THE PAST, PRESENT AND FUTURE OF THE ARBITRAL CLAUSE IN FOREIGN INVESTMENT LEGISLATION: IN PURSUIT OF "THE BALANCE"

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Abstract

An analysis was undertaken of the dispute resolution provisions in the foreign investment legislation of twenty-two developing countries in the context of some of the historical and socio-political situations affecting these countries. The laws were classified into three categories according to the formula used in the dispute resolution clause of each. The laws were found either to contain an open unilateral offer, to list a number of options for the investor to choose from, or to have clauses that allow for international arbitration only after a subsequent agreement has been signed by the host state with the foreign investor. The study examines the interpretation of language used in the laws with reference to emblematic arbitral cases and the author hypothesizes on possible outcomes of arbitral tribunals that may find jurisdiction based on such national investment law provisions in the future. A skeptical review of the motivations for countries adopting these legislative provisions, and the limitations and effectiveness of public international law instruments in safeguarding the investor's rights, is also examined. An assessment of the policy considerations developing states make when entering into international agreements related to the promotion of investment is combined with trying to determine the right balance between these considerations and the national regulation of foreign direct investment. Finally, a proposal is made that developing countries may find the right balance between their national interests and those of the capital exporting states and their investors, with respect to dispute resolution, by tailoring their national investment laws to the politically acceptable circumstances of each nation.

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I. Introduction

Tensions between the developed and the developing worlds seem to be increasing again as apparently evidenced, in part, by growing anti-American and anti-globalization sentiment in the Middle East and by the wave of resurgent leftist movements in Latin America.[1] Struggle between the developed and developing countries is of course by no means a new phenomenon,[2] but nevertheless the world economy continues to grow, supply chains that expand over several continents are becoming more common, and private multinationals from the North have more capital than ever invested in countries of the South.[3] Globalization, a term of art that includes varied aspects that range from the social and cultural to the economic and political, is a phenomenon that, although not entirely well understood, continues to change the way business is conducted and countries develop.[4] The journey of a sweater sold in a Walmart in a suburban Missouri town, for instance, may be the product of a chain of events that can be traced back to the

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[1] As to Latin America, generally inspired by Hugo Chavez in Venezuela (1999-present), Evo Morales in Bolivia (2005-present), the perennial Fidel Castro in Cuba (1960-present) and, most recently, by Ollanta Humala in Peru (presidential candidate). See, for instance, Dani Rodrik, Has Globalization Gone Too Far?, Institute for International Economics, 1997, 2 (making reference to the fact that the diverse political movements against the U.S. and other developed countries may be signs of a backlash against globalization and market liberalization policies).

[2] One can quickly recall a number of the terms used in the past to describe similar if not precisely with broad notion: the expansion of empires over conquered territories, the European superpowers over their colonies, the North versus the South, the first world over the third, the center controlling the periphery, and so on. The "periphery" was a term coined by Raul Prebisch, an Argentine economist, in reference to spatial concepts in his economic development model to refer to developing states, as opposed to the developed world, which he termed the "center." The Brazilian sociologist, and later president, Henrique Cardoso coined the "*dependencia* thesis," in accordance with which the poor countries would remain dependent on the rich countries given the international economic balance of power and trade. President of Ghana, Kwame Nkrumah, wrote about "neo-colonialism" and "crypto-colonialism" as a form of colonial dominance through instruments such as FDI and aid, which disguised such dominance. See David Landes, Wealth and Power of Nations: Why Some Are So Rich and Some So Poor, 1999, 328-334. See also Jagdish Bhagwati, In Defense of Globalization, 2004, 12-15.

[3] See Kenneth Vandevelde, The Economics of Bilateral Investment Treaties, 41 Harv. Int'l. L.J. 469, 469-70 (2000) (finding that BITs are an international phenomenon due to the rate they are being negotiated, which was one per day in the mid-1990s).

[4] Frederic Mishkin, "The Next Great Globalization: How Disadvantaged Nations Can Harness Their Financial Systems to Get Rich," (forthcoming, June 2006).

Peruvian villager sitting on a dirt floor tying alpaca yarn, which is then sold to a textile fabricator in Malaysia that then distributes the product to wholesalers, and so on.[5] Entrepreneurs conducting business in the developing world invest capital and apply technology of the developed world, and in this way make many of the comforts of the Western lifestyle possible. Moreover, foreign direct investment (FDI) has allowed economic growth in the developed world to expand beyond the limits of national frontiers.[6] However, whether investment from abroad truly promotes development and economic growth in the developing countries remains a controversial topic.

When FDI is viewed in a historical context, from the start of the 20th century to date, it is evident that a number of the countries of the South have abandoned their nationalistic posture of the past. In general, it would seem that the days of the Calvo Clause,[7] the Drago Doctrine,[8] tension over the Hull Rule,[9] and the massive wave of

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[5] Idea inspired by a lecture by Professor John Ruggie in a Global Governance class at the Kennedy School of Government, Harvard University, Jan. 31, 2006. See also Peter Singer, One World: the Ethics of Globalization, 2nd ed. 2004, 6 (referring to the fact that technology changes people's way of life, particularly the way things are processed for consumption).

[6] See Jeswald Salacuse, Direct Foreign Investment and the Law in Developing Countries, Vol. 15 ICSID Rev., Foreign Investment L.J. 382 (2000).

[7] The Calvo Doctrine, named after the 19th century Argentine diplomat Carlos Calvo, mandated that aliens are not entitled to rights and privileges not accorded to nationals, and that, therefore, they may seek redress for grievances only before the local authorities. The Calvo Clause, a provision that embodied the Calvo Doctrine, became a standard provision in agreements between foreign investors and Latin American countries in the late 19th and early 20th centuries. In a contract between the Venezuelan government and a foreign investor one finds a classic example of the clause: "Disputes and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic in accordance with the laws of the nation, and shall not in any case be considered as a motive for international reclamations." (Reported in Jackson H. Ralston, Orinoco Steamship Company, in Venezuela Arbitration of 1903, S. Doc. No. 316, 58th Cong., 2d Sess. 100, 1904). See generally Donald Shea, The Calvo Clause; a Problem of Inter-American and International Law and Diplomacy , 1955; Denise Manning-Cabrol, The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors, 26 Law & Pol'y Int'l Bus. 1169 (1995).

[8] The Drago Doctrine, named after a note sent in 1902 by Argentine Foreign Minister Luis M. Drago to the U.S., aimed at forbidding the use of force for the collection of public debt in Latin America.

[9] The Hull Rule, named after Secretary of State Cordell Hull who, in 1938, exchanged correspondence with the Mexican government concerning expropriations during the Mexican revolutionary period, entailed a rule of customary international law that would require prompt, adequate and effective compensation to the expropriated foreign investor. See generally, Rudolf Dolzer, New Foundations of the Law of Expropriation of Alien Property, 75 AJIL 553 (1981).

expropriations of foreign ownership have ended, at least for the time being, albeit with certain glaring exceptions.[10] There are still a number of influential authors who continue to send warning signals about a possible reverse trend in the general liberalization of FDI regimes.[11] Those who believe that the developing world has caved in to the pressures exerted on it may see this as a continuous, unstoppable victory of the developed countries over their developing counterparts.[12] This process, on the other hand, may also be interpreted as a stepping stone that will lead developing countries toward the eventual integration of their local economies, which in turn may ultimately lead to the creation of a single global market for the mutual prosperity and development of all.[13]

The popularity of the bilateral investment treaties (BITs) has seen a dramatic rise in the last four decades and has been the most significant contribution to the evolution of a law of FDI to date.[14] The usefulness of the multilateral investment treaties (MITs) has also seemingly continued to increase and their importance is paramount as regards the

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[10] We say that for the time being this seems to be the case as certain scholars suggest that the oscillation between pro-market and anti-free-market policies are simply part of a historical cycle that developing countries go in and out of. A number of developing countries repeatedly move away from a free market orientation returning to policies that are centered around nationalization and state-intervention, even in light of proven repeated failures. This has been the case of the Chavez government in Venezuela and would appear to be the case in Bolivia under Morales in the western hemisphere, at least so far. See, for instance, Amy Chua, The Privatization-Nationalization Cycle: The Link between Markets and Ethnicity in Developing Countries, 95 Colum. L. Rev. 223, 243 (1995). See also Erste Bank, Emerging Market Weekly 02/05/06, available at http://global.treasury.erstebank.com/display_datei1/0,7047,14916_20060502_0%23EMM%23INT%23EN,00.pdf (reporting that Bolivian President Morales has ordered the military to occupy Bolivia’s natural gas fields after nationalizing the industry and threatening to expel foreign companies that do not recognize state control).

[11] See generally Dani Rodrik, “The Global Fix,” The New Republic, Nov. 2, 1998.

[12] See generally Muthucumaraswamy Sornarajah, The Climate of International Commercial Arbitration, 8 J. INT'L ARB., 47, 61 (1991); Amr Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism, 41 Harv. Int'l L.J. 419 (2000).

[13] Calvin Hamilton & Paula Rochwerge, Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties, 18 N.Y. Int'l L. Rev. 1, 56 (2005).

[14] Kenneth Vandevelde, The Economics of Bilateral Investment Treaties, *supra* note 3, 469-70 (finding that BITs are an international phenomenon due to the rate they are being negotiated, which was one per day in the mid-1990s). See also UNCTAD, World Investment Report 2003: FDI Policies for Development; National and International Perspectives 89, U.N. Doc. UNCTAD/WIR/2003 (Sept. 4, 2003) (estimating that by the end of 2002 there were about 2181 BITs in effect).

potential effects that such multilateral arrangements could have on FDI in the future, in the sense that more states may continually join forces to create groups for economic integration and mutual assistance.[15] The rise of BITs has had consequences other than just seemingly increasing the flow of FDI to the developing world. The debate over the substantial political implications of BITs is also an essential element in analyzing their importance in a historical context, as well as their future role.

Perhaps the most important feature of the modern BIT has been the willingness of host states to submit FDI disputes to international arbitration, since among other reasons that will be expanded on in this paper, this represents, to some degree, the ultimate relinquishment of age-old notions of national sovereignty. In general, today "whether at the international, regional, or bilateral level, many states are now more receptive to the concept of surrendering economic sovereignty in order to achieve economic growth and to establish an investor friendly market."[16] Investor-state arbitration has seen a dramatic rise in popularity and acceptance, so much so that it has become a prerequisite for developing countries to attract serious foreign investors.[17]

This study focuses on an analysis of the evolution of investor-state arbitral clauses in the principal instruments used to create the required networks or commitments, which in turn theoretically promote FDI. The examples to be studied are primarily the

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[15] Although there are only a few MITs in existence as of this date, some authors argue that developing states will begin to feel pressured by BIT commitments, as investors will threaten to resort to international arbitration when they are unhappy with government policy and we may see increased migration to MIT type arrangements. See Luke Peterson, Challenges under Bilateral Investment Treaties Give Weight to Calls for Multilateral Rules, World Trade Agenda, World Trade Agenda, http://www.iisd.org/trade/ilsdworkshop/resources_es.htm (last visited 4/20/06). More generally, this is the future that Martin Wolf foresees and encourages as a means for countries to increase trade and prosperity. See Martin Wolf, Why Globalization Works, Yale Univ. Press, 2005.
[16] Michael Geist, Toward a General Agreement on the Regulation of Foreign Direct Investment, 26 Law & Pol'y Int'l Bus. 673, 678 (1995).
[17] Amr Shalakany, *supra* note 12, 421.

contractual agreements between states and investors, BITs, MITs, and, especially, the foreign investment legislation of various developing states. Practitioners and publicists have contributed significantly to the scholarship in these dynamic areas, with particular emphasis on the staggering popularity of BITs, investor-state arbitration and the relevance thereof to development. Indeed, these topics are increasingly in vogue and will likely continue to be. Moreover, the world will probably see a sharp rise in investment arbitration before international tribunals over the coming years.

Most of the literature in this field has concentrated on the more controversial use of the BITs and, more recently, MITs. In contrast, relatively little has been written about the evolution of national foreign investment laws, their significance and the potential for future liberalization or more efficient regulation of FDI through national legislation. In fact, much of the research done thus far on national FDI legislation has been carried out mainly by Antonio Parra, who until recently was the long-serving deputy secretary-general of ICSID and the managing editor of the ICSID Review.[18]

A number of modern scholars and policy makers focus their attention on trying to encourage countries to enter into regional or global arrangements.[19] For example, in the last two decades authors have discussed the possibility of reviving the OECD's efforts to create a global set of standards to regulate FDI, and there has been a revival and consolidation of interest in the Multilateral Investment Agreement (MIA).[20] Our

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[18] Antonio Parra served as the ICSID deputy secretary-general and managing editor of ICSID Review essentially from their inception until he retired in 2005. See Antonio Parra, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, ICSID Rev., Vol. 12, No. 2, 287 (1997).; Antonio Parra, The Scope of New Investment Laws and International Instruments, in Economic Development, Foreign Investment and the Law, 27- 44 (Robert Pritchard Ed., 1996).
[19] See, for instance, Calvin Hamilton & Paula Rochwerger, *supra* note 13, 18.
[20] See World Trade Organization (WTO), Ministerial Declaration of 14 Nov. 2001, ¶21 & ¶22; WTO, Ministerial Declaration of 3 Sept. 2003, ¶14.

hypothesis, though, is that state actors, in general, are seemingly not ready or willing to join regional or global mechanisms that provide further guarantees to foreign investors. In fact, states have recently shied away from proposals of this sort. Again, there is little doubt that BITs and MITs have changed the foreign investment scene, but there may be underlying limitations to these instruments. For instance, BITs have "proved an open invitation to unhappy investors, tempted to complain that a financial and business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government and delighted by the opportunity to threaten the national government with a tedious, expensive arbitration." [21] It is precisely this proposition that is being tested and will continue to be scrutinized in the near future by virtue of the sharp rise in investor-state arbitrations that rely on either BITs or MITs for invoking the jurisdiction of the arbitral tribunal in so many of these cases.[22]

A decade and a half ago Professor Vagts pointed out that “BITs have not yet been put to the test so that we do not know how much they enhance the security of foreign investment.”[23] However, this assessment may no longer seem to be the case. With the exponential increase in arbitration before ICSID and under NAFTA, and by observing the number of arbitral awards handed down in favor of foreign investors, it would seem that BITs have been effective in providing foreign investors with relief. Hence, the question posed by Guzman: has the movement in favor of the protection of the rights of the

[21] Luke Peterson, Challenges Under Bilateral Investment Treaties Give Weight to Calls for Multilateral Rules, *supra* note 14, 20 (quoting William Rogers' statement that unhappy investors will use the threat of arbitration to respond negatively to government policy).
[22] See David Gantz, Investor State Arbitration Under ICSID, the ICSID Additional Facility and the UNCTAD Arbitral Rules, www.usvtc.org/.../Vicrnam%20IV%20-&20Investor%20-%20State%20Arbitration% C20outline%rev2.pdf (last visited 12/28/05) (stating that as of September 2003, 124 ICSID cases had been registered since 1965, of which 63 were pending).
[23] Detlev Vagts, “Protecting Foreign Investment: An International Law Perspective,” in Foreign Investment in the 1990s 102, 112 (C. Wallace ed., 1990).

investor been too fast, perhaps harming the interests of the host state and its environmental and other interests?[24]

Accordingly, the suggestion is that by using investment legislation, developing countries have access to a domestic solution to better regulate FDI, without being forced to commit themselves to international agreements, particularly in light of doctrines such the as irrevocability of state consent granted in national legislation further elaborated on in Section XII, *infra*. In terms of the arbitral clause, by regulating FDI through national legislation, based on an assessment of national policies and priorities, not only will this process give the host states a better understanding of their particular situations, but may also allow them to limit their consent if they so desire. By conceiving the terms of unique national legislation, host countries competing for FDI can, in principle, create an investment climate in which the host state can receive the maximum benefit from FDI in those areas where it is deemed necessary, while at the same time not be subjected to externally imposed conditions. Thus, the question we pose is whether or not investment legislation could be the best tool to balance the rights of the investor and the regulatory concerns of the host state.

II. Reflections on FDI and Development Policies

The establishment of regimes for the promotion of FDI was generally associated with policies that evolved into what was coined the "Washington Consensus" and the neoliberal policies promoted under the auspices of the international financial institutions

[24] Andrew Guzman, Why LDCs Sign Treaties that Hurt Them, Explaining the Popularity of Bilateral Investment Treaties, 38 Va. J. Int'l L. 639, 659.

("IFI's").[25] At one point, even in cases where developing countries were hesitant to implement liberalization policies, the structural adjustment plans that were imposed on countries by the IFI's—principally the World Bank and the IMF—as a condition for receiving loans left developing countries with little choice but to comply.[26] Policies directed at liberalizing trade, eliminating barriers to foreign capital flows and, in general, the immediate reduction of the intervention of the state in the domestic economy, were seen to be essential to encourage FDI.[27] On the other hand, in the last several years a great deal of criticism has surfaced concerning theories calling for the adoption of highly liberalized models. Economists such as Stiglitz and Rodrik, for instance, call for a gradual opening of developing economies, a less critical approach to heterodox development theories by the North and the application of Keynsian economics when necessary.[28] An entirely open economy may not be the right solution as the weak market structures of developing countries require the state to intervene constantly applying policy measures in an effort to achieve economic objectives.[29] In any case, attracting FDI has most often been associated with the liberalization of controls and, more specifically in the context of this study, this has entailed the liberalization of dispute settlement

[25] Peter Growman, Neo-liberal Theory and Practice for Eastern Europe, New Left Rev., Oct, 1995, 3.

[26] Kenneth Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transant'l L. 502, 515 (1998).

[27] John Williamson, Did the Washington Consensus Fail?, Outline of Remarks at CSIS, Washington DC: Institute for International Economics, November 6, 2002; Moises Naim, Fads and Fashions in Economic Reforms: Washington Consensus or Washington Confusion?, Working Draft of a Paper Prepared for the IMF Conference on Second Generation Reforms, Washington DC, October 26, 1999.

[28] See Dani Rodrik, Rethinking Growth Policies in the Developing World, Oct. 2004, 5 (unpublished working paper); Joseph Stiglitz, Whither Reform? Ten Years of the Transition, World Bank Annual Bank Conference on Development Economics, 1999, 76 (arguing that capital controls on inflows may serve the needs of developing states well). See Ethan Kaplan & Dani Rodrik, NBER Working Paper 8142 (Feb. 2001) concerning steps taken by the Malaysian government to stabilize the "ringgit."

[29] See Roberto Unger, What Should the Left Propose?, Verso, 2005, 65 (making reference to the fact that the countries that least follow formulas of market liberalism, such as China and India, have done well and, hence, the best formula may be "markets and globalization… but on our own terms").

mechanisms, so that the state and the investor are subject to settling disputes before international arbitrators and not before local courts.[30]

When analyzing the effect of FDI on development, there are a number of factors to take into account for policy makers when tailoring their national legislative environment, most of which are beyond the scope of this paper.[31] One question of underlying importance, however, that continues to resurface in the literature is the debate as to whether FDI really does increase trade flows, prosperity and overall well-being in developing countries.[32] The dependency theorists, for instance, believe that multinational

[30] As part of an arbitration agreement, BIT or in the investment law, it can be provided that parties can waive the need to exhaust local remedies before any recourse is had to international arbitration. Article 26 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, in force 14 Oct. 1966, 1 ICSID Rep (ICSID Convention), however, expressly excludes such a waiver unless there is a provision to the contrary. Moreover, where an agreement to arbitrate has been entered into there is a presumption that there has been an express waiver of the rule of local remedies. See Chittharanjan Amerasinghe, Whither the Local Remedies Rule?, ICSID Review, Vol. 5, No.2, 292 (1990). See also Report of the World Bank's Executive Directors on the ICSID Convention, 18 March 1965, reprinted in Doc. ICSID/2 at 10-11.

[31]One item however is determining if the country is concerned with either long or short term development goals which in turn will influence the "type" of FDI policy makers would want to attract. If the country had short-term goals, such as increasing exports and employment as fast as possible, as in the cases of Taiwan, Singapore, Malaysia and Mexico at one point, the country may try to incorporate the *maquiladora* concept into its law. This arrangement allows for raw materials to be imported into the host country for a short period of time during which an industrial activity or service is carried out. On the other hand, countries seeking long-term development goals may avoid this sort of regime in favor of one in which they can establish a "high standard foreign investment regime" that ensures rule of law, democratic institutions and a stable economy. See Alfred Escher, Foreign Direct Investment, in Legal Aspects of Foreign Direct Investment, 30 (Daniel Bradlow and Alfred Escher, Ed., 1999); Carlos Parra, How to Use Maquiladoras in Mexico Today, 6 U.S.-Mex. L.J. 111, 119 (1998). A typical form of maquiladora is that a subsidiary of a U.S. parent corporation operates a manufacturing or assembly plant in Mexico. The U.S. parent provides the management, equipment, and inventory to the maquiladora, and the Mexican maquiladora in turn provides the plant infrastructure and the work force. Also see Sandra Shippy & Patrick Martin, Legal and Practical Issues Involved with Maquiladora Financing, 8-SPG L. & Bus. Rev. Am. 253, 256 (2002).

