**To What Extent has Developing Countries Benefited from International Law?: A Review of Southern Participation in Foreign Investment Law**

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## I. Introduction

Undoubtedly developing countries[1] have secured some minor victories in international law. Arguably they have contributed to its development through participation in many treaties and in advancing customary international law through State-practice.[2] Their very embodiment of statuses of Statehood can be credited to international law and its institutions.[3] A Third World Approaches to International Law (TWAIL) critique reveals, however, that the North-South confrontation in international law has historically been one characterised by Northern hegemony and dominance. TWAIL surfaced after decolonisation as an analytical tool seeking to appraise the validity and universality of international law's relationship with the global South.[4] TWAIL is a multifaceted alternative narrative of international law seeking to supplant what it perceives to be Western domination of the international legal order.[5] For instance, notwithstanding the United Nation's (U.N.) supervision of the soveriegn transformation of over 100 developing countries, jurists have criticised it as making a mockery of the independent statuses of these States through its promotion of foreign policies that serve the needs of the international community's minority elite–its creators.[6] In its colonial/neo-colonial critique of international law, TWAIL illustrates how colonial doctrines divided the world between Europeans and non-Europeans.[7] According to doctrines such as *terrae nullius*, sovereign Europeans could do, as they desired with non-Europeans, which according to the normative interpretation of international law at the time were non-sovereign and open to conquest.[8] Increasingly ancient empires such as China and India were brought under European control.[9] Expansionism was largely underpinned by economic incentives.[10] For five centuries, *inter alia*, non-Europeans satisfied their masters' natural resources needs, resulting in Western States modern economic successes.[11]

Many former colonies emerged as sovereign States after World War II. Nonetheless, TWAIL reveals how the colonial-style exploitation of their resources, that had characterised colonialism, has not changed markedly.[12] TWAIL's regime bias critique illustrates how international law continues to facilitate Southern exploitation today. Regime bias is the latest Southern critique of international economic governance (IEG). Superseding the post-colonial era's new international economic order (NIEO) critique, this newer critique views the manner in which IEG rules are crafted, applied and adjudicated between industrialized and developing countries, or between developing countries and the interest of global capital, as 'unfair'. It rejects the biased manner in which choices are made between alternative ways of crafting IEG rules, the meaning ascribed to a particular rule in its application by administrative agencies or at the

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[1] "Developing countries", "South", "developing world" and "Third World", are used interchangeably to denote States that emerged after World War II, with the exception of Latin American States, which achieved their independence between 1810 and 1900. What these States have in common is that their economies are relatively undeveloped compared to that of former colonial Powers. "North", "industrialized countries", "developed countries", and "Western World" are used interchangeably to denote former colonial powers and the international community's modern economic powers.

[2] Taslim O. Elias, *Africa and the Development of International Law* (Martinus Nijhoff 1988).

[3] Antonio Cassese, *Self-Determination of Peoples: A legal reappraisal* (Cambridge University Press 1995) 5.

[4] Opeoluwa A Badaru, 'Examining the Utility of Third World Approaches to International Law for International Human Rights Law' (2008) 10 International Community Law Review 379, 380.

[5] Mohsen Al Attar and Rosalie Miller, 'Towards an Emancipatory International Law: The Bolivarian Reconstruction' (2010) 31(3) Third World Quarterly 347.

[6] Makau Mutua, 'What is TWAIL?' (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 35.

[7] James T Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184, 200.

[8] Antonio Cassese, *International Law in Divided World* (Oxford: OUP 1992) 42.

[9] Barry Buzan and Richard Little, *International Systems in World History: Remaking the Study of International Relations* (Oxford University Press 2000) 264.

[10] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World' (2000) 32 New York University Journal of International Law and Politics 243, 279.

[11] Herschel I. Grossman and Murat F. Iyigun, 'Population Increase and the End of Colonialism' (1997) 64 Economica 483.

[12] Anghie (n 10) 243, 279.

adjudication stage by international tribunals when developing countries' interests are at stake.[13] Due to developing countries heavy reliance on external economic input,[14] TWAIL's regime bias debate becomes acute in the context of foreign investment law.[15]

The demise of colonialism and its investment protection mechanism, coupled with new States' desire to control their economies, saw the intensification of foreign investment law.[16] Bilateral investment treaties (BITs), which underpin the promotion and protection of foreign investment,[17] have their origin in North-South multilateral negotiations on foreign investment protection that became necessary after decolonization.[18] The International Centre for the Settlement of Investment Disputes (ICSID), the preeminent investor-State dispute resolution institution also emerged in the heydays of nationalist convergence in the South.[19] These institutions' main purpose was perceived as being to protect Northern investors who had acquired resource concessions and commenced other economic activities in the South before or shortly after developing countries became independent. Today they continue to play important roles in the regime's regulation.[20] Undeniably, endorsement of these liberal institutions and participation in foreign investment law has contributed somewhat to developing countries' post-colonial development,[21] however, they have not been wholly beneficial. Notwithstanding their reverence in the industrialized-North, TWAIL views these devices sceptically due to their perceived facilitation of the colonial-style exploitation of Southern States.[22] Arguments concerning the exploitation of developing countries have implicated BITs. Exploitation is perceived as being facilitated by the lopsided negotiation of BITs, where benefits arising from these agreements mostly accrue in favour of Northern capital-exporting States, since developing countries have to forgo key domestic concerns in their competition to attract foreign investment.[23] A more serious critique involves the manner Northern BITs jumpstarted the move to grant private persons the necessary *locus standi* to act like attorney generals and bring suit against soveriegn host-States–an anathema in international law. This reveals how foreign investment law has evolved in a manner that methodically resists Southern influence.[24] The critique also implicates the institution of investor-State arbitration, the primary investment dispute settlement mechanism. The critique is sceptical of the post-globalisation explosion of international tribunals that have supplanted domestic courts in resolving foreign investment disputes. The argument is that investor-State arbitration as conducted by international tribunals is underpinned by a neoliberal bias that seeks to protect Western interests in IEG.[25] ICSID has been a key focal point of TWAIL jurists.[26] ICSID's its neoliberal bias towards foreign investment protection; its disregard for the welfare of developing countries and peoples; and its lack of an appeal mechanism by which reviews of extra jurisdictional decisions may be reviewed are perceived as some of ICSID's most glaring defects. However, its hegemonic review of sovereign States' domestic policies has emerged as ISCID's most acute sin. Like many other international institutions, it is claimed that ISCID's methods are pervasive and increasingly encroaching on States' effective regulation of foreign investment.[27] Whereas, historically disputes concerned expropriations, modern disputes involve matters relating to public

[13]James T Gathii, 'Third World Approaches to International Economic Governance' in Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge 2008) 255, 261.
[14] Robert Jackman, 'Dependence on Foreign Investment and Economic Growth in the Third World' (1982) 34(2) World Politics 175.
[15]Gus Van Harten, 'TWAIL and the Dabhol Arbitration' (Osgoode Hall Law School Research Paper No 19/2011, 2011) 136 <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1057&context=clpe> accessed 10 May 2014.
[16]Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 Penn State International Law Review 251, 256.
[17]Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 International Review of Law and Economics 107, 108.
[18]Stephan W. Schill, 'The Multilateralization of Foreign investment law', *Vol. 2 of Cambridge International Trade and Economic Law* (Cambridge University Press 2009) 99.
[19] Odumosu (n 16) 251, 256.
[20]José E Alvarez, 'Contemporary Foreign Investment Law: "An Empire of Law" or the "Law of Empire"?' (2009) 60 Alabama Law Review 943, 975.
[21] Ismail Adelopo, Kamil Omoteso and Musa Obalola, 'Impact of Corporate Governance on Foreign Direct Investment in Nigeria' (Leicester Business School De Montfort University Research Paper 3, 2009).
[22]Susan D Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51 Virginia Journal of International Law 825, 841.
[23]Olivia Chung, 'The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration' (2007) 47 Virginia Journal of International Law 953, 955.
[24]Odumosu (n 16) 251, 256.
[25]Andrew Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining The Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639-688.
[26] Odumosu (n 16) 251, 256.
[27] Alvarez (n 20) 943, 965.

policy, such as environmental regulation and national security,[28] or human rights protection.[29]A growing concern among developing countries is that resorting to foreign investment arbitration is a guise for universalising Western values.[30]

This has been facilitated partly by tribunals' practices in the course of dispute resolution. The unmerited but popular practice of internationalising foreign disputes, which originated in *Petroleum Development (Trucial Coast) v Sheikh Shakhbut Bin Sultan Bin Za'id*[31] is detrimental to host-States' ability to justify their actions on the basis of national policies.[32] Another concern and an anathema to customary international law,[33] involves the increasingly expansive interpretation of foreign investment to include sovereign prerogatives such as the issuance/revocation of licenses and permits as regulatory controls concerning matters such as the environment, as seen in *Tecmed v Mexico*.[34] As seen in the *Dabhol Arbitration,*[35] the expansion of the rules relating to expropriation whereby State-actions such as States regulatory termination of investor-State contracts, which are undertaken to protect States' welfare, have become compensable is another grave concern. The unfounded nature of foreign investment law's compensation standard and its application to Southern States who, in fact, had collectively rejected it in the 1970s in their attempt to establish a NIEO has also become a critical issue on the agenda of jurists concerned with developing countries' participation in foreign investment law,[36] as seen by the extreme application of this standard recently in *Occidental v Ecuador*.[37] These methods are not underpinned by a rational set of legal principles. Collectively, they aim to foster the highest level of legal protection to foreign investment possible.

Therefore, although it is acknowledged that international law's relationship with developing countries has been beneficial to them in some respects, examination of the entire course of this relationship seems to reveal that international law has generally been a tool employed in a hegemonic way to sustain Northern domination of the South. This is especially true of foreign investment law, which continues to facilitate the exploitation of the South long after the demise of colonialism. Foreign investment law sustains the economic exploitation of developing countries. The rules frustrate host-States' attempts to regulate foreign investment. They have been complicit in decentralising the authority of States in pursuance of economic objectives necessary to augment their development pursuant to their right to economic self-determination. So while economic self-determination has long been held to be central to international law, Southern capital-importing States have found it difficult to exercise their right to freely manage their economies due to the obligations assumed as part of their desire to attract foreign investment.[38]

Part II introduces TWAIL, which harbours an intimate concern for developing countries' welfare in international law. It emerged pursuant to post-colonial ideology that international law did not protect developing countries' interests, thereby restricting their ability to follow former colonial masters' development patterns. This Chapter focuses on TWAIL's multifaceted nature and common concerns, a key area being the developing world's place in IEG. Part III examines the paradigm shift in the South's IEG critique beyond the 1970s NIEO critique, which became largely irrelevant with TWAIL's emergence. A key focal point of TWAIL's IEG critique has been the regime bias critique. This critique rejects developing countries current participation in IEG. It illustrates how developing countries' participation in IEG is not an objective exercise, but a struggle between two camps, the victors often being economically superior States. Part IV focuses on perceived regime bias in foreign investment law. It first examines BITs. TWAIL's

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[28] *Tecnicas Medioambientales (Tecmed), S.A. v United Mexican States* (ICSID Case No. ARB (AF)/00/2) at 144-147.

[29] *Capital India Power Mauritius I and Energy Enterprises (Mauritius), Company v Maharashtra Power Development Corporation Limited, Maharashtra States Electricity Board and the State of Maharashtra,* ICC Case No 12913/MS, Final Award (27 April 2005) at 22-23.

[30] Nicolette Butler and Surya P Subedi, 'Kyla Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy, Cambridge University Press, 2009' (2011) 4 Journal of World Energy Law and Business 201.

[31] *Petroleum Development (Trucial Coast) v Sheikh Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi and its Dependencies* (1952), Int'l and Comparative L. Q. 247.

[32] Khaled M. Al Jumar, 'Arab State Contracts: Lessons From the Past' (2002) 17(3) Arab Law Quarterly 215, 217.

[33] Kyla Tienhaara, The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy (Cambridge University Press 2009).

[34] *Tecnicas Medioambientales* (n 28).

[35] *Capital India Power* (n 29).

[36] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 414.

[37] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador* (2012) ICSID Case No.ARB/06/11 at 876.

[38] U. Oji Umozurike, 'Nationalization of Foreign Owned Property and Self-Determination' (1970) 6 Eastern Africa Law Journal 99.

regime bias critique of BITs reveals that the negotiation of BITs is lopsided in favour of capital-exporting developed countries that are endowed with economic power. It also illustrates how these instruments have provided private persons with *locus standi* to hold investment-hosts accountable for actions perceived as contrary to BIT provisions. This section concludes by illustrating how the North is constantly changing foreign investment rules with little participation from the capital-importing South. This Chapter then examines TWAIL's regime bias critique of the investor-State arbitration regime. The regime bias critique is critical of the post-globalisation explosion of international tribunals that have supplanted domestic courts and tribunals in resolving foreign investment disputes. This Chapter focuses on ICSID. ICSID's neoliberal bias towards foreign investment protection; its disregard for the welfare of developing countries and peoples; and its lack of an appeal mechanism by which reviews of extra jurisdictional decisions may be reviewed, are perceived as some of ICSID's most glaring defects, but its review of sovereign States' domestic policies have captured the special animus of jurists. Part V examines the methods of interntional arbitral tribunals, in the course of dispute settlement, that have facilitated the marginalisation of the interests of developing countries in the investor-State arbitration system. These include: the internationalisation of disputes; increasingly expansive interpretation of foreign investment to include sovereign prerogatives such as the issuance of licenses and permits; the expansion of the rules relating to expropriation; and application of the Western compensation standard despite it being unfounded in international law. It will reveal that these interpretations of foreign investment law are not objective. They are not underpinned by any rational legal principles. They are merely intended to promote a system in which foreign investors will feel comfortable to take their capital abroad. Part VI will illustrate that despite their minor victories, international law has not been wholly beneficial to developing countries. Foreign investment law has facilitated the exploitation of developing countries by facilitating the move of their resources to industrialised countries with developing countries benefitting only marginally. The rules themselves undermine developing countries' ability to regulate foreign investors and plan their economies, a facet of their right to economic self-determination.

## II. Third World Approaches to International Law

Mutua defines TWAIL as a 'broad dialectic of opposition to international law' by the developing world.[39] Al Attar and Thompson, define it as 'an alternative narrative to international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus.'[40] To others, TWAIL sets to reclaim law, while harnessing the critical insights of new approaches to international law in constructing a nuanced critique, especially in terms of the relationship between notions of law and neo-liberal economic policies. TWAIL jurists view it as another method of international legal theory.[41] To them it is certainly as much a method as international law/international relations.[42] But they make it clear that TWAIL is not solely a 'method', if by 'method' reference is made solely to a means of determining 'what the law is'.[43] To these jurists, TWAIL is a counter-hegemonic term designed to rupture received thinking, challenging international law's Eurocentric and colonialist foundations.[44] It is united in its opposition to the politics of empire.[45] It is argued that TWAIL falls under the umbrellas of both 'theory' and 'methodology' for analysing international law and its institutions,[46] and exposing international law's hegemonic tendencies in relation to developing countries.

TWAIL has roots stretching back to the decolonization of Latin America.[47] Its intellectual and inspirational roots can be traced back to Afro-Asian anti-colonial struggles from the 1940s to the 1960s[48]

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[39]Mutua (n 6) 31.
[40]Mohsen Al Attar and Rebekah Thompson ,'How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-determination,' (2011) 3(1) Trade Law and Development 67.
[41] Obiora C Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 International Community Law Review 371, 376.
[42]Antony Anghie and Bhupinder S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' (2003) 2 Chinese Journal of International Law 77.
[43] Ibid.
[44]James T Gathii, 'Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory' (2000) 41 Harvard International Law Journal 163, 274.
[45]Bhupinder S. Chimni, 'The World of TWAIL: Introduction to the Special Issue' (2011) 3(1) Trade, Law and Development 14, 17.
[46] Okafor (n 41) 371, 377.
[47]Mutua (n 6) 32.

such as the 1955 Bandung Conference of Afro-Asian States.[49] TWAIL also descends from Third World critical internationalism that swept the globe in the post-colonial era.[50] This includes works emerging from Third World Universities, such as works emerging from Jawaharlal Nehru University in India under Ram Prakash Anand's guidance from the 1970s. These works fought for an international law that was cognizant of Southern peoples' aspirations.[51] Nevertheless, TWAIL truly emerged from Harvard University Law School's new approaches to international law/critical legal studies project in the 1990s, drawing on post-colonial literature and adopting earlier Third World struggles as inspiration.

TWAIL's emerged partly in response to what is perceived as Western Powers' post-colonial dominance of international law/international relations. An area of particular importance was the NIEO's failure[52] and the way industrialized countries continued to manipulate international law to preserve the colonial-style economic relationship with developing countries.[53] TWAIL questions international law's ability to safeguard developing countries' post-colonial interests, since it had earlier subjected them to domination.[54] Although independent, post-colonial States found that their economies remained subject to external influences.[55] While holding the best part of many important natural resources, developing countries continued to participate only marginally in the international economic system.[56] Despite being located in developing countries, these resources remained in the ownership of corporations, which had their hubs in former colonial powers, similar to colonial chartered companies.[57] Even with the large-scale post-colonial nationalizations of their resources, continued dependence of many developing countries' on foreign investment to extract and transport these resources to industrialized markets inhibited their economic autonomy. Thus, *inter alia*, TWAIL questions IEG's ability to safeguard developing countries' interests in the global economy. It recognises that international law seems not to protect universal interests as it high-sounding ideals tend to advocate.

TWAIL jurists see it as committed to addressing the explicitly political questions of agency, resistance, and the future of international law.[58] To them, it refutes international law's generally unjust character, that all-too often (but not always) help subject developing countries to domination, subordination, and serious disadvantage.[59] For instance, it refutes the way IEG rules restrict poorer countries' participation in the global economy. TWAIL provides a methodological framework for unpacking the way developing countries' national policies are dictated by conditionalities imposed by international institutions and in the interest of economically powerful States.[60] Thus TWAIL jurists see it as a device to transform international law from a language of oppression to a language of emancipation–a body of rules and practices that acknowledge the struggles and aspirations of Third World peoples and thereby promote genuine global justice.[61] TWAIL proposes mentalities of self-determination and self-governance, beyond the façade usually espoused in theory in mainstream international law but which is seldom recognized in practice, for instance, due to conditions attached to capital coming into developing countries. TWAIL insists on the recognition of cultural and civilizational plurality and diversity.[62]

Jurists acknowledge that arguably there is no credible theoretical approach, which unites them; they merely share a sensibility and a political orientation.[63] They argue although far from a theology,

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[48]Obiora C. Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 Osgoode Hall Law Journal 171, 177.

[49] Umut Özsu, '"Let Us First of All Have Unity Among Us": Bandung, International Law, and the Empty Politics of Solidarity' in Luis Eslava, Michael Fakhri, and Vasuki Nesiah, (eds), *Bandung, the Global South, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2015).

[50]Mutua (n 6) 31.

[51] Chimni (n 45) 14, 17.

[52] Balakrishnan Rajagopal, *International Law from Below, Development Social Movements and Third World Resistance* (Cambridge University Press 2003).

[53]Arghyrios A Fatouros, 'International Law and the Third World' (1964) 50 Virginia Law Review 783, 800.

[54] Antony Anghie, 'TWAIL: Past and Future' (2008) 10(4) International Community Law Review 479, 480.

[55] Nana Poku and Lloyd Pettiford (eds), *Redefining the Third World* (Macmillan Press 1998) XIII.

[56]Kamal Hossain (ed), Legal Aspects of the New International Economic Order (Pinter 1980) 2.

[57] Fernand Braudel, The Perspective of the World: Civilization and Capitalism 15th-18th Century, vol III (Fontana Press 1985) 220-35.

[58]Ruth Buchanan, 'Writing Resistance Into International Law' (2008) 10 International Community Law Review 445, 447.

[59] Okafor (n 48) 171, 176.

