I. INTRODUCTION

When talking about corporations as defendants under international law, the narrative and the legal framework seem clear even if the outcome does not. According to the narrative, multinational corporations involved in extractive industries collaborate with repressive governments to terrorize populations, instituting forced labor, attacking those who resist, and spoiling the environment in ways that destroy traditional cultures and, perhaps, the conditions that support human life.1 Relying on the Alien Tort Statute,2 victims invoke the jurisdiction of federal courts in the United States to pursue remedies for state-sponsored injuries committed

1 See, e.g., Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1197-98 (9th Cir. 2007) (involving allegations that an international mining corporation operated an enormous copper and gold mine in ways that severely polluted the environment of an island in Papua New Guinea, subjected workers to “slave-like” conditions, and solicited the government to use force against those who sought to disrupt the mining project) Doe v. Unocal Corp., 395 F.d 932, 936, 939-40, 942 (9th Cir. 2002) (involving allegations that an international oil and gas company aided and abetted the government of Myanmar in displacing rural villagers from a pipeline route, forcing them to work as porters for the project, executing those who refused to participate, and subjecting forced workers to rape); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92-93 (2d Cir. 2000) (involving allegations that that an international oil corporation coercively appropriated land from indigenous people, substantially polluted their homeland, and recruited Nigerian security forces to suppress local opposition by armed force and torture). See also Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247, 249-51, 256 (9th Cir. 2009) (involving claims that a Canadian oil corporation aided and abetted the Sudanese government in executing security measures designed to displace indigenous people through military operations launched from the supply roads and airfields associated with oil facilities).

2 28 U.S.C. § 1350. In its decisions, the Supreme Court has consistently referred to this legislation as the “Alien Tort Statute.” While many lower courts describe it as the “Alien Tort Claims Act,” the author avoids that label because it expresses a normative (and controversial) assessment regarding the statute’s role in promoting international human rights litigation.
abroad against aliens, often by foreign corporations. Although the results may vary from case to case, the storyline and the analytical template encompass familiar terrain. In other words, one at least knows how to begin and to proceed with a discussion of corporations as defendants under international law.

For discussions of corporations as plaintiffs under international law, only the point of departure seems clear: investment treaties represent the prominent gateway into an international

---

3 See generally Talisman Energy, Inc., 582 F.3d at 247, 249-51; Sarei, 487 F.3d at 1197-98; Unocal, 395 F.3d at 936, 939-40, 942; Wiwa, 226 F.3d at 91-93. See also Ingrid Wuerth, Wiwa v. Shell, The $15.5 Million Settlement, ASIL INSIGHT, Sept. 9, 2009, available at http://www.asil.org/files/insight090909pdf.pdf (emphasizing that Alien Tort Statute cases “commit substantial judicial resources to resolving difficult legal issues on cases where the conduct generally occurs abroad, largely or solely between foreigners”).

4 See Wuerth, supra note ___ (concluding that Alien Tort Statute claims remain “uncertain to litigate”). Compare Aldana v. Del Monte Fresh Produce, 416 F.3d ___, 1247 (11th Cir. ___) (declining to recognize claims for cruel, inhuman, or degrading treatment as actionable under the Alien Tort Statute), with Bowoto v. Chevron Corp, 557 F. Supp. 2d 1080, 1092-95 (N.D. Cal. 2008). (concluding that courts may recognize causes of action under the Alien Tort Statute for specific conduct universally condemned as cruel, inhuman or degrading).

In addition to disagreements regarding the scope of conduct potentially falling within the Alien Tort Statute, particular claims may fail for a variety of contextual-specific reasons, including preemption by other federal statutes or, simply, a lack of evidence. For example, in Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1086-88 (N.D. Cal. 2008), the court held that the Death on the High Seas Act preempts application of the Alien Tort Statute to claims for summary execution on offshore oil platforms). In Talisman Energy, 582 F.3d at 247-48, 262-64, the court dismissed the claim for lack of evidence that the oil company affirmatively intended to harm civilians in southern Sudan.

While outright victories against multinational enterprises seem relatively uncommon under the Alien Tort Statute, claimants have received meaningful settlements in particular cases. For example, in 2004, Unocal settled claims relating to the construction of a pipeline in Myanmar. John Crook, Tentative Settlement of ATCA Human Rights Suits Against Unocal, 99 Am. J. Int’l L. 497, 497 (2005). While the terms remain confidential, the agreement included both compensation for the plaintiffs and funds to “develop programs to improve living conditions, health care and education and protect the rights of people in the pipeline region.” Id. at 498 (quoting Unocal Press Release, Settlement Reached in Human Rights Lawsuit (Dec. 13, 2004), available at http://www.unocal.com/uclnews/2004news/index.htm). More recently, in 2009, Royal Dutch petroleum Company and Shell Transport settled for $15.5 million claims brought by members of the Ogoni people in Nigeria. Wuerth, supra note ___. In addition, one can hardly discount the value to claimants (and the cost to defendants) of publicity even in claims that do not lead to judgments or settlements. Cf. id. (speculating that the prospect of negative publicity may have encouraged Royal Dutch and Shell Transport to settle the claims against them on the eve of trial).