[32] For a summary of the arguments for and against, see UNCTAD, Series on Issues in International Investment Agreements, Foreign Direct Investment and Development, (UNCTAD/ITE/IIT/10(Vol.I)) 1999. This UNCTAD publication mentions that there are areas in which the impact of FDI can be negative, as in the case of stifling competition, restricting certain business practices, appreciation of the exchange rate, and when FDI leads merely to the exploiting of static comparative advantage and to a continuing reliance on existing local endowments. Other arguments concerning trade figures are also presented, such as whether "intrafirm trade" distorts the actual benefits of FDI, as it is estimated that as much as fifty percent of international trade occurs between affiliated companies. See Robert Lawrence, How Open is Japan?, in Trade with Japan: Has the Door Opened Wider, 14 (Paul Krugman, Ed., 1991).

corporations (MNCs) come to serve the interests of the home country,[33] and are able to escape host country controls by associating themselves with the politically influential elite of the developing world. The fall of communism, together with successive financial crises in emerging economies, has quelled much of the animosity toward foreign multinationals and has led to a receptive attitude toward FDI. Today there generally seems to be a consensus "that FDI can play a key role in the economic growth and development process."[34] In addition, FDI provides the host state with numerous other benefits, such as the introduction of new technologies, management skills, capital, and the creation of new jobs. Moreover, in a recent UNCTAD report, it was "estimated that global FDI rose by 29 per cent…reflec[ting] an estimated 39 per cent increase of flows to developing countries."[35]

Finally, an issue closer to the scope of this study has been the discussion concerning the effectiveness of BITs in stimulating increased flows of foreign capital to developing countries.[36] Whether this correlation is a positive one remains doubtful.[37] Critics of BITs have charged that the historical experience provides little evidence that investment treaties generate increased investment flows.[38] A correlation between BITs and the attraction of foreign investment may never be able to be established and if one

[33] That is to say MNCs "plunder" the host states economies and take the revenue back to the home state. See Muthucumaraswamy Sornarajah, The International Law on Foreign Investment, 2004, 57.
[34] As contained in "A Partnership for Growth and Development," UN Doc, No TD/378, adopted at UNCTAD 1996.
[35] UNCTAD Investment Brief, No. 1, 2006, Investment Issues Analysis Branch of UNCTAD; UNCTAD Press Release, at UNCTAD/PRESS/PR/2006/002, 23 Jan. 2006.
[36] See William Lovett, Reflections on the WTO Doha Ministerial: Bargaining Challenges and Conflicting Interests: Implementing the Doha Round, 17 Am. U. Int'l L. Rev. 951, 972 (2002) (noting that BITs have opened up foreign investment in many countries due to the heightened confidence they provide).
[37] See Burns Weston, The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth, 75 Am. J. Int'l L. 437, 461 (1981) (acknowledging the problematic nature of investment treaties on the host countries, usually developing nations).
[38] Joseph Stiglitz, Fair Trade for All: How Trade Can Promote Development, 2005, 150.

could be developed, the correlation may be negative.[39] This was precisely the conclusion reached in a study conducted by World Bank Senior Economist Mary Hallward-Driemeier in which BITs were found to have apparently stimulated little foreign investment.[40] Unfortunately, there is no solid evidence that BITs have promoted increased FDI or, consequently, development.[41] This lack of statistical data, together with mounting political pressure by local constituents in developing countries, may force leaders to revise their policies and to ask themselves whether it is worthwhile to surrender so much political sovereignty in favor of foreign investor interests when “the quid pro quo that the host state receives is tenuous and uncertain.”[42]

Notwithstanding, most scholars, even from seemingly contradictory schools of thought, seem to agree on the conclusions offered by Richard Posner in his reflection on legal frameworks for development; Posner argues that those countries that have implemented the “rules first” criteria by creating the proper legal and economic framework within their country before signing international agreements or opening their markets have faired better than those that did not take these antecedent steps.[43] Indeed, those countries with weak domestic institutions, including the protection of private property, have not received significant additional benefits and BITs have not acted as a

[39] Kenneth Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, *supra* note 26, 528.
[40] Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit…And They Could Bite, Policy Research Working Paper 3121, The World Bank Development Research Group Investment Climate, Aug. 2003, 22.
[41] Kenneth Vandevelde, The Political Economy of a Bilateral Investment Treaty, 92 Am. J. Int’l L. 621, 634 (1998).
[42] Muthucumaraswamy Sornarajah, *supra* note 32, 268.
[43] Richard Posner, Creating a Legal Framework for Economic Development, The World Bank Research Observer, Vol. 13, no. 1, Feb. 1998, 4. See also Fernando De Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else, 2000, 153-194.

substitute for broader domestic reform.[44] Hence, perhaps the focus should be on reforming national legislation and consolidating domestic institutions before countries attempt to open their economies to wide-scale foreign investment.[45]

III. FDI and the Competition for Foreign Investment

In the context of modern international dispute settlement, FDI has a relatively short history that can be traced back to the failed negotiations to create the International Trade Organization at the end of the 1940s. During these negotiations the developing countries expressed their fears that pro-foreign investment rules would lead to relinquishment of control over their natural resources and industries necessary for their economic survival.[46] Developing countries then expressed a desire to reserve their rights to expropriate foreign investments and to guarantee their freedom from the exertion of political influence by the capital exporting countries. The political establishment and the business community of the North found these conditions unacceptable and as a result the ITO was stillborn.[47]

Historically, developing countries as a group have opposed economic hegemony and the resulting loss of elements of control that are traditionally related to the concept of sovereignty. The ability of states to regulate through local law, and to adjudicate and

[44] Mary Hallward-Driemeier, *supra* note 40, 22.
[45] In a report on the considerations made in trying to determine what makes certain countries attractive for foreign companies in the mining industry the most important were tax constancy, a record of respecting the law and sustained economic policy. See Vilhena Filho, Main Considerations in the Formulation of Mining Policies to Attract Foreign Investment, in Applied Earth Science: Transactions of the Institution of Mining & Metallurgy, Section B, Dec, Vol. 111 Issue 3, 177 (2002).
[46] This sentiment was voiced by a number of countries during the negotiations leading to the 1947 Havana Charter, See Aleck Ostry, A New Regime for Foreign Direct Investment, Group of Thirty, Washington D.C., 1997, 34.
[47] A couple of decades later, in the 1970's, in part exacerbated by the call for a New International Economic Order (NIEO), a wave of nationalization and expropriation ensued. See Kenneth Vandevelde, A Brief History of International Investment Agreements, 12 U.C. Davis J. Int'l L. & Pol'y 157, 166 (2005).

decide disputes arising between a state and a private enterprise have traditionally been considered to be fundamental rights of states. During the middle and late nineteenth century it seemed clear that developing countries had been able to effectively group together to oppose what were considered to be oppressive, intrusive violations of their sovereign rights. As a general proposition in the historical context, FDI, which entails foreign control over the domestic means of production, was bound to engender ideologically-inspired political opposition. FDI, at the time, was seen by developing countries as a "form of economic colonialism."[48]

The General Assembly of the United Nations would serve as the forum that would allow developing countries to voice their opinions on these matters. The heyday of the debate, which highlighted the North-South tension over capital investments abroad, came during discussions related to the right of developing states to expropriate foreign properties. In 1974 two highly significant steps were taken by the developing countries. First, the New International Economic Order ("NIEO") was passed, which in its relevant section read as follows:

> "The application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which might arise

[48] Remarks by Kenneth Vandevelde, in Toward an Effective International Investment Regime, (M. Lugard, ed.) 91 Am. Soc'y Int'l L. Proc. 485, 487 (1997).

should be settled in accordance with the national legislation of each State carrying out such measures."[49]

Although the declaration called for "the broadest cooperation among all States," especially between the developing and developed nations, the declaration also called for "non-interference in the internal affairs of the State," and could be characterized as a call for reinforcing of the dispute-settlement prerogatives of the developing-host state judiciary. "No State [would] be subjected to economic, political or any other type of coercion to prevent the free and full exercise of th[e] inealianable right,"[50] to adjudicate matters in local courts.

The second victory claimed by developing states, amounting to a "monument to that sense of euphoria"[51] at the time, was the adoption of the Charter of Economic Rights and Duties of States.[52] The Charter would theoretically give each state the right to resolve investment disputes according to domestic law, thereby returning control of the settlement of disputes back to state courts. The Charter's relevant provision in this respect read as follows:

[49] GA Res. 3171, Dec. 4, 1974 was approved by an overwhelming majority: 108 countries voted in favor, 1 against and with 16 abstentions.
[50] GA Res. 3201, ¶4(d) Dec. 4, 1974, UN Doc. A/282/43.
[51] Detlev Vagts, Foreign Investment Risk Reconsidered: The View from the 1980's, ICISID Rev., Vol. 2, No.1, 6 (1987).
[52] Charter of Economic Rights and Duties of States (the Charter), December 1974, GA Res 3281, available at http://www.un.org/documents/ga/res/39/a39r163.htm (last visited 4/24/06). The principles of international coexistence embedded in the United Nations Charter implicitly assume that each member state is independent and enjoys equal legal status, and that each state has the capacity to effectively execute its sovereign rights and obligations. See generally Oscar Schachter, International Law Theory and Practice 30 (1991).

> "In any cases where the question of compensation gives rise to a controversy, *it shall be settled under the domestic law of the nationalizing State and by its tribunals* [emphasis added] unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States, and in accordance with the principle of free choice of means."[53]

This nationalistic sentiment was only exacerbated by the oil arbitrations being decided at the time by the "white men."[54] In a number of cases arbitral awards resulted in outcomes with a significant gain to the investor.[55] This was especially perceived in three landmark cases: *BP Exploration v. Lybia,*[56] *Texas Overseas Petroleum v. Lybia*[57] and *Libyan American Oil v. Lybia.*[58] In these three cases the awards were deemed severe against the host state and today remain controversial. Notwithstanding, they are regarded as having marked the birth of internationalization of foreign investment agreements.[59]

Developing countries around the world soon thereafter began to suffer from debt and energy crises, and from a failure in the implementation of import-substitution policies causing the winds to change once again. The apparent success of the so-called "Asian Tigers" seemed to provide a model for economic development that was based in part on high levels of private foreign investment. The collapse of the socialist economies in the late 1980s further undermined critical views toward foreign investment that, in turn, had been advanced in large part by their now discredited leaders. Moreover, U.S.

[53] The Charter, *supra* note 52, Article 2 (c).
[54] Amr Shalakany, *supra*, note 12, 442.
[55] Detlev Vagts, Foreign Investment Risk Reconsidered: The View from the 1980's, *supra* note 51, 12.
[56] BP Exploration Co. v. Libyan Arab Republic, 1974, 53 ILR 297 (1979).
[57] Texas Overseas Petroleum Co. v. Libyan Arab Republic, 1977, 17 ILM 1 (1978).
[58] Libyan American Oil Co. v. Libyan Arab Republic, 1977, 20 ILM 1 (1981).
[59] Muthucumaraswamy Sornarajah, The Climate of International Commercial Arbitration, 8 J. Int'l Arb., June 1991, at 47, 61.

efforts to launch new rounds of international negotiations and efforts to create and improve the U.S. model BIT helped to foster a new change of attitude. When the GATT Uruguay Rounds concluded, the MNCs were the major contributors of trade, finance and technology for a number of regions around the world, injecting into their economies new inflows of capital and bringing with it a renewed sense of hope for future prosperity for the developing countries. Economists and other developmentalists at the IFI's, and especially the World Bank, called for a new focus that would entail the liberalizing of economies under the Washington Consensus. Developing countries, some with great reluctance, came to the realization that "their dream of economic development might well depend upon their ability to provide a favorable climate for foreign investment, but they would have to compete for such investment."[60]

IV. Importance of BITs and MITs

Before analyzing the importance of BITs in the North-South relationship, it may be noted that our analysis refers primarily to BITs signed between developed (capital exporting) and developing (capital importing) states. Although in the last decade the number of BITs and MITs that have been entered into between developed states have increased, we submit that the political motivation behind these BITs, as opposed to the North-South BITs, is quite different.[61]

Notwithstanding certain contrary events commented on *supra*, until the early 1980's the developing world seemed to be making progress in defending its right to

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[60] Remarks by Kenneth Vandevelde, *supra* note 48, 485.

[61] Samuel Asante, International Law and Foreign Investment: A Reappraisal, 37 Int'l & Comp. L. Q. 588, 607 (1988) (commenting that normally the BITs concluded by developing countries with capital-exporting states constitute little more than "assurances and privileges conceded to foreign companies in return for the bundle of benefits expected from a purely bilateral relationship").

resolve disputes with foreign investors in local courts, at least in a formalistic sense. However, over the last two decades the situation has changed and the North has been able to make use of the BIT concept to diffuse the group efforts of the developing states. Before the introduction of BITs, developing states had a greater ability to control inflows of foreign investment due to notions of sovereign rights of control, notwithstanding the fact that the exercise of sovereignty over what for some should be deemed a purely domestic matter could be restricted by an international treaty establishing rules for how such a matter should be resolved.[62] In this context bilateral and multilateral investment treaties could impose agreed standards of treatment for foreign investment.

Agile strategists had begun to develop more efficient ways to protect the foreign investor from the ability of developing countries to suddenly change the rules of the game. The International Center for the Settlement of Investment Disputes (ICSID) was created by the Convention on the Settlement of Investment Disputes (the ICSID Convention)[63] to provide a forum for conflict resolution in a framework which balanced the interests and requirements of all the parties involved, and attempts in particular to "depoliticize" the settlement disputes.[64] Although at first ICSID's popularity seemed doubtful, with the proliferation of the BITs the Center would be propelled into the eye of the mounting storm.[65]

Even though the U.S. continued to promote its bilateral treaties of friendship, commerce and navigation that contained provisions intended to protect U.S. investments

[62] Muthucumaraswamy Sornarajah, *supra* note 32, 105.
[63] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.
[64] Ibraham Shihata, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, ICSID Rev., Vol. 1, No. 1, 1986, 4.
[65] As of June, 30 2005 155 states had signed the ICSID Convention.

abroad, it was the European countries that successfully mass marketed a model that today more closely resembles the modern BIT. Primarily Germany, Switzerland, France, the United Kingdom, the Netherlands, and Belgium advanced the notion of promoting investment abroad by negotiating certain protective measures for their nationals investing abroad.[66] By 1977 the European countries had concluded approximately 130 BITs with a number of developing countries.[67] Subsequently, the U.S. followed suit, initiating its own BIT program in 1981. Currently the U.S. has entered into 48 BITs with developing countries, with Peru being the latest to have signed a BIT with the U.S., in April 2006. Since the 1980's, then, the popularity of BITs has grown significantly.[68] At the same time, in certain regions of the world MITs have substituted BITs and have been entered into by groups of states, essentially containing, as in the case of BITs, similar provisions offering preferential treatment to foreign investors and a commitment to resort to international arbitration.

V. Political Importance of BITs

The promotion of the BIT effectively undermined the unity of the developing states in their effort to claim and defend their right to domestic adjudicatory practices.[69] In this light, what would seem puzzling were the underlying reasons in this period as to

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[66] The first bilateral investment treaty ever signed (in 1959) was between the Federal Republic of Germany and Pakistan. See Rudolf Dolzer & Margarete Stevents, Bilateral Investment Treaties, 1995, 267-326.

[67] Jeswald Salacuse & Nicholas Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain, 46 Harv. Int'l L.J 67, 73.

[68] Steven Jarreau, Anatomy of a BIT: The United States-Honduras Bilateral Investment Treaty, 35 U. Miami Inter-Am. L. Rev. 429, 430 (2004) (acknowledging the flurry of recent BITs while relying on U.S.-Honduras BIT as paradigm).

[69] Jeswald Salacuse, BIT by BIT:The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries, 24:3 Int'l Law 655, 661 (1990); Mark Bergman, Bilateral Investment Protection Treaties: An Examinzation of the Evolution and Significance of the US Prototype Treaty, 16 N.Y.U. J. Int'l & Pol. 1, 2 (1983).

why developing countries would suddenly begin to sign BITs.[70] Why would developing countries enter into agreements that were viewed as instruments that undermined their independence and control over what they had fought to protect a few years earlier? Moreover, curiously this occurred at a time when there seemed to be a bias against developing countries in international arbitration fora, particularly after the Libyan oil decisions were issued, and in view of renewed doubt as to the benefits of increased FDI flows.

The traditional explanation for this phenomenon is that developing countries saw promoting foreign investment as one of the better ways to stimulate growth and development, and therefore realized that it was in their own interest to encourage foreign investment. Entering into BITs is a step toward the elimination of legal restrictions and exceptions, and part of the inevitable consequence of globalization.[71] By entering into international treaties, this would help to solve the problem created by the confusion stemming from multiple changes in local substantive and procedural rules, and so would generally help to clarify the rules of the game.[72] Developing states may also be prepared to accept certain terms and conditions because of the "special benefits"[73] that they are to enjoy under BITs. A United Nations report captures this sentiment: since "the mid-1970s many of these countries have initiated policies and strategies that depart in certain significant respects from their previous regimes. These new policies on the whole portray

[70] Andrew Guzman, *supra* note 23, 659.
[71] Don Wallace, Jr. & David Bailey, The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions, 31 Cornell Int'l L.J. 615, 619 (1998).
[72] Muthucumaraswamy Sornarajah, State Responsibility and Bilateral Investment Treaties, 20 J. World Trade L. 79, 90 (1986).
[73] Rudolf Dolzer, New Foundations of the Law of Expropriation of Alien Property, 75 Am. J. In'l L. 533, 567 (1981).

a more flexible and pragmatic approach aimed at facilitating and speeding up foreign investment inflows."[74]

The "critical realists," however, would offer another explanation for why, even in light of seemingly little to be gained by BITs in their view, developing countries continue to enter into these arrangements. Developing states may have concluded, albeit with a degree of resignation, that arbitration is necessary and inevitable.[75] Indeed, arbitration characterizes the North-South investment dialogue today, as it seems that developing countries must simply accept international arbitration if they are to attract long-term foreign investment.[76]

Two highly qualified publicists in the field, Guzman and Sornarajah, point out that there seems to be a fundamental difference in the motivation of developing states when acting as a group and developing states when acting individually. "There appears to be a duplicity"[77] in the attitude of these countries in that on the one hand they oppose, as a matter of principle, interference in their internal affairs, while on the other, they continue to sign BITs. Their group bargaining power breaks down as countries begin to compete for investment. This competition leads developing countries, especially among those that lack abundant natural resources and hence an inherent competitive advantage, to accept more developed-country foreign investment conditions in an attempt to attract

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[74] UNCTC, Transnational Corporations in World Development: Third Survey, Nov. 1983, 56-7, available at http://unctc.unctad.org/aspx/ctcTitle.aspx (last visited 4/22/06).

[75] Thomas Friedman argues that global market forces provide for incentives for every nation to put on a "Golden Straight Jacket," which are a set of policies that involve freeing the private sector of the economy and removing restrictions on foreign investment. If a country refuses to wear the Golden Straight Jacket, or tries to take it off, then the currency traders, stock and bond traders, and those who make investment decisions for multinational corporations would be able to quickly take their capital out of the country. See Thomas Friedman, The Lexus and the Olive Tree, 2000, 106. See also Peter Singer, One World: the Ethics of Globalization, 2nd ed. Yale, 2004, 10.

[76] Amr Shalakany, *supra* note 12, 427.

[77] Muthucumaraswamy Sornarajah, State Responsibility and Bilateral Investment Treaties, 20 J. World Trade L. 79, 90 (1986).

as much investment as possible.[78] If this hypothesis is true, then the developing countries will end up competing for a limited quantity and quality of foreign investmest, and as they compete they will lower the possible benefits for the host nation and conditions for state control. The incentive to sign a BIT comes from the ability to get an advantage over one's rival host countries,[79] and hence the countries that are most willing to sign BITs that promise the most favorable conditions to the investor will theoretically attract more FDI. Notwithstanding this perception, presumably there could be formulas incorporated into national legislation that may provide a way for developing countries to offer sufficient guarantees to foreign investors, but without states having to bargain away so much of their regulatory authority and potential tax revenues obtainable from FDI.

VI. International Investment Arbitration

The traditional rule with respect to the settlement of investment disputes was that unless the parties stipulated otherwise, investor-state disputes were to be settled by resort to host-country courts.[80] In contrast, the essential rule stipulated in BITs, MITs and in national legislation intended to entice foreign investment is to resort to international arbitration, a voluntary process in which state and investor parties are deemed to have given their consent to submit their disputes to international arbitration.[81] As the settlement of disputes in local courts of the host state has been "deemed unsatisfactory by

[78] Andrew Guzman, *supra* note 23, 659.
[79] Id. at 659.
[80] Aron Broches, Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, in Selected Essays, World Bank, ICSID, and Other Subjects of Public and Private International Law 167 (Aron Broches, Ed., 1988).
[81] In the context of investment arbitration, Article 25 of the ICSID Convention, for instance, stipulates that both parties must "consent in writing." See the ICSID Convention, *supra* note 63, Article 25.

many Western writers in the context of foreign investment in developing countries,"[82] for this reason host states that agree to submit to international arbitration, whether willingly in the belief that FDI will be attracted and will bring prosperity or because they feel obliged, as discussed above, will be required to honor their commitment to arbitrate.[83]

In order to have recourse to an arbitration procedure, the parties must have agreed either ex-ante or after the dispute has arisen to resort to such procedures. In this respect, the principal feature of the ICSID system, for instance, is its consensual character. In principle, no contracting state or national of such a state is bound to submit a dispute to arbitration under the Convention without having consented to do so.[84] The only formal requirement that the ICSID Convention stipulates concerning the consent of the parties is that such consent be in writing.[85] In the 1965 Report on the Convention, the Executive Directors of the World Bank suggested that the consent of the parties need not occur at the same time and could be given by a series of written exchanges between the parties.[86]

Under the ICSID Convention, the drafters devised three principal mechanisms by which an investor and a state could give their consent. First, the investor and host state can enter into an express agreement that contains a dispute settlement clause. Secondly,

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[82] The World Bank Group, Legal Framework for the Treatment of Foreign Investment, Vol. 1: Survey of Existing Instruments, (1992), 153. Generally arbitration has been seen to offer a number of advantages to both parties. Traditionally among the more important advantages are that arbitral proceedings allow for a the arbitrators to have technical expertise in the matter in dispute (in the petroleum industry this is seen as one of the key factors), neutrality is more likely as foreign investors may fear a bias by local courts, the process is more predictable, it may be kept confidential, awards are enforceable through international instruments, and arbitration is seen to offer more flexibility that may allow for an eventual settlement (as it is less adversarial than ordinary litigation). See generally Tibor Varaday, *et al*, International Commercial Arbitration: A Transnational Perspective, 2nd ed., 2003.

[83] Ambatielos Case, ICJ, May 19, 1953, Mertis, WL 3 (I.C.J.), 1953 I.C.J. 10, 22; Case Concerning Electronica Sicula, S.P.A, ICJ, July 20, 1989 WL 139016 (I.V.J.), 1989 I.C.J. 15; Stephen Shwebel, Justice in International Law, Selected Writings of Judge Stephen M. Schwebel, 1994, 165.

[84] ICSID Convention, *supra* note 63, Preamble ¶ 7, Art. 25(1). See also Ibraham Shihata & Antonio Parra, Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention, 185, ICSID Rev., Vol. 9, No. 2, (1994).

[85] ICSID Convention, *supra* note 63, Article 25(1).

[86] Report of the World Bank Executive Directors on the Convention, Doc. ICSID/2, 575 U.N.T.S. 159.

the host state and the state of which the foreign investor is a national can enter into a BIT or similar treaty in which arbitration is chosen as the method to resolve investor disputes. Finally, by an express provision in its domestic legislation, a host state can grant its consent to submit disputes with foreign investors to arbitration.