[60] Jalia Kangave, '"Taxing" TWAIL: A Preliminary Inquiry into TWAIL's Application to the Taxation of Foreign Direct Investment' (2008) 10 International Community Law Review 389, 390.

[61]Anghie and Chimni (n 42) 78.

[62]Upendra Baxi, 'What May the "Third World" Expect from International Law?' (2006) 27 Third World Quarterly 713, 714.

[63]Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and The Universality of International Law' (2011) 3 Trade, Law and Development 104.

TWAIL represents a 'chorus of voices' rather than a monolithic collegium.[64] To them, TWAIL harnesses critical insights from several disciplines, including Marxism, post-colonialism, cultural studies, critical race theory and critical legal theory.[65] Yet, according to them TWAIL should not suffer reproach due to its internal diversity. As long as it continues to cohere around a broadly unifying intellectual idea, its relatively minor, but still creative internal contestations, should not be mistaken for incoherence.[66] TWAIL jurists acknowledge that TWAIL's parameters are not well defined, but it is understood that TWAIL seeks to oppose international law's hegemony.[67] It is defined by a commonality of concerns, which centre on attempts to attune international law's focus to those subjects traditionally positioned as the 'others' of international law.[68] To TWAIL jurists, subscription to a party program is not necessary to be part of TWAIL's movement. It is a network of jurists whose works are influenced by their desire to promote a truly universal international law, sympathetic to developing countries' concerns.[69]

TWAIL jurists have written extensively on international law's role in marginalizing developing countries; most of the literature centres on what may loosely be categorized as self-determination.[70] They have explored the war on terror,[71] the role of social movements, women, the environment[72] and the Third World from an indigenous perspective.[73] Additionally, TWAIL debates have focused, *inter alia*, on Statehood, State sovereignty, economic intervention[74] and the role that international law, and international institutions play in buttressing colonialism today.[75]

To TWAIL jurists, a foremost purpose of TWAIL is to attune international law to the plight of developing countries.[76] They argue that without such recognition, even potentially resistant discourses, such as development, will become swallowed up in the expanding scope of international law's hegemony.[77] TWAIL helps jurists appreciate how international law is often manipulated to promote neo-liberal objectives.[78] They also opine that TWAIL helps jurists critique the oft-proclaimed high moral ground occupied by the West and mainstream international law, especially as it relates to developing countries' socio-economic under–development.[79] For instance, developing countries have the prospect of development, but only if they 'follow' the path of and insofar as they do not interfere with Western needs and aspirations.[80]

TWAIL opposes Western hegemony, which the U.N. legitimizes through the cloak of universality. Jurists acknowledge that developing countries have secured some victories; however, TWAIL reveals the disregard by the U.N. of developing countries' problems generally. It reveals how the selective use of U.N. organs to advance Western foreign policy, stand in direct contradiction to its high sounding morals.[81] There is no clearer example than the NIEO project's failure, which would have enabled developing countries to compete on an equal footing with industrialized countries, due to a handful of Western States' disapproval. Thus to its champions, a TWAIL perspective helps scholars understand international law's inconsistencies, particularly in the perpetuation of injustice against developing countries. TWAIL demonstrates the discrepancy between the contradictory languages that international law adopts in its different subject streams. For instance, while international law purports to promote State sovereignty and self-determination, it pays little attention when the application of other international law rules restricts

[64]Okafor (n 48) 171, 176.
[65]James T Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 Michigan Law Review 1996, 1997ff.
[66]Okafor (n 41) 371, 376.
[67]Okafor (n 48) 171, 176.
[68]Eslava and Pahuja (n 63) 117.
[69]Bhupinder S Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 18.
[70] Kangave (n 60) 389, 390.
[71]Obiora C Okafor, 'The Third World, International Law, and the "Post-911 Era": An Introduction' (2005) 43(1/2) Osgoode Hall Law Journal 1.
[72] Sara L Seck, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2011) 3(1) Trade, Law and Development 164.
[73]Kangave (n 60) 389, 390ff.
[74] Gathii (n 13) 255, 256-57.
[75] Kangave (n 60) 389, 390.
[76] Rajagopal (n 52) 1-5.
[77]Buchanan (n 58) 445, 448.
[78] Badaru (n 4) 379, 383.
[79]Ibid.
[80]Gathii (n 7) 184, 200.
[81]Mutua (n 6) 31, 37.

developing countries' sovereignty. According to jurists, neither universality nor its promise of global order makes international law a 'legitimate' code of global governance.[82] To these jurists, TWAIL exposes how international law preserves a power hierarchy resembling the one experienced during colonialism.[83] TWAIL jurists claim that classical international law had been influenced by European supremacy and their 'duty' to civilize non-Europeans.[84] Thus, TWAIL is anti-hierarchical. TWAIL views international law as illegitimate, given that much, if not all, of it is driven by complexes of superiority. *Prima facie*, an intellectual goal of TWAIL is to deconstruct international law to reveal its internal inconsistencies.[85] Since its emergence, TWAIL has sought through scholarship, policy and politics, to eradicate Third World underdevelopment and improve the socio-economic status of developing countries.[86] TWAIL has been obstinate in advocating for the enhanced participation of developing countries in the international economic system. It has sought to achieve this by examining the IEG regime, illustrating and rejecting how international institutions charged with the regime's regulation, in their application of the regime's rules and procedures, have marginalised developing countries' interests.

## III. A Theoretical Shift in the South's International Economic Governance Critique: Emergence of TWAIL's Regime Bias Debate

IEG has been of particular concern to Southern jurists since decolonization, influenced by post-colonial States' inferior economic characteristics.[87] Thus, since its emergence, TWAIL too has been unyielding in its critique of IEG. IEG refers to the rules, procedures and the international institutions administering them, which regulate the working of the international economic system. This takes into account the international trade regime, foreign investment regime, increasingly the international development regime and the international monetary system. In international trade, this includes rules espoused in the General Agreement on Tariff and Trade (GATT), General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and their regulation by the World Trade Organisation (WTO) and its Dispute Settlement Understanding (DSU). It also includes GATT Article XXIV numerous Regional Trade Agreements encompassing both Free Trade Agreements such as the North American Free Trade Agreement (NAFTA) or the Korea-U.S. Free Trade Agreement (KORUS) and Customs Unions such as the European Union.[88] In the realm of foreign investment, this includes over 3,000 International Investment Agreements (IIA), numerous international tribunals for the resolution of investment disputes, including the World Bank's ICSID and other relevant bodies such as the Multilateral Investment Guarantee Agency (MIGA). In the sphere of international development, this includes the emerging body of rules underpinning international development and the World Bank as the guardian of international development, especially its International Finance Corporation (IFC) that finances international development. IEG also includes the rules governing the international monetary system and the International Monetary Fund (IMF), which advances the rules. Therefore, one may define IEG as a regime of international law encompassing international economic rules, procedures and institutions charged with regulating State participation in the global economy.

A TWAIL perspective reveals that industrialised countries mostly advanced all these institutions. This is particularly true of the GATT, IMF and World Bank, the three Bretton Woods institutions. These institutions were created with little to no participation from developing countries, which have been historically too economically irrelevant to engage in any meaningful participation of the international economic system's regulation. In the 1970s, wrought by the deepening gloom brought on by expanding mechanisms of indirect economic governance by international economic institutions and the creation of an integrated IEG structure that constrained and supplanted developing economies, the G-77,[89] a group of

[82] Badaru (n 4) 379, 383.
[83] Madhav Khosla, 'The TWAIL Discourse: The Emergence of the New Phase' (2007) 9 International Community Law Review 291, 296.
[84] Mutua (n 6) 36.
[85] Andrew F Sunter, 'TWAIL as Naturalized Epistemological Inquiry' (2007) 20 Canadian Journal of Law and Jurisprudence 475, 477.
[86] Ibid 31.
[87] Winston E. Langley 'The Third World: Towards a Definition' (1981) 2 Boston College Third World Law Journal 1, 5-6.
[88] Raj Bhala, *International Trade Law: Interdisciplinary Theory and Practice* (Lexis Nexis, 2008) 687.
[89] Alan G Friedman and Cynthia A Williams, 'The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea' (1979) 16 San Diego Law Review 555, 557-59.

developing countries, rebelled against the structure of IEG in an attempt to establish an NIEO.[90] Its failure due to Western opposition[91] generated the NIEO critique. This critique was also influence by Latin American early 20th Century national economic control (NEC) theory, which referred to a country's right to exercise sovereignty over its domestic economy without subscribing to IEG rules.[92] The NIEO, in contrast, more accurately referred to developing countries' attempts, from the 1960s through 1980s, to restructure international economic relations in order to establish an equilibrium between developing and industrial economies, challenging the unfair international trading, investment and finance rules advanced by industrialized States.[93] Nevertheless, with greater participation in the international economic system, developing countries moved away from the NIEO critique due to its growing irrelevance in an international economic system where protectionism became tantamount to economic suicide. Since TWAIL emerged, debates surrounding IEG have placed less emphasis on States having control over their domestic economies or completely overhauling IEG. TWAIL's critique has influenced a paradigm shift, which places more emphasis on the ability of developing countries to participate in the global economy.

This has given rise to TWAIL's regime bias critique, the latest in a series of Third World critiques of IEG. Gathii defines regime bias as the manner in which 'rules of international trade, commerce and investment are crafted, applied and adjudicated between developed and developing countries, or between developing countries and the interest of global capital.'[94] To him, it involves the arbitrary examination of the choices made between alternative ways of crafting rules, the meaning ascribed to a particular rule in its application by administrative agencies or at the adjudication stage by domestic judicial bodies or international tribunals. Although the NIEO and regime bias critiques differ in their approaches, they are both obstinate that IEG is at odds with Third World interests. Regime bias exposes IEG's pro-Western bias and its hidden agenda to facilitate developing countries' post-colonial economic exploitation. The regime bias critique is a multifaceted critique of IEG. Its proponents claim that, *inter alia*, reflections on regime bias manifests in the following considerations: first, international law is not an objective set of rules, but an instrument employed in a context of power relations between developed and developing countries; second, international law reflects an underlying racism against former colonies that remain 'others' in international relations; and third, international institutions may interpret and apply international law in ways that are biased systematically against developing countries interests.[95]

Proponents of regime bias claim that unlike its predecessors, the critique exposes the political, legal and other stakes between developed and developing economies. It reveals how interpretations of international law enable powerful economies to manage the tensions of engaging in international commerce to 'buy-off' losers from international trade within their economies.[96] Nevertheless, for the purposes of this Chapter, its essential feature is its use of developing countries' history, such as colonialism, as a benchmark by which their participation in contemporary regimes are measured. Regime bias uses developing countries' colonial history to illustrate how such histories are being replicated in modern times. It foregrounds the inability of developing countries to effectively participate in the foreign investment regime on the ever evolving nature of international law and its manifold contemporary devices that continue to constrict developing countries' engagement with this regime. The critique reveals that whereas classical international law respected the sovereignty and prevented international law from scrutinizing or legally assessing the character of a State's Government,[97] for developing countries infringement on their sovereign capacity to determine national economic policies has become the norm. It helps draw attention to the manner in which colonial discourse interacts with contemporary international law by attributing the persistent economic inequality of developing countries to inferior characteristics of 'otherness' and therefore rationalizes the continuing domination of the South by the North as a product of Northern superiority.[98] In this general perspective, regime bias illustrates how international law commonly serves as

[90]Buchanan (n 58) 445, 447.
[91]J. J. G. Syatauw 'The Relationship between the Newness of States and their Practices of International Law' in Ram Prakash Anand (eds), *Asian States and the Development of Universal International Law*, (Vikars Publications 1972) 13.
[92]Gathii (n 13) 255, 256-57.
[93]Ibid 256-58.
[94]Gathii (n 13) 255, 261.
[95]Van Harten (n 15) 1-25.
[96] Gathii (n 13) 263-64.
[97] Antony Anghie, 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 Villanova Law Review 887, 895–6.
[98]Chantal Thomas, 'Critical Race Theory and Postcolonial Development Theory: Observations on Methodology' (2000) 45 Villanova Law Review 1208.

an agent of First World interests and overwhelmingly reflects continental legal thought shaped during colonialism.[99] So structured, the regime bias critique reveals the replication of a subtler form of colonialism through international law. It reveals how developed countries simultaneously impose First World ambitions upon the rest of the world, while reproducing colonial domination and exploitation within a formalized system of hegemony.[100] Its disguised liberal framework legitimates significant conglomerations of power, preserving and extending the legal shorthand of private property rights, commandeering control over resources and labour to moneyed elites. Thus, a comparative analysis of the ways in which international law facilitated the economic exploitation of non-Europeans during colonialism and the extent to which its role is often repeated, reveals that IEG rules are being interpreted and applied in ways that supplant developing countries' economic interests.[101] This IEG critique manifests most acutely in foreign investment law, especially investor-State arbitration, illustrating that in the context of the foreign investment regime, international law has not been wholly beneficial to developing countries.

## IV. Developing Countries' Scepticism of the International Law of Foreign Investment: A Critical Review of Bilateral Investment Treaties and Investor-State Arbitration

As the forgoing illustrates, developing countries have long perceived international law as being hegemonic and at odds with their interests. Latin American States, the first group of developing countries to emerge from colonialism, immediately recognized how Euro-American powers continued to dominate international law and how this facilitated their continued subjugation. To improve their place in international society, these States sought to enhance the influence of Latin American States in international law. Prominent jurists such as Argentine Diplomats Carlos Calvo and Luis Drago and Brazil's Rui Barbosa, were notable in their attempts to curb Western domination in Latin America in the early 20th Century. [102] IEG, especially foreign investment law, captured the animus of these States. It was Calvo's doctrine, which underpinned Latin American States' historical denunciation of international dispute resolution that sought to pry investment disputes from domestic settings. This doctrine stipulated that aliens relinquished the right to request the diplomatic protection of their home- State and agreed to have disputes settled by domestic tribunals.[103] It sought to limit legal and political intervention in Latin America, which often constituted the pretext or the occasion for armed expeditions, political pressure, or other forms of economic interference.[104] These Latin American experiences influenced the reaction of of Africa, Asia and other areas towards foreign investment law after decolonization.[105] Thus, even though BITs and ICSID were both in existence since the 1960s, they were not employed with any frequency until after the advent of globalization in the 1990s.[106] Driven by their desire to attract much needed foreign investment they began acquiescing Northern neoliberal ideals such as participation in the BIT regime and acceptance of international arbitration of what was essentially domestic contracts. These institutions significantly restricted the sovereign autonomy of capital-importing States, but due to economic vulnerability and their desire to attract foreign investment developing countries were unable to change it.

Many developing countries have become key participants in the global economy. They have attained some degree of economic influence, which now allows them to challenge IEG, particular the rules governing foreign investment. They perceive the rules governing the regime as at odds with their interests. Regime bias in investor-State arbitration is a site of contemporary interest for developing countries.[107] This attention is manifested predominantly in the legitimacy concerns that continue to characterise the manner in which developing countries engage with the investor-State arbitration system.[108] Several developing countries have expressed sceptical views towards investor-State arbitration as undertaken by international

[99] Al Attar and Miller (n 5) 353.
[100] Ibid.
[101] Baxi (n 62) 715.
[102] Becker Arnulf, *Mestizo International Law Volume 115 of Cambridge Studies in International and Comparative* Law (Illustrated Cambridge University Press 2015) 159.
[103] Cassese (n 8) 50.
[104] Ibid.
[105] Odumosu (n 16) 251, 256.
[106] Chung (n 23) 953, 954.
[107] Van Harten (n 15) 136.
[108] Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 471.

tribunals.[109] Consequently, developing countries are once again retreating from international dispute settlement of investor-State disputes and view investor-State dispute settlement as unfair, undemocratic and biased against States, particularly countries with limited financial resources.[110] Without discounting the regimes numerous investor-State arbitral institutions, ICSID, as the most popular mechanism for the settlement of investor-State disputes, have seen mounting criticism in the last decade. Criticisms stem from what is perceived as its review of host-States domestic policies; its neoliberal agenda at foreign investment protection; its disregard for the welfare of developing countries and peoples; and its lack of an appeal mechanism to review potential arbitrary decisions. However, apart from the system of investor-State arbitration, BITs, which mostly channel disputes to international arbitration, have also come under intense scrutiny. BIT negotiation[111] which continue to elude developing countries' effective participation, is a major site of concern.[112] Scepticism relates to the reverence of BITs in Western circles, while highlighting how they negatively impact developing countries. Given developing countries' desire to attract investment, North-South BIT negotiation, in particular, often seems lopsided in favour of developed countries as a consequence of the uneven participation of developing countries.[113] Unfortunately, these treaties bind them when disputes arise, affording private parties with the relevant *locus standi* to bring suit against sovereign States in international law. TWAIL attributes the regime's shortcomings to the incidence of regime bias, a bias that places greater importance on the protection of private property.

### A. Developing Countries Marginalised Position in the Bilateral Investment Treaty System

This Chapter focuses on BITs which currently account for approximately 88% of all IIAs.[114] BITs are agreements between two States instituting the terms and conditions for the promotion and protection of investments by citizens of one State in the other, allowing private individuals to bring suit against States.[115] BITs' emergence can be attributed to the demise of colonialism and Western States' concern for their citizens' investments in new States.[116] Fear of judicial bias drove investors to remove disputes from host-States' legal systems. To give the façade of neutrality, investment regulation was depoliticised from both the governance structures of investors' home-States and host-States. Investors lobbied their Governments to enter BITs intended to protect their investments abroad.[117] West Germany and Pakistan signed the first BIT in 1959.[118] Nevertheless BITs' expanded with multilateral processes on foreign investment within the Organisation for Economic Cooperation and Development (OECD) in the 1960s. The negotiation deadlock that characterised multilateral settings between capital-exporting and capital-importing States caused the former to abandon multilateral for bilateral negotiations.[119] Originally, BITs were concluded between Western-industrialised States and developing countries. Outside of NAFTA's Chapter 11 and the Energy Charter Treaty (ECT) there are no other known IIAs between Western States.[120] The BIT regime has since seen an influx of BITs between developing countries such as the China-Zimbabwe BIT.[121] Despite the original adoption of Western BIT models, States such as China, India, AALCC, Association of South East Asian Nations (ASEAN) and Southern African Development Community (SADC) members, have departed from Western models and created their own. They deem these more beneficial to their economic goals as traditional North-South BITs have not experienced any

[109] Franck (n 22) 825, 841; see *Occidental Exploration and Production Company v The Republic of Ecuador,* LCIA Case No UN 3467, Final Award (1 July 2004).
[110] Butler and Subedi (n 30) 201.
[111] Jeswald W Salacuse 'Your Draft or Mine?' (2007) 5 Negotiation Journal 337.
[112] Odumosu (n 16) 251, 253–4.
[113] Chung (n 23) 953, 955.
[114] UNCTAD World Investment Report 2013: Global Value Chains: Investment and Trade for Development (New York & Geneva: United Nations 2013) 101.
[115] Kenneth K. Vandevelde "The Bilateral Investment Treaty Program of the United States' (1988) 21 Cornell International Law Journal 201-202.
[116] Victor Mosoti, 'Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between?' (2005) 26 Northwestern Journal of International Law & Business 95, 104.
[117] John Anthony Van Duzer, Penelope Simons, Graham Mayeda, *Integrating Sustainable Development Into Foreign investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat 2013) 10.
[118] Alvarez (n 20) 943, 960.
[119] Schill (n 18) 99.
[120] Carlos G Garcia, 'All the other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration' (2004) 16 Florida Journal of International Law 301, 315.
[121] Agreement between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments, signed on May 21st 1996, entered into force on March 1st 1998.