5 See Sosa v. Alvarez-Machain, 542 U.S. 692, 724-28 (2004) (accepting that the Alien Tort Statute provides a cause of action for certain violations of international law, but urging “great caution” in recognizing new causes of action, and authorizing such recognition only for norms “accepted by the civilized world and defined with a specificity comparable to” the 18th-century prohibition of piracy). See also Talisman Energy, 582 F.3d at 255-56; Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 737 (9th Cir. 2008); Vietnam Assoc. for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116-17 (2d Cir. 2008); Bowoto, 557 F. Supp. 2d at 1089 (all applying the framework articulated in Sosa).
legal process that affords corporations wide opportunities to assert rights and to seek remedies for sovereign acts harmful to their investments in foreign states. Having recognized the potential significance of investment treaties, however, one struggles to find an appropriate narrative that explains their function and, thus, can guide their application to concrete situations.

Moving beyond analogies to international commercial arbitration, inter-state arbitration, and the law of sovereign immunity (which tend to emphasize procedural issues), one finds at least three narratives that promise to explain the substantive functions of investment treaties. First, drawing on domestic jurisprudence, one might regard investment treaties as elaborate choice-of-law and forum-selection clauses designed to promote certainty in international business. Second, drawing on scholarship, one might describe investment treaties as the functional equivalent of human rights treaties designed to protect foreign investors from serious abuse by host states. Third, drawing on journalism, commentary, and the campaigns of advocacy groups, one might finally portray investment treaties as dangerous tools that empower

---

6 See Karl P. Sauvant, *Introduction to Yearbook on International Investment Law & Policy* xxi, xxi (Karl P. Sauvant ed., 2008-2009) (indicating that the number of claims brought under investment treaties “has risen rapidly and reached 300 by mid-2008, with more than half of the disputes arising during the past five years”).


9 See infra Part II.

10 See infra Part III.
foreign corporations to avoid regulation, or at least to neutralize the economic consequences of regulation. While plausible up to a point, each comparison requires a level of exaggeration that becomes impossible to maintain. However, by pushing each comparison to the point of failure, one reveals a different and comparatively modest narrative about the proper role of investment treaties.

II. Certainty and Stability: The Business Planning Narrative

In seeking a narrative to explain the function of investment treaties, one often feels the temptation to discuss the Supreme Court’s famous trio of decisions on the enforcement of forum-selection clauses and arbitration agreements. Decided between 1970 and 1985, these cases not only address the enforcement of dispute-settlement clauses. As explained below, they also describe the role of such provisions in facilitating international commerce.

Just over a generation ago, United States courts still operated in an environment that treated forum-selection clauses with suspicion. Regarding them as devices to circumvent the normal judicial process, courts either deemed such clauses to be presumptively invalid or gave them little weight. Writing in 1970, however, the Supreme Court reversed the tide in *The Bremen v. Zapata* by enforcing the agreement of German and American companies to litigate in England disputes arising out of a contract to tow an oil-drilling rig from the Gulf of Mexico to a location in the Adriatic Sea. According to the Court, judicial hostility towards such agreements would retard the growth of international commerce by saddling enterprises with the uncertainty costs associated with exposure to litigation in multiple venues, as well as the risk of litigation in a hostile or inexperienced forum. By contrast, enforcement of freely negotiated forum-selection

12 See *infra* Part IV.
clauses would promote international commerce by allowing the parties to designate in advance a single forum possessing appropriate characteristics (such as neutrality and expertise) and, thus, to bring “vital certainty” to the resolution of contingent risks. In other words, dispute-settlement clauses serve the function of minimizing risks and costs, thus promoting international commerce.

Four years later, in Scherk v. Alberto-Culver Co., the Supreme Court ordered a U.S. company to arbitrate a securities fraud claim against a German individual under the arbitration rules of the International Chamber of Commerce in Paris. In addition to establishing the arbitrability of securities fraud claims for “truly international” agreements, the decision also extended The Bremen in two ways. First, it described arbitration agreements as specialized forum-selection clauses, thus subjecting their enforcement to the legal framework articulated in The Bremen. Second, because the dispute-resolution clause in Scherk contained an express choice of law (unlike The Bremen), the Court took the opportunity to discuss the combined effect of forum-selection and choice-of-law clauses in promoting international trade. Thus, the Court described a “contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied” as an “almost indispensible precondition to achievement of the orderliness and predictability essential to any international business transaction.”

In 1985, the Supreme Court rendered its decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., which addressed the arbitrability antitrust claims for international transactions. While invoking comity to foreign tribunals as an additional reason for the enforcement of arbitration agreements even in the antitrust context, the decision also remains noteworthy for emphasizing the weight that the Court assigned to the role of dispute-settlement clauses in promoting certainty for international commerce. During the decades before Mitsubishi, the Supreme Court had consistently emphasized the importance of antitrust laws to
American capitalism. For example, in 1933, Chief Justice Hughes described the Sherman Antitrust Act as a “charter of freedom” that might be compared to a constitutional provision. Nearly four decades later, the Court referred to antitrust laws as the “Magna Carta of free enterprise[,] [which is] . . . as important to the preservation of economic freedom as the Bill of Rights is to the protection of our fundamental personal freedoms.” Under these circumstances, federal courts of appeal had uniformly declared antitrust disputes as public issues not capable of settlement by arbitration.