Under this last option, the investor has to then also grant its consent. During the preparatory discussions leading to the ICSID Convention it was conceived that a host state could unilaterally grant consent to the jurisdiction of the Center and then if a foreign investor accepted this open offer to arbitrate under the auspices of ICSID, a binding agreement would have come into effect.[87] The Report of the Executive Directors on the Convention points out that a state may "in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Center, and the investor might give its consent by accepting the offer in writing."[88] Although this form of consent has warranted little attention and has been relied on comparatively little in ICSID arbitrations, for scholars such as Paulsson the principle that national investment laws may create compulsory arbitration without privity has been recognized by the international community and if this principle is not accepted, "one must conclude that the 138 States that have signed the ICSID Convention did so in ignorance."[89]

VII. Introduction to Foreign Investment Legislation

A considerable number of developing and emerging market countries have adopted special legislation dealing with foreign investment. In most cases the laws or

[87] Christoph Schreuer, The ICSID Convention: A Commentary, Cambridge, 2001 ¶ 198.
[88] Report of the Executive Directors, 1 ICSID Reports 29.
[89] Jan Paulsson, Arbitration Without Privity, ICSID Rev., Vol. 10, No. 2, 233 (1995).

codes provide for a special authority to be charged with reviewing the proposed foreign investment projects and then conferring the necessary permits, licenses or acceptances. This legislation normally provides that its purpose is to encourage foreign investment, while simultaneously and ostensibly orienting the incoming investment to assure that it favors the development goals of the host country. Often these laws contain provisions intended to guarantee certain minimum protective standards, including most-favored-nation and non-discrimination clauses, references to private property rights and the promise of fair compensation in case of expropriation. Likewise, in many cases these investment laws provide for international arbitration as a means to settle investment disputes.[90]

With regard to dispute settlement clauses contained in such foreign investment legislation, it appears that what may have begun to occur is similar to what was recognized to be happening with the fiscal incentive packages being offered by host countries to attract FDI. That is, developing countries, in their desire to attract FDI, began to offer more beneficial fiscal incentives to foreign investors, which created economic distortions and were financially expensive for the host country. The "race for the best incentive package"[91] may have begun to harm host countries' interests. Accordingly, while such incentives apparently benefit foreign investors, in the long run they may have the effect of undermining a continued willingness on the part of host states to accept submission to international arbitration.

The problem of the repetitive historical cycle of developing countries oscillating in and out of open market/pro-investor regimes to state-interventionist/nationalization

[90] Antonio Parra, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Investment Instruments, *supra* note 18, 314.
[91] Daniel Bradlow & Alfred Escher, Legal Aspects of Foreign Direct Investment, 1999, 32.

policies can be partially explained by the type of FDI framework that some of these countries have adopted.[92] In the past certain free-market, pro-foreign investment regimes repeatedly benefited foreign investors more than local entrepreneurs,[93] even though in the domestic economies local elites and upper class members of society, who usually were politically well connected, already received a disproportionate share of the national wealth and opportunities.[94] As a result of the social antagonisms caused by these tendencies, politicians found that they could gain popular support by basing their campaigns on anti-foreigner and anti-imperialist platforms, as well as other populist grounds. This background of sociopolitical divisions may suggest that for countries with a poor legal culture and infrastructure, shallow markets and general governmental mismanagement the shock of an excessively liberal foreign investment policy may not be able to be pacifically assimilated.[95] Certain developing countries will only be further harmed by liberal policies if a number of "safety-nets" and other steps are not put into place first prior to implementing policies designed bring increased foreign investment. Intelligently and sensitively conceived national foreign investment legislation, then, is one way in which countries could begin to efficiently regulate the inflows of FDI in

[92] Mexico serves to illustrate this point. In this country economic liberalism was the fundamental policy orientation after its independence, but then following the Mexican revolution came a period of nationalizations under Lazaro Cardenas in the 1930's. Shortly thereafter another period of free market policy followed with the reprivitization of many major industries, then followed by another reverse back to nationalization. Today, Mexico is reforming its legislation and policies to encourage foreign investment and an opening of its markets, although this orientation is under threat, depending on the outcome of the national elections in July 2006. With respect to the focus of this paper, Mexico has accepted a liberal arbitral clause under NAFTA.

[93] Amy Chua, Foreign Investment Cycles in Emerging Markets, comments delivered on a panel recorded by Michael Lugard, Toward an Effective International Investment Regime, 91 Am. Soc'y Int'l L. Proc. 485, 500 (1997).

[94] Enrique Carasaco, Law Hierarchy and Vulnerable Groups in Latin America: Towards a Comunal Model of Development in a Neoliberal World, 30 Stan. J. Int'l L. 221, 272 (1994).

[95] Joseph Stiglitz, Fair Trade for All: How Trade Can Promote Development, 2005, 151; Jagdish Bhagwati, In Defense of Globalization, 2004, 255.

accordance with prevailing national criteria, provided that there is sufficient consensus to permit such norms to be enacted.

VIII. Classification of National Investment Laws with Respect to Dispute Resolution Clauses

In the context of the foregoing considerations on the foreign investor – host state relationship, we now turn to an analysis and classification of the arbitration provisions in a selection of developing country investment laws. Many of these legislative provisions have to be analyzed with care as although some national norms do stipulate an unequivocal consent to arbitration, others are not clear or are not inclusive of all types of investment situations; nevertheless, even in these latter cases the norms can often be interpreted in such a way as to confirm the consent of the particular state to acceptance of arbitration.[96] Paulsson, in his seminal article "Arbitration Without Privity" points out the danger of ambiguous legislative provisions, as defendants will be eager to "seize on any ambiguity that might arguably defeat jurisdiction."[97]

Typically, host state investment legislation will offer investors several options in relation to arbitration, which in principle the investor can choose among. These may include an express agreement with the state, ICSID arbitration, or arbitration under the auspices of the International Chamber of Commerce (ICC). Likewise, this legislation frequently offers unilateral guarantees relating to the settlement of foreign investment disputes by a neutral arbitral tribunal. The theory under which arbitral tribunals have accepted jurisdiction in the cases mentioned *infra* is that these legislative guarantees

[96] See also Chritoph Schreuer, UNCTAD Report Dispute Settlement ICSID, 2.3 Consent to Arbitration, UNCTAD/EDM/Misc.232/Add.2, 2003,1-53; Cristoph Sheuer, *supra* note 87, ¶ 262.
[97] Jan Paulsson, Arbitration without Privity, *supra* note 89, 255.

encompass an offer to arbitrate which the foreign investor, by accepting to do so, converts into a legally sufficient agreement to arbitrate the dispute. This was precisely the reasoning of the tribunal in *SPP v. Egypt* (analyzed in Section IX, B).

IX. Classification

The national laws referred to below represent a survey of the arbitration provisions contained in the investment legislation of a number of developing and emerging market economies. Most of this legislation is of African countries, although several Latin American and Eastern European countries are also included. The intent is to review legislation that contains open offers to submit disputes to international arbitration or at least arbitration clauses that could be interpreted in this manner.[98] Most of the countries analyzed had adopted more liberal FDI regimes within a decade of their previous foreign investment law, which in a number of cases also coincided with a period in which these countries signed a number of BITs.

For the purposes of this study these laws have been classified into three categories (see Chart 1.1, below). The first category consists of laws that contain a unilateral and express consent to refer investment disputes to ICSID or the ICC, which is considered to be a unilateral offer that only requires acceptance by the investor. As of 1996 it was estimated that some 45 developing countries had in the last five years enacted new investment laws or codes many of which had open offers of consent.[99] This was an

[98] Our findings generally coincide with a survey conducted by the World Bank in 1992 when a number of codes were found to present a sometimes elaborate and sophisticated menu of options that may be available to investors for dispute settlement. Of the codes surveyed almost half contain a provision whereby the state gives its blanket consent to one or more types of arbitration. See The World Bank Group, Legal Treatment for the Treatment of Foreign Investment, Vol. 1: Survey of Existing Instruments, 1992, 127.

[99] Antonio Parra, The Scope of New Investment Laws and International Instruments, in Economic Development, Foreign Investment and the Law, 27, 30 (Robert Pritchard Ed., 1996).

increase over the number reported in 1994 when Shihata and Parra estimated that "some 20 countries ha[d] followed the suggestion [of the World Bank Executive Directors] and included in their investment legislation provisions containing such general offers or consents to submit disputes with foreign investors to arbitration under the ICSID Convention."[100] The World Bank, under whose auspices most of these surveys of national laws have been conducted, warns, however, that in many cases where unilateral consent is apparently given, the language of the particular provision is ambiguous.[101]

The second category includes laws which, although they refer to the possibility of using ICSID or ICC arbitration, also include a number of other means of dispute resolution and allow the foreign investor the option of selecting one of the procedures specified in the law. Usually these laws also include dispute resolution methods such as resorting to courts or to other conciliation/mediation mechanisms provided for the in the procedural law of the host states. They may also provide for submitting the conflict to an ad hoc arbitration or to lesser known regional arbitration institutions.

Lastly, the third category refers to those national laws that do not contain unilateral offers to submit disputes to arbitration. The laws in this category usually reference the fact that the host state would be willing to enter into an agreement with a foreign investor by which it could be established that if a dispute were to arise, then the parties could resort to arbitration. Again, this category includes only those laws that require an express, individual agreement with a foreign investor before access could be

[100] Ibraham Shihata & Antonio Parra, Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention, 185, ICSID Rev., Vol. 9, No. 2, (1994).
[101] See The World Bank Group, Legal Treatment for the Treatment of Foreign Investment, Vol. 1: Survey of Existing Instruments, 1992, 127 (this study points out that the figure of unilateral consent "should be approached with caution as the clauses concerned are frequently ambiguously drafted").

had to international arbitration. In many of these cases it is the regulating authority that is charged with granting foreign investment licenses that is also responsible for entering into such agreements. Moreover, the agreement to submit disputes to arbitration is usually contained in the initial license the authority grants to the foreign investor.

Chart 1.1: Classification of National Investment Legislation

Country	Category	Unilateral Offer	Condition
Albania	1	Yes	Only refers to expropriation
Kazakhstan	2	No	
Kyrgyz Rep.	1	Yes	3 month "cooling off period"
Armenia	3	No	
Egypt	2	No	
Namibia	2	Yes	Investor must specify in the certificate
Ivory Coast	2	Yes	Investor must ask for it in license
Mauritania	2	Yes	Investor must ask for it in license
Nigeria	2	Yes	Only when conciliation is exhausted
Uganda	2	No	
Zaire	2	Yes	Must consent in the request for admission
Tanzania	3	No	
Ivory Coast	1	Yes	Investor must ask for it in license
Tunisia	3	No	
Botswana	1	Yes	Consent within 1 year
Ghana	2	Yes	Only when conciliation is exhausted
Central African Rep.	2	Yes	Investor must ask for it in license
Ethiopia	2	No	
Mexico	3	No	But highly liberal under NAFTA

El Salvador	2	Yes	
Peru	2	No	
Venezuela	2	Yes	

KEY:

Category 1: Unilateral offer is given

Category 2: List of dispute resolution options is given to the investor

Category 3: Only by agreement

Chart 1.1 lists the countries analyzed in this study and indicates their corresponding category, as described above. Countries in Category 1 will always have a "yes" on the chart under the heading "Unilateral Offer" as these countries have consented to submit disputes to arbitration, usually before ICSID. Countries in Category 2 may or may not have granted their consent unilaterally to submit disputes to arbitration. If the chart indicates a "yes" under the heading "Unilateral Offer," this indicates that those countries, in their investment legislation, have provided for a number of methods of dispute resolution that can be selected by the investor, at its sole discretion. Generally the laws in this category list arbitration and conciliation under the ICSID Convention, ad hoc arbitral procedures under the UNCITRAL Rules, ICC arbitration and some include a regional arbitral institution as the final option. If there is a "no" under the Category 2 "Unilateral Offer" heading, then this state has not made a unilateral offer to submit disputes to arbitration and the express consent of the state is required for the parties to go before the one of the possible methods described in the law for dispute resolution. The final category, Category 3, groups those countries where the investor will only be able to resolve a dispute through an alternative method of dispute resolution when there is an explicit agreement to this effect between the investor and the state. In this category the states listed have not unilaterally consented to submit disputes to arbitration.

In the following section we examine the arbitration provisions in the national investment laws of the countries listed in Chart 1.1.

A. Albania's Foreign Investment Legislation

We first examine the foreign investment legislation of Albania as it serves to illustrate the evolution of the arbitration clause contained in a number of national investment laws. The law of Albania has passed from a regime that affording the investor only a restricted opportunity to resort to international arbitration to one that now incorporates the unilateral consent of the state that only needs to be accepted in writing by the investor to be considered binding and irrevocable.[102] When analyzing the foreign investment legislation of Albania, it is important to keep in mind this country's modern history as it was one of rapid change and legal dynamism, for which reason we provide a brief summary of it here.

i. Recent Albanian History

Albania underwent a radical transformation from a closed economy that some historians considered to be the sole remaining bastion of Stalinism[103] to a rapid shift to an

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[102]Chittharanjan Amerasinghe, The International Center for the Settlement of Investment Disputes and Development through Multilateral Corporations, 9 Vanderbilt Journal of Transnational Law 793, 810 (1976); Christoph Schreuer, *supra* note 87 ¶ 277.

103 Enver Hoxha was the leader of Albania from the end of World War II until his death in 1985, as the First Secretary of the Communist Albanian Party of Labor. He was also Prime Minister of Albania and the Minister of Foreign Affairs. Hoxha's rule was characterized by isolation from the rest of Europe and a firm adherence to Stalinism. See Elez, Biberaj, Albania in Transition : the Rocky Road to Democracy, 1998.

open market economy completely rejecting the previous Marxist-Leninist model. The post World War II closed economy was characterized by the collectivization of agriculture in 1967, the prohibition for its citizens to travel abroad, alliances with the then communist world (Yugoslavia, China and the Soviet Union), and political oppression implemented by the Directorate of State Security.[104] The fall of communism in Eastern Europe in 1989 marked a moment of change for Albania. The national strongman, Enever Hoxha, who had played a vital role in directing Albania's economic policies until the mid-1980s as First Secretary of the Communist Party, was now dead. Multiparty elections were held in 1991, which then led to the victory of the Democratic Party in 1992. Albania's progress toward democratic reform enabled it to gain membership in the Conference on Security and Cooperation in Europe, formally bringing to an end its notorious isolation. Efforts to establish a free-market economy caused severe dislocations, but they also opened the road for Albania to obtain vast amounts of aid from the Western developed countries. Albania was thus well on its way toward integrating its politics and institutions with the West.[105]

Today the Albanian government actively promotes itself as an open market economy wishing to attract foreign investment. It is interesting to note the government-sponsored publicity that Albania has on the World Wide Web, for instance.[106] This is sponsored by the Albanian Ministry of Economy that in turn coordinates the Albanian

[104] Also known as Sigurimi.

[105] It is also important to note that Albania modified its constitution, approving an interim constitution in 1991, a Bill of Rights in 1993, the republican form of government was ratified by a national referendum in 1997 and, on November 28, 1998, a new constitution was adopted. See Daniel Vaughan-Whitehead, Albania in Crisis : the Predictable Fall of the Shining Star, 1999.

[106] See Albanian Foreign Investment Promotion Agency at www.investalbania.com (last visited 2/4/06) and www.anih.com.al (last visited 2/4/06); Albania's Ministry of Economy at www.minek.gov.al (last visited 2/4/06); Bank of Albania at www.bankofalbaniaorg (last visited 2/4/06); Foreign Investors Association of Albania at www.fiaalbania.org (last visited 2/4/06).

Foreign Investment Promotion Agency proclaiming “The Program of the New Government: Albania the most attractive country for FDI” in “Europe’s newest emerging market.”[107] Today Albania has a close relationship with the World Bank and other IFIs. Additionally, the country has signed 22 BITs, most of which were signed between 1992 and 1995.[108]

ii. The Foreign Investment Law

Albania’s current Law on Foreign Investment[109] contains a unilateral offer to submit to international arbitration in the event a dispute may arise between the republic and an investor. In the law, the state gives its consent to go before an international arbitral tribunal and expressly mentions the fact that at the election of the investor, in certain circumstances, the investor may submit a claim to ICSID. Hence, if the investor accepts the jurisdiction of ICSID under Article 25 of the Convention, the Republic of Albania will be bound to arbitrate before ICSID. The current version of the law is the same text relied on by Tradex Hellas S.A., a foreign investor that was able to persuade an ICSID tribunal to proceed to the merits under the presumption that the tribunal had jurisdiction in a case against the Republic of Albania concerning a supposed expropriation of certain properties.[110]

The relevant section of the Law on Foreign Investment reads as follows:

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[107] An Investors Guide to Albania, published by the Albanian Ministry of Economy, http://www.anih.com.al/english/downloads/49.pdf (last visited 2/9/06).

[108] Bilateral Investment Treaties signed by Albania, as recorded and tabulated by the World Bank, at http://www.worldbank.org/icsid/treaties/albania.htm, (last visited 4/16/06).

[109] Law No. 7764 of November 2, 1993, Law on Foreign Investments of the Republic of Albania, ILW, Inc, Release 95-1, Jan 2005.

[110] Tradex Hellas, S.A. v. Republic of Albania, ICSID Case no. ARB/94/2, Decision on Jurisdiction of 24 Dec. 1996, 5 ICSID Rep. 47 (2002).

Article 8, Settling of Disputes

(2) *If a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may choose to submit the dispute for resolution to a competent court or administrative tribunal in the Republic of Albania in accordance with its laws. In addition, if the dispute arises out of or relates to expropriation, compensation for expropriation, or discrimination and also for the transfers in accordance with Article 7, then the foreign investor may submit the dispute for resolution and <u>the Republic of Albania herby consents to the submission thereof, to the International Centere</u>* [sic] *<u>for Settlement of Investment Disputes</u> ("Centere") established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965 ("ICSID Convention").* [111] (Emphasis added.)

This provision gives the investor that has not signed a specific agreement with the state two choices when faced with a dispute. First, the investor may resort to Albanian courts and subject its claim to the application of Albanian law. The second option allows

[111] Translation analyzed by the Arbitral Tribunal in *Tradex Hellas, S.A. v. Republic of Albania*, ICSID case no. ARB/94/2, Decision on Jurisdiction of 24 Dec. 1996, 5 ICSID Rep 47 (2002), 174. Note the translation provided in the text of this paper differs from that found in Investment Laws of the World, compilation prepared by Oceana Publications, Inc, Release 95-1, Jan 2005. The translation of Albanian Law No. 7764 of Nov. 2 1993 offered in this publication varies significantly and the relevant provision reads as follows: Article 8, Settling of Disputes, (2) *If a disagreement with respect to a foreign investment between a foreign investor and the state administration of the Republic of Albania, which is not settled by agreement, the foreign investor may apply to a court or arbitration tribunal competent in the Republic of Albania, in accordance with its compensation for expropriation or discrimination, or with transfers under the Article 7 of this law, and <u>the foreign investor may also apply to the International Center for the Resolution of Investment Disputes (the "Center")</u> established by the Convention for the resolution of investment disputes between states and citizens of other states approved in Washington on March 18, 1965.* We use the translation used in the ICSID award as it seems to be more accurate considering that the Albanian government did not raise objections concerning the translation of the text.

the investor to effectively file its claim with ICSID making use of the Albanian law to invoke state consent. The second option, however, would only be available in certain circumstances, most significantly in relation to cases of expropriation.

As a general proposition, national laws limit the scope of applicability of their norms by defining what sort of legal entity may be considered a foreign investor and in some cases by limiting the activities that a foreign enterprise may engage in. In the case of Albania, however, the definition of who or what kind of entity may be considered to be a foreign investor is quite liberal. Article 1 defines "foreign investors" as any "citizen of a foreign country," "every natural person who is a citizen of the Republic of Albania, but with a permanent residence outside the country," and finally "every juridical person formed under the law of a foreign country."[112] The person, be it natural or juridical, must "seek to carry out… an investment in the territory of the Republic of Albania." Moreover, the law also provides a broad definition of the purpose of the investment that may enjoy the privileges stipulated in the law. A "foreign investment means every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor which consist" of the following: 1) real or personal property, tangible or intangible; 2) a company and rights that flow from every form of participation in a company; 3) loans, monetary obligations or obligations in an activity that has economic value; 4) intellectual property; and 5) every right recognized by law or contract, and every license or permission given in accordance with the law.[113]

Again, contrasting the modern history of Albania in relation to changes in its investment legislation, it is noteworthy that the current definition of what is considered

[112] Law on Foreign Investments of the Republic of Albania, *supra* note 109, Article 1.
[113] Id. at Article 1.

"foreign investment" than that contained in earlier versions of Albanian legislation. The current law applies to almost all investments,[114] while the older laws and regulations only governed the following investments: "movable property and real estate, shares in economic activity with the participation of foreign capital, monetary obligations that are used for the creation of an economic value, and investments for extracting, and exploiting natural recourses."[115] The settlement of disputes between the state and a foreign investor was also much more limited and the old laws did not explicitly mention ICSID as a choice of forum for the investor.[116]

The section that referred to the settlement of disputes read as follows:

> *"The People's Socialist Republic of Albania will encourage the spirit of good faith and cooperation for the speedy and just resolution of disagreements which might arise between the investing parties. If a resolution is not achieved, at the request of one of the parties, the matter can be presented to an arbitrator chosen by the parties."*[117]

This language is evidently vague and could lead to numerous interpretations. Although this provision contains language that may seem to allow a foreign investor to choose arbitration, nevertheless the word "can" is conditioned by the further agreement of the parties, for which reason this wording is considerably less definitive than the

[114] Although the investor can only go before ICSID when there is a dispute relating to expropriation.
[115] Article 2, Decree No. 7406 on the Protection of Foreign Investments in the People's Socialist Republic of Albania, Tirana Gazeta Zyrtare, July 31, 1990.
[116] Decree No. 7406 is dated prior to the date of Albania's accession to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Albania signed on Oct, 15, 1991 and the convention entered into force for Albania on Nov. 14, 1991, as reported in ICSID Annual Report 2005, Sept. 12, 2005.
[117] Law on Foreign Investments of the Republic of Albania, *supra* note 109, Article 8.

language of the 1993 law. In contrast, Article 8 of the 1993 investment law affirms the right of the investor, in defined circumstances, to refer a dispute to arbitration, thereby granting an investor greater legal security when presented with a dispute.

iii. Tradex Hellas S.A. vs. Republic of Albania

Albania's Law on Foreign Investment gave the ICSID arbitral tribunal sufficient leeway to delay its decision on jurisdiction until the merits phase in the case of *Tradex Hellas S.A. (Greece) vs. Republic of Albania*. Tradex, a company registered in Greece, was considered to be a foreign investor under the definitions of the Albanian law: "the clear and detailed wording under the heading "Foreign Investor" did not give room for further conditions"[118] to be imposed by the Albanian government as to whether to consider Tradex as able to enjoy the benefits of the law.

