surveillance SA v. Islamic Republic of Pakistan, ¶ 167, ICSID (W. Bank) Case No. ARB/01/13 (Aug. 6, 2003) (Decision on Jurisdiction) ("[U]nder general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law . . . .").
ties to regional agreements with their own arbitral mechanisms, notably under the NAFTA.\textsuperscript{166}

The ICSID provides for a review of an investment award by an Annulment Committee that is set up specifically for that purpose with the power to modify or nullify an ICSID award on limited procedural grounds under Article 52 of the ICSID Convention.\textsuperscript{167} Either party can request annulment of the award.\textsuperscript{168} The grounds for such a challenge, however, are restricted and fall short of an appeal.\textsuperscript{169} They include the following: (1) the ICSID tribunal was not properly constituted; (2) the tribunal manifestly exceeded its powers; (3) there was corruption on the part of a tribunal member; (4) there was a serious departure from a fundamental rule of procedure; and (5) the award failed to state the reasons on which it was based.\textsuperscript{170} ICSID Annulment Committees have traditionally interpreted these grounds for a challenge liberally, permitting a series of challenges, although such challenges have dissipated in recent years.\textsuperscript{171} Resort to domestic courts is not an option under the ICSID.

b. The ICSID Additional Facility

The ICSID Additional Facility was established in 1978 to provide more effective access to the ICSID dispute resolution regime.\textsuperscript{172} The ICSID Additional Facility regime has rules that differ from the ICSID, notably to accommodate disputes in which either the host state or the home state of the foreign investor is not a member of the ICSID Convention.\textsuperscript{173}

The ICSID and the ICSID Additional Facility rules both require that tribunals hold their first hearing within sixty days from the date of constituting the tribunal, or as otherwise agreed by the parties.\textsuperscript{174} All the other timelines, however, are within the discretion

\begin{itemize}
  \item \textsuperscript{166} See further Part II.D.1.
  \item \textsuperscript{167} ICSID Regulations and Rules, supra note 4, art. 52.
  \item \textsuperscript{168} See id. art. 52(1).
  \item \textsuperscript{169} See id.
  \item \textsuperscript{170} Id.
  \item \textsuperscript{172} See generally ICSID Additional Facility, supra note 4.
  \item \textsuperscript{173} See id., Article 2.
  \item \textsuperscript{174} See id.
\end{itemize}
of the tribunal and are ordinarily reached in consultation with the ICSID Secretary General as well as the disputing parties.\textsuperscript{175}

c. The UNCITRAL Arbitration Rules

The UNCITRAL was established in 1966.\textsuperscript{176} Its purpose is to harmonize and unify international trade law.\textsuperscript{177} Functioning through working groups on specific projects,\textsuperscript{178} its Arbitration Rules were devised specifically to provide member states with a unified and ordered method of arbitrating disputes on trade and investment.\textsuperscript{179} Its procedural framework for resolving international arbitration is widely recognized and incorporated into various international trade and investment agreements between states.\textsuperscript{180} Its rules are also easy to adopt and can be used by any party including non-state parties that are not members of, or affiliated with, any international association.\textsuperscript{181}

The UNCITRAL Arbitration Rules provide that the parties to an investment dispute exchange pleadings within forty-five days of the initiation of proceedings.\textsuperscript{182} The Rules do not prescribe timelines for the duration of hearings, giving the appointed tribunal wide latitude in setting timelines.\textsuperscript{183} As a result, UNCITRAL proceedings can be dilatory unless the tribunal resolves to proceed expeditiously.

Consistent with international commercial arbitration practice, neither the ICSID nor the ICSID Additional Facility Arbitration Rules provide for an appeal on the merits. They limit jurisdiction to review based on the interpretation of awards, to redress proce-
dural irregularities, and to correct arithmetic and other clerical errors.\textsuperscript{184} They also provide for the enforcement, modification, or annulment of awards on their merits.\textsuperscript{185} Consistent with international arbitration practice, the UNCITRAL and ICSID Additional Facility awards may be challenged under the commercial arbitration laws of the place of arbitration.\textsuperscript{186}

d. Distinctive Features

The ICSID, ICSID Additional Facility, and UNCITRAL Arbitration Rules each have their own distinctive procedures for resolving international investment disputes. What they share is the value they place on appointing arbitrators to resolve investment disputes, the discretion accorded to appointed arbitrators to manage proceedings, and the ability to make binding awards. Both the ICSID Additional Facility rules and the UNCITRAL Rules permit arbitral tribunals to establish procedural orders to govern the conduct of proceedings.\textsuperscript{187} The ICSID Additional Facility rules, however, require that the tribunal apply the agreement of the parties on procedural matters.\textsuperscript{188} As a further distinction, the UNCITRAL Rules provide for confidential hearings unless the parties agree otherwise; the ICSID Additional Facility does not so provide.\textsuperscript{189}

Under all three arbitration regimes, a majority of the tribunal must agree on an award.\textsuperscript{190} In practice, two arbitrators may agree on an award, but differ on the amount.\textsuperscript{191} The tribunal may reach a majority decision but fail to agree on the award of damages under the UNCITRAL Rules.\textsuperscript{192}

The ICSID, like the ICSID Additional Facility, leaves costs to the tribunal, subject to guidelines established by the ICSID Administrative Council.\textsuperscript{193} As a matter of practice, ICSID proceedings commence by requiring the parties to make an advance deposit to

\textsuperscript{184} See ICSID Regulations and Rules, \textit{supra} note 4, arts. 50-53.
\textsuperscript{185} See \textit{id}.
\textsuperscript{186} See, e.g., UNCITRAL Rules, \textit{supra} note 3, art. 1(1); ICSID Additional Facility, \textit{supra} note 4, art. 54(3).
\textsuperscript{187} See ICSID Additional Facility, \textit{supra} note 4, art. 26; UNCITRAL Rules \textit{supra} note 3, art. 15.
\textsuperscript{188} See ICSID Additional Facility, \textit{supra} note 4, arts. 27-28.
\textsuperscript{189} UNCITRAL Rules, \textit{supra} note 3, art. 25(4).
\textsuperscript{190} See ICSID Regulations and Rules, \textit{supra} note 4, art. 68; ICSID Additional Facility, \textit{supra} note 4, arts. 11, 23; UNCITRAL Rules, \textit{supra} note 3, art. 31.
\textsuperscript{191} See, e.g., ICSID Additional Facility, art. 24
\textsuperscript{192} See UNCITRAL Rules, \textit{supra} note 3, art. 31.
\textsuperscript{193} See ICSID Regulations and Rules, \textit{supra} note 4, art. 28.
IV. A FUNCTIONAL JURISPRUDENCE

Deciding particular cases without becoming captive to the self-serving claims of states, or of foreign investors, is an important issue for international tribunals. Tribunals must weigh formal assertions of state sovereignty against the manner in which states exercise their powers in discrete cases. Investment tribunals also must decide cases in a principled manner, while effectively balancing the power of states to regulate FDI against the reasonable expectations of foreign investors. The greatest challenge for investment arbitrators is in coherently treating similar cases similarly and different cases differently in responding to specific questions such as the following: When is a "government taking" legitimate? What criteria should tribunals employ to reach such decisions? What legal consequences ought to arise from such decisions?199