While recognizing the “fundamental importance” of antitrust laws, the Mitsubishi Court concluded that the need for predictability in international commerce justified the arbitrability of antitrust disputes, “even assuming that a contrary result would be forthcoming in a domestic context.” In other words, the Court regarded the need for certainty in international commerce as so compelling that the Court pursued it even at the expense of fundamental national policies.

In one sense, The Bremen, Scherk, and Mitsubishi, provide little help in understanding the function of investment treaties. In the narrowest sense, those cases deal with the enforceability of dispute-settlement clauses, which seems above question in the context of investment treaties. Drawing broader lessons, however, the cases suggest that (1) arbitration agreements and choice-of-law clauses promote certainty, (2) certainty fuels international commerce, and (3) adjudicators should apply dispute-settlement provisions in a manner that nourishes commercial certainty even at the expense of other important values.

Building on the points just made, one might pause to observe that investment treaties represent elaborate dispute-settlement clauses insofar as they (1) identify standards for the treatment of foreign investors and their investments, and (2) establish procedures for the arbitration of claims brought by investors directly against host states. Viewed from this
perspective, the Supreme Court’s narrative arguably becomes relevant by analogy: the function of investment treaties is to facilitate international commerce by enhancing the level of certainty for investment transactions. Adopting that as the frame of reference for treaty interpretation, tribunals should apply investment treaties in ways that increase certainty for foreign investors, even at the expense of fundamental values that might otherwise prevail in the domestic context.

In some academic circles, the business planning narrative has gained credence as a tool for describing the function of investment treaties and, thus, guiding their application. For example, at a conference in January 2007, the author made a presentation regarding the sources of decentralization and, therefore, inconsistency in investment treaty arbitration. These included decades of controversy about the standards of treatment for foreign investment, the existence of thousands of bilateral treaties as opposed to a single global instrument (or even a handful of comprehensive regional instruments) on the topic, and recourse to a series of *ad hoc* tribunals as opposed to a single, permanent tribunal. Concluding his presentation, the author described human rights as another decentralized international legal regime, observed that people have come to expect a degree of inconsistency among the jurisprudence of various human rights systems, and suggested that users of investment treaties could tolerate a similar divergence of outcomes. During the ensuing discussion, however, a well-known academic with a transactional and dispute-settlement background opined that the commercial setting of foreign investment requires a higher level of consistency and, thus, certainty than might be tolerated in the protection of human rights.

Turning from academic discourse to the decisions of tribunals, one finds at least two lines of cases that seem to regard promotion of commercial certainty as a touchstone for understanding and applying investment treaties. For example, many tribunals have prefaced their awards by
describing protection and promotion of foreign investment as the fundamental purpose of investment treaties. While unremarkable in the abstract, this insight has led many tribunals to prefer treaty interpretations that resolve “uncertainties” in favor of protecting covered investments. As a result, some observers regard their decisions as reflecting a systematic predisposition towards the commercial interests of foreign investors as opposed to the regulatory interests of host states. While such predispositions may not give foreign investors the reassurance that any particular rule will govern their disputes with host states, they guarantee foreign investors that their commercial interests will receive an edge over competing interests in cases of doubt. In effect, this mirrors the Supreme Court’s business planning narrative by applying the terms of dispute-settlement agreements with a bias towards the reinforcement of commercial certainty, even at the expense of social values that might prevail in a domestic context.

Moving from their general inclinations to the application of specific treaty provisions, many tribunals have expressed a profound concern for establishing conditions often associated with certainty. For example, while subject to important variations in wording, virtually all investment treaties include a clause extending “fair and equitable treatment” to covered investments. While perhaps not implied by the ordinary language, many tribunals have construed this phrase to require that host states meet the “legitimate expectations” of foreign investors, including some demanding assumptions about the requirements of consistency, transparency, and stability in public affairs.13 Thus, according to one popular formulation, host states must “act in a consistent manner, free from ambiguity, and totally transparently in [their]

---

13 See also Stiglitz, supra note ___, at 41 (observing that some tribunals “have interpreted ‘Fair and Equitable treatment’ to entail extraordinarily high . . . levels of obligations for developing countries to provide . . . transparency, competency, responsiveness, and efficiency”).

Page 8 of 37
relations with . . . foreign investor[s].” Furthermore, they must ensure that foreign investments enjoy the luxury of operating within a “stable legal and business environment.”

Paraphrasing the awards just mentioned, host states must establish clear legal rules governing foreign investment, apply them consistently, and refrain from altering the legal and business background for decisions regarding foreign investment. While these obligations do not require host states to guarantee the success of foreign investments or even to create the most favorable conditions for foreign investments, they demand something like certainty in the sense that legal requirements (however good or bad) must be stated clearly and protected from substantial variation in principle and in practice. Thus, mirroring the Supreme Court’s narrative, businesses people should have the opportunity to identify their rights with clarity before committing resources to cross-border transactions. Thereafter, competing social policies will rarely justify the disturbance of settled expectations.