Tradex had entered into a joint venture agreement with a state owned company[119] to undertake engineering, industrial and agricultural investments in Albania. Soon thereafter the joint venture was dissolved as Tradex claimed that a significant part of the farm property that was the object of the joint venture had been expropriated.[120] The first question brought before the arbitral tribunal was whether it had jurisdiction in light of Albania's objections to ICSID jurisdiction. At this stage the tribunal had to determine whether or not the acts of the Albanian government could be considered an expropriation under the definitions of the law. This matter was found to require "further

[118] Tradex Hellas, S.A. v. Republic of Albania, *supra* note 110, 182.
[119] The Albanian government appointed T.B. Torovitsa to enter the joint venture. The agreement was duly approved by an act of the Albanian Ministry of Foreign Economic Affairs in authorization No. 26 and registration was completed on March 7, 1992.
[120] Tradex Hellas, S.A. v. Republic of Albania, *supra* note 110, 167.

examination…[and] would be so closely related to the further examination of the merits…[that it] should be joined to the merits."[121]

In the final award the tribunal decided that the actions taken could not be considered to be expropriations as it "d[id] not affect the title of the property,"[122] and adopting the standard applied by other tribunals,[123] it found that "Tradex ha[d] not prove[d] that the failure of the Joint Venture was due to expropriation measures by the State of Albania."[124] Hence, the tribunal found no case of expropriation and, therefore, that it did not have jurisdiction under Article 8 of the 1993 law.

Had the Albanian law not subjected the consent of the state to cases only dealing with actions of expropriation, it would have to be assumed that the tribunal would have granted jurisdiction. This case is regarded as the second decision that has analyzed and considered national legislation contemplating state consent to arbitration in a unilateral open offer.[125] Although the decision of the tribunal was unfavorable to the investor, several important conclusions can be drawn from the decision.

First, the tribunal found that consent to ICSID arbitration appeared "uncontested by the Republic of Albania."[126] Albania "challenge[d] the jurisdiction of th[e] Tribunal not on the ground of its lack of acceptance of ICSID jurisdiction through Art. 8 (2) of the

[121] Id. at 185.
[122] Id. at 144
[123] The tribunal looked primarily to the standard adopted by the Iran-U.S. Claims Tribunal in the case of Otis Elevator Company (New Jersey) and the Islamic Republic of Iran, *et al.*, Award No. 304-284-2 (29 Apr. 1987), 14 U.S.C.T.R. 283. Here the tribunal found that the infringement of certain rights was not "attributable to the Government of Iran."
[124] Tradex Hellas, S.A. v. Republic of Albania, supra note 110, 200.
[125] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, (SPP v. Egypt) Case No. ARB/84/3, Decision on Jurisdiction 14 April 1988, 3 ICSID Rep., 142/3, which is analyzed in the next section, was the first case brought in which an investor invoked an offer contained in national legislation to submit a dispute before a panel of international arbitrators.
[126] Tradex Hellas S.A. v. Republic of Albania, *supra* note 110, 187

1993 law, but on the ground of its evaluation of the effect in time of such acceptance."[127] The defense team of the Albanian government, consisting of eminent scholars such as James Crawford and Phillipe Sands, did not refute the arguments that the 1993 law contained a unilateral open offer to submit disputes to ICSID arbitration.

The second important conclusion reached by the tribunal was a finding that the 1993 law could apply to an investment that had been initiated before the law had entered into force. Tradex had begun making investments in 1992, evidently without reliance on the law that would only come into existence a year later. At the time, Tradex only had knowledge of the more restrictive provisions concerning the possibility of submitting a claim before an international arbitrator under the old law. The 1993 law came into force on January 1, 1994 and Tradex later relied on Article 8 of this law to file its claim before ICSID on November 2, 1994.

Albania raised several objections to the concept of retroactivity of the national norms and as a general principle of law. The tribunal dismissed these objections and found essentially that retroactivity was not a factor since what mattered was that the state had given its consent to ICSID arbitration and that when the investor opted to file before ICSID, the 1993 law was in effect.[128] Again, this is the formula proposed by commentators such as Sheuer and Broches, mentioned *supra*, that results in a rationale that allows tribunals to consider that sufficient consent exists more frequently than would otherwise be the case.[129]

[127] Id. at 187.
[128] Id. at 186.
[129] Aron Broches, Oberservations on the enforceability of ICSID arbitration, ICSID Rev. Vol 6, 358 (1991); Christoph Schreuer, *supra* note 87 ¶ 385.

Lastly, the tribunal went so far as to examine the evolution of Albanian law to conceive and apply an extensive interpretation of the 1993 law. The tribunal determined that better protection to investors was being granted throughout the years in Albanian legislation and that the "new dispute settlement mechanisms, which are more advanced and efficient, as the recourse to ICSID provided by Art. 8 of the 1993 Law, can be used also in relation to investments made and for disputes arisen before the entry into force of such law."[130]

The notions developed by the tribunal in this case, and the precedent that it creates, may be helpful to the legal advisors of investors in the sense of permitting them to conceive stronger arguments to allow for a jurisdictional claim to be accepted on the basis of the national legislation of a number of other countries in future cases. More importantly, this decision, which is relatively recent, brings attention to the model of unilateral open offers of consent and is instructive for states in terms of how to deal with FDI when attempting to make their economies more globally competitive.

B. Egypt's Foreign Investment Laws

The mid 1970's signified a change for Egypt with respect to FDI as it took major steps to liberalize its economy. It signed twelve BITs from 1973 to 1977 primarily with major European trading partners such as Germany, France, and the UK.[131]

In 1974 Egypt enacted a new foreign investment law which contained a number of provisions granting foreign investors equal treatment, among other benefits. It also contained a liberal dispute settlement clause that provided for the following:

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[130] Tradex Hellas S.A. v. Albania, *supra* note 110, 192.
[131] Currently Egypt has signed 34 BITs, ICSID, Bilateral Investment Treaties, Egypt, http://www.worldbank.org/icsid/egypt.htm (last visited 17/4/06).

"Investment disputes in respect of the implementation of the provisions of this Law shall be settled in a manner to be agreed upon with the investor, or within the framework of the agreements in force between the Arab Republic of Egypt and the investor's home country, or within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of law no. 90 of 1971, where such Convention applies .

'Disputes may be settled through arbitration. An Arbitration Board shall be constituted, comprising a member on behalf of each disputing party and a third member acting as chairman to be jointly named by the two said members. Failing agreement on the nomination of the third member within thirty days of the appointment of the second member, the chairman shall be chosen, at the request of either party, by the Supreme Council of Judicial Bodies from among counsellors of the judiciary in the Arab Republic of Egypt."[132] (Emphasis added.)

An important decree was issued in furtherance of the implementation of the 1974 law, which also was important to the *SPP v. Egypt Case,* commented on below. This decree established a hierarchical relationship among the dispute settlement methods stipulated in the law and established that in the absence of a BIT or an agreement between the state and the investor, "disputes between the State and the nationals of other countries are to be settled in accordance with the provisions of the Convention for the

[132] Translation of Article 8 of Law No. 43 used by the ICSID tribunal in SPP v. Egypt, Decision on Jurisdiction, 27 November 1985.

Settlement of Investment Disputes, to which the Arab Republic of Egypt has adhered pursuant to Law No. 90 of 1971."[133]

On July, 20, 1989 Egypt enacted a new investment law repealing the 1974 law, which contained a provision that made it clear that the choice of any of the several alternatives of dispute settlement contained in the law would require the agreement of the parties involved. The new law was definitely a legislative change.[134] The 1989 investment law provided the following:

> *"Investment disputes in respect of the implementation of the provisions of this Law <u>shall be settled</u>…within the framework of the Convention for the Settlement of Investment Disputes between the State and the nationals of other countries to which Egypt has adhered by virtue of Law no. 90 of 1971, where it applied."*[135]
>
> (Emphasis added.)

This provision clearly indicates that recourse to one of the alternatives mentioned in Article 55 is subject to a specific agreement by the parties to a dispute.[136] The 1989 law clarified the issue on submitting disputes to arbitration, making it clear that Egypt would only do so in those cases when an agreement to this effect had been entered into between the state and the investor. The modified legislation also contains a provision that serves as a reminder that the Egyptian courts would normally have jurisdiction over such

[133] Decree No. 375 of 1977 issued by Egypt's General Authority for Investment and Free Zones.
[134] William Craig, The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk, ICSID Rev., Vol. 8, No. 2, 271 (1993).
[135] Law No. 230 for 1989 Promulgating the Investment Law, Official Gazette No. 29, July 20 1989, Text Prepared by the General Authority for Investment
[136] Bertrand Marchais, The New Investment Law of the Arab Republic of Egypt, ICSID Rev. Vol 4., No 2 306 (1989).

disputes. Unlike what may have been expected in light of the negative experience with the 1974 law, Egypt further liberalized its foreign investment climate, attempting to reduce bureaucratic hurdles by concentrating all matters in the Investment Authority.[137] The new law, however, eliminated the unilateral open offer to submit disputes to arbitration as had been the case with the 1974 law and this change was probably due to Egypt's negative experience in the two ICSID cases referred to *infra.*[138]

Finally, in 1997, Egypt again modified its investment law. This legislation is more cautiously drafted and uses the word "may" instead of "shall," but it is still offers a relatively liberal approach. Notwithstanding, this law does not contrain a unilateral offer to arbitrate disputes. The relevant provision now reads as follows:

> *"Investment disputes related to the implementation of the provisions of this Law <u>may be settled in the manner to be agreed upon with the investor</u>. It is also possible for the concerned parties to agree on settling these disputes within the framework of the Conventions in force between the Arab Republic of Egypt and the country of the investor, or within the framework of the Agreement on Settlement of Disputes arising in respect of Investments between States and the Nationals of other States, to which the Arab Republic of Egypt adhered by virtue of Law No. 90 of 1971, according to the conditions and terms of these agreements and in the cases to which they apply, or according to the provisions of the Law on Arbitration in Civil and Commercial Matters promulgated by Law No. 27 of 1994. Agreement may also be reached on settling the aforementioned disputes by means*

[137] Id. at 309.
[138] Amazu Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development, 2001, 318.

of arbitration before the Cairo Regional Center for International Commercial Arbitration."[139] (Emphasis added.)

i. Importance of the Pyramids Oasis Case

The *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt Case,*[140] also known as the *Pryramids Oasis Case*, is perhaps the most illustrative case concerning state consent to international arbitration granted in national legislation, as it is the only case in which an ICSID tribunal decided in favor of its own jurisdiction, basing its decision on a finding of an open unilateral consent in the national legislation of Egypt. An examination of this case is useful to demonstrate how the consent provision contained in an investment law might be used to find jurisdiction in ICSID proceedings. This case also bears important policy implications for states with respect to their national investment laws or that are in the process of negotiating BITs with mandatory unilateral consent clauses.

In this case a foreign investor relied on the 1974 Egyptian law to invoke the jurisdiction of an ICSID tribunal in a case agasint the state. During the proceedings a number of issues arose concerning interpretation of the national law, and while the government contended that the text of the law was not sufficient to create compulsory jurisdiction, the tribunal thought otherwise. The government alleged that under a literal interpretation of the legislation, a separate agreement needed to be signed between the

[139] Article 7 of Law No. 8 of May 11, 1997 Promulgating the Law on Investment Garantees and Incentives, ILW, Release 97-2, October 1997.
[140] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, (SPP v. Egypt) Case No. ARB/84/3, Decision on Jurisdiction 14 April 1988, 3 ICSID Reports, 142/3.

investor and the state in order to require them to submit disputes to arbitration.[141] The tribunal, however, disagreed and noted that, “Egypt did not repeal Law No. 43 before the Claimants formally invoked ICSID jurisdiction, and indeed has still not repealed it. If Law No. 43 contained an offer by Egypt to accept ICSID jurisdiction prior to cancellation of the Pyramids Oasis project, that offer did not terminate as a result of the withdrawal of the approval of the project.”[142]

The tribunal spent a lot of time hearing testimony and allegations refering to the language and translation of the text. The passage in the 1974 law was published in English by the General Authority for Investment in brochures made available to investors and as such was not an official translation, but merely a way to inform potential investors that ICSID arbitration was one of a variety of dispute settlement methods that investors could seek to negotiate with the state.[143] Moreover, the Egyptian government contended that only the Arabic text of the investment law should be considered by the tribunal to make the determination on jurisdiction. The government then made efforts to analyze the meaning of the word “shall.”

The government also argued that the use of the expressions “within the framework of the Convention” and “where it applies” implied the need for separate consent to ICSID jurisdiction, which had not been given. Another argument advanced by the Egyptian government was that there was a need to undergo a process of conciliation before the arbitration could proceed. This was construed under a reading of the Convention which provides for conciliation as well as arbitration, but this argument was

[141] SPP v. Egypt, *supra* note 140, at 11.
[142] Id. at 17.
[143] The Doctrine of Unilateral Statements and its relvance is discussed below in Section XII.

rejected by the tribunal as it is the party instituting proceedings that is to choose between these two methods.[144]

The claimant, on the other hand, alleged that the law established a hierarchy of dispute settlement procedures between the parties and that in the absence of an agreement or of an applicable BIT, then ICSID could have jurisdiction over the claim submitted.[145] The claimants had accepted the offer of the state to submit claims to ICSID in a letter sent to the Egyptian Minister of Tourism. This letter stated that the investor would "accept and reserve the opportunity of availing [itself] of the uncontestable jurisdiction of [ICSID]…which is open [to the investor] as a result of Law No. 43 of 1974."[146]

The tribunal agreed with the foreign investor and found that recourse to dispute settlement under ICSID could be had in the absence of both an agreement to this effect and a BIT. Moreover, the tribunal found that there was nothing in the legislation that required further documentation or any other form of recordation to declare consent by the state and the investor. Accordingly, the tribunal found that the law "establishe[d] a mandatory and hierarchic sequence of dispute settlement procedures, and constitutes an express consent in writing to the Center's jurisdiction within the meaning of Article 25 (1)."[147]

After this decision was handed down Egypt submitted a petition to have it annulled. The acting secretary-general of ICSID, however, declared that the decision was not an "award" per se under the definition of Article 52 and, therefore, he did not have

[144] Rule 1 of the ICSID Institution Rules provides that the request before the Center shall indicate whether the parties are submitting to arbitration or conciliation.
[145] Many of the Egyptian government's allegations were recognized by the dissenting opinion. SPP v. Egypt, supra note xx, dissenting opinion of Dr. El Mahdi, 14 April 1988, 3 ICSID Rep. 163.
[146] News from ICSID, Vol. 3/2, p.8 (1986).
[147] SPP v. Egypt, *supra* note 140, at 161.

the authority to register the petition for annulment.[148] Once again, in a similar fashion as in the Tradex Case, the secretary-general decided that the challenge to jurisdiction would at least be deferred until a final award was rendered.[149]

A final interesting point to note regarding this case are the clarifications by the tribunal concerning the interpretative mechanisms to be used when analyzing national legislation to determine its consequences. The tribunal did not agree with the argument of the Egyptian government that the consent of the parties to ICSID jurisdiction had be based on Egyptian law or that the arbitration clause in the national legislation be subject to the rules of treaty interpretation. On the contrary, the court found that it would subject the law to statutory interpretation, as well as to certain principles of international law governing unilateral acts.[150] The tribunal contended that "in deciding whether in the circumstances of the present case Law No. 43 constitutes consent to the Center's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations."[151] The tribunal also concluded that "using general principles of staturtory interpretation, a legal test should be interpreted in such a way that a reason and meaning can be attributed to every word in the text."[152] Hence, the tribunal concluded that to "interpret the phrases 'within the framework of the Convention' and 'where it applies' to mean that the parties to an investment dispute must execute a separate agreement to establish consent to the Center's

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[148] Reported in News from ICSID, No. 1, 2 (1989).
[149] G. Delaume, The Pyramids Stand-The Pharaohs Can Rest in Peace, ICSID Rev., Vol. 8, No. 2, 239 (1993).
[150] Cristoph Shreur, The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes, available at http://www.univie.ac.at/intlaw/pdf/csunpublpaper_1.pdf. (last visited 28/04/06).
[151] SPP v. Egypt, supra note 140, at 55.
[152] Id. at 56.

jurisdiction would also destroy the internal logic of Article 8 and render much of that provision superfluous."[153]

ii. Manufacturers Hanover Trust Co. v. Arab Republic of Egypt and General Authority for Investment Free Zones[154]

This case also involved reliance by the investor on the same 1974 Egyptian law commented *supra*. In this case the tribunal found that the 1974 Egyptian law constituted consent to ICSID arbitration, or at least it has so been reported.[155] Although no published award exists, the fact that arbitral proceedings continued implies that jurisdiction was confirmed, as had there been a contrary finding that determination would have taken the form of a final award. Hence, two ICSID tribunals composed of eminent jurists reached the same conclusion concerning Egypt's 1974 law,[156] which was that it did signify the consent of the state to submit disputes to international arbitration.

C. Tunisian Investment Code

The now repealed version of the Tunisian Law Relative to the Code of Investments[157] read as follows:

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153 Id. at 57.

154 Manufacturers Hanover Trust Company v. Arab Republic of Egypt and General Authority for Investment and Free Zones (Case No. ARB/89/1), unreported. Settlement agreed by the Claimant and one of the Respondents and proceeding discontinued at their request, 24 June, 1993.

155 The decision in this case has not been published, but a number of qualified publicists commented on the outcome of this case; see Sheuer, *supra* note 102, ¶269. One possible explanation as to why the parties wished to keep this award confidential was that the jurisdiccional question in the SPP v. Egypt case had not yet been decided, for which reason, perhaps, the Egyptian government wanted to keep the award secret.

156 William Craig, *supra* note 134, 271.

157 Law Relative to the Code of Invesmtnet, Law No. 69-35, June 26, 1969, ILW, Release 88-1, August 1988.

"Any dispute arising between the foreign investor and the Government either from the investor side or from a measure taken by the Government against the investor, *<u>shall be settled</u> in accordance with the procedure of arbitration and conciliation.*

These procedures are those foreseen: either in the framework of the bilateral agreements relative to the protection of the investments between Tunisia and the country of nationality of the investor, or the framework of the International Convention for the settlement of disputes between the State and Nationals of Other States, a convention ratified by law no. 66-33 of May 3, 1966." (Emphasis added.)

The arbitration provision contained in the previous version of this law was similar to the 1979 Egyptian law. In fact, in *Gaith Pharaon v. Republic of Tunisia*[158] the claimant in this case relied on an article in the 1969 Tunisian Investment Code as the basis for ICSID jurisdiction. Because the case was settled, however, the objections raised by the state were never decided.[159]

In the years following, the Tunisian government implemented a number of changes intended to improve the regulation of foreign investment. The Industrial Promotion Agency[160] was established and a number of new laws were promulgated and others were reformed. Although Tunisia pursued a liberal economic policy in terms of integrating its economy into the world trading system,[161] the dispute settlement clause contained in the current investment law is more restrictive. The current body of law

[158] Ghaith R. Pharaon v. Republic of Tunisia (Case No. ARB/86/1). Settlement agreed by the parties and proceeding discontinued at their request.
[159] Ghaith R. Pharaon v. Republic of Tunisia (Case No. ARB/86/1), Order of Discontinuance dated 21 Nov. 1988.
[160] The Industrial Promotion Egency was established by Law No. 87-50 of 2 August 1987.
[161] Jim Phillips, *et al*, Middle Eastern Commercial Law, International Lawyer, Fall, 2002, Foreign Law Year in Review, 36 Int'l Law. 901, 917 (2001).

regulating foreign investment, the Law Promulgating the Investment Incentives Code,[162] incorporates a dispute settlement provision that makes reference to the fact that the "Tunisia[n] courts are competent to investigate any disputes between foreign investors and the Tunisian State unless otherwise agreed upon in an arbitration clause or a clause permitting one of the parties to appeal to"[163] an arbitration procedure. It would appear that the new law will only allow a foreign investor to invoke arbitration when a specific agreement to this effect has been signed, as otherwise the national courts are to be favored rather than international proceedings.

Although it is difficult to speculate as to the reasons for this legislative change, the legislators may have feared another case being brought by an investor under the provision of a unilateral offer to arbitrate. Another possible motive is that previously, around the time when the 1969 investment law was passed, foreign investors particularly wished to be able to have access to international institutions and foreign adjudicatory mechanisms since traditionally the Tunisian legal system was inspired by principles of "Muslim Law."[164] It was only in the mid-1950's that the same procedural law began to be applied to nationals and foreigners, and that Tunisia abolished the shari'a courts.[165] Once western notions of equality in court proceedings were implemented and legislative change was instituted, foreign investors and the Tunisian authorities may have come to consider that it was less important to provide for the foreign adjudication of disputes. In any case, today investors seemingly have more confidence in the Tunisian government as

[162] Article 67, Law No. 93-120 of 27 December, 1993 promulgating the Investment Incentives Code, ILW, Release 95-5, Dec. 1995. This Law effectively repealed the 1969 Law.
[163] Id. at Article 28.
[164] David Bonderman, Modernizing and Changing Perceptions of Islamic Law, 81 Harv. L. Rev. 1169, April, 1169 (1968); Jeremy Sharpe, International Arbitration and the Islamic World: The Third Phase, 97 Am. J. Int'l L. 643, 655 (2003).
[165] David Bonderman, *supra* note 164, 1184.

the Investment Agency "has been luring billions of dollars in foreign investments into the country."[166]

D. Botswana's Investment Act

The 1970 Settlement of Investment Disputes Act contains a fairly liberal dispute settlement clause. One commentator described the law as containing an implicit and "potential unilateral consent in writing to submit disputes to ICSID."[167] The law authorizes a government representative[168] to enter into agreements with nationals of any other contracting state of the ICSID Convention providing for submission to the jurisdiction of ICSID for settlement by conciliation or arbitration of any existing or future legal dispute between Botswana and any such national arising directly out of an investment.