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194. ICSID, supra note 4, rule 28.
195. See id.
196. See UNCITRAL Rules, supra note 3, art. 38(e).
197. On the discretion in determining and allocating "reasonable" costs under the UNCITRAL Rules, see UNCITRAL Rules, supra note 4, arts. 38(b), (d) & (e).
199. Also in issue is the nature and extent of harmonization of international investment law, not limited to harmonizing common and civil law systems. See generally Siegfried H. Elsing & John M. Townsend, Bridging the Common Law-Civil Law Divide in Arbitration, 18 ARB. INT'L 59 (2002); Jack J. Coe, Jr., International Commercial Arbitration (1997).
A. The Legal Issues

Regulating FDI requires assurances that foreign investors receive due process of law, that their substantive rights are not trampled, and that they are not subject to executive fiat or arbitrary proceedings. Due process concerns include the reasonable boundaries within which states exercise sovereign authority, according foreign nationals fair treatment, and allowing states "permissible" limits of leeway in policing foreign investments and in acting in the public interest.\(^\text{200}\) Of concern, too, is the nature and amount of damages that may be awarded to foreign investors and the reason for doing so.\(^\text{201}\)

As an illustration, determining whether a "de facto expropriation" constitutes a reasonable exercise of governmental discretion raises pragmatic questions about "why," "when," "how," and "to what extent" that expropriation of property is legally permissible.\(^\text{202}\) At issue is, not whether a state has the power to expropriate, but whether its "expropriation" of a particular foreign investment is "reasonable," whether the foreign investor is subject to a "fair process," and whether compensation paid, if paid at all, is "adequate."\(^\text{203}\) Answering these questions raises issues of principle, such as whether a state has exercised its "taking" powers in a legitimate matter.\(^\text{204}\) This also raises functional questions, such as the extent to which that "taking" complies with due process of law. In contention is not whether a state has the power to expropriate or nationalize property, which it invariably does have, but whether the exercise of that power accords with responsibilities arising by operation of law that the state owes to foreign investors.\(^\text{205}\)

B. Procedural Limits on State Powers

Procedural limits over the powers of states to regulate FDI include: whether tribunals have subjected foreign investors to dif-

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201. See generally Sergey Ripinsky & Kevin Williams, Damages in International Investment Law (2008).
202. For a classical discussion of the issues surrounding expropriation under international investment law in light of the sovereignty of states, see Herz, supra note 140, at 251-52.
203. On the meaning attributed to "fair" and "equitable" treatment, see Christoph Schreuer, Fair and Equitable Treatment in Arbitral Practice, 6 J. World Investment & Trade 357 (2005).
204. See id.; see also infra Part IV.B.1.
205. See generally Porterfield, supra note 106.
different standards of treatment in otherwise similar cases; the reasons for such differences in treatment; and the justification for those differences. The principled subtext is whether investment tribunals apply such standards in a transparent, consistent, and equitable manner.

The requirement that states accord “fair and equitable treatment” to foreign investors, including whether they respect the “reasonable expectations of those investors,” illustrates the procedural limits on state powers. The goal is for arbitration tribunals to determine whether, why, and how states have accorded foreign investors with “fair and equitable treatment.”

1. Fair and Equitable Treatment

The principle that foreign investors receive “fair and equitable treatment” from host states is a central concept in the protection of private investment under international law. The problem lies in uncertainty over the nature of such “treatment,” the manner in which it is applied to complainant investors, and its legal effect.

How should the “fair” and “equitable” treatment of foreign investors be measured? According to what criteria should investment tribunals assess whether a host state has interfered “unfairly” with investor expectations? These questions raise procedural and substantive considerations. Such considerations include the manner in which a host state notified a foreign investor about an impending exercise of police powers, the abruptness and severity of the exercise of that power, and the degree to which that foreign investor was unreasonably surprised by that state action. At issue is the severity of the impact that the government “taking” has upon a foreign investor, the manner in which the state reasonably forewarned that investor, the reasonable surprise of that investor, and that investor’s ability to avert the consequences of that “taking” in the circumstances.

The jurisprudence on “fair and equitable treatment” is neither settled internationally, nor uniform across the jurisprudence of individual states. Rather than apply it consistently to foreign

206. See Schreuer, supra note 203, at 357.
207. See id. at 374.
investors, investment tribunals construe “fair and equitable” treatment variably in response to differences in the applicable law, competing assertions of state sovereignty, and variations in public policy concerns.\(^{209}\) In the absence of a coherent body of legal principle, “fair and equitable treatment,” at best, is based on imputations of the reasonableness of state action and the reasonable reactions of foreign investors to that action.\(^{210}\) Included among investor reactions is the nature and impact of the host state’s representations upon foreign investors, the precautions taken by those investors in protecting their property rights, and the extent of the state’s infractions upon those investor “rights” notwithstanding those precautions.\(^{211}\)

2. Legitimate Expectations

According “fair” and “equitable” treatment to foreign investors includes protecting their “legitimate expectations.” Foreign investors may base their “legitimate expectations” on, among other factors, the express or implied representations made by the host state to those foreign investors and the reasonable expectations of investors arising from those representations.\(^{212}\) These determinations, in turn, depend on the nature and severity of changes in the representations made by that state, the stated or inferred reasons for those changes, and the deleterious effect of those changes in the state’s representations upon the expectations of foreign investors. Expressed in terms of due process of law, an investor’s legitimate expectations include that a host state not apply its regulatory

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\(^{210}\) See id.

\(^{211}\) Typifying these variable conceptions of “fair and equitable” treatment are a series of cases commencing with the ICSID award in Maffezini v. Spain, ¶ 64, ICSID (W. Bank) Case. No. ARB/97/7 (Nov. 13, 2000), reprinted in 40 I.L.M. 1148 (2001); MTD Equity Sdn Bhd v. Chile, ¶ 178, ICSID (W. Bank) Case No. ARB/01/7 (May 25, 2004), reprinted in 44 I.L.M. 91 (2005); Ian A. Laird, MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile: Recent Developments in the Fair and Equitable Treatment Standard, 1 TRANSNAT’L DISP. MGMT. 10 (2004).

\(^{212}\) See Schreuer, *supra* note 203; supra Part IV.B.1.
framework in a substantively and procedurally unfair manner in relation to it.213

Investment tribunals have used objective measures to determine whether a host state has treated a foreign investor “unfairly” and contrary to that investor’s “legitimate expectations.” For example, in *Saluka v. Czech Republic*,214 the Tribunal explicitly rejected a subjective standard, stating as follows:

> [T]he scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.215

In determining the reasonable expectations of a foreign investor “in light of the circumstances,” investment tribunals have sought to balance host states’ legitimate interests in the exercise of their powers against the countervailing expectations of foreign investors.216 Tribunals have also taken account of the changing legal, economic, and social environment in engaging in that balancing process.217 For example, a Tribunal held that a foreign investor cannot reasonably expect to receive the same treatment from a host state in the face of material changes in economic and social conditions within that state.218 As the tribunal opined in *Saluka v. Czech Republic*:

> [n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic


215. *Id.*

216. *See id.*

217. *See id.*

218. *See id.*
matters in the public interest must be taken into consideration as well.\textsuperscript{219}

Ultimately, investment tribunals determine that the expectations of governments are "legitimate" or "illegitimate" according to a mix of subjective and objective criteria. Although they may try to avoid subjective standards of measurement, they cannot measure the reasonableness of a state's exercise of sovereignty without taking cognizance of its subjective conception of that self-same sovereignty. Similarly, tribunals cannot measure the "reasonable expectations" of foreign investors without taking account of their actual expectations. The Thunderbird investment claim, brought against the Mexican government under Chapter 11 of the NAFTA and decided under the UNCITRAL Arbitration Rules, illustrates the delicate balance between subjective and objective measures of "legitimate" investor expectations.\textsuperscript{220} In that case, the Tribunal weighed the actual representation made by the Mexican government prior to its "taking" and concluded that it had not generated a sufficiently "legitimate expectation" upon which the claimant investor reasonably could rely in the circumstances.\textsuperscript{221}

C. Substantive Limits on State Powers

1. A Principled Approach

Determining the policies, principles, and standards underlying the exercise of a state's "police powers" and the manner in which the state conceives of those powers is a substantive concern. At issue are the normative values that ground those policies, principles, and standards; the functions they are meant to perform; and the actual results of their exercise in specific cases. At their most pervasive, states' police powers form part of international jus cogens while the opinion of investment tribunals constitutes part of the opinio juris on FDI.\textsuperscript{222} At its most particular, the exercise of police


\textsuperscript{220} Thunderbird, supra note 213, \textsuperscript{¶} 147.