Viewed from one perspective, it seems natural that the application of investment treaties should track or even extend the Supreme Court’s narrative on certainty and planning for international trade. Assuming that international commerce demands predictability in general, the need for that element reaches its height in the context of investment transactions. As explained by Professors Dolzer and Schreuer:

. . . Whereas a trade deal typically consists in a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host country. Often, the business plan of the investor is to sink substantial resources into the project at the outset of the investment, with the expectation to recoup this amount plus an acceptable rate of return during the subsequent period of investment, sometimes running up to 30 years or more.

A key feature in the design of such a foreign investment is to lay out in advance the risks inherent in such a long-term relationship, both from a business perspective and from the legal point of view, and then to identify a business
concept and a legal structure that is suitable not only to the implementation of the project in general but also to minimize the risks that may arise during the period of investment.

. . . The central political risk that arises for the foreign investor lies in a change of the position of the host government that would alter the scheme of burdens, risks, and benefits, which the two sides have laid down when they negotiated the deal and which formed the basis of the investor’s plan and the legitimate expectations embodied in this plan. Such a change of position on the part of the host country becomes more likely with every subsequent change of government in the host state during the period of investment.

In other words, given the larger commitment of resources, the longer time periods, and the pressures for host states to revisit the balance between investment and other policies, the application of investment treaties in good faith requires, if anything, an even greater emphasis on certainty and even more protection from competing social policies.

Viewed from another perspective, however, it seems absurd that the application of investment treaties should track (much less extend) the Supreme Court’s business planning narrative for international commercial disputes. *The Bremen, Scherk* and *Mitsubishi* each involved the application of commercial agreements between private parties, who negotiated specific provisions aimed at bringing clarity to the resolution of disputes. Under these circumstances, it made sense for the Court to grant the parties the full measure of their bargains on the modalities for dispute-settlement notwithstanding peripheral effects on enforcement of public regulatory laws.

One may, of course, identify situations in which foreign investors have commercial relationships, such as procurement contracts, with host states. In those cases, large-scale foreign investors bargain directly with their host states regarding the precise allocation of “burdens, risks, and benefits.” To guide the application of such agreements directly or through an investment treaty’s umbrella clause, one might adopt the Supreme Court’s narrative by analogy,
subject to the adjustments required to control for the host state’s dual role as commercial partner and regulator.

However, the relationships between foreign investors and host states often do not involve any commercial transactions. For example, when a U.S. investor acquired from Mexican investors a project to build a hazardous waste facility near a rural Mexican town, it made an investment on Mexican territory, but did not invest in any commercial relationship with the host state. As a result, it did not bargain directly with the host state regarding the allocation of substantive obligations or the modalities for dispute settlement. Under these circumstances, the Supreme Court’s narrative loses relevance to explain the function of bargains that simply do not exist.

Even in the absence of directly negotiated commercial arrangements, investment treaties provide a legal framework to guarantee that relationships between foreign investors and host states do not occur in a vacuum. Thus, mirroring the form of commercial agreements, investment treaties establish the substantive obligations of host states with respect to the treatment of foreign investment, and give foreign investors the right to submit claims for alleged treaty violations directly to arbitration. Given the superficial resemblance to commercial agreements, one understands the temptation to use them as a basis for understanding the function and for guiding the application of investment treaties.

However, one must take care not to exaggerate the similarities between commercial agreements and investment treaties. In fact, their superficial resemblance pales in comparison to the substantial differences between the two. For example, while private parties negotiate and perform commercial agreements, they do not participate in the negotiation of investment treaties and, thus, do not become parties to investment treaties. To the contrary, states (and only states)
negotiate and become parties to investment treaties. Also, while states have an interest in promoting foreign investment to fuel economic development, they also have an interest in pursuing (and may have obligations under international law to pursue) other values, including protection of the environment, public health, human rights and labor rights. As a result, when concluding investment treaties, states often seek to advance the interests of several different constituencies. Consequently, investment treaties may not address all topics of importance to foreign investors. Furthermore, to the extent that they address such topics, they may not adopt the preferred solutions of foreign investors. Finally, given the need to reach agreement while finessing the differences among various stakeholders, investment treaties often do not reflect the specificity of commercial agreements, but formulate the obligations of host states at a high degree of generality. Under these circumstances, the maximization of commercial certainty seems unlikely to represent the core function of investment treaties.

Consistent with the hypothesis just stated, a recent line of cases decided under the NAFTA’s investment chapter indicates that investment treaties and investment tribunals play not a central, but a peripheral, role in promoting commercial certainty for foreign investors. Thus, after the pro-investor triad of Metalclad v. Mexico, S.D. Myers, Inc. v. Canada, and Pope & Talbot v. Canada, which threw the NAFTA parties into a near state of panic, a different trinity emerged. First, in 2003, the tribunal in Loewen Group Inc. v. United States expressed the view that arbitrators should not to display “too great a readiness to step from outside into the domestic arena” and to impose liability even for serious “local error[s].” In other words, contrary to the ubiquitous role of domestic courts in applying the dispute-settlement provisions of commercial agreements to promote commercial certainty, tribunals should apply investment treaties to provide relief only in extraordinary cases. Two years later, the tribunal in Methanex Corp. v.
*United States* operationalized the principle by declaring that non-discriminatory regulations enacted for public purposes in accordance with due process fall outside the scope of expropriation. Most recently, in 2009, the tribunal in *Glamis Gold v. United States* declared that the guarantee of “fair and equitable treatment” in NAFTA Article 1105 only prohibits the sort of “egregious,” “outrageous” or “shocking” government acts condemned in *Neer v. Mexico* during 1926. Together, the *Loewen, Methanex, and Glamis* awards represent a decisive shift away from the promotion of commercial certainty for investors and towards preservation of regulatory space for host states.