The section that refers to the settlement of disputes reads as follows:

"Any national of any other State which is a party to the Convention <u>may submit</u> to the Center, for settlement by conciliation or arbitration in pursuance of the Convention, any legal dispute with Botswana, provided that such foreign national has within one year after the commencement of this Act or within one year after the making of the investment, whichever is the later, filed with the Minister a consent in writing to the like submission to the Center by Botswana of any such legal dispute."[169] (Emphasis added.)

[166] Bernadette Chala, International Lawyer, International Legal Developments in Review: 2004, Regional and Comparative Law, 39 Int'l Law. 597, 616 (2004).
[167] Amazu Asouzu, *supra* note 138, 336.
[168] The law fails to indicate which minister is authorized to enter into these agreements.
[169] Section 11 of the Settlement of Investment Disputes Act of Botswana, 1970. The effective date of the act was 14 December of 1970.

By this provision the government of Botswana grants its consent to submit disputes to an ICSID tribunal, but this also implies an action on the part of investors in that within one year of having made the initial investment, the investor must give and file with the corresponding sectoral minister its consent in writing.

E. The Ugandan Investment Code

Under the Ugandan Investment Code[170] the state does not give its consent to submit to arbitration in all circumstances and rather it reserves a right to later grant its consent. The foreign investor is to negotiate with the authority in charge of granting the investment license the matter of the right to submit disputes before international arbitrators as part of a condition of the license. How the negotiations are to be carried out, however, are not clear from the provisions of the code. In any case, the state remains at liberty to withhold its consent.

Indeed, *"the license in respect of an enterprise may specify the particular mode of arbitration to be resorted to in the case of a dispute relating to that enterprise and that specification* *__shall constitute the consent__* *of the Government, the Authority or their respective agents and the investor to submit to that mode and forum of arbitration."*[171] (Emphasis added.) If the license does not provide for the settlement of disputes by international arbitration, however, the foreign investor will only be able to "apply to the High Court" to resolve its dispute, that is there will only be recourse to the national judicial system.

[170] Uganda's Investment Code of 1/25/06, ILW, Release 92-2, June 1992.
[171] Id. at Part V, Section 29(3).

F. The Central African Republic's Investment Code

The new Investment Code[172] was one of the first acts passed by the National Assembly, which is authorized to approve laws regulating the economy under the constitution that, in addition, emphasizes economic and development matters as vital goals of the government. In general, the new law favors all investment and does not discriminate among different types of investment. It also simplifies procedures and provides guarantees and special advantages to investors who offer the creation of genuine enterprises promising to finance the development of the social and physical infrastructure of the country.[173]

The 1988 investment law contains the state's consent to both conciliation and arbitration under the ICSID Convention. Indeed, the law expressly stipulates that the consent of the state is given by the "present article."[174]

However, this law (as well as those of Mauritania and the Ivory Coast) requires that the foreign investor also manifest its interest in conciliation or arbitration in order to accept the unilateral offer of the state. The law provides only a single opportunity to solicit the consent of the state to arbitrate disputes. In this respect, the investor must expressly give its consent in the application for admission as a foreign investor. In this application the investor has the option of choosing between a conciliation procedure or resorting to arbitration. The consent can only be expressed in the application for admission and the investor's consent must be given, if at all, before the investment is

[172]The Investment Code of the Central African Republic, Loi No. 88.004 of May 9, 1988.
[173] Rolf Knieper, The New Investment Code of the Central African Republic: Profound Changes, 91 ICSID Rev., Vol. 4, (1989).
[174] The Investment Code of the Central African Republic, *supra* note 171, Art. 30.

actually made. If the application for admission does not include a reference to conciliation or arbitration, the investor will not be able to resort to ICSID or other similar procedures.

H. The Investment Code of the Ivory Coast

As in several of the cases analyzed *supra*, the Investment Code of the Ivory Coast is unclear with respect to the provision concerning the dispute settlement mechanism. The relevant provision establishes that arbitration can be resorted to when certain requirements are fulfilled. These requirements are that the agreements and treaties entered into by the Ivory Coast on investment protection must involve an investor from a state who is a national of a state party, that the arbitration procedure be mutually agreed upon by the parties, and that in this case the ICSID Convention could be applicable.[175]

From this first section of the law it would appear that an agreement is necessary to submit disputes to arbitration. However, in the final paragraph of Article 24, the law provides for the following:

> *"The <u>consent</u> of the parties with regard to the competence of the ICSID or of the Supplementary Mechanism, as the case may be, required by the instruments governing them, <u>shall, for the Republic of Cote d'Ivoire, be constituted by this article</u> and is expressly contained in the approval application for the entity concerned."* (Emphasis added.)

[175] Article 24 of The Investment Code of the Republic of Ivory Coast, Aug. 1995 (Law No. 95-260), ILW, Release 97-2, Oct. 1997.

The redaction of this latter section could, it would seem, be interpreted as a clear statement of consent by the state to submit to ICSID arbitration. The investor will still have to request that any possible future dispute be settled by ICSID arbitration in the application for the investment license, but provided that the investor does so and once the license is granted, the mutual consent of the parties should be deemed to be perfected.

A possible consequence of this unilateral offer may be illustrated by reference to the mining code, for instance, which contains a number of provisions on the rights and obligations of the investor and the state in matters related to mining activities. Article 112 of this code provides that *"in the last resort [disputes will be settled] by the competent legal authorities in the Republic of Cote d'Ivoire or by an arbitration court under Ivorian law."*[176] Although it is unclear what is to be considered an "arbitration court under Ivorian law," theoretically, if an investor were to obtain an investment license or approval under the Investment Code (which is a general law and subsequent to the mining code), in which the consent of the state to ICSID arbitration is "expressly contained," it could submit all disputes relating to a mining license to ICSID arbitration.

It is worth noting that this investment law represents a significant liberalization in terms of the ability of an investor to resort to arbitration. The previous law only provided that the investment agreement between the investor and the state will define "*the arbitration procedure that shall be used in case of any dispute between the parties.*"[177]

G. Ethiopia's Foreign Investment Legislation

[176] The Mining Code of the Republic of the Ivory Coast, July 1995 (Law No 95-553), ILW, Release 97-2, Oct. 1997.

[177] Article 23 of The Ivory Coast Investment Code, Nov. 1984 (Law No. 84-1230), unofficial translation by Price Waterhouse, Abidjan, Ivory Coast, and reproduced from its publication, Ivory Coast, 1984 Investment Code, April 18, 1985.

Ethiopia has lagged in terms of the evolution of its foreign investment legislation, the ratification of relevant international treaties and its subscription of BITs. The Investment Proclamation of Ethiopia[178] provides that investment disputes involving foreign investors and the state may be settled in accordance with the choice made by the agreement of the parties concerned.[179] Additionally, under the law disputes relating to foreign investments may be settled in accordance with international dispute settlement procedures which are accepted by Ethiopia or to which Ethiopia is a party.[180]

Unfortunatley, Ethiopia has not ratified the ICSID Convention or the 1958 New York Convention, and although Ethiopia has signed a several BITs, none of these are currently in force.[181]

I. The Zairian Investment Code

The 1986 Zairian Investment Code[182] provides that disputes that arise under the law *"<u>may be settled</u> upon the request of the most diligent party by arbitration."*[183] (Emphasis added.) The law further specifies that *"in its request for admission to the General or Conventional Regime or Free Zone, or later by a separate instrument, the investor gives its consent to such arbitration pursuant to said agreement, and not only in its own name but in that of any Zairian Company which it controls and by whose intermediary the investment is made."*[184]

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[178] Investment Proclamation of Ethiopia No. 37/1996, ILW, Realease 99-1, May 1999.
[179] Id. at Article 21.
[180] Id. at Article 22.
[181] Ethiopia has entered into BITs with Italy (Ethiopia-Italy BIT, signed 21 Apr. 1994), Kuwait (Ethiopia-Kuwait BIT, signed 14 Sept, 1996) and Germany (Ethiopia-Germany BIT, signed 21 Apr. 1964).
[182] Ordinance Law No. 86-028 of Apr. 5, 1986, translated version in ICSID Rev., Vol. 2 No. 1, 232 (1987).
[183] Id. at Article 46.
[184] Id. at Article 46.

Although this dispute resolution clause does not expressly establish the consent of Zaire to ICSID arbitration, by virtue of this provision an ICSID arbitration tribunal could possibly construe an open consent by Zaire.[185] It would seem that the state has granted its consent to submit disputes to ICSID arbitration when the investor has applied to make an investment under one of the mentioned instruments or has submitted its consent in a separate instrument.

J. Namibia's Investment Act

The Namibia Foreign Investment Promotion Act[186] allows the investor to elect international arbitration for the settlement of an investment dispute. Any dispute with the government concerning compensation payable upon expropriation and related matters may be referred to arbitration at the election of the investor.[187] Unless there is an agreement between the ministry (the law does not make it clear which ministry will have the authority to sign agreements) and the foreign investor to arbitrate the dispute under the auspices of a different forum, the dispute will be arbitrated according to the UNCITRAL rules. The election of the investor is to be made prior to the grant of the investment certificate, as the language of Article 13 confers the right of election only to persons *"to whom a Certificate is to be issued."*[188] The Act "implicitly contemplates that prior to granting a Certificate, the Minister will inform the applicant that the Certificate is

[185] Patrick Mitchell & Richard Gittleman, The 1986 Zairian Investment Code: Analysis and Commentary, ICSID Rev., Vol. 2, No. 1, 137, (1987).
[186] Foreign Investment Act of Namibia, Dec. 27 of 1990, as amended by Act No. 24 of 1993, ILW, Release 2004-2, Nov. 2004.
[187] Id. at Section 13.
[188] Id. at Section 13.

to be issued and request the applicant to exercise his option for or against international arbitration."[189]

An interesting problem arises, though, with the particular redaction of this law in that the law does not specify when the investor will be asked to make the determination to resort to international arbitration, that is before or after the Certificate of Status Investment has been granted. Investors may be induced to not elect arbitration as they may know or suspect that the government would favor the resolution of disputes in the local courts, that is some "investors may fear that, in opting for international arbitration, they may prejudice their prospects of receiving a Certificate."[190]

It is interesting to note that one commentator, in referring to the new Namibian Investment Act, mentioned that "the position of the Namibian Government seems to be that even if submission to international arbitration is antithetical to the State's interest, the advantages to be derived from increased capital inflows outweigh any difficulties which are likely to arise."[191]

K. Kazakhstan's Investments Laws

The amended 1994 investment law of Kazakhstan provided that any of the parties to an investment dispute may, if there is the written consent of the foreign investor, submit the dispute to arbitration under the ICSID Convention, under the ICSID Additional Facility Rules or under the UNCITRAL Arbitration Rules.[192] The law made it clear that it embodied the consent of the state to accept certain arbitration procedures that

[189] Stephen Vasciannie, The Namibian Foreign Investment Act: Balancing Interests in the New Concessionary Era, ICSID Rev., Vol. 7 No. 1, 132 (1992).
[190] Id. at 133.
[191] Id. at 134.
[192] Law of the Republic of Kazakhstan on Foreign Investment, Dec. 30, 1994, Art. 27(2).

can be selected by the claimant, whether the state or the foreign investor. The only additional requirement that the investor had to fulfill under the modified law to be entitled to arbitration was to submit its consent, but this may be given at any moment and not only upon the authorization of the investment.

In 2003 the law of the Republic of Kazakhastan "On Investments"[193] was passed under which the liberal model has been considerably restricted. The current law provides that investment disputes shall be resolved by the agreed upon method in the first instance.[194] If the parties cannot resolve the dispute under an agreed upon method of dispute resolution then *"the settlement of disputes shall be carried out in accordance with international treaties and legislative acts of the Republic of Kazakhastan <u>in courts of the Republic of Kazakhstan</u>, as well as by means of international arbitration <u>agreed</u> by the parties"*[195] (emphasis added). Hence, the investment law no longer embodies the prior consent of the state to submit disputes to arbitration.

L. The Tanzanian Act

The Tanzania Investment Act of 1997[196] calls for the parties to resort to negotiation in the first instance to try to resolve investment related disputes. If a settlement is not reached by this first method, then arbitration may be agreed upon. The new law provides that a method of arbitration that has been *"mutually agreed upon"* by the parties is to be used. The dispute settlement mechanism that may be chosen could be specified in the certificate of approval of the investment. A stipulation to this effect

[193] The Law of the Republic of Kazakhstan "On Investments," Jan. 8, 2003, Release 2004-1, March 2004.
[194] Id. at Article 9 (1)
[195] Id. at Article 9(2).
[196] Tanzania Investment Act, 1997, ILW, Release 99-1, May, 1999.

would constitute the consent of the government, or of any agency involved, as well as that of the investor, to submit to the forum selected.[197]

M. The Togolese Investment Code

The Togolese Investment Code does not require the investor to specifically seek the consent of the state to resort to arbitration, as all advantages granted to investors under the law are deemed to be granted to those foreign investors who are admitted as such under the investment procedure. [198] One of the advantages stipulated in the law is the ability to resolve disputes amicably. If they cannot be settled, then they will be finally resolved by ICSID arbitration. This, as one commentator has said, “obviously represents consent to arbitration on the part of the host State in respect of disputes with investors that have gained admission under the law.”[199] The consent of the foreign investor to the advantages of the law is presumed to be contained in the application for admission.

N. Cameroon’s Investment Code

The Cameroonian Code of 1990 is similar to the Tanzanian and Ugandan Codes in that it provides a number of dispute resolution options from which the parties may choose. The dispute settlement mechanisms described in the law will only be available to

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[197] Chris Peter, Promotion and Protection of Foreign Investments in Tanzania: A New Investment Code, ICISD Rev., Vol. 6, No. 1, 58 (1991).
[198] Article 20 (g), Law No. 85-3 of Jan. 1985 which Provides for Readjustment of the Investment Code of the Togolese Republic, ILW, Release 87-4, Dec. 1987.
[199] Antonio Parra, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, *supra* note 17, 287.

the *"approved undertakings,"* which enjoy an *"element of delocalization [of the dispute] after avenues for amicably settling the dispute have been exhausted."*[200]

The dispute settlement clause reads as follows:

"Where an <u>approved undertaking</u> cannot settle a dispute amicably with the State in connection with the validity and interpretation of the approval document, non respect of the guarantees provided for under Part II above and non respect of the undertakings implicit in the objectives of the investment programme which were a determining factor for placement under one of the schedules in Part III above, it <u>shall be entitled to request that such a dispute be conclusively settled</u> in accordance with an arbitration or conciliation procedure derived from one of the following:

> *-a conciliation or arbitration procedure expressly agreed upon by the parties;*
>
> *-agreements and treaties relating to the protection of investments signed between the Republic of Cameroon and the State of which the natural person or corporate body concerned in the enterprise approved as investor is a national;*
>
> *-the procedure of settling conflicts before the International Chamber of Commerce (ICC);*
>
> *-the convention of 19 March 1965 setting up the International Centre for the settlement of investment-related disputes between states and nationals of other states, drawn up under the auspices of the International Bank for Reconstruction and Development (IBRD) and ratified by Cameroon;*

[200] Ordinance No. 90/007 of 08 Nov. 1990 to institute the Investment Code of Cameroon, ILW, Release 92-2, June 1992, Section 45 (1).

-provisions of the regulation governing the additional mechanism approved by the Board of Directors of the international centre for the settlement of investment-related disputes, if the person or body concerned does not fulfill the conditions of nationality laid down in Article 27 of the above-mentioned convention." [201] (Emphasis added.)

In theory, any foreign individual or corporate entity holding shares in an approved company governed by Cameroonian law may have recourse to any of the options established in the law. However, it would appear that the choice of any of the options would have to be expressly stated either at the time of the legal formation of the enterprise or in the application for the approval of the enterprise concerned and in this case the choice should be mentioned in the document of approval of the investment.[202]

O. The Investment Code of Mauritania

The Investment Code of Mauritania[203] combines the legislative techniques used in the 1979 Egyptian law, and in the Tanzanian and Cameroonian Codes. The dispute settlement provision gives the investor a number of options by which disputes can be settled. The investor can either go before the "competent Mauritanian courts" in accordance with local law or can choose among a number of options, which include "a procedure of conciliation or arbitration to which both parties have agreed," "or according to the" ICSID Convention, or "if the person concerned does not fulfill the conditions of nationality laid down in" the ICSID Convention the investor may resort to the Additional

[201] Id. at Seciton 45(1).
[202] Id. at Section 45(3); See also Amazou Asousu, *supra* note 138, 394
[203] Ordinance No. 89.013/CMSN Concerning The Investment Code, ILW, Release 93-1, June 1993.

Facility Rules. Hence, the law rather liberally stipulates a number of options in an apparently hierarchical order of dispute settlement that are available to the investor. The relevant provision with respect to arbitration reads as follows:

> *"However, any dispute between an individual or legal entity and the Islamic Republic of Mauritania related to the application or the interpretation of this present Code, <u>is settled according to a procedure of arbitration</u> and conciliation as follows:*
>
> *a) Either by agreements and treaties concerning the protection of investments concluded between the Islamic Republic of Mauritania and the State to which the individual or legal entity concerned belongs,*
>
> *b) or by a procedure of conciliation and arbitration to which both parties have agreed,*
>
> *c)or in accordance to the convention of March 19, 1965 for the settlement of disagreements related to investments between states and citizens of other states, established under the aegis of the International Bank for Reconstruction and Development, ratified by the Islamic Republic of Mauritania through Law No. 65.136 on July 30, 1965;*
>
> *d) or, if the person concerned foes not fulfill the conditions of nationality laid down in Article 25 of the above-mentioned Convention, according to the provisions for settlement in the supplementary mechanism approved by the Board of Directors of the International Center for the Settlement of Disagreements concerning Investments. The consent of the parties to the jurisdiction to ICSID or*

the supplementary mechanism, as the case may be, required by the instruments governing them, is constituted as far as the Islamic Republic of Mauritania is concerned by the present article and, as far as the person affected is concerned, is explicitly expressed in the request for agreement."[204] (Emphasis added.)

P. The Investment Code of the Kyrgyz Republic

The dispute settlement clause of the Kyrgyz Republic is long, confusing and contains a number of exceptions. The relevant provision establishes a number of methods for dispute resolution, theoretically in order of preference by the state. However, if the parties cannot reach an agreement on how to resolve a dispute, the law contemplates a three-month "cooling off period" similar to that contained in a number of the more modern BITs. The law also makes reference to solving disputes in the national courts, unless one of the parties requests that the dispute be presented to ICSID or to an ad hoc tribunal constituted under the UNCITRAL rules. The dispute resolution section of the law reads as follows:

"Article 18. Settlement of Investment Disputes. 1. Investment disputes shall be resolved in accordance with any applicable procedure agreed in advance between an investor and authorized state bodies of the Kyrgyz Republic that does not exclude the use of other means of legal defense by an investor in accordance with the legislation of the Kyrgyz Republic. 2. If such agreement is not reached the investment dispute between authorized state bodies of the Kyrgyz Republic and

[204] Article 7.2, Ordonnance No.89.013/CMSN 23 du janvier 1989 portant code des investments, ILW, Release 93-1, June 1993.

investor shall be resolved by conducting consultations between the parties. If parties will not agree in <u>3 month period</u> from the day of the first written address for such consultation, the dispute shall be resolved by addressing a court of the Kyrgyz Republic, <u>unless</u> one of the parties to a dispute between the foreign investor and the state body <u>requests to consider the dispute</u> in accordance with one of the following procedures:

a) by applying to the International Center for Settlement of Investment Disputes (ICSID) pursuant to the Convention on the settlement of investment disputes between states and citizens of other states or the rules regulating the use of additional means for conduct of a hearing by the Secretariat of the Center; or

b) by applying to arbitrage or an international temporary arbitral tribunal (commercial court) formed in accordance with the arbitration rules of the UN Commission on international trade law."[205] (Emphasis added.)

R. The Laws of Nigeria and Ghana

The law regulating foreign investment in Nigeria[206] is similar to Ghana's investment law.[207] Both of these laws cover any dispute between an investor and the state in respect to investments to which the laws apply. The dispute resolution provision in the Nigerian law reads as follows:

[205] Article 18 of the Law of the Kyrgyz Republic on Investment in the Kyrgyz Republic (Feb. 7, 2003), ILW, Release 2005-1, Sept. 2005.
[206] Nigerian Investment Promotion Commission Decree No. 16, 1995, Article 26(2), ILW, Release 2001-1, June 2001.
[207] The Ghana Investment Promotion Centre Act, 1994 (Act 478), ILW, Release 95-3, June 1995.

"Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Decree applies which is not amicably settled through mutual discussions <u>may be submitted at the option of the aggrieved party</u> to arbitration as follows:

a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitrtion and Conciliation Decree 1988; or

b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or

c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties."[208] (Emphasis added.)

In the case of Ghana, as a first step the law calls for the investor and the government to resolve the dispute by reaching an amicable settlement. If, however, an amicable settlement cannot be reached, then the law gives the investor, as the "aggrieved party," the right to elect one of the following methods of arbitration: *"a) in accordance with the rules of procedure for arbitration of the UNCITRAL; or b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties; or c) in accordance with any other national or international machinery for the settlement of investment disputes agreed to by the parties."*[209]

[208] Nigerian Investment Promotion Commission Decree No. 16, *supra* note 202, Article 26(2).
[209] The Ghana Investment Promotion Centre Act, *supra* note 203, Article 29(a).

Under these laws the investor could resort to international arbitration under the UNCITRAL rules or before ICSID, or under a bilateral treaty if the investor is from a country that has a BIT with Nigeria or Ghana. These multiple jursidiction clauses do not conflict with other instruments, since the national laws provide for dispute settlement according to the procedures contained in the BITs.