\textsuperscript{221} Id. \textsuperscript{¶} 304.

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policies is restricted to specific states and investors and has limited significance in the international jurisprudence governing FDI.

2. The Exercise of Police Powers

States invoke police powers as a primary justification for the expropriation of foreign investment. At issue is not simply that states may exercise those powers in an arbitrary and excessive manner, but also the extent to which that exercise is grounded in pre-existing norms of international investment law. Scholars have observed as follows:

The conclusion that a particular interference is an expropriation might also be avoided if the State whose actions are the subject of complaint had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property.

The normative basis for the exercise of police powers resides in the sovereign authority of states to act in the public interest. The extent of their police powers is contingent upon the source, the particular reason for, and the manner of invoking that power, as well as the power's particular effect upon the complainant investor. For example, the source of a state's power may reside in its monetary, fiscal, tax, or penal authority; alternatively, its authority may be based on its authority over public health, social welfare, and environmental safety. The reason for a state invoking its police power may arise, inter alia, from economic policy, social welfare, or in its protection of the environment. The exercise of police powers may vary widely from imposing a duty, levy, or tax upon a complainant investor to regulating the manner of the investment to minimize risks to public health, safety, and the environment.

The source of the police power does not, in and of itself, determine the extent to which a state can legitimately exercise that power.


224. Herz, supra note 140, at 306.

225. Christie, supra note 140, at 331.

226. See id.; Levesque, supra note 223, at 305-06.

227. See further supra Part II.B.


power. For example, however justifiable the reason may be for a state to “take” FDI on grounds of public health and safety, that “taking” still may be deemed to be punitive. It may be insufficiently related to the public health reason invoked to justify that “taking,” or it may have a disproportionately greater harmful effect upon the complainant investor than its public health benefit. Conversely, a monetary regulation of FDI that denies full compensation to a complainant investor may be deemed reasonable on grounds of the dire economic and social conditions giving rise to it.

The legitimate reach of a state’s police power is ultimately circumscribed according to whether its exercise is deemed to be reasonable. Determining reasonableness depends, inter alia, on whether the foreign investor was properly notified of the application of those police powers, whether the foreign investor was accorded due process of law, and whether the exercise of those powers caused that investor unjustified or excessive harm. A key issue is the extent to which states should reasonably compensate foreign investors for exercising police power, whether grounded in national security, public safety, monetary, tax, or fiscal policy.

Decision makers may accord states variable latitude in regulating FDI for the “public good.” Establishing that the exercise of police powers is excessive hinges on the legitimacy that is imputed to that exercise, the availability of alternative and less invasive measures to

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230. See id.
231. See id. at 305.
232. Courts have long grappled with the question of where property rights end and public regulation begins. See Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) (“The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.”). See generally Poirier, supra note 223; Levesque, supra note 223.
that state, and the impact of the measures actually adopted on the complainant investor.\textsuperscript{234}

V. CHAPTER 11 OF THE NAFTA

In the absence of a meaningful multilateral treaty on FDI, Chapter 11 of the NAFTA between the United States, Canada, and Mexico has evolved into perhaps the most influential supranational body of investment law. A well tested—while arguably flawed—template for regional investment treaties, it provides measured safeguard protection for FDI, including in dispute resolution.\textsuperscript{235} Some Chapter 11 decisions, such as the minority decision of Dean Cass in \textit{UPS v. Canada},\textsuperscript{236} have also articulated coherent statements on the nature and limits of a “government taking.”\textsuperscript{237}

As a result, Chapter 11 serves as an early warning signal of regulatory practice in relation to the expropriation of FDI. It also represents an authoritative, though controversial, body of investment law that is cited by investment tribunals well beyond NAFTA tribunals and its member states.\textsuperscript{238} At the same time, Chapter 11 should be viewed cautiously as a classic BIT that emphasizes the extensive liberalization of FDI that more recent BITs have sometimes avoided.


\textsuperscript{236} See UPS v. Canada, NAFTA Tribunal (May 24, 2007) (Final Award) (Cass, D., separate opinion), available at http://naftaclaims.com/Disputes/Canada/UPS/UPS-Canada-Final_Award_and_Dissent.pdf [hereinafter UPS].

\textsuperscript{237} Decided on June 11, 2007. See id. For a useful, albeit self-serving, interpretation of the UPS decision, see Memorandum from Steven Shrybman to the Canadian Union of Postal Workers (June 27, 2007), available at http://www.cupw.ca/index.cfm/ci_id/9654/la_id/1.html.

The NAFTA is an early modern trade and investment agreement that circumscribes the power of each NAFTA party in relation to investors from other NAFTA parties. It also brings together partners with shared aspirations. Mexico and Canada had a common interest in building more enduring trade and investment ties with the United States, while fearing U.S. investment expansionism. Both also wished to preserve their sociocultural traditions and political distinctiveness.

The NAFTA parties also have significantly different foreign investment philosophies. The most pronounced differences are those between the United States and Mexico. The United States traditionally sought investment expansionism while, in contrast, Mexico resisted such expansionism. The United States adopted a nineteenth century philosophy grounded in states’ responsibility to accord a Minimum Standard of Treatment to foreign investment. Mexico subscribed to the so-called Calvo Principle, which enshrined a simple conception of equality in relation to FDIs. As practical measures, the United States sought full compensation for the expropriation of FDI while Mexico favored protective investment legislation that resisted full compensation.

239.


241. See Mann & Soloway, supra note 234.

242. On these developments, see Kurtz, supra note 33, at 28-29.

based their different treatment towards FDI on public policy grounds.\textsuperscript{244}

The negotiators of Chapter 11 of NAFTA specifically sought to find a balance between a liberalized international investment regime and to protect the powers of NAFTA parties to regulate FDI selectively in the "national interest."\textsuperscript{245} The drafters chose to achieve this balance through both conceptual and functional means. Conceptual means included applying well-recognized international standards, such as the "Most Favored Nation" and "National Treatment" to NAFTA investors.\textsuperscript{246} Functional means included applying substantive and procedural rules to the operation of such standards to ensure the consistent and equitable treatment of NAFTA investors.\textsuperscript{247}

### B. The Rationale Underlying Chapter 11

Chapter 11 contains the primary vehicle for resolving investment disputes under the NAFTA.\textsuperscript{248} In addition, Article 2022 in Chapter 20 encourages the use of international commercial arbitration to resolve NAFTA related disputes generally.\textsuperscript{249} Chapter 11 straddles the divide between the liberalization of FDI under the NAFTA and the conditions under which host states may proscribe such investment.\textsuperscript{250} Unlike most BITs, Chapter 11 gives

\textsuperscript{244} See also Peterson, supra note 233; UPS, supra note 236.