Given the Free Trade Commission’s Notes of Interpretation regarding NAFTA Article 1105 (which equates “fair and equitable treatment” to the minimum standard of treatment for aliens under customary international law) and the United States’ frequent role as a respondent in disputes under NAFTA’s investment chapter, one might limit *Loewen, Methanex, and Glamis* to the North American context and take the position that they do not necessarily reflect broader trends. State practice, however, emphatically signals a trend towards the rebalancing of investment treaties to protect the regulatory space of host states.

In a move described by a former President of the International Court of Justice as the regressive development of international law, the United States comprehensively revised its model BIT in 2004 with the intent of reducing the jurisprudential discretion of tribunals and increasing the regulatory discretion of host states. Thus, while retaining a provision on “fair and equitable treatment,” the 2004 model BIT expressly defines that concept to embrace the “minimum” standard of treatment required by customary international law, as documented by actual state practice (as opposed to aspirational best practice). Likewise, while retaining a provision on expropriation, the United States Model BIT of 2004 provides that
nondiscriminatory regulatory actions designed to protect public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations “[e]xcept in rare circumstances.” Furthermore, it reserves the right for states parties acting jointly to remove issues from tribunal consideration and to resolve them at the political level, a possibility that seems difficult to square with the promotion of commercial certainty. Finally, the United States seems poised to draft a new model BIT that may tilt even farther towards the preservation of regulatory space.

Looking beyond the United States, Canada also adopted a new model Foreign Investment Protection Agreement during 2004. In addition to provisions mirroring the United States’ refinements on the minimum standard of treatment and the power of states parties to remove certain issues from tribunal consideration, the Canadian model includes a provision on expropriation that resembles its U.S. counterpart, but differs in tone. Thus, while reiterating the principle that non-discriminatory regulations adopted for public welfare purposes do not constitute indirect expropriations “[e]xcept in rare circumstances,” the Canadian text emphasizes just how exceptional circumstances must become for regulations to cross the threshold of expropriation. Specifically, the Canadian text refers to situations in which “a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith.”

In addition, the Canadian model breaks new ground by incorporating general exceptions drawn almost verbatim from Article XX of the General Agreement on Tariffs and Trade. Thus, it expressly reserves the rights of states parties to adopt and enforce measures necessary to

---

14 As another example of its tone, the Canadian model includes a provision in which the states parties “recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”
protect human, animal or plant life or health, or necessary for the conservation of living or non-
living exhaustible natural resources. In addition, it exempts from coverage investments in
cultural industries. Even according to those not known for their sympathy towards foreign
investors, the exceptions contained in the Canadian model “are so extensive as to raise the
question as to whether they do not undermine the scope of the treaty.”

Moving beyond North America, Norway unveiled a draft model BIT in December 2007.15 Like its U.S. and Canadian counterparts, the Norwegian text assimilates “fair and equitable treatment” to the minimum standard of treatment for aliens under customary international law, and authorizes the states parties to remove certain issues from tribunal consideration. While including a provision on expropriation, the Norwegian model defines the concept even more narrowly than the Canadian version. Thus, without including a qualification for exceptional circumstances, the text simply reserves the right of states parties to “enforce such laws as [they] deem[] necessary to control the use of property in accordance with the general interest.”16 Though somewhat longer and more extensive than its Canadian counterpart, the Norwegian text also includes a list of general exceptions drawn almost verbatim from Article XX of the General Agreement on Tariffs and Trade. Thus, it preserves the right of states parties to adopt measures necessary to “protect public morals or to maintain public order,” to “protect

15 Draft Norwegian Model BIT (Dec. 19, 2007) [hereinafter Draft Norwegian Model BIT],
available at

16 Further emphasizing the regulatory prerogatives of states, the Norwegian text provides that measures applied “in pursuance of legitimate policy objectives of public interest such as the protection of public health, safety and the environment” do not violate disciplines on national treatment or MFN treatment when they bear a “reasonable relationship to rational policies” not motivated by discriminatory animus. Draft Norwegian Model BIT, supra note __, arts. 3(1) & n.2, 4(1) & n.3.
human, animal or plant life or health,” or to protect “the environment.” Unlike its Canadian
counterpart, the Norwegian text defines necessity broadly to encompass measures justified by the
“precautionary principle.”