'real' participation of developing countries. By 'real', reference is made to the fact that North-South BIT-negotiation is tainted by economic coercion. If developing countries do not acquiesce North-South BITs' neoliberal ideals, they risk losing-out on foreign investment and even financial aid.[122] Notwithstanding criticisms, any differences existing over norms regulating the treatment of foreign investment in earlier times have been surpassed by BITs.[123] BITs are no longer an exceptional phenomenon, but part of the normal investment landscape. They represent a crucial part of foreign investment, spelling out the duties of host-States towards foreigners.[124] In 2003 world-BIT-count was slightly above 2,000.[125] By 2007 BIT-count had risen to 2,676.[126] The regime now hosts about 2,809 BITs, together with 345 other IIAs,[127] revealing the rapid expansion of this system. Most developing countries are party to at least one BIT in their competition to attract foreign investment.

BITs display uniform structure and content because they are based on capital-exporting States' model treaties that serve as a basis for negotiations. They provide for the protection of foreign investment granting investors various rights of protection in host-States. BITs grant foreign investors numerous guarantees, which include *inter alia* fair and equitable treatment, protection from expropriation, free transfer of means, full protection and security and unhindered repatriation of capital,[128] non-discrimination or national and most-favoured-nation (MFN) treatment or equivalent measures.[129] Without downplaying BITs' other guarantees, an essential feature is their depoliticization of disputes, removing them from domestic law and subjecting them to international law. They specify standards-of-treatment for foreigners, and provide for extra-jurisdictional dispute settlement and enforcement of investor-State agreements.[130] BITs take advantage of a widely recognised regime of investor-State arbitration, especially a sub-set of it involving investors' right to bring suit against sovereigns, a new development in international law.[131] They extend the domain of public international law to public-private relationships. BITs diminish sovereign authority in matters over which national law otherwise grants complete dominion. Governments are constrained from taking regulatory action over investor behaviour even where national law authorises it to do so and public policy demands it.[132] So the preference in favour of BITs stems from their preferential treatment of aliens, which solves the problem of foreigners' "vulnerability" *vis-a-vis* host-Governments. BITs compensate for this by giving investors special causes-of-action not available to nationals.[133] Treaties are said to contain a unilateral offer to arbitrate made to all foreigners in host-States. When disputes arise, the request for arbitration is treated as an acceptance of the offer, creating the arbitration agreement.[134] BITs allow investors to submit claims directly against host-States where investments are subjected to measures that contravene BIT standards-of-protection.[135] This provides investors with a direct avenue to depoliticised dispute resolution. Investors are empowered with the rights and responsibilities of enforcement. No further consent to arbitrate is required as BITs themselves provide for this *a priori*. Capital-exporting States see BITs as promoting foreign investment protection, removing them from the thorny role of espousal and depoliticization. BITs, therefore, enhance the trustworthiness of investor-State agreements by reducing the risks associated with investing abroad.[136]

Indeed, States worldwide, including non-Western States like China, have signed onto expansive

[122]David Dollar, 'Who Gives Foreign Aid to Whom and Why?' (2000) 5(1) Journal of Economic Growth 33-63.
[123]David Schneiderman, 'The Global Regime of Investor Rights: Return to the Standards of Civilised Justice?' (2014) 5 Journal of Transnational Legal Theory 60, 70.
[124]Jennifer L Toblin and Marc L Busch, 'A Bit is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements' (2010) 62 World Politics 1, 42.
[125] Ginsburg (n 17) 107, 108.
[126]Franck (n 22) 826.
[127] UNCTAD World Investment Report 2013 (n 114) 101; ICSID, 'Database of Bilateral Investment Treaties' <icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main> accessed 19 February 2014.
[128]Jarrod Wong, 'Umbrella Clauses In Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries In Foreign Investment Disputes' (2007) 14 George Mason Law Review 135.
[129]Rudolf Dolzer and Christoph Schreuer, *Principles of Foreign investment law* (Oxford University Press 2008) 16.
[130]Ginsburg (n 17) 107, 108.
[131]Ibid.
[132] Garcia (n 120) 301, 306-310.
[133]Muthucumaraswamy Sornarajah, 'State Responsibility and Bilateral Investment Treaties,' (1986) 20 Journal of World Trade Law 79–98.
[134] Sornarajah (n 36) 307-308.
[135] Noah Rubins and Azizjon Nazarov 'Investment Treaties and the Russian Federation: Baiting the Bear?' (2008) 29 Business Law International 101.
[136]Garcia (n 120) 301, 312-315.

North-South treaty standards.[137] Alvarez argues that this global unanimity suggests that BITs should not be considered hegemonic tools of empire or biased tools for the imposition of Western hegemony.[138] What is unappreciated, however, is that Western States' BIT models, which seek to universalise Western values are the ones adopted by States worldwide, usually in conditions where there is no equality of negotiating power. Despite capital-exporting States' reverence for BITs and the recent surge in developing countries ' participation in this regime,[139] TWAIL's analysis of these devices casts a shadow of doubt on the entire system. The evolution of BITs has not been by chance, but part of industrialised States' agenda to control the investment regime, with little influence from developing countries. For instance, article 2 of the Netherlands-Philippines BIT provides that: "Each Contracting Party shall encourage and create favourable conditions for investments, consistent with its national objectives, of nationals of the other Contracting Party, subject to the laws and regulations of the Party in whose territory the investment is made..."[140] Notwithstanding the neutrality of its wording, critical analysis reveals that it merely spells out the rules for favourable treatment of Dutch nationals doing business in the Philippines since in reality very few Philippines Nationals can do business in the Netherlands.[141] Despite the conditions BITs place on host-States, they seldom contain provisions enabling host-States to impose obligations on foreign investors regarding compliance with human rights standards and sustainable development support.[142] Moreover, with all the attention attributed to them, for most of their existence, BITs have been obscure international agreements. Precisely how and when a State's liability under its law gives rise to a breach of BIT protection is impossible to determine and there is little jurisprudence to help draw the line.[143] For example, tribunals have generally failed to examine the monist/dualist divide that underpins the international law of treaties in its relationship with domestic law. In contrast to monist legal systems, which do not distinguish between national law and international law, dualist legal systems require international law enshrined in treaties to be translated into domestic law by use of domestic provisions.[144] So, in reality dualist State actions that affect investors' investment undertaken pursuant to BITs, such as nationalisations, do not violate BITs but is an implicit repeal of the host-States laws translating BIT provisions into domestic law. However, international tribunals in their examination of BITs have failed to pay adequate attention to such conflicts. Two even more serious critiques, however, involve the perceived lopsided negotiation of BITs,[145] and the manner BITs undermine developing countries ability to regulate foreign investment by granting investors the to bring causes-of-action against host-States.

Due to economic vulnerability, developing countries have failed to meaningfully participate in BIT negotiation. Effective negotiation is supplanted by developing countries' frantic desire to attract foreign capital.[146] Lack of economic clout has resulted in BIT negotiation, where the benefits to Western States seem to vastly outweigh the benefit to developing countries.[147] Developing countries' economic-relief needs appears to have caused them to enter agreements with Western States that they would not otherwise have.[148] Capital-exporting States' move from multilateral to bilateral negotiations had strengthened their negotiating position and allowed them to push for a level of investment protection that developing countries had collectively rejected.[149] Consequently, developing countries are often in disadvantaged positions when negotiating BITs with wealthier States whose investors can choose among numerous developing countries. In the competition to secure foreign investment, prospective investment-hosts end-up in a bidding contest. States feel compelled to forgo key concerns and citizens interests in exchange for more inducements for

[137] Schneiderman (n 123) 60, 71.
[138] Jose Alvarez, 'The Once and future Foreign Investment Regime' in Arsanjani, Cogan, Sloane, and Wiessner (eds), *Looking to the Future: Essays on International Law' in Honour of W. Michael Reisman* (Martinus Nijhoff 2010) 634.
[139] Toblin and Busch (n 124) 1, 42.
[140] Article 2 of the Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments Date of Signature 27-February- 1985, Date of entry into force 1-October-1987.
[141] Jeswald Salacuse, 'Bit by Bit: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing States' (1990) 24 International Lawyer 666.
[142] Jalia Kangave, 'A TWAIL analysis of Foreign Investment and Development-Induced Displacement and Resettlement: Lessons from Uganda's Bujagali Hydroelectric Project,' (2012) 44 Ottawa Law Review 213.
[143] Garcia (n 120) 301, 328.
[144] John Laws, 'Monism and Dualism,' (2000) 53(2) La Revue Administrative 18.
[145] Salacuse (n 111) 337.
[146] Chung (n 23) 953, 955.
[147] Salacuse (n 111) 337-341.
[148] Antonius Hippolyte 'Calls for National Intervention in the Toxic Waste Trade with Africa: A Contemporary Issue in the Environmental Justice Debate' (2012) 58 Loyola Law Review 302.
[149] Schill (n 18) 99

investors, such as tax breaks, reduced pollution controls, and lax employment regulations.[150] Developing countries must concede concerns about economic sovereignty and capital controls and ultimately give all the benefits of foreign investment to capital-exporting States. Some claim that negotiators from developing countries who signed BITs in the 1990s were unclear as to what they were getting themselves into.[151] There was little information available to negotiators informing them of some of the risks in terms of sovereignty restrictions associated with accepting these pre-commitments.[152] Therefore, BITs can be characterised as mechanisms of economically strong States to impose their preferences on weaker States in the of foreign investment law. The West has 'instrumentalized' developing countries need for foreign capital as a bargaining tool to extract promises regarding the treatment of foreign investment that protect Western interests.[153] The *realpolitik* of the relationship between States like the U.S. and their Third World BIT counterparts offer an even darker picture of the BIT negotiating process.[154] José E. Alvarez, a former member of the U.S. State Department BIT-negotiating team, describes it in the following terms:

> "For many, a BIT relationship is hardly a voluntary, 'uncoerced' transaction. They [U.S. BIT partners] feel that they must enter into the arrangement, or that they would be foolish not to. For Latin American States, the BIT represents a return to the earlier days of reliance on FDI-before they learned to fear becoming dependent. But the truth is to date the US model BIT has been regarded as, generally-speaking, a "take it or leave it" proposition, with the United States calling the shots and the BIT partner as supplicant...A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft."[155]

The U.S. BIT-model finds counterparts in the models of other industrialised States that developing countries are also departing from. Having embraced the U.K. treaty-model, South Africa's Department of Trade and Industry recently held that it has not served the State well.[156] While pursuing a model that is more attentive to its development concerns,[157] it has suspended negotiation of future treaties that include investor-State arbitration.[158] As aforementioned, traditional North-South BITs lacks 'real' participation from developing countries. A hegemonic form of economic coercion, which suggests that developing countries risks losing foreign capital in both financial aid and foreign investment if they do not accede the neoliberal standards advanced by Western States, taints the process.[159] In BIT negotiation, neither has there been concern for poorer States affected, nor for the fact that the fundamental bases of foreign investment law are being distorted. According to Sornorajah, it is a sad episode, which demonstrates that "greed" and not "need" influenced foreign investment law.[160] Notwithstanding debates that developing countries' BIT models have followed North-South BITs, actually Western States continue to dominate rule advancement, while developing countries play a subordinate role. Debates surrounding the emergence of more South-South BITs are belied since South-South investment flows are insignificant compared to North-South investment flows. Despite the increasing number of Southern BITs, only a handful of Southern States have the capacity to invest any meaningful capital abroad.[161] In 2009, only about 10% of foreign direct investments (FDI) capital, or about $1.8 trillion, accounting for 17% of world trade, was attributed to MNCs from developing countries. Eighty percent of capital moved from industrialised countries to the rest

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[150] Chung (n 23) 953, 958.
[151] Lauge Poulsen, 'Learning About BITs' (2010) [unpublished manuscript on file with the author].
[152] Lauge Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in K. Sauvant, (eds), *Yearbook on Foreign investment law and Policy 2009/2010* (OUP 2010).
[153] Schill (n 18) 99.
[154] Garcia (n 120) 301, 316.
[155] Jose Alvarez, Remarks [on the Proceedings of the 86th Annual Meeting of the ASIL] vol. 86 ASILP 552-53.
[156] South Africa, Department of Trade and Industry, BIT Policy Framework Review<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf> Accessed August 2nd 2014
[157] UNCTAD, 'SADC Moving forward on BIT Template' (6 August 2012) <unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=210> accessed 23 June 2014.
[158] Rob Davies, (Minister of Trade and Industry, South Africa), 'Investment Policy FrameworkSpeech<http://unctad.org/meetings/en/Miscellaneous%20Documents/South-Africa-Investment-statement_Rob_Davies.pdf > Accessed August 2nd 2014.
[159] Dollar (n 122) 33-34.
[160] Muthucumaraswamy Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law' (2011) 3 Trade Law and Development 203, 207.
[161] UNCTAD, Trends in outward investments by transnational corporations in 2013 and prospects for 2014-15(29th April 2014)<unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=729> Accessed June 20th 2014.

of the world.[162] In 2013, almost half of FDI from developing and transition economy MNCs was in equity, while industrialised countries held large amounts of cash reserves in their foreign affiliates as part of reinvested earnings. The latter were at record levels of 67% of total FDI outflows from industrialised countries. True, foreign investment by MNCs from developing economies grew in 2013, reaching a record level of $460 billion. Yet, developing countries' MNCs together with those from transition economies ($100 billion) accounted for just 39% of global FDI outflows, while MNCs from a few industrialised countries held 55% of global investments.[163] Therefore, while developing countries are participating in the BIT regime, their roles are merely as recipients. Most lack the economic clout to influence the regime in any significant way.

Another serious critique of BITs is the manner they undermine developing host-States' regulatory authority. BITs now serves as *de facto* enforcer of the foreign investment regime, allowing private persons to personally enforce foreign investment contracts. BITs exhibit constitution-like characteristics,[164] intended to extend market-friendly conditions globally,[165] by authorising private persons to enforce these constitution-like guarantees.[166] The regime exhibits what Gill describes as a 'new constitutionalism,' whereby markets are shielded from politics, and economic actors are given unusual rights of citizenship to facilitate foreign investment.[167] This has resulted in the subordination of non-market considerations such as the environment and local welfare, and the promotion of market values as is popular in everyday practices.[168] For instance, it is argued that the 'fair and equitable treatment' (FET) standard, prevalent in BITs, is analogous to due process clauses or ones assuring the enforceability of domestic agreements. This reveals that BITs' standards of protection typically originate from capital-exporting States' domestic laws.[169] This involves, particularly, norms associated with contracts and rights to property,[170] which capital-exporting States aim to transpose into international law.[171] The objective sought by Western States, lawyers, scholars, and public officials is to have idealised versions of the industrialised world's notion of property rights, long claimed to have ascended to the level of customary international law, accepted as the universal standard.[172] The universal advancement of the 'takings rule' in the Fifth and Fourteenth Amendments of the U.S. constitution, including 'regulatory takings'[173] identified with reference to the U.S. Supreme Court's dissection of property rights in *Penn Central v New York*,[174] is symbolic of a plan to have U.S. domestic law ascend the interntional plain.[175] In *Penn Central,* New York's 1965 City Landmarks Preservation Law authorised the city to define specific structures and neighbourhoods as "landmarks" or "landmark sites." Penn Central, which owned the Grand Central Terminal, was denied authorisation to build a multi-story office building above it. The contention was whether this restriction constituted a "taking" in violation of the U.S. Constitution. The Supreme Court opined that the restriction did not prevent Penn Central from future construction above the terminal. New York's objection was the nature of the proposed construction and not to construction in general. Therefore, prohibiting the construction above the terminal was a rational restriction involving the city's welfare.[176] The U.S. seems to have transposed these ideals to its BITs to protect U.S. investors abroad by making any host-State interference with investors' property or investors' right to enjoy their property tantamount to a taking. This desire to protect investments has undoubtedly animated Western attitudes towards international law.[177] However, these rules reach so deep into host-States' regulatory spaces[178] that they are unacceptable to even the principal State

[162] Alvarez (n 20) 943, 956.
[163] UNCTAD, Trends in outward investments by transnational corporations in 2013 and prospects for 2014-15 (n 161).
[164] David Schneiderman, *Constitutionalising Economic Globalisation: Investment Rules and Democracy's Promise* (Cambridge University Press 2008) 5.
[165] Upendra Baxi, *The Future of Human Rights* (OUP 2008).
[166] Jan Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2011) .
[167] Stephen Gill, *Power and Resistance in the New World Order* (Palgrave Macmillan 2008) 139-142.
[168] Ibid 135.
[169] Eric Fryar 'NOTE: Common-Law Due Process Rights in the Law of Contracts' (1988) 66 Tulane Law Review 1021.
[170] Schneiderman (n 123) 60, 71.
[171] Parvan P. Parvanov and Mark Kantor 'Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar Than You Might Expect' in Sauvant (eds), *Yearbook on Foreign investment Law Policy 2010-2011* (OUP 2012).
[172] Sornarajah (n 160) 203.
[173] David A. Dana and Thomas Merrill, *Takings*, (Foundation Press 2002) 52-57.
[174] Penn Central v New York City, 438 U.S. 104 (1977).
[175] Schneiderman (n 164) 80-83.
[176] Penn Central v New York City, 438 U.S. 104 (1977).
[177] John Williams, 'International Law and the Property of Aliens' (1928) 9 British Yearbook of International Law 1, 24.
[178] José Alvarez and Tegan Brink 'Revisiting the Necessity Defense: Continental Casualty v Argentina' 2010-2011 (2012) Yearbook of Foreign Investment Law and Policy 319, 348.

authors of the regime.[179] In *Methanex v United States*, the tribunal upheld the host-States' argument that the banning of the manufacturing of MMT, a substance harmful to public health, was a regulatory exercise and did not amount to a taking even if such ban decreased the value of the investor's investment.[180] Either way BITs have been significant devices in holding capital-importing States accountable to foreign investors for their actions that affect investors' investments. Moreover, this reveals that Western-industrialised countries dominate foreign investment rule advancement.

Before the 1990s, foreign investment rules seemed well established, at least from the perception of capital-exporting States. The OECD's failed attempt to craft a Multilateral Agreement on Investment (MAI),[181] in 1995, cogently reveals this. Thinking it was the right time for such an effort, due to the apparent enthusiasm of developing countries to liberalise their economies and ratify BITs, the OECD attempted to draft a MAI. During the discussions, OECD members found that even among them there was no consensus on the rules on foreign investment protection.[182] However, when rules formerly applied almost exclusively to developing countries in international dispute settlement proceedings were extended to industrialised States,[183] as seen in cases such as *Pope and Talbot v Canada*[184] and *Methanex v United States*,[185] suddenly, the rules were inadequate and biased in favour of investors and industrialised States increasingly adopted developing countries' formerly untenable arguments. Due to Western States' emergence as respondents,[186] they are once again engaging in the re-formulation of foreign investment rules. Though the investment protection purpose still dominates, now it seems to contend with Western States' new desire to rewrite, or at least adjust relevant rules to accommodate their interest as respondents.[187] Like the crop of investment law that emerged after decolonisation, there appears to be a reiteration of the development of foreign investment law in a manner that resists developing countries influence. Today, investment law is not being refashioned solely to protect foreign investment in developing countries, but also to protect Western State-respondents.[188] The rationales for the emerging rules are strikingly familiar as they echo earlier arguments of developing countries (which were not favourably received) on the intrusiveness of foreign investment law.[189] Earlier disqualified arguments, including concerns about the erosion of regulatory sovereignty, have attained popularity in some forums.[190] These changes in foreign investment law resemble the general trend in IEG where accepted rules seem to derive mostly from the initiative of industrialised States, or at least sanctioned by them.[191] This is seen in the popularity of ISA, despite developing countries 1970s demands for domestic regulation of foreign investment as seen in article 2(2) of the NIEO Charter.[192] Capital-exporting States are once again engaging in the modulation of the *opinio juris* of majority of the international community in favour of the IIAs they advance. This is exemplified in the U.S. Congress' response to international tribunals' wide interpretation of the 'takings rule'.[193] Latitudinal interpretations precipitated amendment to U.S. treaty-model text, as required by its 2002 Trade Promotion Authority Act, so that treaties could again reflect the States' constitution, bolstering the universalisation of U.S. constitutional norms.[194] Western dominance of IEG is illustrated in Australia's recent attitude towards foreign investment regulation. Famous for both incoming and outgoing investments, Australia who cogently supported the Washington Convention recently declared that it would not accede to investor-State dispute settlement mechanisms in future investment treaties considering the policy restrictions levied by these agreements, for example restricting its ability to put

[179] Schneiderman (n 123) 60, 71.
[180] *Methanex Corp. v United States* (2005) 44 ILM 1345.
[181] Foreign investment Agreement, Multilateral Agreement on Investment, OECD<www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> Accessed August 27, 2014.
[182] Sornarajah (n 36) 3.
[183] Odumosu (n 16) 251, 256.
[184] (2002) 41 ILM 1347.
[185] *Methanex* (n 180).
[186] Alvarez (n 20) 943, 951.
[187] Sornarajah (n 160) 203.
[188] Odumosu (n 16) 251, 255-56.
[189] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007) 211.
[190] Odumosu (n 16) 256.
[191] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16(2) Wisconsin International Law Journal 362.
[192] 3281(XXIX) Charter of Economic Rights and Duties of States, (No. 31), 29 UN GAOR. Supp. 50, UN Doc. A/9631 (1974).
[193] Schneiderman (n 164) 80-3.
[194] Parvanov and Kantor (n 171) 741; G.H. Sampliner, 'Arbitration of Expropriation Cases Under U.S. Investment Treaties – A Threat to Democracy or the Dog that Didn't Bark?' (2003) 18 ICSID Review 1.

health warnings on tobacco products.[195] Australia seems to to be driven to withdraw from the BIT regime due to its dispute resolution mechanism, available not only to State-parties but also to individuals requesting compensation for States' regulatory actions that are contrary to BIT provisions.[196] As seen in their BIT-models, the rules governing foreign investments seem to be designed to suit the needs of capital-exporting States.