\textsuperscript{245} No doubt altruism plays a role in formulating and applying such philosophies to FDI. At the core, however, each state views FDI from the perspective of its distinctive interests. See, e.g., supra Parts IV.1 & IV.2.

\textsuperscript{246} See UPS, supra note 236.


\textsuperscript{248} See generally Jimenez, supra note 246.

\textsuperscript{249} See generally Meg N. Kinnean et al., Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (2009); Noemi Gal-Or, NAFTA Chapter Eleven and the Implications for the FTAA: The Institutionalization of Investor Status in Public International Law, 14 Transnat'l Corp. 121 (2005).

investors of NAFTA parties a choice to proceed under the banner of Chapter 11 or to resort to the host states' domestic courts. Investors can make the choice between Chapter 11 arbitration and domestic courts based on the conduct of host states, the issues in dispute, along with the perceived cost, duration, efficiency, and fairness of proceeding. In choosing arbitration under Chapter 11, investors may select a distinctive mode of arbitration that is different from both traditional private arbitration as well as public arbitration between states.

Chapter 11 does not exclude other options. NAFTA parties may still invoke diplomatic measures against other states, including under Chapter 20 of the NAFTA. Investors may also resort to traditional arbitration to resolve their disputes, an option encouraged under Article 2020 of the NAFTA.

C. Interpreting Chapter 11

Chapter 11 proceedings reflect a conscious abrogation of sovereignty by NAFTA members, as embodied in their adoption of a sui generis system of dispute resolution without obvious ancestry. A public means of dispute resolution, Chapter 11 arbitration differs from both resort to domestic courts and private arbitration. Also, no supranational NAFTA body responsible to weigh human rights against other social considerations exists, such as the Euro-

251. See supra Parts V.B & V.F.
253. See infra Part V.E.
255. On Article 2022 of the NAFTA, see infra note 249 and accompanying text.
256. See Leon E. Trakman, Arbitrating under Chapter 11 of the NAFTA: A Mexican Investor vs. the U.S., in 1 DOING BUSINESS IN MEXICO pl. VI, ch. 9 (Mark E. Wojcik ed., 2002); NAFTA, supra note 104, art. 2020.
pean Court of Human Rights. Additionally, Chapter 11 tribunals are not bound by jurisprudential doctrines such as the "margin of appreciation" doctrine developed by the European Court of Human Rights to balance human rights against permissible social considerations.258 Again, unlike European Union law, Chapter 11 decisions are not incorporated directly into the domestic law of NAFTA parties.259

Chapter 11 of the NAFTA is also subject to various "clarifications" provided for in the text of the treaty. These include the judicial review of panel awards,260 an Interpretive Note and Statement by the Free Trade Commission,261 and the passing of legislation in the United States, notably the Trade Act of 2002.262 Among other functions, these "clarifications" limit the authority of the U.S. Executive to negotiate treaties.263 The "clarifications" also serve as a backdrop against which individual NAFTA parties, primarily the

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United States, can attempt to negotiate other BITs, FTAs, and global agreements.

There is no appeal from a Chapter 11 NAFTA decision. The parties to an investment dispute have a limited right to review a Chapter 11 award, such as to correct errors in the award. Such review may take place before international bodies like the ICSID so long as the applicable NAFTA party is a signatory to the ICSID Convention. Review may also take place before domestic courts of NAFTA partner states. While a review is narrower in scope of application than an appeal, the review of tribunal decisions under Chapter 11 before the domestic courts of NAFTA parties is common. Domestic courts ordinarily apply the law of the place of arbitration. They diverge, however, over the applicable standards of review, the permissible discretion accorded to Chapter 11 tribunals, and the reasons for modifying or nullifying Chapter 11 decisions. Such differences, particularly in the standards of review applied by domestic courts, provide NAFTA investors with an incentive to forum shop among the domestic courts of NAFTA.


265. See U.S. Dep't of State, 2004 Model BIT, http://www.state.gov/documents/organization/117601.pdf (last visited Dec. 21, 2009); see also Canada Dep't of Foreign Affairs & Trade, Canada's Foreign Investment Promotion and Protection Agreements (FIPAs) Negotiating Programme, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf (last visited Dec. 21, 2009). Chapter 11, arguably, is progressive when compared to most BITs, including those following the NAFTA, that deny such ex post legislative and executive action.


267. On unsuccessful attempts to extend the purview of international investment law in the Doha Round, see WTO, Ministerial Declaration, supra note 63.

268. On this right of review under the ICSID, see ICSID Additional Facility, supra note 4; UNCITRAL Rules, supra note 3; supra Part III.B.2.d.

269. On review under the ICSID Convention, see supra Part III.B.2.a.

270. On review of Chapter 11 NAFTA decisions by domestic courts, see supra notes 134 & 261.

271. See supra note 261.

272. See supra note 261.
parties in search of a sympathetic forum to "review" Chapter 11 decisions.273

The alternative, a second level of review within Chapter 11, or a Chapter 11 appellate process, has not yet evolved, although a case can be made for such a development.274

D. Wading through a Minefield

Chapter 11 is the subject of ongoing criticism. At the institutional level, NAFTA parties are criticized for invoking it simultaneously to promote and undermine the liberalization of FDI.275 In particular, the U.S. government is criticized for invoking Chapter 11 unevenly,276 promoting markets for its investors in NAFTA partner states while concurrently imposing regulatory measures to protect its domestic markets from investors of those states.277 Most controversial is the United States' alleged shift from a staunch protector of liberalized FDI to the source of protective barriers against it.278 Proposals that U.S. courts should be empowered to review Chapter 11 awards and that arbitral decisions should be vacated for conflicting with U.S. law typify this alleged shift.279 These contro-

273. For controversy surrounding the review by an American court of the Chapter 11 arbitration decision in the Loewen case, see infra note 286.


276. Some of these criticisms are channeled into proposals that Chapter 11 arbitration be preserved, but supplemented by an appellate process. See, e.g., Gantz, supra note 274, at 74.


278. See generally Charles N. Brower & Lee A. Steven, Who Then Should Judge? Developing the International Rule of Law Under NAFTA Chapter 11, 2 Chi. J. Int'l L. 193, 194-95 (2001); Gantz, supra note 274; Kruegar, supra note 131. See also Coe, supra note 274, at 194.

279. See also infra Part V.H.
verses are most profound in relation to the law governing the resolution of FDI disputes. 280

Particularly controversial is the absence of general exception clauses by which states can shield themselves from investor challenges in relation to nondiscriminatory regulatory measures under Chapter 11. Varying markedly from the GATT that contained such nondiscriminatory provisions, 281 NAFTA panels are called upon to differentiate between discriminatory and nondiscriminatory measures. 282 The judicial review of Chapter 11 determinations are most profound in investor challenges to states determining that measures are nondiscriminatory, such as in Loewen v. United States 283 and Methanex v. United States. 284 In both cases, U.S. courts construed the regulatory practices of the United States expansively to legitimate allegedly discriminatory practices. 285

The perceived virtues of Chapter 11 have been questioned in key respects. A rationale in support of Chapter 11 was to establish a balance between investor rights and domestic economic, labor, and environmental interests. 286 A fear today is that NAFTA states

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280. For the proposal that Chapter 11 arbitral awards be subject to review by the Court of International Trade in the United States, see S. 3216, 106th Cong. § 2 (2000). See also Gary R. Saxonhouse, Dispute Settlement at the WTO and the Dole Commission: USTR Resources and Success, in ISSUES AND OPTIONS FOR U.S.-JAPAN TRADE POLICIES 363, 364 (Robert M. Stern ed., 2002).