Viewed from the perspective of substantive provisions, the Norwegian text seems only
somewhat more ambitious than the Canadian model in terms of preserving regulatory space for
host states. However, viewed from the perspective of overall tone, the Norwegian text signals a
fundamental change. Thus, the preamble (1) expresses a desire to achieve the treaty’s objectives
“in a manner consistent with the protection of health, safety, and the environment, and the
promotion of internationally recognized labour rights”; (2) emphasizes the “importance of
corporate social responsibility”; (3) reaffirms the “commitment to democracy, the rule of law,
human rights and fundamental freedoms”; and (4) recognizes the need for “mutually supportive”
interpretations of investment and environmental treaties.” Later, while elaborated in language
that lends itself to a variety of constructions, the Norwegian text contains an article on the “Right
to Regulate.” As implied by the text’s overall tone, the official commentary explains that the
Norwegian government sought “lead the development from one-sided agreements that only
safeguard the interests of the investor to comprehensive agreements that [also] safeguard . . .
regulative needs.”17

(Dec. 19, 2007) [hereinafter Official Comments on Draft Norwegian Model BIT], available at
http://www.regjeringen.no/upload/NHD/Vedlegg/hoering/2008/Forklarende%20vedlegg%20(e
ngelsk)%20-%20final.doc.
Roughly 18 months after its release, the Norwegian government shelved the draft text following an overwhelmingly critical, but polarized, response. While the business community felt that the draft did not provide investors with enough protection, non-governmental organizations complained that it placed too many restraints on the government’s capacity to regulate.

Turning from the practice of developed states to trends among developing states, one finds similar forces at work. In the growing network of so-called South-to-South investment treaties, which now account for over one quarter of the worldwide total of investment treaties, one tends to find limitations in the levels of protection not normally included in North-to-South investment treaties. Also, given the series of high-stakes and high-profile claims against Argentina, other states in the region have begun to denounce existing investment treaties, to renounce investor-state arbitration in whole or in part under the ICSID Convention, or to refrain from the conclusion of new investment treaties.

While some describe the phenomenon as a “recalibration” or “rebalancing” of international investment law (thus suggesting a change in course), the fact is that recent tribunal decisions and state practice emphasize not the promotion of certainty for foreign investors, but preservation of regulatory space for host states. Viewed from this perspective, the function of investment treaties is not to protect foreign investors from disappointment in their relations with

---


19 Id.

host states, from breaches of commercial agreements by host states, from incremental
development of law by host states, or even violations of domestic law by the officials of host
states. In other words, the emerging narrative does not track the Supreme Court’s jurisprudence
on the role of dispute-settlement provisions in enhancing the level of predictability for
participants in international commerce. To the contrary, the emerging narrative seems to focus
on the guarantee of incremental protection from serious governmental abuses.

III. Protection from Abuse: The Human Rights Narrative

Assuming that protection from abuse has become the focus of investment treaties and
investment treaty arbitration, one feels the temptation to draw on human rights narratives to
describe the function and, thus, guide the application of investment treaties. Although first
raised with irony in academic discourse on critical race theory and although historically resisted
by tribunals when deciding investment disputes, this perspective has gained a measure of
credence among observers and at least one tribunal, which applied an investment treaty to
provide remedies for paradigmatic human rights violations.

As far as the author knows, Professor José E. Alvarez first drew the analogy between
investment treaties and human rights treaties over one dozen years ago, during a conference at
which he observed that application of critical race insights to foreign relations would “benefit
both international lawyers and traditional race critics, albeit for different reasons.” Among other
things, he predicted that race critics would discover how U.S. treaty practice “serves to entrench
or even exacerbate racial and ethnic divides within other nations.” To drive the point home,
Alvarez unveiled a sharp assessment of the NAFTA’s investment chapter, which he described as
“the most bizarre human rights treaty ever conceived.”
According to that view, NAFTA’s investment chapter granted foreign investors “direct access to binding denationalized adjudication of any governmental measure that interferes with their ample rights.” Elaborating the substance of those rights, Alvarez explained that they echo many of the themes contained in the principal human rights instruments, including the rights to security and undisturbed ownership of property, as well as the freedoms of movement and from discrimination. Contrasting these with the complete absence of any rights or freedoms granted to the local employees of foreign investors, Alvarez dismissed the NAFTA’s investment chapter as a “human rights treaty for a special-interest group.”

In addition to emphasizing the disparity of concern for the interests of corporations and for the physical welfare of human beings in U.S. treaty practice, Alvarez consciously sought to juxtapose concepts (investment treaties and human rights) not often regarded as logical pairs. Viewed from this latter perspective, his discourse accurately captured the state of play for investment arbitration. As of the 1990s, tribunals showed a strong preference for maintaining rigorous distinctions between international investment and human rights law. For example, in Biloune v. Ghana Investments Centre, Ghanaian authorities ordered a Syrian investor to stop work on a construction project previously approved at the highest levels of government and, then, partially demolished the works before expiration of the time allotted to the investor for responding to the stop-work order. Contemporaneously, Ghanaian authorities commenced an investigation into financial improprieties allegedly committed by the investor, arrested him at night, held him without charge for thirteen days, and permanently deported him, summarily terminating his residence in Ghana after more than two decades.