Therefore, in determining the extent to which they have benefited from international law, in the context of foreign investment regime with particular focus on BITs, these treaties can best be described as the "headaches" of developing countries. While BITs have enhanced the investment climate of many developing countries, the benefits of such agreements have mostly accrued in favour of capital exporting-States and their citizens. BITs seem to facilitate the side-lining of the welfare of developing countries and their peoples by undermining the authority these States have over foreign investment, due to the obligations they place on investment hosts. BITs continue to be powerful weapons for individuals wanting to hold States accountable for breaching BIT provisions. Where IIAs are in place, there are few impediments, other than perhaps costs, to investors wanting to access investor-State arbitration. They need not, for example, subject their disputes to local tribunals nor need their relationship to the home-State to be any more substantial than the place of incorporation.[197] Although in *Tulip v Turkey*, which arose pursuant to the Netherlands-Turkey BIT, the tribunal disagreed with the claimant's argument that non-compliance with the consultation obligation does not create a jurisdictional hurdle to filing a claim and does not impact its admissibility,[198] generally when jurisdictional issues occur, empirical evidence suggests that tribunals are more likely to assume jurisdiction over investors' claims, particularly where investors' investments are made pursuant to North-South BITs.[199]

### B. Developing Countries' Attitudes towards Investor-State Arbitration with a Special focus on ICSID

Today foreign investors can choose from a menu of arbitration options; these include the Stockholm Chamber of Commerce (SCC), LCIA, ICC, Cairo Regional Centre for International Commercial Arbitration (CRCICA) NAFTA, ICSID or arbitration without any supervising institution, for example pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976.[200] Increasingly international tribunals are supplanting domestic courts in resolving investment disputes.[201] UNCTAD statistics reveal that in 2008, the number of ISAs filed under IIAs, grew by at least 30, bringing the aggregate to 317 cases by the end of 2008.[202] It continued a trend that began in 2002, with between 28 and 48 new cases every year, indicating that investor-State arbitration is now common in foreign investment regulation. In 2009, of the 317 known investment disputes, 201 was launched with ICSID, 83 under the 1976 UNCITRAL rules,[203] 17 with the SCC, 5 with the ICC, 5 with the CRCICA and 1 was administered by the Permanent Court of Arbitration (PCA).[204] In 2013, of the 57 new disputes, 31 were registered with ICSID, 20 under the UNCITRAL rules, 3 under the SCC, while 3 were conducted *ad hoc* without any supervising institution.[205] This rise to prominence of international tribunals was influenced by the growth of the foreign investment regime after decolonisation as seen by ICSID's establishment in 1966.[206] International tribunals' resolution of investor-State disputes became prolific in the post-globalised

[195] Australia, Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity'<www.dfat.govau/publications/trade/trading- our-way-to-more-jobs-and-prosperity.pdf> Accessed August 2nd 2014
[196] Schneiderman (n 123) 60, 72.
[197] Aguas del Tunari, S.A. v Bolivia ICSID Case No. ARB/03/3.
[198] Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey, ICSID Case No. ARB/11/28 at 72.
[199] Gus Van Harten 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) Osgoode Hall Law Journal 233-234.
[200] Rubins and Nazarov (n 135) 101.
[201] Chimni (n 69) 13.
[202] UNCTAD, Latest Developments in Investor-State Dispute Settlement. (Geneva: United Nations Foreign investment Agreements Monitor 2009), No. 1 p. 2
[203] UNCITRAL Arbitration Rules<www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>Accessed August 30th 2014.
[204] UNCTAD, Latest Developments in Investor-State Dispute Settlement (n 202) 2.
[205] UNCITRAL, IAA Issue Note 1: Recent Development in Investor-State Dispute Settlement (April 2014) <unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf > accessed September 29th 2014.
[206] Antonio R. Parra, *The History of ICSID* (Oxford University Press 2012).

world, influenced by the rise to prominence of a previously disregarded international economic law.[207] The international business community came to view international tribunals as more suitable for resolving disputes due to their supposed neutrality in contrast to local tribunals who it is perceived favour local interests. It is argued that investor-State arbitration lies at the cutting edge of IEG and dispute resolution and promises to play an increasingly important role in strengthening the global economic system.[208]

Nevertheless, critical analysis reveals that investor-State arbitration is another facet of foreign investment law that has not been wholly beneficial to developing countries. Southern States perceive this mechanism as a Western device for undermining their interests in the global economy. Developing countries view the overt preference in favour of international systems as their removal of disputes away from States' regulatory reach. TWAIL's critique of the foreign investment regime is sceptical of the proliferation of these international tribunals, which subordinate domestic Courts in resolving investment disputes. A major concern is the way tribunals' apply IEG rules in ways that supplant States' interest is facilitated by the need to resolve trans-boundary disputes arising from agreements that these States enter into to secure much needed investment capital.[209] Tribunals interpret foreign investment law to ensure developing countries honour their obligations to investors but ignore States local obligations.[210] To safeguard investors' interests, just as with economic areas, international tribunals have facilitated the internationalisation of legal fields in the post-globalised world.[211] Some legal fields have become more internationalised than others. Like the globalisation of the world economy, the rules used to facilitate such movement have also been internationalised.[212] Areas closely connected with international commerce, such as investor-State agreements have been most affected.[213] Foreign investment regulation is departing from traditional assumptions underlying the conceptual framework of international law, and is increasingly encroaching on States' authority.[214] Many developing countries' national policies concerning foreign investment have been 'denationalized'. Their source, content, logic and even interpretation or application owe much to international, transnational or intergovernmental institutions, norms and dispute resolution processes.[215] Legal and political arenas, which had previously been mainly national in terms of background assumptions, actors and orientation, are being influenced by 'external' factors such as foreign investors' desires.

Proponents of globalisation argue that the rapid economic integration of the world economy has necessitated the harmonisation of the rules and standards to create a level playing field.[216] However, the expansion of IEG rules seems to be reflected only in the significant improvements in their enforceability. In the *Karaha Bodas Arbitration,*[217] which arose from a project for the creation of thermal energy from gas fields in Indonesia, the award made in Geneva was enforced against the assets of the Indonesian State Corporation, Pertamina, held in New York, with simultaneous proceedings brought against assets held in Hong Kong and Singapore.[218] So although the rules reach deeper into national policy-making, they are taken seriously because they are easily enforced, due to the existence of numerous international tribunals with expanding jurisdiction.[219] In *Transglobal v Panama*, the Claimant's request for arbitration is underpinned by the Government's refusal to give effect to the Supreme Court's ruling (to reinstate the investor's company as a concessionaire in a hydroelectric project) in breach of the U.S.-Panama BIT.[220] Such review host-States domestic policies, denying them a voice in managing their economies is a cause

[207] Julio Faundez, 'International Economic Law and Development before and after Neo-liberalism' (University of Warwick School of Law Research Paper No 1, 2009) 2.
[208] Christopher F Dugan, Don Wallace, Noah D Rubins and Borzu Sabahi, *Investor–State Arbitration* (Oxford University Press 2008) 2-3.
[209] Chimni (n 69) 13.
[210] Odumosu (n 16) 251.
[211] Kanishka Jayasuriya, 'Globalisation, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' (1999) 6(2) Indiana Journal of Global Legal Studies 425.
[212] John Reynolds, 'The Political Economy of States of Emergency' (2012) 14 Oregon Review of International Law 85, 113.
[213] Michael Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Martinus Nijhoff 2009).
[214] Faundez (n 207) 3.
[215] Francis Snyder, 'Economic Globalisation and the Law in the 21st Century, in Sarat (eds), *The Blackwell Companion to Law and Society* (Blackwell 2004) 3.
[216] Martin Wolf, *Why Globalisation Works* (YUP 2004).
[217] Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 465 F Supp 2d 283 (SDNY, 2006).
[218] Sornarajah (n 36) 302.
[219] Faundez (n 207) 3.
[220] Transglobal Green Energy v Panama (ICSID Case No. ARB/13/28), Request for Arbitration, (19 September 2013).

for concern. *Transglobal* exemplifies investors' indirect determination of host-States' domestic policies facilitated by international tribunals.[221] Developing countries national policies such as environmental regulation as seen in Santa *Elena v Costa Rica*[222] that affect foreign investment have been most affected. The promulgation of domestic policies no longer rests just with States. International legal regimes have penetrated domestic legal systems.[223] A novel feature is the extent to which the rules question matters hitherto States' exclusive preserves. This undermines developing countries ' sovereignty and places significant hindrances on their ability to regulate foreign investment. Such criticisms are particularly true of the World Bank's ICSID. It is the leading institution for resolving investor-State disputes,[224] whose use as a specialised body for the resolution of investor-State disputes under BITs, became prolific in 1992 after *Asian Agricultural Products Ltd (AAPL) v Sri Lanka*.[225] As of 31st May 2014, out of the 159 States that had signed the Washington Convention, governing ICSID arbitration, 150 had deposited their instruments of ratification.[226]

ICSID was established at a time of concentrated discussion about the significance of foreign investment law and the ambit of substantive protection for nationalisations that beset the post-colonial era.[227] As the World Bank's General Counsel, Aaron Broches recommended the establishment of procedural mechanisms to settle foreign investment disputes. Broches promoted the establishment of a neutral medium, regulated by international rules, to resolve these disputes. In 1966, ICSID was established under the Washington Convention.[228] ICSID was initially envisaged as an institution providing dispute settlement services for disputes between investors and States that had ratified the Washington Convention. ICSID's first dispute was *Holiday Inns S.A. and Occidental Petroleum Corporation v. Kingdom of Morocco*.[229] In 1978, ICSID's Administrative Council established the Additional Facility (AF) rules.[230] They extended dispute settlement services to provide an additional ground for making resort to ICSID arbitration for cases whereby only one party was a convention signatory or a person from a convention signatory, thereby expanding ICSID's jurisdiction.[231] ICSID also provides other services like fact-finding and conciliation. Its fact-finding procedures have not been used at the time of writing, while ICSID has seen 8 conciliation cases.[232] ICSID's Secretariat sometimes offers various levels of administrative and organisational assistance for non ICSID State-State dispute resolution. Among the State-State cases that have been considered are an expert determination proceedings under the 1960 Indus Waters Treaty, the *Southern Bluefin Tuna Case*,[233] and a dispute between the U.S. and Canada under the 2006 Softwood Lumber Agreement.[234] ICSID's docket, however, mainly comprises of Convention arbitrations and arbitrations under the AF rules, but for simplicity they are lumped together here as "ICSID arbitrations". ICSID arbitration is unique and should not be confused with *ad hoc* arbitrations or arbitrations undertaken by private arbitral tribunals. ICSID is a specialist institution specialising in the resolution of investor-State disputes and, in contrast to other arbitral institutions, is underpinned by the Washington Convention. Its legal status is as an international institution, while other tribunals are either private entities, domestic establishments of States or *ad hoc* tribunals created by the immediate disputing parties.[235]

At its inception, many developing countries signed the Washington Convention with hopes of reaping ICSID's benefits. Due to historical suspicions surrounding international dispute settlement in Latin

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[221] Gus Van Harten, TWAIL and the Dabhol Arbitration. (2011) 3(1) Trade Law and Development 136.
[222] Compañía del Desarrollo de Santa Elena v Republic of Costa Rica (2002) 15 ICSID Rev 72.
[223] David Held and Anthony McGrew, *Globalisation/Anti-Globalisation, Beyond the Great Divide* (Polity Press 2007) 24.
[224] Parra (n 206).
[225] ICSID Case No. ARB/87/3.
[226] ICSID Member States <icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home>accessed 31 May 2014.
[227] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 88.
[228] Convention on the Settlement of Investment Disputes Between States and Nationals of other States, concluded on March 18th 1965, entered into force on October 14th 1966 (17 UST 1270, TIAS 6090, 575 UNTS 159).
[229] ICSID Case No. ARB/72/1
[230] Parra (n 206).
[231] Franck (n 22) 826, 837-838.
[232] ICSID Caseload Statistics (Issue 2013-1) 8<icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41 > Accessed September 1st 2014.
[233] Australia and New Zealand v Japan (Decision of 04 2000).
[234] Softwood Lumber Dispute (United States v Canada).
[235] Sornarajah (n 36) 299.

America, these States did not immediately endorse this institution. Latin American States were strongly opposed to ICSID's creation. The World Bank's Governing Board approved the first draft prepared on the Washington Convention in September 1964, at the annual meeting of the World Bank in Tokyo. Besides Iraq and the Philippines, in what is known as the "Tokyo No," Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela, voted against it.[236] Eleven years after coming into force no Latin American State had ratified the Washington Convention. Although they had achieved their independence much earlier, disinclination towards ICSID in Latin America was attributable to their continued opposition to Western domination of IEG.[237] Despite earlier disinclinations, a recent review of this treaty's ratification reveals that most Latin American States ratified it.[238] This change in attitude can be attributed to Latin America's 1970-1980s debt crisis. Latin American States debt had quadrupled between the 1970s and the 1980s and many could not repay their debt.[239] Foreign credits to the region came to a standstill and lending institutions started formulating new rules and policies for loans to Latin American States. Loans became conditional upon borrowers' improving their investment climates. This included signing treaties and conventions guaranteeing protection of investments going into these States, as well as assuring neutral forums for dispute resolution arising from new investor-State relationships. Venezuela highlighted in its Statement revoking ICSID membership in 2009,[240] many States, jolted by the crisis, readily accepted the conditions set by lending institutions and agreed to adopt economic reforms designed to attract FDI and guide them out of financial crisis. In the 1980s these States began changing their positions. Ecuador, Honduras, and El Salvador were the first States to ratify the Washington Convention. In the 1990s, other States, with the exceptions of Mexico, Cuba, Brazil and Dominican Republic (which have not yet ratified ICSID), entered into BITs and ratified the Convention.[241] With the need to protect investors' interests and developing countries' desire to increase investment capital inflows, ICSID found its place in the multifarious world of investment dispute settlement.[242]

In mainstream scholarship, ICSID is considered today's leading institution dedicated to foreign investment dispute resolution. Its advocates claim that ICSID's prominence is supported by its many members, substantial caseload and by the many references to its investor-State arbitration services in BITs. A 2009 UNCTAD report revealed that 65% of investment disputes were resolved by ICSID.[243] In 2011, ICSID's registered caseload included 296 ICSID Convention arbitrations and 29 AF arbitrations.[244] On December 31, 2012, ICSID had registered 419 cases under the ICSID Convention and AF Rules.[245] Thus, according to its enthusiasts, ICSID plays a significant role in foreign investment and economic development.[246] To them, it is instrumental in a foreign investment international dispute resolution process that aims to further sustainable worldwide development. Noted arbitrator Johnny Veeder, claims that "ICSID is the best institution in its field, the best run, the best staffed, with the best rules and treaty."[247] Susan Franck believes that ICSID is a crucial component in an international dispute resolution process that aims to foster sustainable international development and enhance the flow of investment capital globally, and ICSID's scrutiny flows merely from its affiliation with the World Bank.[248] According to her, ICSID tribunals have examined the fall out of key international economic meltdowns such as Argentina's 2002

[236]Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington DC, ICSID, vol. II-1 606-608.
[237]Alden Abbott, 'Latin America and International Arbitration Conventions: The Quandary of Non-Ratification' (1976) 17 Harvard Journal of International Law 140.
[238] ICSID, 'Member States' <icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home> accessed 31 May 2014.
[239]LDC Debt Crisis <www.fdic.gov/bank/historical/history/191_210.pdf> Accessed December 9th 2013.
[240]ALBA-TCP, "Gobierno Bolivariano denuncia convenio con Ciadi", January 25, 2012, <www.alba-tcp.org/contenido/gobierno-bolivariano-denuncia-convenio-con-ciadi-25-de-enero-de- 2012> (accessed 3, 2013).
[241]Silvia Fiezzoni, 'The Challenge of UNASUR Member States to Replace ICSID Arbitration' (2011) 2 Beijing Law Review 136-7.
[242]Odumosu (n 16) 251, 255.
[243]UNCTAD, Latest Developments in Investor-State Dispute Settlement (n 202) 2.
[244]Franck (n 22) 826, 848.
[245]ICSID Caseload Statistics (Issue 2013-1) (n 232) 7.
[246]Charles E. Aduaka, 'The Enforcement Mechanism under the International Centre for Settlement of Investment Dispute (ICSID) Arbitration Award: Issues and Challenges' (2013) 20 Journal of Law, Policy and Globalisation 134.
[247]V.V. Veeder, 'Why Bother and Why it Matters' (2006) News & Notes, Institution for Transnational Arbitration. Plano, Tex.), at 2. See Franck (n 22) 848.
[248]Sergio Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda' (2012) 36 Fordham International Law Journal 465.

fiscal emergency. With universal supply chains, vast investment flows, and almost 3,000 treaties–many containing *ex ante* agreements channelling disputes towards ICSID investor-State arbitration; it is believed that ICSID could potentially settle disputes associated with the 2008 global economic crisis.[249]