The most interesting section of these laws is the provision that gives preference to the choice made by the investor when there is a disagreement between the investor and the government as to the method of dispute settlement to be adopted.[210] This provision is highly favorable to the investor and would theoretically give the investor ample flexibility to negotiate dispute settlement procedures with the government. The provision that gives the investor this discretion in the Nigerian law reads as follows:

> *"Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the ICSID Rules shall apply."*[211]

T. The Peruvian Investment Legislation

The 1970's was a difficult time for international arbitration in Latin America. Many of the countries of this region were reacting negatively to initiatives to liberalize investor-state arbitration as evidenced in part by Decision 24, the restrictive investment

[210] The Ghana Investment Promotion Centre Act, *supra* note 203, Article 29(C) and Nigerian Investment Promotion Commission Decree No. 16, *supra* note 202, Article 26(3).
[211] The Ghana Investment Promotion Centre Act, *supra* note 203, Article 26(3). The equivalent provision in Ghana's law is virtually identical.

regime of the Andean Pact.[212] This decision, adopted by the Andean Pact in 1970, has been "perhaps the most restrictive foreign investment regulation in the world."[213] Since then it has been amended significantly,[214] but at one point it established rules against the removal from the national jurisdiction of the member states any dispute arising out of foreign investments or the "transfer" of technology.[215] Although since the 1970s Latin American countries have considerably liberalized their foreign investment regimes, particularly with the signing of a number of BITs, a degree of hostilitly remains. This has especially been evident in those countries where left-leaning governments have come to power.

The Peruvian law is relatively liberal and it contains a legislative authorization directed at the executive and other state entities to enter into contracts with foreign investors in which dispute resolution clauses can be agreed on.[216] The relevant provision reads as follows:

> *"The State, its branch offices, the Central Government and other persons subject to public law, as well as the companies managed by the State, shall be authorized to submit to national or international arbitration all controversies relating to*

[212] Now the Andean Community of Nations comprised of five member states; Bolivia, Colombia, Ecuador, Peru and Venezuela, although in April 2006 Venezuela renounced its membership. See Venezuela quits Andean trade bloc, BBC News, at http://news.bbc.co.uk/2/hi/business/4925056.stm (last visited 26/04/06).

[213] Gonzalo Biggs, The Latin American Treatment of International Arbitration and Foreign Investment and the Chile-US Free Trade Agreement, ICSID Rev., Vol. 19, No. 1, 70 (2004).

[214] Decision 24, adopted on December 31, 1970 by the Commission of the Andean Pact, was modified by Decision 220, of May 11, 1987, recognizing the freedom of each state to adopt its own national legislation to regulate foreign investment.

[215] Id. at Article 51.

[216] An issue that has not played much of a role in investment arbitration thus far is the concern of political tensions within countries that have a system of separation of powers. In the near future, however, debate could arise concerning whether the judicial power of decision over a dispute that arises within the territory of one state could be transferred to a foreign tribunal by the legislature in absolute terms and then with respect to all future disputes. See Muthucumaraswamy Sornarajah, *supra* note 32, 115.

their goods and obligations, in conformity with national law or international treaties, in which Peru is a signatory country, provided any such controversies arise from <u>their relationship</u> with a company <u>subject to private law or under a contract.</u>"[217] (Emphasis added.)

The law authorizes the state or its entities to accept international arbitration with private parties as contemplated by national law or any treaties to which Peru is a party. The reference to contracts could include non-private law parties, as well as the special investment contracts that Peru has offered to foreign investors as a way to entice investment. Under these contracts an investor can negotiate the terms and conditions under which the investment will take place and be governed, including, in particular, a guarantee as to tax treatment, as well as other aspects that are deemed important for the investment project. In this context a specific dispute settlement procedure can also be included.

S. Mexican Law

Mexico presents an interesting contrast as the state has had to defend against, and is currently involved in, a number of ICSID disputes where foreign investors have triggered arbitral proceedings under the NAFTA.[218] Except for its obligations under NAFTA and other treaty commitments, however,[219] Mexico's Investment Law[220] is

[217] Article 48 of the Foreign Investment Promotion Law, 1991 (Legislative Decree 662), ILW, Release 95-5, Dec. 1995.
[218] Eleven claims have been filed against Mexico under NAFTA. These claims are available at http://www.state.gov/s/l/c3742.htm, (last visited 4/25/06).
[219] Although the investment regime under NAFTA is quite liberal Mexico has only entered into three BITs (Mexico-Spain BIT, 22 June 1995, not yet in force, Mexico-Switzerland, 10 July 1995, in force 14 March

considered to be among the more restrictive. This law does not provide for Mexico's consent to submit disputes to arbitration. Furthermore, the law is generally restrictive and provides that a number of "economic activities and enterprises…shall be limited to" maximum amounts of foreign ownership. [221] Another group of activities require special approval of the foreign investment commission if the foreign investor is to own more than 49%. Moreover, the registration procedure is burdensome, there are limits on the foreign ownership of property, and there are various sanctions that can be imposed on foreign investors who breach the provisions of the law.

U. The Salvadoran Law

In the case of the Salvadoran Investment Promotion Law, it would appear that an authorized investor could elect to resolve disputes by submitting claims to ICSID. The relevant section of the law reads as follows:

> *"In the case of controversies arising between foreign investors and the government, regarding their investments in El Salvador, the investor may remit the controversy to:*
>
> *a) the Centro Internacional de Diferencias Relativas a Inversiones (CIADI, Center for International Arrangements on Differences Relative to Investments), with the object of solving the controversy through conciliation and arbitrage, in accordance with the Agreement over Arrangements on*

1996, and Mexico-Argentina BIT, 13 Nov. 1996, not yet in force) and is not party to the ICSID Convention.

[220] Foreign Investment Law of Mexico (Diario Oficial of Dec. 27, 1993), ILW, Release 97-1, Mar. 1997.

[221] Id. at Article 8.

Differences Relative to Investments between the States and Nationals of other States (Agreement of the CIADI);

b) *the Center for International Arrangements on Differences Relative to Investments (CIADI) with the object of solving the controversy through conciliation and arbitrage, in accordance with the procedures included in the Complementary Mechanism of the CIADI, in those cases when the Foreign Investor party be a National of a State which is not a contracting party of the Agreement with the CIADI."*[222] (Emphasis added.)

U. Venezuelan Investment Law

With the sharp decline in petroleum prices toward the end of 1985, Venezuelan policy makers began to give consideration to liberalizing the foreign investment regime in order to attract foreign investment in areas not directly related to the energy sector.[223] Moreover, since the mid 1980s the Venezuelan norms have experienced a number of changes leading to the current Venezuelan investment promotion law, which falls into the category of laws that give the investor the possible option of several procedures for the settlement of a dispute with the state. Article 22 of the Investment Law reads as follows:

"Controversies that arise between an international investor, whose country of origin currently has in effect treaties with Venezuela concerning the protection and promotion of investments, or controversies that arise under the Multilateral

[222] Article 15 of the Law on Investments of El Salvador (Legislative Decree No. 732 of Oct 14, 1999, ILW, Inc, Release 2002-2, Feb. 2002.

[223] John Pate, Venezuelan Foreign Investment and Technology Licensing Regulations: An Introductory Note, ICSID Rev., Vol. 2, No. 1, 193 (1987).

Insurance Guarantee Agency (MIGA) or under the Convention for the Settlement of Investment Disputes (ICSID), shall be settled by international arbitration under the terms of the applicable treaty or agreement, if it is so established, without prejudice to the possibility of recourse to, when possible, the local court system as contemplated in the Venezuelan legislation in force at the time."[224] (Emphasis added.)

By virtue of the last phrase of this provision of the Venezuelan law, the commitment of the state to arbitration is rendered ambiguous and contradictory, and a "literal interpretation of the text of the law would lead to conclusions void of reasonable logic."[225] While on the one hand this article seems to indicate that Venezuela will submit to international arbitration when it has a treaty obligation to do so, on the other, it would seem that in certain circumstances domestic law could frustrate this intention. Accordingly, with respect to the former, it is significant that the language of this article provides that disputes "shall be settled" by international arbitration, which could be interpreted to mean that the state has a duty and not simply an option[226] to submit disputes to arbitration. The fact that the law uses the term "shall" and not "may" could be of tremendous importance if a foreign investor were to rely on this provision to bring a case before ICSID, as it could make the allegation that the state committed itself to arbitrate.

[224] Article 22 of Decree No. 356, Oct. 3 1999, on the Promotion and Protection of Investments, ILW, Release 2001-1, March 2000 (translation by the author).
[225] Andres Mezgravis, in Arbitraje Comercial Interno e Internacional: Reflexciones Teoricas y Experiences Practicas, (Irene de Valera, ed., 2005) Academia de Ciencias Politicas y Sociales, Serie I, 388. Similar language was used by the SPP v. Egypt tribunal when finding that the Egyptian law contained a unlilateral open offer to submit disputes between the investor and the state to ICSID.
[226] See also, Gabriela Avila, Las Características del Arbitraje CIADI, Anuario Mexicano de Derecho Internacional, Vol. 2, Universidad Nacional Autónoma de México, 207 (2002).

Article 21 of the law further reinforces the suggestion that the state will submit controversies to international arbitral tribunals, as this particular article refers to the duty of the government to promote investment and to "submit controversies before an arbitral tribunal" when attempts to resolve disputes via diplomatic channels have failed. Additionally, commentators have interpreted this text to mean that the state has given its consent to submit disputes to ICSID and other international dispute resolution entities.[227]

The Investment Law is also consistent with general principles contained in the Venezuelan constitution of 1999 in favor of international arbitration.[228] In fact, a Venezuelan Supreme Court decision noted that the law had "developed the constitutional principles." This decision also highlighted that now international arbitration is part of the "tools available to foreign investors,"[229] when presented with a conflict with the state over an investment project.

Notwithstanding, whether and to what extent an ICSID tribunal would consider dicta from Supreme Court decisions and the writings of Venezuelan scholars to support a finding that the state has indeed consented via this section of the law remains doubtful, especially when the state has, in the last few years, indicated its unwillingness to submit to international arbitration.[230]

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[227] Andres Mezgravis, *supra* note 225, 393; Tatiana Maekelt, Tratados Bilaterales de Proteccion de Inversiones: Analisis de las Clausulas Arbitrales y su Aplicacion, in Arbitraje Comercial Interno e Internacional: Reflexiones Teoricas y Experiencias 344 (Irene de Valera, ed. 2005).

[228] Andres Mezgravis, *supra* note 225, 391.

[229] Venezuela Supreme Court decision of the Constitutional Chamber, file No. N°:00-1438, 14 Feb. 2001.

[230] However, applying the interpretation in some of the decisions mentioned *supra*, it is likely that tribunals would look to these opinions and other evidence to favor a pro-arbitration interpretation. In any event, in recent years Venezuela has been involved in several significant international arbitrations that have been distasteful for the government and as a result it may be expected that Venezuela will move to reduce its exposure to international arbitral jurisdiction as, indeed, it has done with respect to the new petroleum sector joint ventures signed in early 2006.

V. The Armenian Law

The Armenian law is an example of a more restrictive regime, leaving little doubt that the state has not consented to arbitrate disputes with investors. The relevant section of the law emphasizes the role of the Armenian courts in resolving disputes between the state and a foreign investor, "unless otherwise specified" in a contract or agreement in relation to international arbitration. The relevant provision reads as follows:

> *"Any disputes on foreign investments, which may arise between the foreign investor and the State* <u>*shall be considered by the courts of the Republic*</u> *of Armenia based on the legislation of the Republic of Armenia.*
>
> *Other disputes where the Republic of Armenia is not involved as a side, shall be considered, based on the legislation of the Republic of Armenia, by the courts of the Republic of Armenia or other bodies resolving economic disputes,* <u>*unless it is otherwise specified by international contracts or preliminary agreement of the sides*</u> *(on the basis of foundation documents, economic agreements, etc.)"*[231] (Emphasis added.)

<u>X. Preliminary Findings Concerning Investment Laws</u>

Based on a review of the dispute settlement provisions of the foregoing laws, it is evident that many of them are ambiguously worded. While a number of these laws seem to follow a common substantive pattern, they tend to be confusing and leave room for interpretation. Apparently in some instances the reason for this situation is that the laws

[231] Article 24, The Law of the Republic of Armenia On Foreign Investments, 1994, ILW, Release 95-3, June 1995.

were hastily conceived and may have been drafted quickly and by extraordinary legislative procedures to attract FDI or in order to comply with expectations and policies of international creditors.[232] In this regard the influence of institutions such as the IMF and the World Bank has been evident.[233] In fact, Shihata opined the following concerning this matter:

> "In some instances, a change of legislation is made on a condition for the presentation of a loan to the Bank's Board, or for the effectiveness of the loan agreement. While this approach ensures that the legislative changes take place without delay, it does not always ensure that sufficient deliberations have taken place to achieve appropriate legislative changes. Laws drafted too quickly may not be understood or supported by those who must implement them or be governed by them. Moreover, because they may be poorly drafted, they would likely become subject to frequent amendments with adverse effects on their policy objectives."[234]

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[232] Amazu Asousy, *supra* note 138, 338. The Law and Development Movement that primarily originated in the U.S. attempted in the 1970s to modernize the legal systems of Latin American countries. See Francis Snyder, The Failure of "Law and Development," Wis. L. Rev. 373, 374 (1982).

[233] The World Bank: Alleviating Poverty and Promoting Economic Growth with Social Equity, Metro. Corp. Couns., Apr. 2004, 1 (discussing the increased use of arbitration as investors have challenged host nations); Julio Faundez, Legal Technical Assistance, in Good Government and Law, 4 (Julio Faundez, Ed. 1997). Other agencies such as the International Law Institute have drafted Model Foreign Investment Laws as well. See Don Wallace & Robert Shanks, Model Foreign Investment Law with Annotations, International Law Institute, 1996, 22 (making reference to the model clause on dispute resultion which would apparently contain a unilateral offer to submit disputes to arbitration; they comment that "as a practical matter, by including the dispute resolution provision of Section 12, the host State consents to the jurisdiction of the designated judicial forum or arbitral tribunal.")

[234] Ibrahim Shihata, "Legal Framework for Development: Role of the World Bank in LTA," IBL 23, 1995, 360.

XI. Unilateral Offer to Consent to Arbitration – A Trend

As indicated in the foregoing survey, it seems as if states have become more willing to consent to provide an open unilateral offer to arbitrate disputes with foreign investors, as is also indicated in a number of international instruments. This is the case with many of the BITs, the more recent of which contain clauses whereby states consent to some form of international arbitration, most often to ICSID arbitration. In fact, it has been reported that some 900 BITs contain a generic advanced consent clause.[235] This is one of the essential elements contained in the model BITs of countries such as Austria, The Netherlands, and the United Kingdom.[236] A number of BITs now incorporate a phrase that makes reference to the fact that the resolution of disputes "shall be submitted to" the Center for their resolution.[237] A number of other BITs leave the investor with a choice of one of several options to choose from, such as ICC arbitration, arbitration under the UNCITRAL rules, and ad hoc arbitration.[238] The most recent U.S. Model BIT of 2004 contains perhaps the most emphatic redaction of any of the model BITs concerning consent. It states that "each party consents to the submission of a claim to arbitration under this Section in accordance with this treaty."[239]

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[235] Mary Moreland, "Foreign Control" and "Agreement" under ICSID Article 25(2)(B): Standards for Claims Brought by Locally Organized Subsidiaries Against Host States, 9 Currents Int'l Trade L.J. 18, 18 (2000). See also Noah Rubins, In God We Trust, All Others Pay Cash: Security for Costs in International Arbitration, 11 Am. Rev. Int'l Arb. 307, 337-338 (2000).

[236] Austria-Morroco BIT, signed 2 Nov. 1992, not yet in force, Art. 8; The Netherlands-Nigeria BIT, in force 1 Feb. 1994, Art. 9; UK-Hungary BIT in force, 28 Aug. 1987, Art 8.

[237] See, for instance, the Article 11 of the German Model Agreement, reprinted in UNCTAD, Bilteral Investment Treaties in the Mid-1990's, 1998, UCTAD/ITE?IIT/7 259 and Article 8 of the Swiss Model Agreement, reprinted in in UNCTAD, Bilteral Investment Treaties in the Mid-1990's, 1998, UCTAD/ITE/IIT/7 273.

[238] Switzerland-Paraguay BIT in force 28 Sept.1993, Art. 9; Lithuania-Poland BIT, in force 6 Aug. 1995 Art 7.

[239] U.S. Model BIT 2004, US Model BIT 2004, US Dept. of State and United States Trade Rep, Nov. 2004, Art. 25(1), available at http://www.state.gov/documents/organization/38710.pdf (last visited 27/04/06).

A. Multilateral Invesment Treaties (MITs)

A number of the more influential MITs also contain important dispute resolution clauses. The MITs with open acceptances to arbitrate disputes can be found in the 1987 ASEAN Agreement for the Promotion and Protection of Investments,[240] Chapter 11 of the 1992 NAFTA,[241] the 1994 Energy Charter Treaty,[242] and the Colonia and Buenos Aires Investment Protocols of Mercosur.[243] In this respect it is useful to analyze two examples to illustrate how advanced consent to arbitration is used in MITs.

B. North American Free Trade Agreement (NAFTA)

NAFTA is perhaps the prime example of acceptance by sovereign states in a multinational convention of mandatory referral of investment disputes to ICSID arbitration at the request of a foreign investor.[244] Under Section A of NAFTA Chapter 11, private investors from other NAFTA state parties may submit directly to international arbitration any such disputes with a NAFTA host state. The investor has ample discretion

[240] ASEAN Agreement for the Promotion and Protection of Investments, Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, Philippines, 15 December 1987, available at www.aseansec.org/menu.asp?action=4&content=11 (last visited 4/18/06). This agreement covers investments between investors from Brunei, Indonesia, Malaysia, Phillipines, Singapore, Thailand and Vietnam.

[241]The North American Free Trade Agreement (NAFTA), entered in force on January 1, 32 ILM 605, 643 1993, available at www.sice.oas.org/trade/nafta/chap-11.asp (last visited 4/15/06). This agreement covers investments between Canada, the United States and Mexico.

[242] The Energy Charter Treaty, signed at Lisbon on 17 December 1994, available at www.encharter.org/index.jsp?psk=02&ptp=tMessAgenca.jsp&pci=53&pti=14 (last visited 16/04/06). This charter covers investments in the energy sector between forty-seven states.

[243] The Colonia Protocol on Reciprocal Promotion and Protection of Investments within Mercosur, approved by Decision 11/93 of the Council of Mercosur, signed 17 January1994, not yet in force (the Colonia Protocol). The protocol covers investments from investors of the Member States of Mercosur in the territory of these states. The Protocol on Promotion and Protection of Investments coming from States not Party to Mercosur, approved by Decision 11/94 of the Council of Mercosur, signed in Buenos Aires on 5 August 1994 (the Buenos Aires Protocol).

[244] David Gantz, The Evolution of FTA Investment Provisions: From NAFTA to the United States--Chile Free Trade Agreement, 19 Am. U. Int'l L. Rev. 679, 683 (2004) (explaining that, in the context of NAFTA, the dispute resolution provision sets mandatory standards for the treatment of foreign investment and investors, and also provides for binding arbitration of disputes related to those standards).

to a) unilaterally consent and bring the state before an international arbitration forum and b) unilaterally waive its rights to initiate or continue in any national or international forum any proceedings with respect to the measures by which the host state has allegedly violated its NAFTA obligations.[245] Moreover, the rule on the exhaustion of domestic remedies is waived. Therefore, NAFTA Chapter 11 arbitration allows private investors to effectively block local courts and to compel a government, or any of its subdivisions, to submit to arbitration.[246]

The result of the liberal regime under NAFTA has resulted in twenty-four cases being brought under the treaty, of which only ten have been concluded with a final award by the respective tribunal deciding on the merits. Although the arbitral procedure under NAFTA has been a contentious issue recently, and much has been written about this,[247] it would appear that the arbitral mechanism provided for under the agreement has worked relatively well.[248] Although this mechasism has been termed "a significant innovation in international law,"[249] the future of the NAFTA dispute settlement mechanism continues to be questioned by a number of scholars.[250]

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[245] NAFTA, *supra* note 241, Articles 1503(2), 1502(3)(a) and 1121.
[246] Rukia Dames, The First Arbitral Award and its Implications for Asean's Legal Framework, Journal of International Arbitration, Vol. 22 No. 6, 535 (1998).
[247] The debate has been exacerbated in the political arena since the U.S. so far has a perfect record in defending against cases brought against it under the investor-state provisions of NAFTA with no tribunal having found the U.S. liable under NAFTA.
[248] See Barton Legum, Lessons Learned from the NAFTA: The New Generation of US Investment Treaty Arbitration Provisions, ICSID Rev., Vol. 19, No. 2, 344-354 (2004).
[249] Ronald Wolf, Trade, Aid and Arbitrate: The Globalization of Western Law, 2004, 11.
[250] The principal criticisms have been that it exposes the host state to excessive abuse by the investors, it is burdensome for the public fisc as the host state will have to expend considerable monies on defense, and that it allows the disappointed investor to resort to arbitration when it has lost its case in the state or local courts, if it first chose to try to resolve the dispute in the local forum under local law. See Justin Bytne, Comment, NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy Through Direct Access, 35 Tex. Int'l L.J. 415, 434 (2000). See also Stuart Gross, Note, Inordinate Chill: BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom--An Indonesian Case Study, 24 Mich. J. Int'l L. 893, 894-95 (2003).

C. The Common Market of the Southern Cone (MERCOSUR)

The MERCOSUR agreement has been implemented by a series of protocols to which every member state must be a party. Two of the protocols are intended to promote and protect investments. The first, the Colonia Protocol,[251] covers investments by investors from a member state in the territory of another member state, and the second, the Buenos Aires Protocol,[252] covers investments by investors from non-member states in the territory of a member state.

The Colonia Protocol can be considered to be an investment protection MIT and it provides for an arbitration procedure as the principal dispute settlement system among its members. The protocol allows investors to request the submission of an investor-state dispute to ICSID by providing that covered investment disputes "shall be submitted" to international arbitration "at the request of the investor."[253] However, it is not clear if the protocol contains the "advanced consent of each Contracting Party to the forms of arbitration mentioned."[254] The protocol does, though, explicitly state that "each Contracting Party gives its consent for the dispute to be submitted to arbitration under the ICSID Additional Facility Rules,"[255] which would appear to allow an investor whose state is not party to the ICSID Convention to resort to ICSID arbitration. This would theoretically allow an investor from Brazil (not a member of ICSID) to submit a dispute to ICSID that arises out of an investment dispute in Argentina, for instance.

XII. Ability to Withdraw Consent

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[251] The Colonia Protocol, *supra* note 243.
[252] The Buenos Aires Protocol, *supra* note 243.
[253] The Colonia Protocol, *supra* note 243, Article 9.
[254] Nigel Blackaby, Investor-to-State Arbitration under Mercosur, in International Arbitration in Latin America (Nigel Balckaby *et al*. Eds. 2002), 287.
[255] The Colonia Protocol, *supra* note 243, Article 9.4(a).