Invoking the dispute-settlement provisions of his investment agreement, the Syrian investor commenced an ad hoc arbitration in which he accused the host state and related entities
of expropriating his investment by permanently depriving him of the opportunity to complete the construction project. In addition, he claimed that the host state subjected him to arbitrary arrest and detention, thus violating his human rights. While accepting that the investor’s permanent deportation supported his claim for expropriation, the tribunal held that it lacked jurisdiction to consider the human rights claim as such because the host state’s consent extended only to arbitration of disputes “in respect of” foreign investment.

Perhaps motivated by Professor Alvarez’s challenge for stakeholders to adopt broader frames of reference for understanding the functions of investment treaties, observers and tribunals have begun to explore the ways in which human rights could inform the application of investment treaties. At the level of theory, one writer probed the genealogy of modern international law on (1) civil and political rights, and (2) the protection of foreign investment, tracing the development of both subjects to a common foundation in the customary international law of state responsibility for injuries to aliens. As a result, one could easily discern a shared emphasis on the creation of zones of autonomy or freedom from governmental intervention. More importantly, however, the recognition of shared roots tends to contradict the need for maintaining rigorous distinctions between human rights and international investment law. To the contrary, the existence of a common source justifies a measure of cross-fertilization between the two traditions. Consistent with this observation, other writers have recognized that human rights may have a role to play in the application of investment treaties depending on their precise wording. [Newcombe & Parradel].

Moving from theory to practice, at least one recent award supports the use of investment treaties to redress the sort of abuse normally associated with human rights violations. Thus, in Desert Line Projects v. Yemen, the host state’s president invited an Omani investor to undertake
road construction projects of signal importance for the host state’s national security and economic development. Despite the absence of a clear agreement on compensation, the head of state encouraged the investor to begin and to continue work, promising that the investor would receive fair remuneration in due course. Notwithstanding such assurances, the host state made no progress payments for eighteen months, then provided a measure of compensation but quickly fell behind, and finally declared that it had actually overpaid for the work completed to date. When the investor threatened to stop work, the host state subjected his construction sites to treatment described by one senior military commander as a “siege.” Thus, faced with enormous pressure to continue work, the investor consented to a summary arbitration procedure in which the head of state instructed the Yemeni tribunal not to consider the underlying contract or the investor’s actual costs when establishing the measure of compensation.

While the Yemeni arbitral tribunal heard and decided the case in just six weeks, did not provide any reasons for its decision, and allegedly committed vast miscalculations, it rendered a substantial award in favor of the investor. Rather than directing his government to satisfy the award, however, the head of state “advised” the investor that it would be “in [his] interest” to accept a far lower sum offered by the Ministry of Public Works. Contemporaneously, the host state renewed a “siege” of the investor’s construction site, arrested three of his managers (including his son), and denied his operations protection from “harassment, threat and theft by armed third parties.” Shortly thereafter, the investor’s contacts in Yemen warned him to leave the country because his life was in danger. Under these circumstances, the investor departed from Yemen, accepted an unfavorable settlement agreement with the host state through local agents, and then commenced a second arbitration against the host state under a bilateral investment treaty.
Although the host state pleaded the settlement agreement as a definitive resolution of the investor’s claims, the investment treaty tribunal regarded that instrument as the product of “physical and financial duress.” As a result, it could not defeat the investor’s claim or his right to collect the full amount of compensation awarded by the Yemeni arbitral tribunal. The tribunal also regarded the host state’s use of physical and financial coercion as a denial of the “fair and equitable treatment” required by the investment treaty. To remedy that violation, the tribunal awarded the investor the full amount of the Yemeni arbitral award, minus the sums already paid by the host state under the coerced settlement agreement.

In addition to restoring the economic and financial status quo ante, the tribunal also granted the investor’s claim for “moral damages” as compensation for the “stress and anxiety of being harassed, threatened, and detained by the [host state] as well as by armed tribes.” While recognizing that investment treaties primarily aim to protect economic and property interests, the tribunal concluded that the “malicious” application of “physical duress” justified an award of moral damages in the “modest” amount of $1 million.

Although described by the tribunal as a financial consequence of the investment treaty violation, the award of moral damages represents a striking development in the investment context, where treaties seek to regulate economic relationships involving substantial commitments of resources, where disputes involve substantial economic losses, and where damage awards focus on economic concepts. By contrast, awards of moral damages seem more deeply rooted in human rights jurisprudence, where claimants frequently experience pain, suffering, mental anguish, and humiliation without substantial economic loss. Given these facts, one might describe the Desert Line Projects award as a rare but concrete example that proves the viability of drawing on human rights narratives to guide the application of investment treaties, at
least in cases where the host state’s conduct involves the sort of abuse normally associated with human rights violations.

While many observers have emphasized the extraordinary nature of the circumstances justifying moral damages in investment claims, that was not always the case. During the nineteenth and early twentieth centuries, investment claims often resembled the sorts of human rights claims that entail moral damages. Upon reflection, the overlap makes sense. At the time, foreign investors had to justify their claims under the customary law of state responsibility for injuries to aliens, which also served as a conceptual foundation for the development of international law on civil and political rights. Under those circumstances, investment claims necessarily resembled human rights claims.