However, some view investor-State arbitration as an attempt by Western States to impose their will on developing countries.[250] In contrast to domestic tribunals international tribunals especially those established under ICSID, have found themselves in the unique position of having to defend themselves regularly against attacks on their legitimacy, for instance, as a means for resolving disputes relating to the scope and the limits of State sovereignty.[251] It is claimed that investor-State arbitration subjects national law-making and law-administering authorities to investment law disciplines. Tribunals are seen to resolve disputes in ways that structurally tilt regulatory solutions to harmful public issues away from States.[252] The argument is that international tribunals are merely tools employed by capital-exporting States to further their hegemonic neoliberal investment protection agendas.[253] The regime is perceived as harbouring a predisposition towards the protection of property, investment, and foreigners without sufficient regard for host-States' non-investment-related interests. These considerations turn consistently around a common core and finds refuge in the criticism that the foreign investment regime, especially investor-State arbitration, unilaterally favour investors' interests, thereby establishing an asymmetrical legal regime detrimental to State sovereignty.[254] Criticisms surrounding international tribunals' sovereignty restricting effects are particularly important in ICSID's case. Unlike the ICC, for instance, with long tradition dating back to the 16th Century, being formally established in 1919,[255] critics, particularly those advocating TWAIL's discourse, sees ICSID as only having become necessary only after decolonization since, hitherto, the colonial mechanism had protected foreigners. After decolonisation, investment disputes were gradually internationalised by investors who had negotiated investor-State arbitration clauses into agreements and international law emerged as the primarily applicable substantive law.[256] This resulted from investors' perceptions that application of newly-independent host-States' laws and adjudication by domestic tribunals were prejudicial to their interests.[257] Due to ICSID's establishment, investor-State arbitration was institutionalised as a depoliticised system. ICSID filled the need to protect foreign investment in developing countries that were being indoctrinated that investment protection would attract foreign capital.[258] By placing disputes within the international domain, Western States merely ensured that their economic interests stayed in a domain that was accessible to (and dominated by) them.[259] Today, ICSID remains consumed by Western States' neoliberal desires in a manner that eludes developing countries influence.[260] Notwithstanding ICSID's high-sounding ideals, it is an institution consumed by metropolitan influence. The way ICSID has evolved reflects Western neoliberal attitudes towards foreign investment.[261] This is seen in ICSID's development.[262] ICSID was initially intended to provide dispute settlement services only for disputes arising out of agreements between investors and States that had 'ratified' the Washington Convention. ICSID's Administrative Council's later creation of the AF Rules,[263] expanded ICSID's jurisdiction, providing investors with an added ground for gaining access to arbitration for cases where only one party is a convention signatory or an individual from a convention signatory. This may have been influenced by early cases such as *ALCOA v Jamaica*.[264] Following a dispute between the parties in relation to ALCOA's bauxite mining interest in Jamaica, ICSID proceeded to undertake an arbitration finding in

[249] Franck (n 22) 828.
[250] Butler and Subedi (n 30) 201
[251] Brower and Schill (n 108) 471.
[252] Alice Amsden, *Escape from Empire: The Developing World's Journey Through Heaven and Hell* (MIT Press 2007) 125.
[253] Bhupinder Chimni, 'An Outline of Marxist Course on Public International Law' in Susan Marks (eds), *International Law on the Left* (Cambridge University Press 2008) 59.
[254] Brower and Schill (n 108) 471, 474.
[255] International Chamber of Commerce: History<http://www.iccwbo.org/about-icc/history/the-merchants-of-peace/>Accessed July 12th 2015.
[256] Odumosu (n 16) 251, 254.
[257] Amr A. Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Spectre of Neoliberalism' (2000) 41(2) Harvard International Law Journal 419, 468.
[258] Fiezzoni (n 241) 136-7.
[259] Odumosu (n 16) 251, 254.
[260] Reynolds (n 212) 85, 121.
[261] Guzman (n 25) 639-688.
[262] Odumosu (n 16) 251.
[263] Franck (n 22) 840.
[264] ALCOA Minerals of Jamaica v Government of Jamaica (ICSID Case No. ARB/74/2), 1975.

favour of ALCOA, despite Jamaica's prior revocation of ICSID's jurisdiction, under article 25(4) to arbitrate matters flowing from the host-States' management of its natural resources.[265] Thus, creation of the AF rules appears to be an attempt to reign-in recalcitrant developing countries that had not ratified the Washington Convention or had since revoked ICSID's jurisdiction.[266] Therefore, legitimacy concerns have left ICSID shrouded in controversy manifesting in various criticisms of this institution. ICSID is currently experiencing resistance from developing countries, especially Latin American States.[267] ICSID is viewed as furthering the World Bank's neoliberal agenda of a world of free market economies and the consequent protection of private property without sufficient regard for non-investment related concerns.[268] Criticisms emanating from the developing world include ICSID's predisposition to neoliberalism, disregard for developing countries and peoples and lack of an appeal mechanism; and its review of host-States' national policies.

Critical review seem to suggest that ICSID is not a suitable and fair forum for settling investor-State disputes, since it is not an autonomous body, but the judicial arm of an international organisation whose key stakeholders are industrialised States.[269] The U.S, which holds the largest portion of the World Bank's shares, significantly influenced the bank's lending policies in the 1990s,[270] and could just as easily influence ICSID's dispute settlement processes.[271] In fact, sometimes the World Bank is a direct investor itself, through its IFC.[272] In *Aguas Argentinas, SA v Argentina*,[273] the World Bank had played a key role in designing Argentina's regulatory framework for public services under concession and in the privatisation process. Its IFC also held a percentage of Aguas Argentinas SA's equity shares.[274] MIGA, established in 1988, is another organ of the World Bank, developed from industrialised countries' concerns surrounding investing in politically turbulent developing countries. The World Bank felt that the non-commercial risk guarantee that MIGA provided would reassure investors that their investments would be protected.[275] Thus, the World Bank is sometimes both judge and party to ICSID's arbitral proceedings.[276] The argument is that ICSID too is driven by a neoliberal agenda of property protection with little regard for host-States' interests.[277] This was clearly illustrated in *Aguas del Tunari v Bolivia*.[278] Due to the environmental and social interests involved, this case attracted the world's attention. Labelled the 'water war', it became entwined in the anti-globalisation movement and became a focus of attack on neoliberal policies of privatisation and the market economy.[279] ICSID too was implicated. Aguas del Tunari had secured a contract to supply water and sewerage services to Cochabamba, Bolivia. It belonged to a complex corporate chain. Its founding stockholder was Bechtel Enterprises Holding Ltd, an American company. Bechtel owned International Water Ltd a Cayman company. International Water owned 55% of Aguas del Tunari. There was a restructuring of the corporate holdings, during which time the holding company migrated from the Cayman Islands to Luxembourg, which in turn was controlled by a Dutch company. The claimant argued that as a result of migration, a Dutch corporate national protected by the Netherlands–Bolivia BIT, now controlled Aguas del Tunari. Bolivia's argument was that at the time of the investment, the claimant, a Bolivian company controlled by a Cayman company, was without protection. Since, although Bolivia had a

[265] John Schmidt, 'Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Mineral of Jamaica, Inc v. Government of Jamaica,' (1976) 17 Harvard International Law Journal 90, 109.
[266] Washington Convention (n 228).
[267] James Gathii and Ibironke T. Odumosu, 'Forward: International Economic Law in the Third World' (2009) 11 International Community Law Review 349, 350.
[268] Franck (n 22) 826, 841.
[269] World Bank Investor Brief<treasury.worldbank.org/cmd/pdf/WorldBankInvestorBrief.pdf>accessed September 1st 2014
[270] Henrik Hansen and Thomas Markussen, 'U.S. Politics and World Bank IDA-lending' (2006) 42(5) Journal of Development Studies 772.
[271] Bartram Brown, *The United States and the Politicization of the World Bank: Issues of International Law and Policy* (Routledge 1992) 7.
[272] International Finance Corporation, CSR<www.gcgf.org/ifcext/economics.nsf/Content/CSR-IntroPage> Accessed April 22nd 2012.
[273] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v The Argentine Republic Case no. Arb/97/3 at 262.
[274] D. Santoro, The 'Aguas' Tango, Global Policy Forum, Centre for Public Integrity (2003)< www.globalpolicy.org/component/content/article/221/46887.html> Accessed November 4th 2014.
[275] Kangave (n 142) 213.
[276] Fiezzoni (n 241) 136-7.
[277] Ibironke Odumuso, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World' (2006-2007) 8 San Diego International Law Journal 345, 371.
[278] ICSID Case No.ARB/02/3 (Jurisdiction Award, 21 October 2005).
[279] Water War in Bolivia, The Economist<www.economist.com/node/280871> Accessed November 1st 2014.

BIT with the UK, UK BITs do not extend to overseas territories.[280] It was only after problems arose, the restructuring led to 'migration' from Luxembourg to the Netherlands so that the Netherlands-Bolivia BIT could be invoked. The tribunal rejected Bolivia's view that this 'migration' was a fraudulent device to secure jurisdiction under the Netherlands-Bolivia BIT. It also rejected that the controlling company was the American company, and that the Dutch company's insertion was an attempt to secure ICSID jurisdiction.[281] The claimants settled the dispute after the jurisdictional phase. Bolivia bought Bechtel's share in Aguas del Tunari. The 'water war' led to the election of Eva Morales, and triggered Bolivia's subsequent displeasure with ICSID.[282] The tribunal's expansive view on jurisdiction through migration of companies exposed it to the neoliberal criticism that it too merely seeks to promote foreign investment protection.[283] Despite the outcome in *Tidewater v Venezuela*, which held that reorganising investments, only, to gain access to BIT protection constituted an abusive manipulation of foreign investment protection,[284] unfortunately, this approach is inconsistent. ICSID tribunals continue to uphold corporate restructuring to take advantage of BITs. In *ConocoPhillips v Venezuela*, the tribunal found that there was no evidence of abuse of process because no claim had been made (and none was in prospect) at the time of the reorganisation and ConocoPhillips' continued expenditure on the projects showed that, even after the reorganisation, it desired to resume undertaking its commitments.[285] This neoliberal approach towards disputes involving developing countries is further exemplified in *Santa Elena v Costa Rica,* where an ICSID tribunal held that "expropriation due to environmental regulation, no matter how laudable and how beneficial to society as a whole, still amounted to a taking of the claimant's property for which compensation was required".[286] In contrast, cases such as *Methanex v United States*[287] and *Saluka v Czech Republic*,[288] recognise that some regulatory takings are non-compensable. According to the *Saluka* formulation, States are not liable to pay compensation to investors when, in the ordinary exercise of their regulatory authority, they adopt in a non-discriminatory way *bona fide* regulations aimed at the general welfare.[289] Thus, *Aguas del Tunari, ConocoPhillips* and *Santa Elena* seem to indicate a *per se* bias towards neoliberalism and the sacrifice of the intention of the parties to further legal schemes that advance narrow economic interests.[290]

Investor-State arbitration as conducted by ICSID tribunals has also been criticized for paying inadequate attention to the fact that foreign investment can have harmful impacts on society and it is States' responsibility to regulate harmful investments. States are have a right to regulate on behalf of the public's welfare and this right must not be subordinated to investors' interest where the right to regulate is exercised in good faith and for legitimate purposes. Awards issued by ICSID tribunals against developing countries have in many cases incorporated overly expansive interpretations of language in IIAs, as seen in many instances of the review of host-States' domestic policies.[291] Interpretations prioritise foreign investment protection over States' right to regulate their domestic activities. This is evident in the approach adopted by tribunals to investment treaty concepts of corporate nationality, expropriation, MFN treatment, non-discrimination, and fair and equitable treatment, all of which have been given unjustifiably pro-investor interpretations to the detriment of States and those on whose behalf they act as seen in cases such as *Metalclad*.[292] Moreover, tribunals' award of damages as a remedy of first resort flowing from expropriations pose a serious threat to the democratic nature and capacity of Governments to act in the public interest by way of innovative policy-making in response to changing socio-economic conditions. This constitutes a reorientation of the balance between investment protection and international law's review of host-States' domestic policies.[293] Examination of ICSID's institutional legitimacy reveals that ICSID

[280] UK Treaties: Overview<https://www.gov.uk/guidance/uk-treaties> Accessed August 23rd 2014.
[281] Aguas del Tunari v Bolivia (2005), ICSID Case No. ARB/03/3 (21 October).
[282] Fiezzoni (n 241) 136, 144.
[283] Sornarajah (n 36) 326-27.
[284] Tidewater v Venezuela (ICSID Case No. ARB/10/5) 8 February 2013 at146.
[285] ConocoPhillips v Venezuela (ICSID Case No. ARB/07/30) at 279-280.
[286] Compañía del Desarrollo de Santa Elena v Republic of Costa Rica Case No. ARB/96/1(Final Award 17th February 2000); ICSID Rev 169 at para 72.
[287] *Methanex* (n 180).
[288] Saluka Investments BV v Czech Republic (UNCITRAL Partial Award, 17 March 2006)
[289] Ibid at 255.
[290] Odumuso (n 277) 345, 371.
[291] Sornarajah (n 36) 291.
[292] Metalclad Corp. v Mexico ICSID (W. Bank), Case No. ARB (AF)/97/1 (August 30, 2000)
[293] Gus Van Harten and others, 'Public Statement on the International Investment Regime' (31 August 2010) <www.osgoode.yorku.ca/publicstatement/documents/Public%20Statement%20%28June%202011%29.pdf> accessed 27 February 2014.

represents the biases of an institution prejudiced in favour of foreign investment.[294] Tribunals have paid little attention to developing countries' concerns that hostility toward ICSID may hamper access to World Bank finance; the pressure on States to resort to assistance from expensive foreign law firms; and have attached little importance to non-commercial interests such as public health as seen in and *Tecmed*[295] or environmental protection as seen in *Santa Elena*. Thus, a key criticism of ICSID is its disregard for developing countries and peoples' interests.[296] The high level of abstraction with which ICSID tribunals view capital-importing States has influenced this. Tribunals construe disputing parties narrowly as investors and host-States as private entities, with the arbitration itself framed as a commercial matter. Whereas States and investors are not equal from a pure public law context, as soon as States cross over into private law by entering into commercial agreements, tribunals view investors as being theoretically on the same level as States with equal bargaining powers.[297] Public interest considerations and the needs of poverty stricken populations are incidental.[298] This has been influenced by the universalization of some capital-exporting States' domestic practices such as the U.S, where contracts entered into by the State are viewed as being governed generally by the law applicable to contracts between private individuals as held by the Supreme Court in *Winstar Corp v. United States*.[299] Tribunals' limited engagement with the incidence of peoples' interactions with foreign investment stems partly from the interests that they conceive themselves as serving. Commercial-law-trained arbitrators have failed to recognise that investor-State arbitration is fundamentally different from international commercial arbitration, which involves strictly private commercial interests and not host-States citizens' socio-economic welfares. By discounting citizens' interests, the State is constructed as an artificial entity without a population, viewed only as Government and territory. Based on this construction citizens become invisible in the dispute settlement process.[300] So while citizens' perspectives have often been at the forefront of disputes, as seen in *Tecmed v Mexico*,[301] these have never translated into significant considerations of the negative impacts of foreign investment on citizens. Besides the cursory examination in cases such as *Vivendi v Argentina*,[302] and *Pezold v Zimbabwe*,[303] ICSID tribunals have generally paid little attention to subjects such as human rights. ICSID's award in *Tecmed*, which paid little attention to citizens' welfare, acutely reveals this.[304] Therefore, the question of how to approach normative clashes between citizen's rights and welfare in contrast to foreign investment protection has become pertinent. Schill *et al* proposes a proportionality analysis as a suitable approach for the resolution of this conflict.[305] It is a legal construct that provides a methodology for decision-makers to balance conflicting rights and interests. A proportionality analysis is a desirable means of reconciling conflicting norms given the structured manner it balances competing interests.[306] Therefore, tribunals do not merely concern themselves with ensuring that commercial parties honour their obligations under their agreements but also take into consideration the impact of their decision-making on the welfare of local populations. This proportionality construct received tacit support in *SAUR v Argentina*[307] where the tribunal sought to 'counterbalance' competing obligations drawn from investment law and human rights law to determine which should be prioritised; nevertheless the ICSID tribunal did not conduct the proposed balancing exercise. As seen in *Biwater v Tanzania*,[308] a structured approach to resolving normative conflict in the context of foreign investment law is beneficial given the existing concerns over the legitimacy of investment tribunals. Nonetheless, as *Tecmed* reveals, tribunals seldom adopt this balancing exercise that would ensure more neutral resolution of disputes by attaching greater significance to citizens' welfare such

[294] Ibid.
[295] *Tecnicas Medioambientales* (n 28).
[296] Nicholas Boeglin, ICSID and Latin America: Criticisms. Withdrawals and Regional Alternatives, Committee for the Abolition of Third World Debt (2013)<cadtm.org/ICSID-and-Latin-America-criticisms> accessed September 1, 2014.
[297] Engela C. Schlemmer, 'A New International Law on Foreign Investment' (2005) 3 Journal of South African Law 535.
[298] Reynolds (n 212) 85, 121.
[299] (1996)518 U.S. 839,895.
[300] Ibironke Odumosu, 'Locating Third World Resistance in the International Law of Foreign Investment' (2007) 9 ICLR 433.
[301] Tecnicas Medioambientales (n 28).
[302] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v The Argentine Republic Case no. Arb/97/3 at para 262.
[303] Bernhard von Pezold v Zimbabwe, Case No. ARB/10/15 Procedural Order 2 at 57 – 59.
[304] *Tecnicas Medioambientales* (n 28) at 175-181.
[305] Stephan Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of Foreign Investment Law, the Law of State Immunity and Human Rights' (2012) 27 ICSID Review 87.
[306] Stephan Schill and Benedict Kingsbury, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest–the Concept of Proportionality' in Schill (eds), *Foreign investment law and Comparative Public Law*, (OUP 2010) 78.
[307] SAUR v Argentina, ICSID Case No. ARB/04/4 at para 332.
[308] Biwater v Tanzania Case No. ARB/OS/22Procedural Order at 50.

as a clean environment.[309] Such narrow interpretations of foreign investment law are common as arbitrators are more concerned with giving effect to contracts rather than adopting a balance between protecting investors while keeping host-States' welfare in the background of their decision-making.[310] The manner tribunals cast disputes reveals that the interests of investors, who take the "risk" of bringing development to developing countries, are paramount. This is an erroneous exercise as States are primarily responsible for the welfare of their citizens.[311]

Lack of an effective and consistent review or appeal mechanism is quickly emerging as one of ICSID's most glaring defects.[312] It must be remembered that investor-State arbitration, as conducted by international tribunals, is not only concerned with the resolution of disputes, they make law as much as, if not more than, they resolve disputes.[313] Tribunals frequently make law as later tribunals reference earlier decisions, which overtime come to adopt a certain degree of legitimacy as evidenced by the *Abu Dhabi Arbitration's* development of internationalisation. This is problematic since even if arbitrary, the binding nature of awards comes from their hegemonic enforcement almost anywhere in the world where host-States hold assets, as seen in the *Karaha Bodas Arbitration*,[314] and there is no appeal mechanism. ICSID, too, is implicated in this shortcoming of the regime. ICSID arbitrations have no determinate outcome and are subject to the manner tribunals interpret foreign investment law in each case.[315] Tribunals coexist without hierarchy and are not subject to consolidation cases nor appeals or any other form of external control by an overseeing or appellate body that could guarantee uniformity in the decision-making process.[316] This understates the possibility for mischief and intellectual dishonesty. Arbitrators who wish to be review-proof may simply ignore or distort facts, and on the basis of a skewed view of reality, proceed to decide cases with impeccable legal reasoning and grounding and certainly not in a manner that could ever be characterised as *ultra vires*. The mere fact that arbitral rules require written, reasoned awards is of little assistance in the unclear, open world of investor protection norms, where international law allows decision-makers to draw upon (or ignore) many sources in crafting reasons.[317] With no right to challenge errors of law or unsupported findings of fact, losing parties have no real hope of overturning even arbitrary decisions. Article 53(1) of the Washington Convention states that the: "award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." In this scheme of things commercial arbitrators' desire to hold States to honour their agreements thereby protecting foreigners could influence awards and not because developing countries are predisposed to being unsuccessful. The necessity of an appeal mechanism arose in *Repsol v Petroecuador*.[318] Ecuador sought to annul this award on the basis that ICSID had acted *ultra vires* by applying Ecuador's domestic law in resolving the dispute. The *ad hoc* Committee, basing its findings on earlier annulment decisions,[319] refused to annul the award on the grounds of the tribunal's alleged manifest excess of power, and noted that even if: "the tribunal had erroneously applied the laws of Ecuador, it should be recalled that, in ICSID's annulment system, the errors made in the application of a law...do not constitute...grounds for annulment of an award...The latter must not be confused with an appeal,"[320] not available pursuant to article 53(1).[321] Given the regime's predisposition towards foreign investment protection, it appears that ICSID's

[309] Ruchi Anand, *International Environmental Justice: a north-south dimension (ethics and global politics)* (1st edn, Ashgate Publishing 2004).
[310] Edward Guntrip, International Human Rights Law, Investment Arbitration and Proportionality Analysis: Panacea or Pandora's Box? (*EJIL: Talk!* 2014)< www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/> Accessed March 5th 2014.
[311] Chimni (n 69) 4-5.
[312] Ibid at 340.
[313] Jason Yackee, 'Controlling the Foreign investment law Agency' (2012) 53 Harvard Journal of International Law 391, 411.
[314] Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 465 F Supp 2d 283 (SDNY, 2006).
[315] F. Spoorenberg and J. E. Vinuales, 'Conflicting Decisions in International Arbitration' (2009) 8 The Law and Practice of International Courts and Tribunals: Martinus Nijhoff Publishers 91-113.
[316] Fiezzoni (n 241) 134, 135.
[317] Garcia (n 120) 301, 342.
[318] *Repsol YPF Ecuador S.A. v Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10) Decision on the Application for Annulment (January 8, 2007).
[319] *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of Award, February 5, 2002, 41 I.L.M. 933 (2002).
[320] *Repsol* (n 318) at 38.
[321] Fiezzoni (n 241) 134, 135.

institutional make-up may pose a significant threat to the neutral resolution of foreign investment disputes involving developing countries in ways that balance States and investors' positions, as States will never be able to appeal decisions, due to this defect.