The advantage in having politically turbulant developing countries sign BITs and MITs was that once they had entered into an international obligation they would find it difficult to renege on their treaty obligations. The mechanism of having the host state grant consent to appear before an international tribunal to settle a foreign investment dispute in its national legislation would be of little utility if states were free to repeal their consent by modifying their legislation. For this reason, this matter has been debated since the negotiation phase of the ICSID Convention. Some states expressed concern as to whether the host state would be able to revoke the consent given in its national legislation at any time, hence rendering the mechanism virtually ineffective. In this regard, it would seem settled that a state could amend its law and, hence, its consent to ICSID jurisdiction, but provided that the investor had not first accepted the Center's jurisdiction or the state's offer to arbitrate either by an agreement with the host state, a simple communication to the state, a statement contained in an application for an investment license under the provisions of the national law, or by simply submitting a claim to the Center.[256] Under this scenario no agreement would have been perfected since there would only be consent by one of the parties and so the state could freely repeal its legislation. However, once the private investor consents to the jurisdiction of the Center, the agreement on consent will remain in effect even if the national legislation giving rise to the consent of the state is repealed. Schreuer argues that if the investor accepts the offer contained in the legislation in writing, then the parties become "insulated" and an assumption arises as to the existence of a contract independent of the legislative instrument that brought it into

[256] Christoph Sheuer, *supra* note 87, ¶257; Antonio Parra, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, *supra* note 18, 320.

existence.[257] Once there has been subsequent acceptance by the investor, there does not need to be any further mutual agreement per se between the contracting state and the national of another contracting state for ICISD to have jurisdiction.[258] Under this characterization, if the investor accepts the offer during the lifetime of the legislation, the repeal of the legislation containing the offer of ICSID arbitration will not modify the state's agreement, and commitment, to do so.

Again, the consent must become mutual for there to exist a perfected agreement and for this to occur the investor needs to grant its consent by one of the several recognized methods. The simplest form would be for the investor to communicate its consent to the state in writing.[259] The other method that the investor could use to manifest its consent would be to simply bring a claim before ICSID or another institutional organization.[260] Indeed, a request for arbitration may itself constitute the consent of the investor-claimant where there is an instrument already expressing the consent of the state to submit to ICSID.[261] This method of granting consent was recognized in *SPP v. Egypt*,[262] *AAPL v. Republic of Sri Lanka*,[263] *AMT v. Zaire*[264] and *Fedax v. Venezuela*.[265] In all four cases the tribunals recognized that the claimant, be it whether the investor relies on a BIT or a national law, may demonstrate consent simply by bringing the claim.

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[257] Christoph Schreuer, *supra* note 87, ¶406.
[258] Jan Paulsson, Arbitration Without Privity, *supra* note 89, 233.
[259] Report of the Executive Directors, 1 ICSID Reports 28, 24. This was the method chosen by the investor in Tradex Hellas S.A. (Greece) vs. Republic of Albania.
[260] Aron Broches, The Convention on the Settlement of Investment Disputes, Some Observations on Jurisdiction, 5 Colum. J. Transant'l L. 263 (1996); Christoph Schreuer, *supra* note 87, ¶ 276.
[261] Amazu Asouzu, *supra* note 138, 328.
[262] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, (SPP v. Egypt) Case No. ARB/84/3, Decision on Jurisdiction 14 April 1988.
[263] Asian Agricultural Products Ltd. v. Republic of Sri Lanka (AAPL v. Sri Lanaka) ICSID Case No. ARB/87/3, 6 ICSID Rev 526 (1991).
[264] American Manufacturing and Trading, Inc. v. Republic of Zaire (AMT v. Zaire), Case No. Arb/93/1, Int'l Arb. Rep. 12 (April 1997).
[265] Fedax N.V. v. Republic of Venezuela (Fedax v. Venezuela), Decision on Objections to Jurisdiction of July 11, 1997, 5 *ICSID Rep.* 186 (2002).

The consequence of consent being formed in this manner is that both parties will be bound irrevocably and will also be exluded from seeking any other remedy.[266] Where consent is given under the ICSID Convention, the only remedy available to the parties is that which has been agreed upon. This will effectively preclude either party from going before national courts to seek any remedy, including interim or provisional measures.[267]

A more contentious issue, however, is the scenario wherein the host state will not be able to revoke its consent once given in national legislation. This could occur, for example, if a state were to expressly declare in its national legislation that its consent was irrevocable.[268] In a situation such as this there are two possible interpretative options. The first would be to give a literal interpretation to the last sentence contained in Article 25 (1) of the ICSID Convention, which states that "when the parties have given their consent, no party may withdraw its consent unilaterally,"[269] and so permit the tribunal to determine its own jurisdiction based on the national law. The second option would be to construe the wording of Article 25 in accordance with its "ordinary meaning."[270] Under this second interpretation, it would appear that the "consent is not irrevocable unless it has been cemented in a bilateral treaty,"[271] and the state would be free to change its legislation. What is clear, however, is that if a state has granted a unilateral open offer to

[266] Stephen Schwebel & J. Gillis Wetter, Arbitration and the Exhaustion of Local Remedies, AJIL, Vol. 60, No. 3 484, 487 (1966).
[267] ICISD Convention, Article 26; Article 39 of the ICSID Arbitration Rules. The rules provide that provisional measures may be sought by the parties before local courts only when the parties have agreed on such a procedure in their agreement to arbitrate. See also Antonio Parra, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, ICSID Rev., Vol. 12, No. 2, 312 (1997).
[268] Morse Hirsch, The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes, 1993, 53.
[269] The ICSID Convention, *supra* note 63, Article 25 (1).
[270] Art. 31(1) of The Vienna Convention on the Law of Treaties (the Vienna Convention), 8 I.L.M., 679 (1969),, provides that treaties are to be construed in accordance with the ordinary meanings of the words contained in their provisions.
[271] Morse Hirsch, *supra* note 268, 53.

submit disputes to ICSID, and the investor submits a claim before this forum without having previously consented in writing to ICSID arbitration, the act of submitting a claim will be interpreted as the consent of the foreign investor. In that case, the state will be bound to arbitrate.

XIII. Concerning Unilateral Declarations

The rule of unilateral declarations, a rule of public international law but which also applies to the internal legislation of states,[272] may also provide a strong ground for the arguments advanced in favor of the irrevocability of consent. The implications of this doctrine are adressed in the following section.

A. Binding Nature of Unilateral Statements

Under international law it has been widely accepted that under certain conditions the unilateral statements of a government can bind the state to act in a certain manner or to abstain from doing so. This rule was confirmed by decisions of the Permanent Court of International Justice (PCIJ) and later ratified in subsequent decisions by the International Court of Justice (ICJ).[273] In the *Nuclear Tests Case*, for instance, the ICJ held that when a state makes repeated declarations and these are given "publicly and with the intention to be bound," the state should be legally required to follow a course of conduct consistent with such declarations.[274] In that particular case the reiterated statements made by French

[272] Id. at 53.
[273] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment of April 5, 1 Series A/B, No. 53 (1933), 22; Case Concerning the Arbitral Award made by the King of Spain, 23 December 1906 (Honduras v. Nicaragua), Judgment of November 18, 1960, ICJ Rep. 1960, at 192; Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Judgment of May 26, 1961, ICJ Rep. 1961, at 17.
[274] Case Concerning Nuclear Tests (Australia v. France), Judgment of Dec. 20, 1974, ICJ Rep. 1974, at 44.

officials stating that France would cease nuclear testing were found to bind the state to abstain from undertaking further tests.[275] The rule as it stands today implies that a unilateral statement will be binding upon the state when the declaration is given publicly and repeatedly, and those to whom the statements were directed could reasonably rely upon them, or the state intended to be bound by said statement.[276]

Another important element of the rule was clarified in the *Frontier Dispute Case*, which emphasized the importance of looking at "the factual circumstances in which the act occur[s],"[277] to determine the extent to which a unilateral statement may be binding on a state. In this case a chamber of the court reviewed the dicta contained in the decision of the *Nuclear Test Case* and emphasized that it may have been more the historical circumstances, rather than the factual realities, that figured in the decision of the court to attribute binding force to those unilateral statements.[278] During the early 1960's the U.K., the U.S. and the Soviet Union concluded the Treaty Banning Weapon Tests in the Atmosphere, in Outer Space and Under Water.[279] Although the treaty gained wide support, some believed for political considerations, and others for environmental concerns, France nevertheless continued to conduct tests in the Pacific. Countries then began to pressure France to cease its testing,[280] which was at least partly the reason why

[275] The declaration that the Court found most compelling was that made by the French Embassy in Wellington, referring to a statement by the President of France in which he referred to the fact that France would cease atmospheric testing but continue with "underground tests." See Case Concerning Nuclear Tests (Australia v. France), Judgment of Dec. 20, 1974, ICJ Rep. 1974, at 37.
[276] Ian Brownlie, Principles of Public International Law, Sixth Ed., Oxford, 2003, 613.
[277] Case Concerning Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment of Dec. 22, 1986 ICJ Rep. 1986, 554 at 40.
[278] Barbara Kwiatkowska, New Zealand v. France Nuclear Tests: the Dismissed Case of Lasting Significance, 37 Va. J. Int'l. L. 107, 122 (1996).
[279] Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 480 UNTS 43, in force Oct. 1963.
[280] Australia and New Zealand, with wide Asian support requested to the ICJ to enjoin the French atmospheric tests. See Case Concerning Nuclear Tests (Australia v. France), Interim Protection, Order 1973, ICJ Rep. at 99.

its representatives made the declarations they did. The French authorities presumably felt obliged to make unilateral statements to the effect that France would refrain from the criticized activities in order to save face in the geopolitical arena.

Legislation is one clear example of how a state may be bound, as it is one form of unilateral statement.[281] In this context it is of interest to note that in most cases where states have conceded unilateral open offers of consent to resort to international arbitration, or those with more liberal legislation generally, such states have also experienced particular socio-political and economic circumstances that led to the enactment of such legislation.[282] Although it is difficult to generalize, we suggest that in looking at the historical situations in which countries such as Albania found itself at the time it enacted its foreign investment legislation, coupled with the additional criteria noted above, an arbitral tribunal would be inclined to find that statements made through national legislation would bind the state to comply with the garantees made therein.

B. Promotional Campaigns

A more complicated question, however, is the effect that promotional campaigns conducted by governments to attract foreign investment may have concerning the matter of unilateral declarations. A number of developing countries conduct campaigns by the national government, or through diplomatic and consular channels abroad, and frequently with the aid of private publicity companies or state-owned agencies. Generally these government-sponsored promotions involve affirmative unilateral statements and guarantees intended to attract foreign investors. Hence, the question is whether this type

[281] Morse Hirsch, *supra* note 268, 53.
[282] See, for example, the cases of Albania, Tunisia, Central Afircan Republic, and Peru, above.

of publicity could be sufficient to bind the state *vis a vis* a foreign investor who then relies on this type of information.

An additional element that contributes to the uncertainty when determining the effect of such statements or claims is whether the official making the statements has sufficient authority or legal status to do so. Under international law there exists a presumption that persons entitled to exercise elements of governmental authority have the capacity to bind the state, even if such an official exceeds his true authority.[283] Notwithstanding, it may generally be presumed that a unilateral declaration promoting a national FDI regime made under apparently official circumstances would become binding on the state in relation to any investors who relied on such statements or information.[284]

In *Revere Copper & Brass v. Overseas Private Investment Corp.*, decided under the Commercial Arbitration Rules of the American Arbitration Association (AAA), the claimant based its allegations on statements made by the government of Jamaica. Spokesmen of the Jamaican government had made certain public statements disavowing the contract between the foreign investor and the state. The claimant alleged that these statements were sufficient to be considered an expropriation and that, therefore, it was entitled to compensation. In this case the tribunal undertook an analysis to determine whether "actions taken by a government contrary to and damaging to the economic interests of aliens [were] in conflict with undertakings and assurances given in good faith

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[283] This principle is embodied in Article 5 of the Articles on Responsibility of States for Internationally Wrongful Acts, UNGA, Official Records, Fifty-Sixth Session, Supp. No. 10 (A/56/10), Report of the International Law Commission Fifty-Third Session (23 April-1 June and 2 July 10August 2001), at 99. See also Robert Jennings & Arthur Watts, Oppenheim's International Law, 9th ed., 1996, 540; Claire Finkelstein, Changing Notions of State Agency in International Law: The Case of Paul Touvier, 30 Tex. Int'l L.J., 278 (1995). Moreover, certain state functionaries, such as the Heads of State and the Minters of Foreign Affairs, are presumed to have the power to represent their state under Article 7(2) of The Vienna Convention.

[284] Michael Reisman & Mahnoush Arsanjani, The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes, ICSID Rev., Vol. 19, No. 2, 340 (2004).

to such aliens as an inducement to their making the investments affected by the action."
[285]

From an analysis of these cases, together with general principles of international law, it may be concluded that when a state makes unilateral declarations or provides enticing information, with the intent of inducing a foreign investor to make an investment, and the investor reasonably relies on the declaration or information, then a binding legal obligation will have been created on the part of the state. Moreover, where a host state "seeks foreign investment, [and] acts intentionally, so as to create expectations in potential investors with respect to particular treatment or comportment, the host state should…be bound by the commitments and the investor is entitled to rely upon them in instances of decision."[286]

C. Estoppel

Finally, an argument can also be made under the doctrine of estoppel. The estoppel doctrine provides that a party is precluded from acting contrary to its own declaration when the declaration was made in an unequivocal manner by an authorized person and the other party relied on the declaration to its detriment.[287] Although admittedly this doctrine, which had its origins in the common law, has not enjoyed the broad recognition of other principles of international law,[288] it has nevertheless been recognized by a number of scholars to be applicable in the context of international law.

[285] Revere Copper & Brass, Inc. v. Overseas Private International Corp., Arbitral Award in Dispute Involving U.S. Investment Guaranty Program, 17 I.L.M. 1321; (1978), 1331.
[286] Michael Reisman & Mahnoush Arsanjani, *supra* note 284, 342.
[287] Elihu Lauterpacht, The Development of International Law by the International Court: Being a Revised Edition of The Development of International Law by the Permanent Court of International Justice (1934), 1982, 172.
[288] Ian Brownlie, Principles of Public International Law, Sixth ed., 2003, 613.

This was the finding of an ICSID tribunal in the case of *Amco v. Indonesia*. The relevant section of the tribunal's decision reads as follows: "The Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved. In addition, the Tribunal considers that, in particular for its applications in international relations, the whole concept is characterized by the requirement of good faith."[289] Hence, when a government makes declarations concerning the conditions of legal security afforded to foreign investors, it may not later renege on its promises.

XIII. Analyzing the Relationship Between BITS and Foreign Investment Legislation

In the case of many developing countries BITs and national laws combine to provide a unified regulatory framework for foreign investment in the host country. In many instances BITs are limited instruments as they tend to constitute only a part of a liberal investment regime.[290] BITs only provide the investor with the most basic of tools, while it is up to the host state to create an environment that will entice the investor to come into the market. Regulations such as the screening of investors, taxation of foreign investment, the policy on independent contracts versus joint ventures with the state,[291] and various other state practices of intervention in the economy are all factors that will influence the flow of FDI. Even though as a general proposition BITs will not impose conditions on such national policies, nevertheless in many situations the existence of a

[289] Amco Asia Corp and Others v. Republic of Indonesia (Amco v. Indonesia) Case No. ARB/81/1, Decision on Jurisidiction of September 25, 1983, 9 ICSID Rep. at 47.
[290] Kenneth Vandevelde, *supra* note 26, 502.
[291] Such as the forced "migration" to minority joint ventures in the case of foreign oil companies, as occurred in early 2006 in Venezuela, for instance. See for instance Peter Wilson, Venezuela's Chavez Squeezes Oil Companies With Taxes, Raids, Bloomberg News Feature, Aug., 24, 2005, at http://quote.bloomberg.com/apps/news?pid=nifea&&sid=a3z63_HrIvtc (last visted 26/04/06).

BIT may permit the host government to pursue more nationalistic and revenue-enhancing policies than it might otherwise be able to afford, in terms of appearing as an attractive situs for foreign investment in the absence of the protections created by a BIT.

In connection with dispute resolution, the relationship between BITs and national laws is of particular interest. In the first place, when a BIT is in force between two countries only investors of the nationality of the capital exporting state will be able to rely on the protections contained in the BIT, as the BIT is merely a bilateral treaty between two sovereign states. If the home country of the investor does not have a BIT with the particular host country, then the existence of other BITs of the host country are irrelevant (unless the investment can be channeled through one such home country jurisdiction).

On the other hand, when there is only a national investment law in place that contains an open unilateral offer to resort to international arbitration, the law should permit all foreign investors, regardless of origin, to commence proceedings in reliance on the law, that is, of course, asuming that the law does not differentiate or discriminate among investors from different countries. Normally, national investment laws do extend to all foreign investors irrespective of their country of origin and regardless of whether they are protected by BITs or other multilateral treaties.[292] In this case nationality should be irrelevant. Accordingly, it would seem that states that wish to attract FDI from investors of different nationalities would be more successful by enacting a liberal foreign investment law rather than negotiating a series of BITs.

[292] Norbert Horn, Arbitrating Foreign Invesment Disputes: Concepts and Means, 2004, 132.

The final scenario is one in which both national legislation and BITs are in force and are applicable simultaneously.[293] In this case there are two possible situations that may arise: 1) the national law could offer more favorable treatment concerning the conditions under which the state consents to arbitration, or 2) the BIT could offer more favorable treatment.

In the event that a BIT contains similar or identical provisions as the norms of the host state, then the principal contribution of the BIT is to raise such favorable treatment to the level of an international obligation. The BIT will serve to stabilize the favorable investment climate that exists within the host country, as the host country would also be bound by an international obligation. In the absence of a BIT, a host state could "not credibly bind itself to a particular set of legal rules when it negotiates with a potential investor."[294] Without a BIT investors may fear that a host state could enact certain favorable norms to attract the investor and later change those rules if the state later believes that such favorable norms are harming the interests of the nation.[295] The rules established in a contract between an investor and the state are, as is the usual situation, no more reliable than the willingness of the state to continue to honor them, and enforcement of these provisions may prove problematic, if not impossible.[296] However, as mentioned *supra*, it would seem as though the doctrine of irrevocability of consent by the state, once

[293] In this case the foreign investor would have to be of the nationality of the contracting party which would make the BIT provisions relevant.
[294] Andrew Guzman, *supra* note 23, 659.
[295] One recent, glaring example has occurred between 2005 and early 2006 in the case of the multiple foreign oil companies operating in Venezuela. The case of a change of government would be another example of when this could occur. See Venezuelan Ministry of Energy and Petroleum, PDVSA True Nationalization,
http://www.pdvsa.com/index.php?tpl=interface.en/design/readmenuprinc.tpl.html&newsid_temas=44, (last visited 25/04/06).
[296] Andrew Guzman, *supra* note 23, 659; Thomas Waelde & George Ndi, Stabilizing International Investment Commitments: International Law Versus Contract Interpretation, 31 Tex. Int'l L.J. 215, 243 (1996).

the foreign investor has consented, is settled, so that foreign investors that have international dispute resolution provisions in their contracts should at least have this safeguard, provided that there are not overriding economic or business reasons that prevent them from resorting to such procedures, as indeed is sometimes the case.

BITs have been conceived as "legal floors, and not legal ceilings,"[297] as BITs simply provide a minimum standard for the treatment of foreign investment within the host state. Given the element of competition among developing countries, states grant more beneficial treatment in their laws. Moreover, under the doctrine of unilateral statements, referred to *supra*, a state could also grant more beneficial treatment regardless of any limitations that might be embodied in a BIT by making unilateral declarations, presumably to non-BIT nationals, with the intention of being bound by them. However, when two or more instruments contain arbitration clauses under which an investor may resort to international arbitration the matter becomes more complex. This is discussed below.

A. Law Applicable to Determine Jurisdiction

The existence of multiple jurisdictional clauses has presented a further potential problem that could tend to undermine the acceptance of international arbitration under particular circumstances. One such example was the decision of the ICSID tribunal in the *SGS v. Pakistan Case*[298] where the tribunal found that the investor would be able to bring its arbitration claim either under municipal law or under an international agreement. It

[297] Michael Reisman & Mahnoush Arsanjani, *supra* note 284, 340.
[298] SGS Societe Generale de Surveillance S.A. v. Pakistan, Decision on Jurisdiction, ICSID No. ARB/01/13 (Aug. 6, 2003), 8 ICSID Rep. at 145.

would be up to the "claimant to characterize the claims as it sees fit,"[299] effectively granting the investor the option to choose to bring the jurisdictional claim under the provision that would grant it the more favorable regime.

Notwithstanding the fact that instances in which the investor can elect at its discretion the more favorable law or provision under which it can submit a dispute to international arbitration could lead to situations of forum shopping,[300]which is perceived as a negative consequence, the legal propriety of being able to do so is the general criterion applied by international arbitral tribunals.[301] In the *Tradex v. Albania Case* the claimants first attempted to rely on a provision in the BIT between Albania and Greece. The tribunal, however, denied this basis for jurisdiction as the alleged expropriation and Request for Arbitration had occurred before the entry into force of the BIT. The investor then successfully proceeded to bring the claim under the legislative provision as discussed in Section IX A, above.

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[299] Id. at 148.

[300] When such options exist, the party that commences arbitration can elect the choice of forum. See Yuval Shanny, Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims, 99 Am. J. Int'l L. 835, 838; Rudolf Dolzer & Margarete Stevens, Bilateral Investment Treaties 25-31 (Brill Acad. Pub. 1995). See, also, Emmanuel Gaillard, Vivendi' and Bilateral Investment Treaty Arbitration, N.Y.L.J., Feb. 6, 2006 at col. 1 (stating that where a BIT coexists with a contractual agreement a foreign investor may find separate causes of action against a host state, one in the BIT and one in the contract). See, also, Susan Franck, The Legitimacy Criss in Investment Treaty Argitration: Prvitizing Public International Law Through Inconsistent Decisions, 73 Fordham L. Rev. 1521, 1153 (2005) (discussing that investors will try to enter into FDI agreements where they may avail themselves of favorable provisions under more than one BIT).