282. On such measures in the GATT, see supra notes 59, 60, 89, and accompanying text.

283. See supra notes 59, 60, 89, and accompanying text.

284. On Loewen, see supra notes 131, 251, and accompanying text.


In Loewen, the tribunal was presented with a straightforward application of denial of justice concepts. The trial was botched so badly that any reader of its transcripts could not help but recall the proverbial ‘kangaroo court.’ The defendant corporation was targeted specifically because of its nationality. The verdict was huge and wholly disproportionate to the actual harm committed. Its appeals were not accepted, and in the end, Loewen was forced to settle under duress. However, any arbitral panel would have found it difficult to rule against the United States, even given the facts of the case. The U.S. justice system is known for aberrations such as the one that occurred in Mississippi, and they are part of America’s social, cultural and institutional fiber. The combination of punitive damages, a runaway jury, and a pro-plaintiff judge is not an unusual one in this country. The outcry against the Loewen-NAFTA litigation, and the vigor of the defense mounted by the Justice Department, signaled to the tribunal that the case touched a nerve with many of the powers-that-be.

See id.
may succumb to foreign investor pressure on the one hand, or labor, environmental, and local investor interests on the other. An underlying concern is that, rather than assessing the legitimacy of investor rights, NAFTA states will regulate FDI for political reasons, making decisions in response of adverse publicity, litigation costs, reprisal risks from other NAFTA parties, and the hazard of losing foreign investment to competitor states.\(^{287}\)

A justification for the United States and Canada in negotiating Chapter 11 was to impede Mexican courts from invoking constitutional measures to regulate foreign investment or to expropriate in the absence of “adequate” compensation.\(^{288}\) A concern today is that constitutional challenges to Chapter 11 of the NAFTA in the protection of domestic interests are as likely to eventuate in the United States and Canada as in Mexico.\(^{289}\)

Some rationales for adopting Chapter 11’s distinctive mechanisms for resolving investor-state disputes were to avoid domestic courts that might lack expertise in FDI, focus unduly on domestic interests, and respond only selectively to foreign investor rights.\(^ {290}\) The perceived threat today is the development of a Chapter 11 jurisprudence that is unduly responsive to investor expectations at

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\(^{288}\) See Pope & Talbot Interim Award, infra note 300, ¶ 75.


\(^{290}\) It is noteworthy that the first constitutional challenge to Chapter 11 of the NAFTA, on January 24, 2005 was brought by the Council of Canadians and the Canadian Union of Postal Workers [CUPW] before the Ontario Superior Court of Justice, arising out of the UPS Chapter 11 arbitration. See United Parcel Service of America, Inc. (UPS) v. Government of Canada, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/facet.aspx?lang=en.
the expense of the material interests of domestic states. A collateral concern is that Chapter 11 tribunals may lack FDI expertise. They may also be overly responsive, or conversely, insufficiently responsive to state interests.

E. Standard of Treatment and Performance Requirements

Chapter 11 of the NAFTA sets out four standards of treatment to be accorded to NAFTA investors: National Treatment, Most Favored Nation Treatment, Standard of Treatment, and Minimum Standards of Treatment. Article 1105 embodies the requisite standard for the “fair and equitable treatment” of investors; it is distinctive and is not a distillation of other treaty-based guarantees such as National and Most Favored Nation treatment.

Chapter 11 also imposes performance requirements on NAFTA parties that might otherwise diminish the value of FDI. These performance requirements prohibit NAFTA member states from tying sales to foreign exchange earnings, insisting that investors buy local products and services, requiring a minimum of local content, requesting foreign exchange inflows, demanding technology transfers other than corrective anticompetitive measures, demanding technology transfers to local companies in particular, requiring specific levels of goods or services, and requiring that foreign markets be supplied from local production. The NAFTA also stipulates that member states permit the free and uninterrupted transfer of investments at prevailing market rates of exchange.

These performance requirements are subject to the right of a NAFTA party to impose special formal and disclosure require-
ments on NAFTA investors. These requirements, however, may not materially impair the requisite protection accorded foreign investors and requirements imposed on NAFTA parties under Chapter 11, including the equitable and good faith application of each party’s law.

F. Restrictions on State Powers

The NAFTA prohibits states from imposing national requirements on investors of other NAFTA member states that are not imposed on that state’s own nationals. Illustrating this rule, the Pope & Talbot tribunal held that a measure is a “requirement” only if it has a mandatory character that requires particular investor behavior. NAFTA states are specifically prohibited from placing transfer restrictions on investors, except where they are equitable, nondiscriminatory, and exercised in good faith and in accordance with law.

Chapter 11 measures are especially controversial in respect to “indirect expropriation” and measures “tantamount to expropriation.” On the one hand, there is a view that expropriation ought to be limited to governmental regulations that are clearly nondiscriminatory and reasonable under international law. On the other hand, there is an opinion that NAFTA’s provisions on expropriation ought to be construed expansively to exclude protective measures that constitute indirect expropriations.

In issue, too, are appropriate limits on states’ rights to act in the public interest when exercising state sovereignty and when such action is “tantamount to expropriation.” Both Chapter 11’s imprecise language in describing expropriation and compensation and

297. See id. ch.11, art. 1109 (concerning transfers).
298. See id. art. 1110(1)-(2).
299. See id.
300. See NAFTA, supra note 104, art. 1107, ¶ 1-2.
302. See Pope & Talbot Interim Award, supra note 300, ¶ 75.
303. See NAFTA, supra note 104, art. 1109. Chapter 11 tribunals have construed these requirements restrictively to situations in which requirements are mandatory and compel the investor’s behaviour. See S.D. Myers, Inc. v. Canada, NAFTA/UNCITRAL Tribunal (Nov. 13, 2000) (Partial Award), reprinted in 40 I.L.M. 1408 (2001) [hereinafter Myers].
the lack of clarity in the Chapter 11 case law complicate arriving at decisions regarding when a governmental regulation constitutes a legitimate expropriation.305

G. Chapter 11 Cases

A limited number of Chapter 11 cases exist.306 Key among these are Methanex,307 Metalclad,308 Feldman,309 Ethyl,310 Pope & Talbot,311 Myers,312 Ethyl,313 and Thunderbird.314 Most Chapter 11 cases deal with Article 1110 on direct and indirect government takings.315 A few cases, however, clarify the international investment law governing the nature and limits of an “expropriation.” Those that provide substantive content and meaning to an “expropriation” are treated as authoritative.316 These cases, however, are sometimes doubted as being too open-ended or conversely, too closed-ended.317 For example, in finding a breach of Article 1110 on


312. See Pope & Talbot Interim Award, supra note 300, ¶ 24; Pope & Talbot Final Merits Award, supra note 300, ¶¶ 1-18.


315. See Thunderbird, supra note 213, ¶ 149.

316. On claims under the NAFTA, see NAFTA Claims, supra note 306.

317. See Metalclad, supra note 308, ¶ 72; Pope & Talbot Interim Award, supra note 300, ¶¶ 81-95; Pope & Talbot Final Merits Award supra note 300, ¶ 96; Feldman, supra note 309, ¶¶ 98-100; Myers, supra note 302, ¶¶ 287-288.
expropriation, the Metalclad tribunal defined the taking of property, not only as “outright seizure or formal or obligatory transfer of title in favor of the host State,” but also as a “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.” While some doubt this expansive conception of an expropriation as being unduly open-ended, others sometimes cite it as an authority on the limits of expropriation.