An even more serious critique concerns ICSID's review of host-States' domestic policies. Like the sovereignty-restricting effect of international arbitral institutions,[322] ICSID, too, has habitually engaged in wide reviews of developing countries' investment regulations. This was seen in *Tecmed v Mexico*, which arose out of Mexico's non-renewal of a permit to operate a hazardous waste landfill that was dangerously close to a populated municipality. ICSID held that Mexico had indirectly expropriated the investment by declining to renew the permit, since without the permit all other real and personal property was of little value to the investor. The tribunal concluded that the issuance and revocation of licenses should be undertaken in a transparent manner.[323] This is biased against developing countries since the level of transparency often required from developing countries, in domestic policy implementation, is hardly achievable in Western States with more sophisticated governance structures.[324] However, capital-importing States find themselves stuck in a system biased against them, which they cannot escape due to their desire to attract investments. While it is argued that developing countries voluntarily participate in ICSID's investor-State dispute settlement and their later claims of ICSID's illegitimacy in resolving investment disputes are unfounded;[325] such arguments discount the threat or incidence of economic coercion of developing countries by industrialised countries.[326] Developing countries who refuse to participate in such proceedings risk losing support from foreign aid benefactors. The U.S. 'First Hickenlooper Amendment'[327] allows the President to terminate aid to any country that interferes with the property of U.S. nationals and fails to immediately compensate in accordance with international law.[328] Moreover, since foreign arbitral awards are enforceable under the New York Convention,[329] there is another powerful compliance mechanism available to the system of foreign investment protection. This was seen in action in the sequel to the abovementioned *Karaha Bodas Arbitration*.[330] In the regime's desire to protect foreign investment, international tribunals have failed to respect developing countries' law-making capacity. ICSID's review of host-States' domestic policies is largely facilitated by the purpose they seem themselves as serving and consequently the practices employed by tribunals in the course of dispute resolution. Therefore, examination of international arbitral tribunals' subversion of States' domestic laws for international law, said to have become necessary with the intensification of globalisation,[331] is critical in this account. It reveals that investor-State arbitration as presently conducted is not just, neutral and balanced in settling investment disputes. Investor-State arbitration seems to be conducted according to a Western standard of justice, which ignores developing countries' interests.[332] Major shortcomings concern the interpretations adopted by tribunals and how these interpretations work against host-States' domestic interests. It focuses specifically on tribunals' interpretation of foreign investment law that undermine host-States' regulation of foreign investment in ways conducive to their own economic development. These include the internationalization of disputes; increasingly expansive interpretation of foreign investment to include regulatory matters such as the issuance of licenses and permits; the expansion of the rules relating to expropriation; and application of a compensation standard unfounded in international law.

[322] Van Harten (n 221) 136.
[323] Técnicas Medioambientales (Tecmed) v United Mexican States (ICSID Case No. ARB (AF)/00/2) at 148-151.
[324] Alvarez (n 20) 965.
[325] Alvarez (n 138) 634.
[326] Chimni (n 69) 2, 3.
[327] Foreign Assistance Act of 1961, Pub. L. No. 87-195, 77 Stat. 386 (1963), (codified as amended at 22 U.S.C. § 2370(e)(1)(1994)).
[328] Patricia Robin, 'The BIT Won't Bite: The American Bilateral Investment Treaty Program' (1984) 33 American University Law Review 938-39.
[329] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
[330] Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 465 F Supp 2d 283 (SDNY, 2006).
[331] Faundez (n 207) 3.
[332] Sornarajah (n 36) 289.

## V. Subversion of National for Interntional Standards in Investor-State Arbitration Dispute Settlement Proceedings

### A. Internationalising Foreign Investment Disputes

In foreign investment agreements, the parties' contractual rights exist under, and are defined by host-States' municipal law, but foreigners' claims for the breaching of their rights is said to arise in international law (customary international law, treaty or both).[333] A major practice of tribunals settling disputes has been the prying of disputes out of host-states' legal systems.[334] This involves the substitution of host-States' laws for an international law standard. This is said to promote neutrality, as application of host-States' laws would prejudice the proceedings in its favour. In foreign investment law, this process is referred to as the internationalisation of the dispute. Investors view internationalisation as critical to preserving foreign investment agreements as it would be naïve not to foresee that at some point that host-States will interfere with the conduct of transactions, being undertaken within their territory, involve substantial capital and are undertaken over lengthy periods of time. Removal of disputes arising from agreements which are presumably concluded in the background of host-States' legal systems, from host-States' jurisdictions and their subjection to an immutable, supranational system is seen as crucial to foreign investment protection.[335] This practice is at odds with the jurisprudence of early international courts. The Permanent Court of International Justice (PCIJ) in the *Brazilian and Serbian Loans Cases*[336] held that international law had no relevance in transactions involving States and private parties, and reference should be made to municipal systems to settle problems arising from such transactions.[337] In the *Anglo Iranian Oil Co. Case*, the International Court of Justice (ICJ) declared that agreements between States and corporations were concessionary agreements and could not be elevated to international law.[338] In the *Norwegian Loans Case*, Judge Lauterpacht observed, "…that an international contract must be subject to some national law…"[339] Likewise, Mann argues that a contract between a State and an investor is a domestic contract.[340] Nevertheless, internationalisation of disputes has been a pervasive practice of arbitral tribunals.[341] Internationalisation is seen as critical, as application of domestic law is at odds with the version of investment protection envisaged by investors and their home-States.[342]

Some cases, dating back to the early 20th century, first suggested a move away from host-States' laws in resolving investor-State disputes.[343] Nevertheless, internationalisation was substantively developed in three seminal investor-State arbitral awards around the mid 20th century. These are the *Abu Dhabi Arbitration*,[344] *Qatar Arbitration*[345] and the *ARAMCO Arbitration*.[346] None of the concessions underpinning these disputes contained explicit choice-of-law clauses.[347] Employing the conflict-of-laws rule, the arbitrators had to deduce the law applicable to these agreements by choosing the law of the States with which these agreements had their closest connection.[348] Application of the conflict-of-laws rule, led to the undisputable supposition that these host-States' laws were applicable.[349] The resources, to which these agreements were subject, were situated and the contracts underpinning their exploration were executed in these States.[350] The arbitrators admitted this point.[351] In each case it was duly recognised that ordinarily the

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[333] Anghie (n 189) 235-240.
[334] G.R. Delaume, 'The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal' (1997) 12(1) ICSID Review 1, 3.
[335] Sornarajah (n 36) 289.
[336] Serbian Loans Case (1929). PCIJ, (ser. A) No. 20 and Brazilian Loans Case (1929) P.C.I.J. (ser. A), No. 21
[337] Thomas Wälde, The Serbian Loans Case – A Precedent for Investment Treaty Protection of Foreign Debt? (2004) 1(4) TDM.
[338] *Anglo-Iranian Oil Co. Case* I.C.J. Reports 1952, at 93.
[339] Norwegian Loans Case (1957) ICJ Rep 9 at 37.
[340] F.A. Mann, '*Lex Facit Abitrum'* (1986) 2 Arbitration International 241.
[341] A.F.M. Maniruzzaman, State Contracts in Contemporary International Law (2001) 12(2) European Journal of International Law 309-310.
[342] Anghie (n 189) 224.
[343] *Delgoa Bay Railway Case*, The Advocate of Peace (1894-1920), Vol. 62, No. 4 (April 1900), p. 88; *Lena Goldfields v USSR* (1930) The Times, 3 September; and *Schufeldt Claim* (1930) 5 AD 179; 24 AJIL 799.
[344] *Petroleum Development* (n 31) at 250-51.
[345] *Ruler of Qatar v International Marine Oil Company* (1953), 20 I.L.R at 534-535.
[346] *Arabian American Oil Co. (Aramco) v Saudi Arabia* (1963), 27 I.L.R at 116.
[347] Al Jumar (n 32)215, 218.
[348] Ole Lando, 'The Law Applicable to the Merits of the Dispute, in: Sarcevic (ed.) *Essays on International Commercial Arbitration* (Martinus Nijhoff 1991) 129-159.
[349] Hege Elisabeth Kjos Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law (Oxford University Press 2013) 190.
[350] Maniruzzaman (n 341) 310.

host-State's law was applicable to the dispute, but all three tribunals held that the contracts were governed by some supranational system, as Islamic law was too primitive to apply to such disputes.[352]

In the *Abu Dhabi Arbitration*, the Umpire recognised that the agreement had been conducted in Arabic. He is recorded saying: "the Arabic of the Gulf, in which the contract is framed, is an archaic variety of the language". Thus, in deciding the "Proper Law" applicable to the dispute," the Umpire held that: "[T]his is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi." The Umpire, however, decided that: "no such law can reasonably be said to exist."[353] According to him: "[T]he Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."[354] On this basis, the Umpire held that the terms of the concession invited and indeed prescribed, the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of "modern law of nature". He went on to hold that English Law is: "so firmly grounded in reason, as to form part of this broad body of jurisprudence—this modern law of nature".[355] A year later in the *Qatar Arbitration* Sir Alfred Bucknill, the arbitrator, held that Islamic law governed the agreement given its subject matter, and the fact that the State was party to the agreement.[356] Nevertheless, the arbitrator concluded that "there was no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments" and instead relied on "the principles of justice, equity and good conscience".[357] In the 1960s, the arbitrator, Professor Suaser-Hall, in the *Aramco Award*,[358] arrived at a similar conclusion. He held that Saudi Arabia's domestic law would ordinarily apply to the concession because Saudi Arabia was party to the contract, as grantor, and because it is widely recognised, in private international law, that a State is presumed, unless contrary is proven, to have subjected its undertakings to its own legal system. According to the arbitrator this principle was mentioned by the PCIJ in its judgment in the *Serbian Loans Case*.[359] However, in applying general principles of law, the tribunal held that: "public international law should be applied to the effects of the Concession, objective reasoning lead it to conclude that certain matters cannot be governed by any rule on the municipal law of any State, as is the case in all matters relating…to transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of States for the violation of its international obligations".[360] Today, internationalisation is so commonplace and tribunals have become so complacent that they seldom provide justification for internationalisation and where they do, the reasoning has been inconsistent. For instance, the tribunal in *Tecmed v Mexico* provided no justification for internationalisation. Otherwise, tribunals justify internationalisation on the basis that disputes are referred to international tribunals as seen in *Texaco v Libya*[361] or arise pursuant to some IIA as seen in *Metalclad v Mexico*, where the tribunal held that: "A Tribunal established pursuant to NAFTA Chapter Eleven, Section B must decide the issues in dispute in accordance with NAFTA and applicable rules of international law (NAFTA Article 1131(1)). In addition, NAFTA Article 102(2) provides that the Agreement must be interpreted and applied in the light of its stated objectives and in accordance with applicable rules of international law."[362]

With these developments, tribunals have attempted to formulate various justifications for internationalisation. It was argued by Rene Jean Dupuy in *Texaco v Libya*, that investor-State contracts are different, as they are international development agreements designed to bring development to host-States.[363] In *Sapphire v NIOC* it was held that: "Such a solution seems particularly suitable for giving the guarantees of protection which are indispensable for foreign companies undergo considerable risks in bringing financial and technical aid to countries in the process of development. It is in the interest of both

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[351] Taida Begic, *Applicable Law in International Investment Disputes* (Eleven International 2005).
[352] Miles (n 227) 80-81.
[353] *Petroleum Development* (n 31) at 250.
[354] Ibid at 250-51.
[355] Ibid at 251.
[356] *Ruler of Qatar v International Marine Oil Company* (1953), 20 I.L.R) at 534-535.
[357] *Ruler of Qatar v International Marine Oil Company* (1953), 20 I.L.R at 545.
[358] Arabian American Oil Co. (Aramco) v Saudi Arabia (1963), 27 I.L.R 116.
[359] *Serbian Loans Case* (1929) PCIJ, Ser. A No. 20
[360] *Arabian American Oil Co. (Aramco) v Saudi Arabia* (1963), 27 I.L.R 116.
[361] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic,* Award (19 January 1977) (1978) 17 I.L.M. 3 at 13
[362] *Metalclad Corp v United Mexican States,* ICSID Case No. ARB (AF)/97/1 (August 30, 2000) at 70-71.
[363] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic*, Award (19 January 1977) (1978) 17 I.L.M. 3 at 17.

parties to such agreements that any disputes between them should be settled according to the general principles universally recognized and should not be subject to the particular rules of national law…"[364] This reasoning is however based on non-legal considerations as such has generally been abandoned. Further attempts have been made to justify internationalisation on the basis of the general principle of *pacta sunt servanda*. This idiom refers to the obligation one to perform their obligations under any agreement entered into by them. Nevertheless, this reasoning is also unfounded. The argument is that although contractual sanctity may have been the basis of contract law up until the 19th century, this notion has given way to notions such as the free will of States and the inequality of bargaining power and economic coercion. The notion that a State is barred from regulating a contract negotiated and to be performed within its territory is an affront to the customary sovereign equality principle. In *Amphitrite v R*,[365] an English Court reiterated that the State's legislative capacity could not be restrained by any obligations owed to private parties.[366] Economic coercion was examined in *The Universe Sentinel,*[367] where a Liberian ship was blacklisted by a trade union due to the ship-owners' failure to contribute to the trade union's welfare fund. Due to this blacklisting no tugboats were available for the ship to sail, so the owners paid the trade union and successfully sued for its recovery. The trial judge held: "It was a matter of the most urgent commercial necessity that the plaintiffs should regain the use of their vessel. They were advised that their prospects of obtaining an injunction were minimal, the vessel would not have been released unless the payment was made, and they sought recovery of the money with sufficient speed once the duress had terminated."[368] The passing-off of *pacta sunt servanda* as universally accepted without qualification, to justify internationalisation, appears to be an attempt to selectively apply rules to promote the foreign investment regimes' neoliberal predisposition in favour of investment protection. Consequently, this Chapter argues that internationalisation of foreign investment disputes is an arbitrary exercise based on non-legal considerations. Its main objective is in removing disputes from host-States' authority by neutralising their legal systems.

### B. Expansion of the Meaning of Foreign Investment

The expansive interpretation of the meaning of foreign investment is another key criticism of foreign investment law. Today foreign investment's interpretation has seen the inclusion of intangible assets, which investors claim they acquired as part of the investment portfolio. This is at odds with the customary international law of State-responsibility, which referred only to FDI i.e. physical assets.[369] Article 25 of the Washington Convention, provides no help on this matter, merely requiring disputes referred to ICSID to arise from foreign investments. Capital-exporting States have exploited this shortcoming of the system and provided for expansive definitions of foreign investments in their BITs. While not overlooking the impact this has on States' regulation of intangible investments such as sovereign bonds, other financial instruments and intellectual property rights, a key concern is the manner in which the rules restrict capital-importing developing countries' capacity to regulate sovereign prerogatives such as regulatory licenses and permits granted to investors to undertake investments as investors' property. Today, host-State's legislative actions that affect the issuance of licenses and permits are attracting States' liability. It is claimed that without licenses and permits investors' physical assets have no commercial value.

This expansion of the rules can be said to have started after decolonization. In the 1970s, influenced by the U.N. Committee on TNCs that foreign investment could be beneficial to host-economies if investments were attached to their development; developing countries started enacting legislation intended to monitor foreign investment taking into consideration the effects investments could have on their economies.[370] Much of the screening was done through administrative agencies. Overtime such agencies have transformed in line with the current and changing ideas associated with foreign investment. When economic liberalism emerged, a need arose for a more *laissez-faire* approach. The dismantling of these screening processes and the acknowledgement of a right of entry was a key objective of BITs. These

[364] *Sapphire v National Iranian Oil Company* (1963), 35 I.L.R. 136 at 175-176.
[365] [1921] 3 KB 300. See also *Czarnikow Ltd v Rolimpex* [1979] AC 351 and *Settebello v Banco Totta e Acores* [1985] 1 WLR 1050.
[366] Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015).
[367] [1983] 1 AC 366 and The Evia Luck [1992] 2 AC 152.
[368] [1983] 1 AC 366
[369] Christoph Schreuer, 'Full Protection and Security' (2010) 1(2) Journal of International Dispute Settlement 353-369.
[370] Khalil Hamdani and Lorraine Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (Routledge 2015) 97-105.

agencies' functions have changed. Their basic functions today are to establish administrative procedures such as the issuance of licences to facilitate and regulate foreign investment. These functions are undertaken in virtually all States to different degrees. Such licenses are administrative rights, which the foreigner secures upon entry or at the post-entry stage. Even where they are not undertaken upon entry, there are various administrative procedures involved such as environmental licenses and planning authorisations, which investors have to acquire before they can begin their projects.[371] Underpinned by what is referred to as the doctrine of acquired rights,[372] IIA-models of capital-exporting States have defined these administrative licenses as constituting part of investors' investment portfolios as seen in article 1 of the U.S.-Honduras BIT, which provides that: "…forms that an investment might take include…rights conferred pursuant to law, such as licenses and permits..."[373] This has been justified on the basis that if host-States revoke any of these administrative rights, investors will be unable to undertake investments. All physical property will remain theirs, but although, there has been no meddling with their physical property; these assets will be useless to investors for they cannot undertake investments without obtaining the required administrative authorisation.[374] Thus, capital-exporting States view the protection of these rights as essential. Tribunals have been crucial in facilitating this expansion of the rules, having decided in several cases that host-States' revocation of licenses or permits constitutes an expropriation of investors' property.