[301] In Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, Case No. ARB/00/5, Decision on Jurisdiction, Sept. 27, 2001, 6 ICSID Rep, the foreign concessionaire was registered as a company in Venezuela. However, the investment agreement provided that the concessionaire was to be considered to be an investor under foreign control for the purposes of establishing ICSID jurisdiction if the majority of the concessionaire's shares were held by a foreign national from an ICSID state. The tribunal accepted this definition of foreign control and considered that the parties were free to agree on a reasonable meaning of foreign control under the ICSID Convention. The tribunal concluded that ICSID, and not the Venezuelan courts, had jurisdiction over the dispute because the majority of the concessionaire's shares had come to be held by a U.S. corporation. See, also, Tai-Heng Cheng, Power, Authority and International Investment Law, 20 Am. U. Int'l L. Rev. 465, 478 (2005).

Today if a U.S. investor in Albania had a dispute with the state arising from a situation not related to an expropriation,[302] the U.S. investor could bring its claim before ICSID under the U.S.-Albania BIT.[303] This is because under the BIT the consent to arbitration is not limited to cases relating to expropriation. In fact, in the BIT both the U.S. and Albania, "consent[ed] to the submission of any investment dispute for settlement by binding arbitration" concerning all disputes that arise between the state and the investor.[304] On the other hand, if the dispute relates to a matter involving expropriation and, therefore, also falls under the scope of the law, in this case the investor would have a choice as to under which instrument to bring the claim, both of which should be sufficiently valid.

B. Other considerations

As noted above, certain investment legislation in capital importing countries tracks the broad, inclusive consent clauses typical of BITs, which in practice are the norm and are in most cases preferable.[305] Regardless, BITs have become the primary source of state consent to investment arbitration, reducing the significance of the investment definitions contained in domestic legislation.[306] However, as in the case of more recent investment laws, it has become increasingly common for the more recent BITs to contain the express, advance consent of each state party to submit investment disputes with nationals of the other state party to ICSID or to other dispute resolution mechanisms.

[302] As discussed in section IX A, the Albanian law contains an open unilateral offer to submit disputes to arbitration, but limits the offer only to cases relating to expropriation.
[303] U.S.-Albania BIT, signed Jan. 11, 1995, in force Jan. 4, 1998.
[304] U.S.-Albania BIT (1998), Article IX (4).
[305] Chritoph Schreuer, UNCTAD Report Dispute Settlement ICSID, 2.3 Consent to Arbitration, UNCTAD/EDM/Misc.232/Add.2, 2003, 29.
[306] Noah Rubins, The Notion of "Investment" in International Investment Arbitraton, in Arbitrating Foreign Investment Disputes, 296 (Norbert Horn, Ed., 2004).

Some BITs require that the investor make an effort to settle the dispute by conciliation, while in other cases there is the requirement of a certain waiting period, during which settlement negotiations are to be attempted, before the controversy can be filed before an arbitration forum. In any case, though, regardless of whether a contract has been concluded with the host state or of the results of the "cooling off" period for negotiations, the investor will be able to commence an arbitration proceeding against the host state.[307]

This U.S. Model BIT, for instance, follows this pattern and provides that "each party consents to the submission of a claim to arbitration….[therby satisfying] the requirements of Chapter II of the ICSID Convention (Jurisdiction of the Center) and Additional Facility Rules for written consent of the parties to the dispute."[308] BITs with clauses of this kind will confer upon the investor rights which do not depend on the existence of an arbitral clause in an investment contract, provided that a breach of the treaty can be established. Hence, when the "investor of country A invests in country B and a dispute arises, the investor should check whether there is a biltalteral investment treaty between countries A and B which might enable the investor to commence an arbitration against country B."[309] Today, "the great majority of treaties…including almost all the MITs, provide aggrieved investors with a direct right to resort to arbitration with regard to any disputes arising from treaty breaches."[310]

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[307] Under Argentina's BIT with the U.S. (Argentina-US BIT, in force 20 Oct., 1994, Article VII3(a)), an investor must wait at least six months before submitting a claim before an arbitral panel. See Stewart Shackleton, The Importance of Investment Protection in Argentina, Ins. Day, Sept. 23, 2002, 1; Matthew Saunders, Bilateral Investment Treaties Oil the Wheels of Commerce, Lloyd's List International, June 23, 2004, 6.

[308] Article 25, US Model BIT 2004, US Dept. of State and United States Trade Rep, Nov. 2004, available at http://www.state.gov/documents/organization/38710.pdf (last visited 27/04/06)

[309] Nigel Blackaby, Overview of Regional Developments, in International Arbitration in Latin America, 10 (Nigel Blackabay *et al* Ed., 2002).

[310] Nigel Blackaby, Arbitration Under Bilateral Investment Treaties in Latin America, in International Arbitration in Latin America, 402 (Nigel Blackabay *et al* Ed., 2002).

In the *AAPL v. Sri Lanka Case*[311] the request for arbitration was made pursuant to the ICSID Convention and a clause under a BIT between the UK and Sri Lanka.[312] The treaty provided that each party had thereby consented to the submission of disputes to arbitration before ICSID. Although in this case the competence of the tribunal was not challenged, the tribunal stated the following: "The present case is the first instance in which the Center has been seized by an arbitration request exclusively based on a treaty provision and not implementation of a freely negotiated arbitration agreement directly concluded beween parties among whom the dispute has arisen."[313]

The question of jurisdiction based, in part, on a BIT also arose in the *AMT v. Zaire Case*[314] and was resolved by the tribunal in favor of recognizing the existence of consent due to provisions to this effect contained in the BIT between the U.S. and Zaire.[315] In this case the tribunal stated that "the requirement of the consent of the parties does not disappear with the existence of the Treaty,"[316] and that by "reading the provisions of the Treaty, it cannot be contended that consent of the parties to come before ICSID simply results from a pre-existing agreement by the United States and Zaire."[317] After some debate the tribunal concluded, however, that the investor, AMT, had

[311] AAPL v. Sri Lanka, *supra* note 263.
[312] Article 8(1) of the 1980 BIT between the UK and Sri Lanka read as follows: "Each Contracting Party herby consents to submit to the International Centre for the Settlement of Investment Disputes…for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former." See United Kingdowm-Sri Lanka BIT, in force 18 Dec. 1980.
[313] AAPL v. Sri Lanka, *supra* note 263, at 18.
[314] AMT v. Zaire, *supra* note 264.
[315] Article VII(2) of the BIT between the US and Zaire (US-Zaire, July 28, 1989) reads as follows: "Each Party hereby consents to submit investment disputes to the International Center for the Settlement of Investment Disputes (Center) for settlement by conciliation or binding arbitration."
[316] AMT v. Zaire, *supra* note 264, at 5.19
[317] Id. at 5.36.

expressed its choice "without equivocation"[318] to submit disputes before ICSID and "this willingness together with that of Zaire expressed in the Treaty created the consent necessary to validate the assumption of jurisdiction by the Center."[319]

Finally, in another important case that involved a BIT between The Netherlands and Venezuela a sufficient basis for ICSID jurisdiction was found regarding a dispute involving certain promissory notes evidencing a loan to the Venezuelan government. In the *Fedax Case*[320] the language of the BIT being relied on by the claimant stated that "concerning an obligation of the former under this Agreement in relation to an investment of the latter shall be submitted to ICSID for settlement by arbitration or conciliation."[321] The BIT also established that each Party "gives its unconditional consent"[322] to submitting such disputes. The tribunal then found that "loans and other credit facilities are within the jurisdiction of the Center under both the terms of the Convention and the scope of the bilateral Agreement governing consent."[323]

XIV. Conclusions

Reactions to the open offers to submit disputes to international arbitration are mixed. Those who think it is a postitive development see it as creating the possibility of having the "true complainant face the true defendant."[324] Moreover, those who tend to be in favor of liberal FDI regimes generally coincide in the belief that states should not be concerned provided that they intend to comply with their obligations *vis a vis* foreign

[318] Id. at 5.37.
[319] Id. at 5.37.
[320] Fedax v. Venezuela, *supra* note 265.
[321] The Netherlands-Venezuela BIT, in force 1 Nov. 1993, Article 9(1).
[322] Id., at Article 9(4).
[323] Fedax v. Venezuela, *supra* note 265, at 37-38.
[324] Jan Paulsson, "Arbitration Without Privity,"*supra* note 89, 233.

investors. The arbitration obligation is principally a matter of concern only to the extent that there are substantive obligations that the host state is unprepared to meet. The problem arises, however, because of "the possibility that the dispute resolution provisions will be used veraciously against a blameless host state."[325]

In the past there may have been an inherent bias against developing states in the international arbitral investor-state system, as evidenced by the questionable Lybian oil arbitrations, as commented on in Section I. Paulsson, for instance, recognized that while it may have been true that in the beginning of this century, and until the 1950s, arbitrations conducted by various tribunals evidenced bias against developing countries, this is no longer true today.[326] Indeed, it appears that the majority of scholars and practitioners today are of the view that developing countries can be successful in vindicating their rights through the international arbitral process, including the enforcement of arbitral awards that are handed down in their favor.[327]

Still, the potential problems created by mechanisms that allow for arbitration without privity or for compulsory arbitration are, nonetheless, worrisome.[328] Through investment treaties and laws providing for advanced and mandatory consent to arbitrate disputes, the ground has been laid for an investor to pursue a state as far as ICSID or another institution, even if there was no investment contract containing an arbitral

[325] Kenneth Vandevelde, *supra* note 26, 502.
[326] Jan Paulsson, Third World Participation in International Investment Arbitration, Vol. 3, No. 2 ICSID Rev.,21 (1987).
[327] George Delaume, The Pyramids Stand-The Pharaohs Can Rest in Peace, ICSID Rev., Vol. 8, No. 2, 263 (1993); Jan Paulsson, Third World Participation in International Investment Arbitration, *supra* note 326, 22.
[328] See Luke Peterson, Bilateral Investment Treaties and Development Policy-Making, working paper for the International Institute for Sustainable Development, 38, available at http://www.iisd.org/pdf/2004/trade_bits.pdf (last visited 4/24/06) (making reference to the fact that states should do their "due diligence" before entering into BITs).

clause.[329] That is, a clause in a BIT or law may allow an investor to trigger the entire institutional mechanism under the ICSID Convention, including the request for arbitration or conciliation, its registration, the constitution of a tribunal or commission, and the complete proceedings up to the rendering of an award.[330] Throughout this process neither the further consent nor the participation of the host state would be necessary.[331]

Moreover, the language of most of these treaties and laws leaves the election of the dispute settlement procedure to be used to the sole discretion of the investor. Indeed, the state will have entered into an "asymmetric relationship"[332] with the investor when consenting to arbitrate disputes in the manner discussed above.[333] Moreover, a developing state may find itself in a disadvantageous situation if the host state has unilaterally consented through its legislation and/or in a BIT to ICSID arbitration and determines that it has been wronged by an investor, in which case the injured state can neither invoke the treaty nor the law to satisfy the jurisdictional requirements of the

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[329] Antonio Parra has commented that the floodgates seemed to open after the mid 1990's, as from 1997 to date ICSID had registered twenty-five further cases of arbitration without privity. Of the cases pending before ICSID in 2000, eighteen had been brought under BITs, five under the NAFTA, one under an investment law, and six of the more traditional types of cases brought under the arbitration provisions of an investment contract. Remarks by Antonio Parra, ICSID and the Rise of the Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?, 94 Am. Soc'y Int'l L. Proc. 41 (2000).

[330] ICSID Convention, *supra* note 63, Articles 28, 36 and 45.

[331] Paul Redmond, Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance, 37 Int'l Law 69, 79 (2003) (discussing how bilateral investment treaties strongly favor foreign investors and allow them to go straight to international arbitration without obtaining consent from the host nation); Amazu Asousu, *supra* note 138, 356.

[332] See Luke Peterson, Bilateral Investment Treaties and Development Policy-Making, working paper for the International Institute for Sustainable Development, 34, available at http://www.iisd.org/pdf/2004/trade_bits.pdf (last visited 4/24/06). The asymmetry may only further exacerbated by the fact that large multinationals may be able to hire expensive counsel and be able to persuade host countries that have minimal experience in arbitration to settle cases instead of defending against claims.

[333] See CME Czech Republic B.V. v. Czech Republic (Final Award) (separate opinion of Ian Brownlie), slip op. at 76 (UNCITRAL, March 14, 2003), available at http://www.investmentclaims.com/decisions/CME-Czech-FinalAward-14Mar2003-Separate.pdf (last visited April, 25 2006) ("It is, of course, a truism to point out that multinationals may be more powerful than small states.").

Convention against the investor, if the latter does not also consent to ICSID proceedings.[334]

The original reasons that developing states entered into these agreements or undertook to liberalize their investment legislation and to open their economies was not, of course, with the aim of reducing the prerogatives of the state or diminishing its sovereign rights, but rather to enhance both by encouraging foreign investors to contribute to the development of their countries. The purpose was to provide foreign investors with a sense of legal security in being able to have their disputes resolved by an independent and neutral arbitrator.

Traditionally, arbitration was conceived as a mechanism whereby either party could have the right to refer disputes to arbitration.[335] Now, under these new modes of granting consent in national legislation or under treaties, this has changed. Schreuer, for instance, warns that "while such a one-sided approach to ICSID's jurisdiction is technically possible, it is not in the interest of the host State to grant access to the Center to investors without obtaining reciprocal rights."[336] Paulsson, much on the same note, concludes with the following words:

> "Explorers have set out to discover a new territory for international arbitration outside the basic framework. They have already landed on a few islands, and they have prepared maps showing a vast continent beyond. This new world of arbitration is one where the claimant need not have a contractual relationship with

[334] Jan Paulsson, "Arbitration Without Privity,"*supra* note 89, 234; Amazu Asousu, *supra* note 138, 366.
[335] Rene David, Arbitration in International Trade, 1985, 5; Mauro Rubino-Sammartano, International Arbitration Law and Practice, 6 (2001).
[336] Christoph Schreuer, *supra* note 87, ¶305.

> the defendant, and where the tables coud not be turned; the defendant could not have initiated the arbitration, nor is it certain of being able even to bring a counterclaim."[337]

At a certain point and for some developing countries, the competition to attract FDI became a race to the bottom in an effort to offer the most liberal dispute settlement regime, although it may imply unknown and negative consequences for the host state.[338] Although seemingly beneficial from the investor's viewpoint, this trend may serve to undermine investment arbitration at large.[339] Given the tumultuous history of investor-state arbitration and the debates over the effective value of FDI, it is necessary to remain cautious "as a single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash."[340] The cycles that developing countries go through as a consequence of their political instability only makes for a more delicate balancing act. If host countries adopt the view that they are becoming the victims of excessive investor-initiated arbitration, and so begin to restrict their willingness to accept international dispute resolution, the ultimate

[337] Jan Paulsson, Arbitration Without Privity, *supra* note 89, 242.

[338] Sherif Seid, Global Regulation of Foreign Direct Investment, Ashgate, 2002, 39 ("The realization that FDI can play an important role in the development of a country has spurred competition between host countries for such investment."). See also remarks by Jose Alvarez (regarding the fact that the liberal NAFTA regime as well as that contained in the U.S.-Argentina BIT may be the model that the U.S. wants to take to other Latin American countries), Gennady Pilch Reporter, The Development and Expansion of Bilateral Investment Treaties, April 1-4, 1992, in 86 Am. Soc'y Int'l L. Proc. 532 (1992).

[339] Interview with James Carter, President, Am. Soc'y Int'l L., ASIL Newsletter May/July 2004 1, 10 (speculating that bodies such as NAFTA tribunals are causing a backlash because they require a relinquishment of sovereignty that destabilizes domestic political groups).

[340] Jan Paulsson, Arbitration without Privity, *supra* note 89, 257.

consequences will be harmful to the principle of neutral, unbiased and capable fora, as must be the role and standard of international arbitration.[341]

The danger is that treaty frameworks that traditional notions of public international law have offered investors and host states may not continue to provide the significant benefits of furthering the ends of globalization. BITs and MITs have been criticized for a number of reasons in the last decade,[342] critisicms that may have contributed to developing states having recently shied away from proposals of this nature.[343] Hundreds of BITs have been entered into in the past decades, but there is evidence to suggest that the trend may be slowing,[344] suggesting that the BIT phenomenon may have limitations.[345] It is precisely these limits that are being tested and will continue to be scrutinized in the near future by virtue of the sharp rise in investor-state arbitrations that rely on BITs for invoking the jurisdiction of the arbitral tribunal.[346]

[341] It is difficult to gain a true insider perspective on the motivation of the legislatures in many of the countries analyzed in this study. However, it would seem that a number of the countries that at one point had relatively liberal investment laws and then returned to more restrictive models may have had negative experiences with foreign investment arbitration or have realized that the investors had excesive leverage in investor-state negotiations by being able to threaten to arbitrate disputes. See the cases of Egypt and the Kyrgyz Republic, above, for instance.

[342] It has been suggested that developing host states lack the economic and political bargaining power to negotiate favorable terms when entering into North-South BITs. Mark Baker, No Country Left Behind: the Exporting of US Legal Norms Under the Guise of Economic Integration, 19 Emory Int'l L. Rev. 1321, 1371 (2005).

[343] The Latin American countries as a bloc have been reluctant to enter into a regional FTA with the U.S., although recently various have done so bilaterally. See Peter Wilson, Venezuela, Cuba and Bolivia Sign Trade Agreement (Update 1), April 30, 2006, Bloomberg.com, available at http://www.bloomberg.com/apps/news?pid=10000086&sid=aNpUcmEsghyA&refer=latin_america (last visited 05/03/06).

[344] UNCTAD, Research Note, Recent Developments in International Investment Agreements, 30 Aug. 2005, available at http://www.unctad.org/sections/dite_dir/docs//webiteiit20051_en.pdf (last visited 4/25/06) (recognizing that although the network of BITs continues to grow it is doing so at a slower pace).

[345] Kenneth Abbott & Gregory Bowman, Economic Integration in the Americas: "A Work in Progress," 14 Nw. J. Int'l L. & Bus. 493, 511 (1994) (suggesting that American states are not pursuing BITs at the same rate as some European countries and that the through BITs hemispheric integration or a multilateral system may never be achieved); Victor Thuronyi, International Tax Cooperation and a Multilateral Treaty, 26 Brook. J. Int'l L. 1641, 1661 (2001) ("Bilateral treaties simply are inadequate structures" to create a substantial regulation of tax on foreign multinationals).

[346] Kenneth Vandevelde, The Political Economy of a Bilateral Investment Treaty, *supra* note 42, 645.

It would seem that the "goal for a developing country in concluding a BIT, then, is to maximize its benefits in the form of increased flows of FDI, while minimizing its costs in the form of obligations and commitments that may prove burdensome or expensive…[and] this task of achieving this balance can be particularly difficult for developing countries that are not capital-exporting countries."[347] Drawing on these preliminary conclusions, it seems clear that developing states must attempt to do two things: 1) offer attractive dispute resolution mechanisms to foreign investors in order to be competitive and to attract greater FDI flows while, at the same time, 2) optimize the benefits to be derived from FDI by efficiently, but not abusively, regulating such investment.[348]

Given the alternative legal instruments available to developing countries, both internationally and domestically, perhaps the most beneficial way for developing states to achieve both of these objectives in the short term is by modifying their respective investment laws.[349] The formula of the open unilateral offer to submit disputes between the investor and the state is not necessarily a mechanism that is harmful to the interests of developing nations, since it has come to be recognized as providing a critical element of juridical security, which is often essential for attracting foreign investment. This is

[347] UNCTAD, BITs in the Mid-1990s, (UN, NY and Geneva, 1998) 7. Jeswald Salacuse and Nicholas Sullivan consider that the strategy of entering into BITs and FDI promotion policies in general by developing countries is founded on a grand bargain whereby the developing countries understand that they will be "losing" in the short run to gain in the future. Our view, however, is more that developing countries can and must try to strike a balance in the short term.

[348] For a discussion of whether investor-state dispute settlement mechanisms under ICSID has sufficiently balanced the interests of investors with those of host states, see Margrete Stevens, Arbitration and Investment Disputes--Are We Heading in the Right Direction? ICSID NEWS, Spring 2002, 4, available at http://www.worldbank.org/icsid/news/n-19-1-4.htm.

[349] In contrast to the views of Jeswald Salacuse and Nicholas Sullivan, *supra* note 340, it is our view that developing countries should try to strike a balance, as one of the problems in developing countries is that liberalization regimes are generally unpopular with the electorate. Hence regimes that promise long-term goals development goals based on the benefits of globalization may encounter significant political obstacles. See Nocholas Sullivan, Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harv. Int'l L.J. 67, 78 (2005).

particularly so if the doctrine of irrevocability of perfected state consent discussed in Section XII continues to be recognized by practitioners and tribunals. Moreover, under the doctrine of unilateral statements as applied to investment disputes, as elaborated on in Section XIII, *supra*, states will have more tools at their disposal to foster confidence in investors without having to resort to international commitments that may be shrouded with inflexible terms conditioned by unequal bargaining power of the contracting states.

Developing countries would be well advised, however, to pay greater attention to the manner in which their consent is given and to regulate their consent, which can be done through appropriate provisions in their national laws, perhaps more efficiently than by using any other instrument currently available to host states.[350] This approach has the potential to evolve into a system that could contribute to further enhancing the necessary legal security and stability required in the modern globalized world and, at the same time, permit host states to monitor and be prepared for eventual arbitration with investors. In some countries this approach may entail a structural reform of their legislation, while in others only minor adjustments may be necessary. The solution will depend on the current law of each country and their current ranking on the scale of attractiveness to investors, as well as the perceived requirements of each individual country in terms of what sectors of the economy the policy makers are most concerned with developing.

In the meantime, as the developing countries work to find the right balance for their national interests and try to align them with the interests and concerns of the capital exporting states and their investors, the practice of international arbitration, and

[350] It has been suggested that signing international treaties for FDI protection may weaken the authority and power of host states to regulate investment controls, which can effectively impede the autonomous exercise of legislative power and authority. See Tai-Heng Cheng, Power, Authority and International Investment Law, 20 Am. U. Int'l L. Rev. 465, 486 (2005).

especially that of investor-state arbitration, will continue to be a convoluted area of international law. In this spirit Professor Vagts' concluding remarks on this subject are as valid today as they were twenty years ago: "Foreign direct investment is inherently fraught with the danger of drastic government-initiated change. Much of it is triggered by social and political shifts in the host state that bring new groups to power….Thus despite the best efforts of lawyers and others, FDI is going to continue to be an exciting way of life."[351]

[351] Detlev Vagts, Dispute Avoidance Devices in Foreign Direct Investment, in International Investment Disputes: Avoidance and Settlement, 38 (Seymour Rubin & Richard Nelson Ed. 1985).