Other Chapter 11 cases have taken a restrictive view of an expropriation under Article 1110. For example, the tribunal in Pope & Talbot, after identifying “creeping expropriation,” insisted that “confiscatory” action is contrary to Article 1110 when it “prevents, unreasonably interferes with or unduly delays, effective enjoyment of an alien’s property.” In holding against the investor, the Pope and Talbot tribunal concluded that the government regulation fell short of a “taking” and the investor, in continuing to operate a profitable business, had not suffered a substantial loss of control over that business as a result of the government regulation.

The Myers tribunal also viewed expropriation restrictively. In order to satisfy the requirement of an “expropriation,” the government’s action needed to create “a lasting removal of the ability of

318. See Metalclad, supra note 308, ¶ 103 (for an expansive conception of expropriation); Pope & Talbot Interim Award, supra note 300, ¶ 102 (for a restrictive conception of expropriation).

319. Metalclad, supra note 308, ¶ 112.

320. Id. ¶ 103.


322. See Weiler, supra note 305, at 325 (providing an optimistic view that Chapter 11 jurisprudence is increasingly comprehensible).


324. Defined as government taking that “could be conducted by regulation and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation.” See Pope & Talbot Interim Award, supra note 300, ¶ 99; see also Sohn & Baxter, supra note 2, at 548 (noting Harvard’s Draft Convention on the International Responsibility of States for Injuries to Aliens).

325. Pope & Talbot Interim Award, supra note 300, ¶ 102.
an owner to make use of its economic rights... even if it were partial or temporary.\footnote{326} 

The Feldman tribunal elaborated on this restrictive conception of an expropriation by drawing a distinction between an expropriation contrary to Article 1110 and a regulation falling short of an expropriation.\footnote{327} Drawing on the Azinian decision,\footnote{328} the Myers tribunal commenced with the cautionary comment that "not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business... is an expropriation under Article 1110."\footnote{329} Further, "governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue," but they do not necessarily constitute acts of expropriation.\footnote{330} In deciding that the government's actions fell short of an expropriation, the Feldman tribunal declined to consider whether the government had violated the public purpose, nondiscriminatory, and due process criteria in Article 1110; but it did consider whether it had violated the minimum standards of treatment.\footnote{331}

Both the Pope & Talbot and Feldman tribunals held that, for a government to substantially interfere with an investment sufficient to constitute a confiscation, such interference needed to impact the investor's business as a whole, rather than only a part of it.\footnote{332}

In identifying sources of law to justify a finding of a "government taking," Chapter 11 tribunals have relied significantly on U.S. domestic law, treating it as part of international law.\footnote{333} For example, both Pope & Talbot and Feldman drew heavily on the U.S. Restatement Second\footnote{334} and in the case of Feldman, the Harvard
Draft, and the umbrella provisions of the Fifth and Fourteenth Amendments of the U.S. Constitution. Even though U.S. law is part of international law, problems arise in attributing a weight to that law when it diverges from “other” international law on the nature and limits of an expropriation.

In the absence of a consistent Chapter 11 jurisprudence, the nature and limits of an expropriation remain unclear under the NAFTA. For example, even though Chapter 11 tribunals reasonably consistently conclude that an expropriation occurs only when governmental interference is “substantial,” it is still unclear how much interference is “substantial.” On a narrower view, “substantial” interference ought to be construed restrictively, in deference to the police powers of NAFTA parties and their right to regulate property rights. On a wider view of substantial interference, investment tribunals ought to take full account of both the kind and degree of government regulation in determining whether to treat a “taking” as unjustified interference.

If tribunals decide investment cases based on the kind or genus of an expropriation, their analysis invites open-ended normative discourse into different kinds of state action that ought to be permitted. If they ground their determinations in the degree of governmental interference, they invite debate over the spectrum of legitimate governmental action. The problem is that decisions based on either the kind or degree of a “government taking” can be construed differently from case to case based on variations in philosophical and functional values. All this can lead to further uncertainty over the parameters of a legitimate “government taking.”

In summary, some Chapter 11 tribunals have avoided relying on Article 1110 when dealing with direct and indirect expropriation. They have preferred, instead, to ground their decisions on Article 1105 on fair and equitable treatment. Other Chapter 11 tribunals have based their decisions on a breach of contract by a local authority, as distinct from a “government taking.” Most tribunals that have relied on Article 1110 have construed an expropriation claim against the U.S. government. See id.
tion restrictively, requiring a high degree of interference to constitute an expropriation.\textsuperscript{340} This restrictive conception of an expropriation is most evident in the \textit{Myers} decision, where the tribunal differentiated between expropriations that "tend to involve the deprivation of property rights" and regulations that "amount to a lesser interference."\textsuperscript{341} Substantive reasons for distinguishing between a legitimate regulation and an arbitrary "taking" are elusive. The legal significance of different kinds and degrees of government regulation remain uncertain.

\textbf{H. Placing Chapter 11 in Perspective}

Chapter 11 jurisprudence has not enjoyed an easy right of passage. A macropolitical critique of the NAFTA, not limited to Chapter 11, is that the Executives of the three NAFTA member states negotiated it, that the Executives' negotiations were undemocratic and usurped the powers of the legislative arm of government.\textsuperscript{342} Chapter 11 is also challenged as an undesirable template for replication in other regional agreements.\textsuperscript{343}

Chapter 11 decisions are also criticized for providing greater benefits to investors from capital-exporting NAFTA states than capital-importing ones, in effect, protecting U.S. and Canadian investment interests above Mexican interests.\textsuperscript{344} It is true that there are more Chapter 11 proceedings involving Canadian and U.S. investors than Mexican investors, but that is understandable given the

\begin{itemize}
\item \textsuperscript{340} See Azinian v. Mexico, NAFTA Arbitration (Nov. 1, 1999) (Final Merits Award), \textit{supra} note 328.
\item \textsuperscript{341} See \textit{supra} Part V.G.
\item \textsuperscript{342} Myers, \textit{supra} note 260, \textsection 282.
\item \textsuperscript{344} Some regional Free Trade Agreements (FTAs) concluded directly after the NAFTA replicated parts of its investor provisions particularly in regard to safeguard protection. \textit{See} Canada-Chile Free Trade Agreement, Dec. 5, 1996, 36 I.L.M. 1067, 1114 (1997); Guillermo Pereira, \textit{Mexico-Central America Free Trade Agreement}, 7 L. & Bus. Rev. Am. 383, 396 (2001). More recent regional agreements, such as the Central American Free Trade Agreement (CAFTA) and the U.S.-Chile FTA, are distinct from the NAFTA; and this trend away from the NAFTA's safeguard provisions is likely to continue. \textit{See} David A. Gantz, \textit{The Evolution of FTA Investment Provisions: From NAFTA To The United States-Chile Free Trade Agreement}, 19 Am. U. Int'l L. Rev. 679, 708-740 (2004).
\end{itemize}
larger capital markets in those countries than in Mexico. It is also questionable whether Mexican interests have borne the brunt of adverse Chapter 11 decisions—some of the evidence suggests the contrary. Additionally, particular criticism is directed at Chapter 11's terms of reference governing the appointment of investment tribunals, the inconsistent interpretations that different tribunals accord to Chapter 11, and the costs of Chapter 11 proceedings.