In *Amco v Indonesia*, the Indonesian government had revoked a profit-sharing licence to operate a hotel in Jarkata. The tribunal opined, "by receiving the authorisation to invest, AMCO was bestowed with acquired rights (to realise the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law). These were transmitted to the Indonesian entity P.T. AMCO, created in conformity with said authorisation and with Indonesian law, and then partially, upon authorisation by the competent authority, to Pan American. Indonesia could not withdraw these acquired rights, except by observing the legal requisites of procedural conditions established by law, and for reasons admitted by the latter. In fact, Indonesia did withdraw such rights, not observing the legal requisites of procedure, and for reasons which, according to law, did not justify the said withdrawal. The principle of acquired rights was thus infringed, and Indonesia had committed its international liability."[375] In *Middle East Cement v Egypt*, in breach of a prior undertaking the host-State banned the importation of cement other than by its Cement Office, thereby revoking the claimant's licence to import cement. The tribunal held that: "The License being the "expropriated" investment, its earning capacity during the remainder of its life may well come into consideration for assessing its "market value" under the BIT. Nothing would have prevented the Claimant from concluding other cement supply contracts or contracts providing for the use of its terminal facilities. The circumstance that some of the cement supply contracts take into consideration possible increases in quantities and/or extension of duration lends support to the conclusion that the License had not exhausted its potentiality of yielding further profits and that, accordingly, the Claimant had a legitimate expectation that it could have earned additional profits under the License."[376] *Metalclad v Mexico* also involved the non-issuance of a permit to operate a hazardous waste landfill in Guadalacazar. The tribunal held that: "NAFTA Article 1110 provides that: "[n]o party shall directly or indirectly…expropriate an investment…or take a measure tantamount to…expropriation…except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law; and (d) on payment of compensation…" A "measure" is defined in Article 201(1) as including "any law, regulation, procedure, requirement or practice". Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure…in favour of the host-State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host-State. By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad…and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1)…taken together with the representations of the Mexican federal government, on

[371] Sornarajah (n 36) 13.
[372] Martin Domke, 'Foreign Nationalisations, Some Aspects of Contemporary International Law' (1961) 55 AJIL 585.
[373] Treaty Between the Government of the United States of America and the Government of the Republic of Honduras Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, signed at Denver on July 1, 1995.
[374] Sornarajah (n 36) 13.
[375] Amco Asia Corporation v Indonesia, 23 I.L.M. 351 (1984) at 248.
[376] Middle East Cement Shipping and Handling Co. v Egypt, (2002) ICSID Case No. ARB/99/6 at 127.

which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation."[377]

Today investment hosts are held liable for any host-State interference with investors' licences and permits, which cause investors loss. The above cases reveal how tribunals have facilitated the widening of the meaning of foreign investment in their interpretation of IIAs. These interpretations are at odds with the way the law developed. Interpretation of licences and permits required by investors to undertake investments as being captured under the meaning of foreign investment is at odds with the customary international law of state-responsibility. Again this Chapter argues that expansion of the rules has not been by chance but part of the agenda of capital importing States to foster in foreign investment law the highest degree of protection for foreign investments as possible.

### C. Expansion of the 'Takings' Rule

Tribunals' expansion of the 'takings' rule in deciding disputes is another key criticism of investor-State arbitration. No longer is a taking predicated on a confiscation, nationalisation or expropriation the traditional forms of taking. Overtime the takings rule has marred by interpretation, which cover not only direct takings, they now cover indirect takings and "anything tantamount to a taking". Moreover, while historically foreign investment law generally recognised that expropriations should be followed by compensation, overtime a regime of regulatory takings by States in pursuance of economic reforms or any other measure aimed at general welfare, developed for which compensation need not be paid as seen in *Saluka v Czech Republic*.[378] Such a formulation encompasses most regulatory takings. Nonetheless, tribunals' have expanded the law of expropriation to include regulatory takings. The result being that regulatory takings have become compensable. This wide expansion has been achieved, in large part, by viewing property not just as physical assets but also inclusive of owners' right to enjoy their physical assets. This theory was mastered in U.S. domestic practice, and is reflected in the Fifth and Fourteenth Amendments of the U.S. Constitution, whereby the State is obligated to compensate a person for interference with his property. The theoretical elucidation of property rights was clearly articulated in the Supreme Court's decision in *Penn Central v New York*.[379] Although the Court held that the State's prohibition of a proposed construction did not to amount to a taking as it reflected an act, which sought to protect the city's welfare, the general trend has been to view such interference as violating the takings rule and the consequent need for compensation. In *United States v Pewee Coal Co*., the Court held that when the Government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.[380] In *Loretto v Teleprompter Manhattan CATV Corp*., the Court held that when the Government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, it is required to pay for that share no matter how small.[381] These sentiments can also be seen in the Court's approach in *United States v Causby*,[382] where the States' planes had used private airspace to approach a government airport.[383] Most recently in *Lucas v South Carolina Coastal Commission*, Justice Scalia described prohibition on building on the beachfront as denial of all economic valuable use "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture".[384] By these judgments, U.S. Courts have intricately examined what constitutes property rights. The U.S, who historically has mostly advanced the rules regulating foreign investment, as it is the largest of the capital-exporting economies, has sought to transpose this unbundling of property rights developed in its domestic law into foreign investment law in a hegemonic manner as part of its effort to protect its investors abroad. In the 1980s, the U.S. arbitrators who sat on the Iran-U.S. Claims Tribunal (IUSCT), adopted methods grounded in U.S. domestic law in their decision-making. The views taken in these awards have acquired notoriety, finding their place in later arbitral jurisprudence. This universalisation of U.S. domestic practice means that almost any governmental interference with an investor's property or property rights may be held to be analogous to a taking.

Due to this fine dissection of the different components associated with ownership of property,

[377] Metalclad Corp v Mexico, ICSID Case No. ARB (AF)/97/1 (August 30, 2000) at 70-71.
[378] Saluka v Czech Republic (UNCITRAL Partial Award, 17 March 2006) at 255.
[379] Penn Central v New York City, (1978) 438 US 104.
[380] (1951) 341 U.S. 114, 115.
[381] (1982) U.S. 419, 458.
[382] (1946) U.S. 256, 328.
[383] Joanne Hames and Yvonne Ekern, *Constitutional Law: Principles and Practice* (Cengage 2012) 280.
[384] (1992) 505 US. 1003, 1025-8.

whereas early in the history of foreign investment a taking was predicated on the taking of the investors' physical assets, overtime takings came to include: revocation of licences and permits as seen in the above cases; forced sales of property; forced sales of shares in investments through corporations; excessive taxation; and indigenisation measures.[385] However an area in which the literature has paid inadequate attention has been the inability of States to regulate investor-State contracts. This facet of takings is fundamental as it reveals the extent of the limits placed on the sovereignty of capital-importing States due to the preconditions they agree to as a consequence of their desire to attract investment capital. This involves the inclusion of the reneging of prior commitments by States, attempting to protect their domestic welfare, by providing an international law remedy in case of any, even if "simple" or commercial, breach of an investor-State contract. This opens recourse to dispute settlement by arbitral tribunals for breaches of specific and individual promises made by the State *vis-à-vis* investors.[386] This was seen in the *Dabhol Arbitration,*[387] where Maharashtra State in India had entered into an agreement with investor for the investor to build two LNG-fired power plants to sell this electricity to the State in an effort to remedy the State's acute power shortage. Besides the inequitability of the power purchase agreement, India cited numerous irregularities, stemming from corruption and lack of transparency, human rights abuses and environmental risks as the main reasons for termination. Even the World Bank refused to finance this project.[388] Nevertheless, the tribunal held that Indian authorities' termination of the agreement was tantamount to an expropriation. According to the tribunal: "…the coordinated course of conduct, including the several breaches found above, are all in violation of the Shareholders Agreement, the law of the State of New York which governs that contract, and the applicable standards of international law requiring recognition of written agreements to submit to international arbitration and forbidding uncompensated expropriation of Claimant's property…the coordinated course of conduct, including the several breaches found above, operated as a total expropriation of the Claimant's investment in the Project, and resulted in depriving Claimant of its fundamental rights in the Project and the entire benefit of its investment therein."[389] The tribunal awarded the investor an award damages that largely reflected the loss he had suffered inclusive of all his legal costs and the cost of the arbitration.[390] Such a conclusion seems arbitrary. Despite the fact that compensation is an ordinary and common remedy for a breach of contract, in investor-State cases the same rules do not apply as there is a party which must give primary consideration to local welfare of citizens and only secondary consideration to honouring commercial agreements. Due to their economic vulnerability, developing countries see it as paramount their ability to regulate investor-State contracts, without regulatory termination of these agreements giving rise to host-States' liability. Thus the conclusion in the Dabhol arbitration seems at odds with customary international law, as such regulatory termination does not justify compensation according to foreign investment law's current minimum standard.

According to Professor Stephan W. Schill, it has long been recognised that States can terminate investor-State contracts based on superseding public interests, a right that has always been recognised under customary international law and domestic legal systems as a general principle of law that not even BITs have thwarted.[391] State practice and the jurisprudence of international courts and tribunals has consistently recognised that under international law States have the power to interfere with investor-State contracts in the public interest; a right which they cannot even contract away. In the *Olivia Case*, although the Italian-Venezuelan Claims Commission held that "[a] nation, like an individual, is bound by its contract, and although it may possess the power to break it, is obliged to pay the damages resultant upon its action," the tribunal held that the expulsion of the investor was justified in the public interest, because the investor was suspected of having cooperated with revolutionary factions.[392] Similarly in the *Company General of the Orinoco Case*, the French-Venezuelan Claims Commission accepted the right of the host-State to terminate a mining concession unilaterally, which had created political tensions with Colombia over disputed territorial boundaries. Although the Commission held that the State had to compensate the

[385] Sornarajah (n 36) 370-410.
[386] Stephan Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) 18(1) Minnesota Journal of International Law 6.
[387] *Capital India Power* (n 29).
[388] Abhay Mehta, Power Play: A Study of the Enron Project (Orient Longman, 2000) 42-43.
[389] *Capital India Power* (n 29) at 30-31.
[390] Ibid at 34-36.
[391] Stephan W. Schill, 'Umbrella Clauses as Public Law Concepts in Comparative Perspective' in Stephan Schill (eds) *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 336.
[392] Olivia Case Award, 1903, 10 UNRIAA 600, 609.

investor, it held that since the Government's "duty of self-preservation rose superior to any question of contract, it had the power to abrogate the contract in whole or in part".[393] More recently in *Amoco*, the IUSCT held that good faith execution of contracts: "…must not be equated with the principle *pacta sunt servanda*, often invoked by claimants in international arbitrations. To do so would suggest that sovereign States are bound by contracts with private parties exactly as they are bound by treaties with other sovereign States. This would be completely devoid of any foundation in law or equity and would go much further than any State has ever permitted in its own domestic law. In no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather private parties who contract with a government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights. No justification exists for a different treatment of foreign private interests."[394] The above cases illustrate that States' power to regulate and even terminate investor-State contracts is firmly established in customary international law. By making reference to 'fair compensation,' *Amoco* implies that some regulatory acts may not even warrant compensation if it would be unfair to the State to award compensation to the investor. Such a notion invariably applies to the termination of inequitable agreements, such as power purchase agreements, which are crucial to States economies given the direct link of a stable power supply to a States' industrialisation.

Moreover the notion of property rights developed in the U.S, which it has sought to universalize, is at odd with the legal systems of many capital-importing States who traditionally preferred communal ownership of property. Traditional societies, before Western notions of law tainted them during colonialism, preferred communal possession of property and would have found individual ownership objectionable. These customary conceptions continue in cultural attitudes to property in these societies as seen in the case of the Tonga/Ila peoples of the Kafue River basin of Zambia. In a society where these peoples depend on the land, they have developed complexed management systems in response to the unpredictable nature of the ecosystem. One such management strategy is that the land is own communally and controlled by clan leaders, thus no fruit tree or certain other trees considered to be beneficial to soil or people, may be felled without the permission of the clan leader.[395] Article 3(1) of the Nigerian Bill of Rights, the archetype for the constitutions of numerous Commonwealth States, recognises situations when the individual right to property becomes defeasible to protect public interests.[396] Article 14 of the Banjul Charter also subjects the right to property to the interest of the community at large. According to it: "[T]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."[397] These examples reveal that many African societies' social, cultural and even legal systems do not support the notion of individual property rights. Nonetheless, there seems to be a mission among capital-exporting States such as the U.S. to promote in international law, as the focus of foreign investment protection, a system of complete protection of individual property rights.[398]

### D. Examination of the Foreign Investment Law's Compensation Standard

Another major criticism of investor-State arbitration relates to investment law's "prompt, effective and adequate" compensation standard. Application of this standard was seen in its most glaring form recently in ICSID's $1.7 billion award in *Occidental v Ecuador*,[399] the largest award in the history of foreign investment. The current standard has its origin in the PCIJ's judgement in the *Chorzów Factory Case*,[400] where Poland had expropriated a German Nitrate factory in the Upper Silesia in Polish territory. The Court

[393] Company General of the Orinoco Case Award, 31 July 1905, 10 UNRIAA 184, 280
[394] Amoco International Finance Corp v Government of the Islamic Republic of Iran Award, 14 July 1987, 15 Iran-US CTR 189, 242-43, para 178. See Stephan W. Schill and Yun-I Kim, 'A critical Analysis of the decision by the German Constitutional Court in the Argentine Bondholder Cases' in Karl P. Sauvant (eds), *Yearbook on International Investment Law and Policy 2010-2011* (OUP 2012) 507.
[395] Darrell Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (IDRC 1996) 60-61.
[396] Thomas Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge University Press 2000) 60-61.
[397] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.
[398] Sornarajah (n 36) 5.
[399] *Occidental* (n 37) at 824-825.
[400] Chorzów Factory Case (1928), PCIJ (Ser. A), No. 17

held that: "[T]he essential principle contained in the actual notion of an illegal act–a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals–is that reparation must, as far as possible, wipe out al1 the consequences of the illegal act and re-establish the situation which would, in al1 probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[401] While some courts and tribunals, such as the ICJ in the *Temple of Preha-Vihea Case*[402] and the tribunal in *Texaco Overseas Petroleum Co/California Asiatic Oil Co. v. Government of the Libyan Arab Republic*,[403] have awarded the remedy of restitution as suggested in the *Chorzów Factory Case*, generally the remedy has been to award compensation for the obvious reason that if the host-State grants the investor leave to re-establish his investment there is nothing preventing it from future interference with the investor's investment.

Overtime, the U.S. in its international economic relations with its Latin American neighbours refined this standard established by the PCIJ. "Prompt, adequate and effective" compensation was first proposed by U.S. Secretary of State Cordell Hull addressing Mexico's expropriation of the property of U.S. nationals in its attempts at land reform.[404] In his memorandum to the Mexican ambassador in April 1940, Hull stated: "[T]he Government of the United States readily recognizes the right of a sovereign State to expropriate property for public purposes."[405] However, Hull argued that while the expropriations were Mexico's legal prerogatives, payment of 'prompt, adequate and effective' compensation must follow even lawful expropriations. This standard cannot be said to be universally accepted to give rise to any uniform set of legal principles and is endorsed mostly by Western capital-exporting States for the obvious reason that it affords them the highest degree of protection from a commercial perspective. This standard is arbitrary as it is unsupported in international law by any uniform set of legal principles. Unwavering support for this standard of compensation cannot be found in any of international law's sources, whether treaty, customary interntional law, general principles or the decisions of international Courts and tribunals.

As far as treaties are concerned, there are no multilateral agreements on investment protection to help shed light on the issue of compensation. The earliest attempt at such a multilateral agreement was the 1948 Bogota Economic Agreement. Article 25 encompassed a provision requiring fair compensation in a "prompt adequate and effective" manner. Nevertheless, Argentina, Cuba, Ecuador, Guatemala, Honduras, Mexico, Uruguay and Venezuela expressed reservations towards article 25. Article 3(3) of the 1967 Draft OECD Convention required payment of full compensation.[406] The latest attempt by the OECD in 1998 to try to establish such a multilateral instrument also included a clause articulating the 'Hull formula'.[407] But, this draft was advanced by industrialised States, which can be expected to subscribe to a formula articulating full compensation, as it is reflective of their neoliberal attitudes. Industrialised States' failed multilateral negotiations with developing States reveals a conflict between the interests of these two camps on the issue. BIT practices also diverge. Reviews of the treaty practice of the U.K or China, for instance, reveal those countries' investment treaty practices diverge significantly.

Customary international law is also inconsistent in relation to the award of full compensation for taking of investors' property.[408] While some have acquiesced the Western advanced standard of prompt adequate and effective compensation in their BIT practices as part of their desire to attract investment capital, historically, they had collectively rejected this standard as part of their attempt to establish a NIEO in the 1970s. Under article 2(2)(c) of General Assembly Resolution 3281(XXIX),[409] which formed the centrepiece for developing countries' 1970s NIEO project, the States expressed their resentment towards the Hull formula. According to Article 2(2)(c): "Each State has the right to nationalize, expropriate or

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[401] Ibid at 47.
[402] (Cambodia v Thailand), [1962] 25 I.L.R Rep 91.
[403] (1977), 17 I.L.M. 3 at 92-109.
[404] Sornarajah (n 36) 414.
[405] Excerpt of Hull's Statement in Marjorie Whiteman, ed. Digest of International Law, vol.8 (1967), p. 1020.
[406] Convention on the Protection of Foreign Property 12 October 1967.
[407] OECD, Multilateral Agreement on Investment<www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> accessed 2nd August 2015.
[408] Lee A. O'Connor, 'The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State' (1983) 6 Loyola of Los Angeles International and Comparative Law Review 355, 359.
[409] Charter of Economic Rights and Duties of States, (No. 31), 29 UN GAOR. Supp. 50, UN Doc. A/9631 (1974)

transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent." This reveals that placed in a different economic position, developing countries would not accept the standard advanced by the developed countries in their BITs and as such, no voluntary uniform standard can be said to exist.

Principles such as "unjust enrichment" and "acquired rights" are said to underpin the full compensation rule.[410] It is claimed that because States are enriched as a consequence of taking foreigners' property, they must repay investors, as reparation, a sum reflecting the degree of their enrichment.[411] Nevertheless, this is not the way unjust enrichment works. It is an equitable remedy, which requires tribunals to consider the course of the agreement and the direction the benefits have flowed. In investment agreements such benefits would have weighed heavily in favour of investors. Thus, unjust enrichment will not favour full compensation as often propounded by international arbitral awards. Likewise, there is no clear indication that the principle of acquired rights is part of international law.[412] Investors' rights are obtained under host-States' national laws. International law's relevance to these rights, excepting where treaties protect them, is conceptually a problematic theory to fit into international law's domain.[413] The argument is that since the doctrine of acquired rights arises primarily in domestic law, the State should be able to fetter such rights without reference to any other legal system.[414] Moreover, these principles arise from private law in the legal system of States and cannot be easily transported into an area dominated by public law characteristics, as rights that arise in public law are generally defeasible in the public interest and are increasingly accepted in the legal systems of Western States.[415]

Compensation, in the context of foreign investment, was intricately dealt with by an international Court in the *Chorzów Factory Case*.[416] However it cannot be said to establish a precedent similar to the common law doctrine as the facts of this case are unique. This case arose from the illegal taking of a nitrate factory contrary to the Treaty of Versailles, which under article 6 stated that Poland could nationalise major industries in the Upper Silesia of Polish territory but that it could not liquidate German investors' rights in that region. The Court ruled that the Convention itself made some takings lawful and others unlawful and under the treaty, the taking of the factory fell in the group of unlawful takings. So this case arose at a time before takings were deemed legal. In this sense, the *Chorzów Factory Case* was unique. Clearly the case involved a taking, which was regarded as unlawful because it violated a treaty, and not with takings that are regarded as lawful in contemporary foreign investment law. Therefore, there are many features in the judgement that make it difficult to apply it to modern day investor-State disputes. Support for full compensation has also been articulated in the individual opinion of judges in later ICJ judgments. Clear endorsement of full compensation can be seen in Judge Carneiro's dissenting judgment in the *Anglo-Iranian Oil Company Case*.[417] Carneiro argued that full compensation for expropriated property must be made; as such a rule is a: "…[p]rerequisite of international Co-operation in the economic and financial fields. When there are so many countries in need of foreign capital for the development of their economy, it would not only be unjust, it would be a grave mistake to expose such capital, without restriction or guarantee, to the hazards of the legislation of countries in which such capital has been invested."[418] This view is underpinned by the notion that if full compensation is not recognised in FIL, this will hinder the free flow of investments, and not on legal principles. Therefore, from the practice of international Courts, compensation arising from expropriatory acts does not give rise to any uniform system of precedent, but a system whereby each case should be considered on their individual facts.[419]

International tribunals have also been inconsistent in their approach to compensation in their resolution of foreign investment disputes. Although, from an institutional perspective, since its establishment ICSID has often awarded the remedy of compensation in its awards, ad hoc tribunals have been less consistent. In the three Libya arbitrations of the 1970s, which arose from similar nationalisation acts on the part of the Libyan Government. One tribunal awarded restitution while two tribunals awarded