As a result, Chapter 11 is marred by repeated calls for its repeal and consternation over the millions of dollars of damages awarded to foreign nationals as well as over the impact of such disputes on sensitive areas like the environment. Counted among its critics, from time to time, are the U.S. Congress, powerful lobby groups, and some academics whose criticisms include the cost of arri
ters needed to protect domestic interests from foreign investors and the filtration of millions of taxpayer dollars to defend Chapter 11 actions brought by foreign claimants.

Impending Chapter 11 challenges against the United States are likely to exacerbate existing concerns that NAFTA arbitrators pose a direct and real threat to the U.S. judicial process. Notably among these is a proposed challenge by Canadian generic drug manufacturer Apotex that the U.S. federal courts "denied it justice" in its patent dispute with Pfizer. A Chapter 11 arbitration, alleging that

345. Claims brought against the U.S. and Canadian governments represent a greater share of investment capital than claims against the Mexican government. U.S. and Canadian investors also incur significant costs in bringing NAFTA claims under Chapter 11, which sometimes are unsuccessful. See generally Herz, supra note 140; Dai, supra note 222; see also Josè E. Alvarez, Critical Theory and the North American Free Trade Agreement's Chapter Eleven, 28 U. MIAMI INTER-AM. L. REV. 303, 304-06 (1997).

346. An overriding issue is the perceived inequality between investors from developed states like the United States and Canada and developing countries like Mexico, which is accentuated by the use of the NAFTA in a manner that conflicts with select equality rights under the Mexican Constitution. See Cesar De La Garza, Constitutional Inconsistencies of NAFTA Chapter 19: A Mexican Perspective, in 1 DOING BUSINESS IN MEXICO pt. III, ch. 4 (Mark E. Wojcik ed., 2009).

347. Interestingly, Canada became the target of a series of recent challenges from U.S. investors arising primarily from Canada’s environmental protection regulation. See CAN. CTR. FOR POLICY ALTERNATIVES, NAFTA CHAPTER 11 INVESTOR-STATE DISPUTES TO JANUARY 1, 2008 (2008).

348. On doubts about the manner in which domestic courts construe Chapter 11 of NAFTA parties, see Afilalo, supra note 285, at 93.


the U.S. Supreme Court has sanctioned this "denial" of justice, to say the least, is likely to be inflammatory.\[351\]

In a further illustration of alleged protectionism under Chapter 11, Camara Nacional del Autotransporte de Carga has initiated arbitration proceedings against the U.S. government on grounds that the United States has violated its "national treatment" and "most favored nation" obligations under Chapter 11. In dispute is an alleged adoption of protectionist measures by the United States to protect U.S. carriers from competition from Mexican carriers whose drivers charged lower wages.\[352\] The case illustrates the difficulty that developed states face in protecting domestic interests while honoring their NAFTA obligations, in financially challenging times.\[353\]

As Chapter 11's terms remain far from predictable in operation, the U.S. government has sought to clarify its most controversial provisions on the nature and limits of expropriation, national treatment, fair and equitable treatment, and consultation among NAFTA member states over its future application.\[354\] At the same time, it is important to recognize that the treaty provisions of the NAFTA anticipate the ongoing interpretation of the NAFTA and that such interpretation inevitably includes the prospect of controversy over its application to particular cases.\[355\]

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351. This concern is most pronounced following the Chapter 11 arbitration in the Methanex case. See generally Methanex, supra note 198, Crook, supra note 307.


Periodic comments, including statements by President Barack Obama, lend some credence to the prospect that the NAFTA may be renegotiated, although the timing, nature, and extent of such renegotiation remain uncertain.\textsuperscript{356} The recent financial crisis, including domestic concern that FDI incursions into the United States aided by Chapter 11 of the NAFTA, will undermine U.S. domestic interests, accentuate this probability.\textsuperscript{357}

In fairness, one ought not to expect too much from Chapter 11 jurisprudence. Chapter 11 of the NAFTA attempts to balance the competing interests of the United States and Canada as capital exporters, with an uneven history of investment liberalization, against the interests of Mexico as a capital importer, with an uneven history of investment confiscation.\textsuperscript{358} Equally challenging for Chapter 11 tribunals is the absence of firm ground upon which to base their decisions, given the changing economic, labor, environmental, and human rights issues that they must weigh. In a world imperiled by global financial crises, arriving at principled and consistent investment decisions, will be challenging at the very least, however adept such tribunals might be.\textsuperscript{359}

VI. REGULATION OF FOREIGN DIRECT INVESTMENT: PAST AND FUTURE

A. On Reflection

A historical criticism of the liberalization of FDI is that, regardless of the collective weight of the developing world, wealthy developed states and their corporate investors dominate global investment markets, leading to the regulation of FDI that is skewed

\textsuperscript{356} See supra Part III.B.2.d.

\textsuperscript{357} President Obama's comments on the NAFTA arose primarily in February 2008 during his campaign for the presidency. See Clinton, Obama Threaten to Withdraw From NAFTA, CBC News, Feb. 27, 2008, available at http://www.cbc.ca/world/usvoters/story/2008/02/27/debate-nafta.html. Whether the elected Obama would unravel the NAFTA in fact appears less likely in the immediate future, although it is well conceivable that he will seek to modify aspects of the NAFTA. See Laura Carlsen, Obama and NAFTA, FOREIGN POL'Y FOCUS, Jan. 9, 2009.

\textsuperscript{358} Current speculation is that, despite election promises, Barack Obama will delay or even avoid overhauling the NAFTA so as to concentrate on the more immediate American economic crisis. It is, however, arguable that foreign investment in the United States might have contributed to that crisis. See generally Mark Drajem, Obama May Delay NAFTA Overhaul, in Victory for Caterpillar, GE, BLOOMBERG, Nov. 18, 2008, available at http://www.bloomberg.com/apps/news?pid=20601087&sid=avUEQDcf.ZxM&refer=home.

\textsuperscript{359} The nationalization of the Mexican oil industry is the best known example of Mexican expropriation. Other expropriations revolve around a series of devaluations of the Mexican peso, giving rise to litigation. See Callejo v. Bancomer, 764 F.2d 101 (5th Cir. 1985).
in their favor.\textsuperscript{360} The result is that developing states have resented their perceived limited capacity to influence the terms and operation of FDI through the WTO. Their further concern is that, with the growth of FTAs and BITs, they may lose the strategic advantages accorded them by the WTO and further revert to their historical status of economic and political disempowerment.\textsuperscript{361}

Developing states also find themselves walking a tightrope. On the one hand, they need to secure advantageous standards of treatment for their investors abroad to bolster capital exports and to generate foreign revenues in a global climate of economic hardship.\textsuperscript{362} On the other hand, they need to insulate their vulnerable domestic interests from the assertion of property rights by foreign investors in order to promote domestic productivity.\textsuperscript{363}

Given their different economic, cultural, and political interests in the regulation of FDI, developed and developing states are unable to arrive at uniform standards by which to liberalize FDI.\textsuperscript{364} The failure of the OECD to reach accord on a Multilateral Agreement on Investment in 1998,\textsuperscript{365} the somewhat inconsequential

\begin{footnotesize}


\textsuperscript{364} On property rights in relation to international investment law, see generally Kades, supra note 362; Wälde, supra note 362.

\end{footnotesize}
results of the Doha Round, and the impasse on the liberalization of FDI at Cancun typify this paralysis.\textsuperscript{366}

A perceived virtue of divergence among states is the plethora of FTAs and BITs by which developed and developing states alike have managed to reach agreements without invoking the WTO.\textsuperscript{367}

The hazard associated with these FTAs and BITs is that, in serving as piecemeal mechanisms in which states conclude discrete investment agreements with selected local, regional, and global partners, they will steer FDI away from systematic legal reform. The risk is that FTAs and BITs that adopt different protocols, principles, and standards will disrupt the uniform treatment of FDI and lead to confusion in regulating FDI. One worries that this will produce a patchwork quilt of FDI laws that conflict, leading to a disruption of FDI initiatives.\textsuperscript{368}

Disparate tribunal decisions, in turn, can lead to confusion over the boundaries of a complainant investor’s “legitimate expectations,” doubt as to a state’s duty to pay “adequate” compensation to foreign investors, and dissent over its power to impose punitive measures.\textsuperscript{369} These problems are apparent in the jurisprudence surrounding Chapter 11 of the NAFTA and in divergence among investment tribunals over the definition of an expropriation, the police powers of the state, and the property rights of individuals.

A further hazard of bilateralism is fear that domestic courts, exercising judicial review of tribunal decisions, will poison the FDI well. Reactions to the \textit{Loewen} case, which arose under Chapter 11 of the NAFTA, illustrate this concern.\textsuperscript{370} There, in a trial by jury a Mississippi state court awarded almost $500 million dollars of damages against the Loewen Group, a Canadian company, including $400 million dollars in punitive damages. While a tribunal


\textsuperscript{368} See Trakman, \textit{supra} note 104, at 367; see also Vandevelde, \textit{supra} note 99, at 169-70.

\textsuperscript{369} See \textit{supra} Part II.D.5.

\textsuperscript{370} In fairness, international negotiations have underscored both the need for greater harmonization in the regulation of investment as well as ways in which to do so, including through regional and bilateral agreements. How instrumental such negotiations will be in the unification of international investment law and practice remains to be seen. See generally Kennedy, \textit{supra} note 36. On the prospective impact of the Doha round of multilateral negotiations on Chapter 11 of the NAFTA, see generally Bryan Swartz, \textit{The Doha Round and Investment: Lessons from Chapter 11 of NAFTA}, in NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 445 (Todd Weiler ed., 2004).
appointed under the NAFTA identified transgressions at trial, it dismissed Lowen’s claim on grounds that the actions at trial “did not transgress the minimum standard of treatment mandated” by Article 1105 of the NAFTA and were “at worst . . . erroneous or mistaken.”\(^{371}\)

Differences in mechanisms used to decide investment disputes are not undesirable in themselves. Dissimilar experiences in resolving investment conflicts may lead to constructive discourse around the meaning of such fundamental concepts as a “government taking,” the nature of a property right, and the evenhanded application of international standards of FDI to foreign investors in particular cases. Different constructions of a “legitimate” expropriation can invite debate over the parameters of state sovereignty and the “reasonable expectations” of foreign investors. Different institutional mechanisms used to resolve FDI disputes can also help to gauge the functional value of holding public hearings, the virtue of having resort to *amicus curiae* briefs in arbitral proceedings, and the sustainable grounds for reviewing investment decisions.\(^{372}\)

Debate over the liberalization and regulation of FDI may, however, make uniformity all the more elusive. The result may be a failure to establish sustainable boundaries between legitimate and illegitimate FDI. The risk may be to deny foreign investors certainty in planning their investment decisions and unfair surprise in having their plans disrupted by intrusive host states invoking nuanced regulatory apparatus to undermine FDI.

**B. Conclusion**

Part of the task ahead is to clear the pathway that hitherto has impeded states from reaching multilateral accord on the liberalization of FDI without jettisoning the value of BITs and FTAs. At issue is more than the functional need to redress the sovereign powers of states over FDI, or to assess the procedural and substantive rights of foreign investors. FDI needs a body of investment law that integrates both investment rules and investment practice, that responds to the exercise of state powers without being wholly captive to them, and that accords a measure of protection to foreign investors while taking adequate account of the interests of host states. In contention is the need for a workable agenda by which states, courts, and investment tribunals can together reform inter-

\(^{371}\) See “The Loewen case” *supra* note 129.

\(^{372}\) *Id.* ¶ 189. For the full transcript of the Tribunal’s reasoning in “the Loewen case,” see http://www.state.gov/documents/organization/22094.pdf.
national investment protocols and standards without regressing into an impasse.\textsuperscript{373}

The institutional deficiencies arising from multiple bodies deciding investment cases and tribunals' decisions relying on sometimes conflicting jurisprudence do not create an obstacle in achieving greater cohesion in international investment law.\textsuperscript{374} These differences are unavoidable in a complex world order in which investment practice operates at different levels of abstraction and basic legal concepts relating to property rights differ perceptibly from one legal regime to another.

A deeper dilemma lies in the elusiveness of a definitive international investment regime that is devised, sanctioned, and recognized by the international community as well as the states that comprise it. If Chapter 11 of the NAFTA serves as an example, only part of the difficulty lies in the fact that Chapter 11 is open-textured and that its interpretative framework is pliable. A perhaps more intractable part of the problem resides in the intermittent ambivalence of some NAFTA parties' have shown towards Chapter 11 and their reluctance to settle on uniform methods of addressing its perceived limitations.

A challenge ahead will be establishing a politically sustainable pathway towards multilateral accord over the regulation of FDI. If the history of international investment law demonstrates anything, it is that old habits die hard. State sovereignty coupled with economic self-interest is a powerful weapon in jettisoning multilateral accord and in leading to dissension among states in a constantly changing global economy. Variations in the regulation of FDI disputes have a legitimate role to play in this changing legal order. If states are to be free to devise disparate policies towards foreign investment in expressing their sovereign power, then a homogenized, one-size-fits-all method of regulating FDI is assuredly ill-fitting. If the exercise of state sovereignty is to be dynamic in application, it is in the interest of states to be part of that dynamic process in order to attract, not alienate preferred FDI.

In responding to these challenges, states need to be better advised about the benefits of FDI, different options in regulating it,
and the perceived impact of those options upon particular or groups of states in disparate economic and political contexts.

One way for the multilateral community including but not limited to states to be better informed about the mechanisms and means of regulating FDI is through the establishment of an international investment secretariat. The mandate of such a secretariat could include responsibility to promote a wider degree of participation among states in formulating and applying international investment law. Its mandate might be to encompass NGOs within its consultative ambit including in dispute resolution. A function of the Secretariat would also be to help identify the complexities, inconsistencies, and delays in resolving FDI disputes between investors and states and to provide logistical support in addressing these issues of difference before they grow into conflicts. The secretariat would also be responsible for collaborating with investment bodies established under existing conventions such as the WTO, the ICSID, and regional treaties like the European Union and NAFTA in the reform of international investment law.

International investment tribunals have done much to enhance the burgeoning body of international jurisprudence that was hitherto unevenly conceived and fractured in its application. However piecemeal their approach has been, they have helped to construct a body of investment law that can mediate between states’ complex interests and investors’ rights. It is unreasonable, however, to expect them to carve out a coherent and sustainable regime for regulating FDI in the absence of a supportable institutional fabric. That fabric ultimately rests in the hands of states that sometimes need to be reassured that the tailored liberalization of FDI may benefit not only foreign investors, but states themselves.

If the sovereignty of states is to benefit the multilateral community as a whole including foreign investors, states need to be assured that the multilateral end product is potentially greater than the sum of the different state parts.