[410] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 495.
[411] Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (CAMBRIDGE UNIVERSITY PRESS 1997).
[412] Domke (n 372) 585.
[413] A.F.M. Maniruzzaman, State Contracts in Contemporary International Law (2001) 12(2) EJIL 309, 309-310.309, 317.
[414] Sornarajah (n 36) 417-19.
[415] Ian Brownlie, *Principles of Public International Law* (OUP 2003) 533.
[416] Chorzów Factory Case (1928), PCIJ (Ser. A), No. 17
[417] Anglo-Iranian Oil Company Case (1952), I.C.J Rep. 93.
[418] Ibid at 162.
[419] Sornarajah (n 36) 428.

compensation. In *Texaco Overseas Petroleum Co/California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, after reviewing the jurisprudence of various international cases and the writings of international jurists, the arbitrator came to the conclusion that the appropriate remedy was to award restitution.[420] In contrast, in *British Petroleum Oil Company v Government of the Libyan Arab Republic*[421] and *Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic,*[422] the tribunals awarded compensation. In fact the arbitrator in *LIAMCO* refused to recognise that the act of nationalisation was illegal and did not accept that full compensation was applicable in that case. According to the arbitrator, application of the jurisprudence of previous arbitral awards that had favoured full compensation was invalid, as these awards had been handed down during a time when expropriation was deemed illegal. He further held that although the Hull formula may have been valid historically, it had given way to the requirement merely to pay 'convenient and equitable compensation' and the requirement to pay future profits was not justified.[423] Likewise in *Kuwait v American Independent Oil Company (Aminoil)*,[424] the arbitrator did not find full compensation as being applicable in that case on the basis that Kuwait was a State that welcomed foreign investment. Again as seen in *Aminoil*, *ad hoc* tribunals have not been uniform in their approach to the issue of compensation and awards are often rendered on considerations that are not strictly legal.[425]

Not even domestic courts have recognised the supposed international minimum standard of compensation. In *Banco Nationale de Cuba v Sabbatino*,[426] the U.S. Supreme Court held that "international law rules imposing a duty upon an expropriating Government to pay an alien "prompt, adequate and effective compensation were no longer supported by a consensus of sovereign States, and the validity of those rules were so ambiguous as to make them inapplicable to the case."[427] In *Banco Nacional de Cuba v Chase Manhattan Bank*,[428] the U.S. Court of Appeals (Second Circuit) held that failure to compensate at all would be a violation of international law, but it was not clear what international law's standard of compensation was. In the English case *Williams and Humbert v W. & H. Trademarks*[429] it was held that a Spanish decree underpinned the taking of a family's property holdings could not be questioned before English Courts on the basis that inadequate reparation was made. Similarly to the U.S. Supreme Court's approach in *Sabbatino*, Lord Templeman's approach suggests that in contemporary foreign investment law, attitudes to property have changed considerably, and that State's right to nationalise has received overall recognition, thus, compensation has to be calculated taking these changes into account. Nonetheless, the award of full compensation has become commonplace and the amounts growing to unprecedented levels. However, as Aminoil clearly illustrates, like other aforementioned facets of investor-State arbitral proceedings, determination of compensation is not underpinned by any recognisable set of legal principles, but by the regime's desire to promote as high a level of protection for foreign investment as possible. The assumption is that the foreign investment regime harbours a neoliberal bias in favour foreign investment protection, which has resulted in the economic exploitation of developing countries since they ascended to Statehood. Coupled with the neoliberal orientation of BITs and international arbitral tribunals like those constituted under the auspices of ICSID, collectively these interpretations are aimed at fostering as high a degree of legal protection for foreign investment as possible. They are common to tribunals deciding all investment disputes regardless of the host-State's degree of development. However, as most developing countries depend primarily on foreign investment often forgoing key domestic interests to attract investment;[430] investor-State arbitration's neoliberal investment protection bias has its most glaring effect on these capital-importing States, hindering their ability to exercise their right to economic self-determination such as implementing polices aimed at economic reform to foster economic growth.

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[420] (1977), 17 I.L.M. 3 at 92-109.
[421] (1973), 53 I.L.R. 297.
[422] 20 I.L.M 161 (1981).
[423] Libyan American Oil Company (LIAMCO) v Government of the Libyan Arab Republic 20 I.L.M 161 (1981) at 143-144.
[424] (1982) 66 I.L.R. 519.
[425] Sornarajah (n 36) 430.
[426] 376 U.S. 398 (1964) at 428.
[427] Joel Paul, 'The New Movements in International Economic Law' (1995) 10 American University Journal of International Law and Policy 607, 611.
[428] (1981) 658 F 2d 875
[429] [1986] AC 368.
[430] Chung (n 23) 953, 955.

## VI. Exposing the Dark Side of International Law From the Perspective of the Foreign Investment Regime

Undeniably international law has served the collective ambitions of developing countries, notably in their ascendency to Statehood following almost five centuries of colonial subjugation. It was international law and the U.N, one of its elite institutions, which was responsible for the anticolonial revolution of the post-war era.[431] The doctrine of self-determination, which underpinned the decolonisation movement by asserting the right of colonies and colonised peoples to determine their political, social, cultural and economic destinies has since become a prominent international law principle and is enshrined in the Charter of the U.N.[432] Developing countries have contributed to the body of international law by ratifying numerous treaties. Many countries have enshrined respect for international law in their constitutions. Developing country-organisations such as the Asian African Legal Consultative Organisation (AALCO) and the African Union have time and again expressed their deepest respect for international law. Thus, Southern States have generally recognised the importance and binding nature of international law. However, this does not mean that these States accept that international law has been wholly beneficial to them. Southern States have time-to-time expressed dissenting attitudes to various international law rules. It will be remembered that the Asian African Legal Consultative Committee (AALCC), later superseded by the AALCO, was established at the peak of the decolonisation movement to advocate and protect the interests of new Afro-Asian States in international law, notably in IEG.[433] In many respects, in the South, IEG is perceived as having contributed to the marginalisation of Southern States as it continues to be dominated by developed countries. As the forgoing reveals, this contention is of particular concern in the context of foreign investment law. This regime of international law seems to have merely facilitated the undermining of Southern capital-importing States in controlling their economies. Like interntional law generally, although foreign investment law has been somewhat beneficial to developing countries,[434] generally its rules seem to be a way to hold developing countries to account to foreign investors. This is perceived as undermining Southern States exercise of economic self-determination due to their heavy reliance on foreign investment.

Whatever ambiguity that may have characterised the legal status of economic self determination in the past, this principle can now be said to be a significant international law principle. Implicit reference to economic self-determination can be found in the U.N. Charter and in other international accords such as the OAS and Banjul Charters. Nevertheless, reference to economic self-determination has mostly been articulated in U.N. General Assembly Resolutions enunciating the doctrine of a States' Permanent Sovereignty over its Natural Resources. General Assembly Resolution 1803(XVII) the most notable of these Resolutions, makes reference to: "(t)he right of peoples and nations to permanent sovereignty over their natural resources".[435] Paragraph 7 is explicit that: "Violation of the 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 economic cooperation and maintenance of peace." Another significant exposition of the doctrine of Permanent Sovereignty over Natural Resources can be found in the U.N. General Assembly Resolution on the Right to Development. Article 1(2) States: "The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."[436] Overtime, economic self-determination has evolved beyond the sphere of natural resources to encompass and empower States to regulate and implement the economic conditions necessary to augment their development. In academic circles economic self-determination has increasingly been recognized as part of the body of international law. Umozurike argues that economic self-determination is a recognised international law principle. It is of special significance to the States that emerged from colonialism since their economies were invariably linked with metropolitan States. It was usual to subordinate colonies' economies to that of metropolitan States; while the former were producers of raw materials, the latter were manufacturers of finished products. To him, this has been one of the main contributory factors to the

[431] Mutua (n 6) 35.
[432] Daniel Thürer and Thomas Burri, 'Self-Determination' (Oxford Public International Law December 2008)<opil.ouplaw.com/view/10.1093/law: epil/9780199231690/law-9780199231690-e873> accessed June 24th 2014.
[433] Article 1 of the Statutes of AALCO (Revised and adopted at the Bali Session, 2004).
[434] Joseph T. McLaughlin, 'Arbitration and Developing Countries' (1979) 13 International Lawyer 211, 213.
[435] UNGAR 1803(XVII), 17 GAOR (1962) Supplement No. 17, (A/5217) p. 15
[436] UNGAR 41/128 of 4 December 1986.

disparity between the rich industrial States and former colonies.[437] Nevertheless, the ability of capital-importing States to exercise their right to economic self-determination is undermined by their heavy reliance on investment capital due to their meagre participation in international trade, 149 developing countries registering only 37% of world trade in 2007 while just 33 developed countries registered almost 60%.[438] This is compounded by the regime's neoliberal bias in favour of investment protection as illustrated above. This undermining of the sovereignty of investment-hosts has been achieved in part in the course of dispute settlement.

This may be attributed, first, to the fact that tribunals in the manner they interpret and apply foreign investment law have accorded little to no legal value to economic self-determination in investor-State arbitration. Economic self-determination is erroneously viewed as *lex ferenda*, by its exposition primarily in UNGARs, which are themselves non-binding. Second, investor-State arbitration as currently oriented is detrimental to developing countries ' effective regulation of foreign investment. Their reliance on investment capital facilitates their acceptance of neoliberal foreign investment rules in BITs, which are then interpreted in investor-State arbitration to protect capital-exporting States economic interests.[439] The pro-investment protection interpretation of these rules, in investor-State arbitration, impedes ability to regulate incoming investment. How does this occur? It undermines developing countries ability to plan their economies to cater to local conditions as past disputants' later investment policies become more investor-friendly even if this prejudices their control of their economies. For instance, despite Libya's post-1970 ban of investor-State arbitration as seen in its promulgation of Article 11(2) of the Libyan Civil Code that rendered void any arbitration clause in future Government contracts, following three unsuccessful arbitrations,[440] Libya later took the economical approach and began accepting arbitration clauses again.[441] Argentina, too, since its 2002 financial crisis that created significant liability for the State resulting in close to fifty arbitration cases against Argentina, has been adopting more investment friendly policies.[442] Moreover, current investment-hosts fully aware of the operation of the investor-State arbitration regime and how other capital-importing States have fared in this system will disregard domestic conditions and endeavour not implement policies that adversely affect foreign investors.

*Philip Morris v Uruguay*[443] provides a concrete example of how investor-State arbitration restricts capital importing States' exercise of economic self-determination. Under President Tabaré Vázquez, the Uruguayan Government started a public health campaign to decrease smoking among Uruguay's population. The movement included raising taxes on tobacco products and strict regulation of labeling, marketing and display of cigarettes packages. A Uruguayan Ministry of Health regulation prevented tobacco companies from labeling and marketing cigarettes as 'light' or 'mild' and required 'single presentation', which allows only 'one pack variation per cigarette brand'. Additionally it required that health warnings would cover 80% of cigarette package surfaces. In response, filed a request for arbitration against Uruguay before ICSID. Philip Morris claimed that since Uruguay's new measures in its anti-smoking policy harmed the company's investment in the country, they violated the provisions of the Uruguay-Switzerland BIT, which applies to its investment in Uruguay. Banai reasons that if Philip Morris proves successful in this arbitration, Uruguay would be required to change its anti-smoking policies and pay compensation.[444] El Salvador also faces a claim for its refusal to grant an environmental permit and gold exploitation concession to Pacific Rim Corp, a Canadian Company, due to concerns that such a concession threatened it citizens' clean water supply. Pacific Rim claims that the refusal to grant the permits violated the treaty's investor rights clauses and makes El Salvador liable to pay damages.[445] Following ICSID's acceptance of jurisdiction and denial of the preliminary relief sought by El Salvador,

[437] Umozurike (n 38) 99.
[438] Gillian Moon, 'Trade and Equality: A Relationship to Discover' (2009) 12(3) Journal of International Economic Law 617.
[439] Schill (n 18) 99.
[440] British Petroleum Exploration Co. (BP) v Government of the Libyan Arab Republic (1973), 53 I.L.R. 297; LIAMCO v Libya (1977), 20 I.L.M 1; and TOPCO/CALASIATIC v Libya, Award (19 January 1977) (1978) 17 I.L.M. 3
[441] Howard Stovall, Arbitration and the Arab Middle East: Some Thoughts from a Commercial Practitioner, Chicago International Dispute Resolution Association<www.cidra.org/winter_2010_newsletter_3> Accessed August 21st 2014.
[442] Arturo C. Porzecanski, 'The Origins of Argentina's Litigation and Arbitration Saga, 2002-2014' (School of International Service American University, Research Paper No. 6, 2015) 3.
[443] (ICSID Case No. ARB/10/7).
[444] Ayelet Banai, 'Freedom beyond the threshold: self-determination, sovereignty, and global justice' (2015) 8(1) Ethics and Global Politics 21, 32.
[445] Pacific Rim v El Salvador, ICSID Case No. ARB/09/12.

the State faces a $315 million claim before ICSID.[446] Such situations significantly affect States' ability to exercise their right to economic self-determination as their right to implement economic reforms and other measures is often fettered by their obligations to foreigners.

## VII. Conclusion

Indeed international law has served the collective objectives of developing countries, notably in their ascendency to Statehood following almost five centuries of colonial subjugation. It was international law and the U.N, one of its elite institutions, which was responsible for the anticolonial revolution of the post-war era. The doctrine of self-determination, which underlined decolonisation by asserting the right of colonies and colonised to determine their political, social, cultural and economic destinies has since become a notable international law principle and is enshrined in the U.N. Charter. Developing countries have contributed to the body of international law by ratifying numerous treaties. Many countries have enshrined respect for international law in their constitutions. Developing country organisations such as the African Union have time and again expressed their deepest respect for international law. Thus, Southern States generally recognise the importance and binding nature of international law. This does not mean that these States accept that international law has been wholly beneficial to them. Southern States have time-to-time expressed dissenting attitudes to some international law rules. In many respects international law is perceived as having contributed to the marginalisation of Southern States as it continues to be dominated by developed countries in a manner similarly to the colonial era. The AALCC was established at the peak of the decolonisation movement to advocate and protect the interests of new Afro-Asian States in international law.

In the economic arena specifically, developing countries have remained mere spectators as opposed to active participants in the working of the international economic system. This can be seen in their meagre participation in international trade since decolonisation. As seen above, as recently as 2007, 149 developing countries contributed to only 30% of interntional trade, 67% being contributed by 33 developed countries. This resulted from their tutelage in the post-colonial era by Western States and institutions to continue trading in primary products, which it was said that they had both competitive and comparative advantages. As such developing countries have relied significantly on capital imports in the form of foreign investments since decolonisation. Critical analysis reveals that developed countries have developed techniques to dominate the foreign investment regime. This domination of international law influence critical internationalism in the post-colonial era. This post-colonial critical internationalism reached its highpoint with the emergence of TWAIL in the 1990s. TWAIL is a multifaceted Southern critique of interntional law. TWAIL, which owes its origin to developing countries' post-colonial struggles such as their meagre participation in international trade and the failed attempt at instituting a NIEO in the 1970s, has as a primary goal to attune international law to cater to the needs of developing countries and their peoples. In the economic arena, TWAIL seeks through politics and resistance to attune IEG in areas such as international trade, foreign investment and international development, to the economic needs of the developing world. A critical facet of TWAIL's critique of IEG has manifested in the regime bias debate, which questions the manner in which the rules of international law are promulgated i.e. with little consultation from developing countries but is then interpreted and applied to these same countries in ways that marginalise their interests. *Inter alia*, the regime bias critique uses developing countries colonial history to expose how IEG continues to facilitate the movement of developing countries resources to metropolitan markets similar to the colonial era. This is particularly true of the foreign investment regime, upon which Southern States have relied so heavily since the post-colonial era.

A regime bias critique reveals how the foreign investment regime's rules, as currently constituted, significantly restrict developing countries' ability to regulate foreign investments. It illustrates how the foreign investment regime disempowers developing countries in their attempts to undertake policies beneficial to their economic welfare. The foreign investment regime is underpinned by the promotion of foreign investment in a way that seeks to bolster the world economy. To promote foreign investment it is fundamental that measures are in place to protect such investment to offer investors the confidence they need to invest abroad. From this, it appears that the regime's regulatory devices i.e. BITs and international tribunals such as ICSID harbours an institutional bias towards foreign investment protection. BITs, which mostly espouse the rules governing foreign investment regime between host-States have come under heavy

[446] Banai (n 444) 21, 32-33.

criticism, and for good reason it appears. Critics illustrate that like other facets of foreign investment regulation, BITs did not become desirable until after decolonisation, when the colonial mechanism was no longer available. Due to developing countries frantic desire to attract investments to supplement their meagre economies, BIT negotiation is a lopsided exercise as developing countries generally concede all the benefits of foreign investments to developed countries. These devices are then relied by foreign investors in a hegemonic manner to hold host-States to account to investors for any actions that is perceived as contrary to BIT provisions. In other words, BITs provide foreign investors with the relevant *locus standi* to bring suit directly against sovereign States–a relatively new development in international law. BITs offer a host of options for the resolution of foreign investment disputes, but ICSID has been by far the most popular institution. However, ICSID too have been implicated in the many criticism that the foreign investment regime currently faces. Like BITs, critics view ICSID as having become necessary only after decolonisation since the colonial investment protection mechanism was no longer available. Since its emergence ICSID have been criticised heavily for its many shortcomings. It is criticised for undertaking reviews of States' domestic policies, harbouring a neoliberal predisposition towards foreign investment protection, paying insufficient regard to the welfare of developing countries and their citizens in its dispute settlement and its lack of an appeal mechanism given the ease with which arbitrariness can occur.

In addition to the numerous institutional criticisms the regime faces, further criticisms manifest in the rules themselves. The rules inscribed in BITs and the manner in which international tribunals interpret these rules further illustrates the regimes predisposition towards investment protection without sufficient regard for host-States. As the forgoing illustrates, the internationalization of disputes; increasingly expansive interpretation of foreign investment to include regulatory matters such as the issuance of licenses and permits; the expansion of the rules relating to expropriation; and application of the Western compensation standard despite it being unfounded in international law, is underpinned by the desire to foster in the regime the highest degree of foreign investment possible. As the forgoing reveals, these rules are generally not underpinned by legal rules. These rules appear to be driven primarily by developed countries to protect their citizens doing business in developing countries. Developing countries have not been key participants in the evolution of the rules. The value of internationalisation is in its elevation of disputes to the realm of international law, thereby neutralising host-States laws and restrict their attempt to justify local acts that affect foreign investors on the basis of domestic laws. The expansion of the meaning of foreign investment to include regulatory licenses and permits has merely been a ploy to protect investors from any regulatory actions on the part of the host-State. Likewise the expansion of the 'takings' rule has been merely an attempt to protect investors from the regulatory authority of the host-States. Thus no longer is a taking predicated on the taking of an investor's physical property. Today any regulatory action that causes the investor loss or restricts his enjoyment of the commercial value of his property may be deemed a taking. The regime's compensation standard, too, reveals a neoliberal bias in favour of property protection. Even though justification for it cannot be found in any of international law's sources the regime continues to apply it to developing countries. The main reason being that it affords investors the best level of protection possible from a commercial perspective.

The regime's neoliberal bias towards foreign investment protection significantly affects the ability of developing countries to regulate foreign investment in ways that are beneficial to them or what is essentially their right to economic self-determination. It restricts the ability of developing host-States to regulate foreign investment. The regime's desire to promote and protect foreign investments in its desire to promote a *laissez faire* world economy affects developing countries' ability to plan their economies, which has contributed to economic disenfranchisement in many States. With that said, while developing countries have secured some victories in international law, this regime has not been wholly beneficial to the category of States often referred to as the global South. As the forgoing reveals, the foreign investment regime, in particular, has not been wholly beneficial to these States. Foreign investment law seems to facilitate the continuation of the economic exploitation of developing countries in a ways that find counterpart in the colonial era.