Subsequently, capital-exporting states used investment treaties as a tool to increase the protection of foreign investment, which eventually drew the discipline beyond the customary standards associated with human rights law.21 However, as noted above, recent investment treaty practice signals a retreat from the high-water mark of investor protection and a return towards customary norms, perhaps even to the very standards that prevailed during the early 1900s. To the extent that “egregious,” “outrageous,” or “shocking” government conduct (or similar abuses) again become the standards for assessing the liability of hosts states, successful investment claims will once again come to resemble human rights claims. As that happens, one might feel not just the temptation, but the obligation, to draw on human rights narratives when applying investment treaties.

21 INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT & WORLD WILDLIFE FUND, PRIVATE RIGHTS, PUBLIC PROBLEMS 5-6 (2001) [hereinafter PRIVATE RIGHTS], available at http://www.iisd.org/pdf/trade_citizensguide.pdf (explaining that investment treaties first sought to protect foreign investors from outright takings and discrimination during the 1950s, 1960s, and 1970s, but later expanded their scope to include undertakings with respect to liberalization.
Despite the functional similarities, the shared historical roots, and the arguably growing emphasis of investment treaty awards on curtailing serious abuse by host states, one should not lose sight of compelling practical differences between human rights claims and investment treaty claims. To begin with, most human rights claimants are individuals who seem relatively powerless and vulnerable compared to the respondent states. Also, depending on the particular human rights instrument, the opportunity to pursue individual complaints may not exist or may be sharply curtailed. Next, even when available, such mechanisms typically require claimants to exhaust local remedies. In addition, even when available, such mechanisms may not result in binding decisions, much less decisions capable of global enforcement in domestic courts. Finally, even when available and effective, such mechanisms generally result in modest, if any, damage awards against the respondent states. In other words, human rights law provides comparatively weak remedies for comparatively weak claimants.

By contrast, many (if not most) investment treaty claims involve multinational corporations with economic resources and leverage that may rival those of their host states.\footnote{See also Stiglitz, supra note ___, at 16 (observing that the “economic powers [of multinational corporations are huge----often far larger than the countries with which they are dealing”). Also, despite some exceptions, most investment treaties guarantee claimants not only the unfettered right to submit claims directly to arbitration before international tribunals, but also to influence the composition of those tribunals. Next, when available, such mechanisms generally do not require exhaustion of local remedies. In addition, such mechanisms virtually always result in binding awards capable of global enforcement in domestic courts under the ICSID Convention (without any judicial review) or the New York Convention (with limited judicial review). Finally, while not always the case, the proceedings can result in substantial—even ________________}
crippling—damage awards against the respondent states. Depending on the state’s resources, even the cost of successfully defending claims can be onerous.\textsuperscript{23} In other words, investment treaties provide powerful remedies for powerful claimants.

Building on the points just made, one might portray investment treaties as forceful and potentially dangerous tools that could empower foreign corporations (1) to intimidate host states and, thus, to discourage them from regulating foreign investors even when needed to safeguard the public interest, or (2) at least to neutralize the financial consequences of regulation. Viewed from this perspective, one might either reject the use of human rights narratives to guide the application of investment treaties or, as explained below, one might invert the use of such narratives to protect host states and their citizens from the potentially harmful consequences of foreign investment.

IV. The Right to Regulate and Human Rights: The Anti-Globalist Narrative

Assuming that investment treaties impair the capacity of host states to regulate or even to protect the human rights of their citizens, one might feel the temptation to draw on anti-globalist narratives to describe the function of investment treaties. As explained below, this perspective has found purchase in the work of advocacy groups, mainstream journalism, the highest levels of academic discourse, and reports of distinguished figures within the United Nations.

As far as the author recalls, advocacy groups first trumpeted the anti-globalist perspective on investment treaties. After spearheading a successful campaign to scuttle the OECD’s draft Multilateral Agreement on Investment during the late 1990s, many advocacy groups sought to

\textsuperscript{23} Van Harten, Wells, Stiglitz, supra note ___, at 58 (referring to “the often huge legal bills poor countries face in defending themselves”).
discredit the NAFTA’s investment chapter, which seemed a likely starting point for negotiations regarding the investment disciplines in a Free Trade Area for the Americas.\textsuperscript{24} For example, in 2001, the International Institute for Sustainable Development and the World Wildlife Fund published a layman’s guide to NAFTA’s investment chapter, which warned that corporations had transformed the instrument into a “sword” or “strategic weapon” that could either defeat the ability of host states to regulate in the public interest or, alternatively, require them to compensate foreign investors for the costs of regulatory compliance.\textsuperscript{25}

During the same year, Public Citizen and Friends of the Earth released an assessment of NAFTA’s investment chapter.\textsuperscript{26} Expressly designed to influence negotiations of investment rules for the FTAA,\textsuperscript{27} that document referred to the then-pending NAFTA investment claims as an “extraordinary attack on normal government activity.”\textsuperscript{28} According to Public Citizen, foreign investors were using the NAFTA “to demand payment for any government action that impacts the value of [their] property.”\textsuperscript{29} As a result, it predicted that taxpayers faced “billions” of dollars

\textsuperscript{24} \textit{See Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy} at 5 (2001) [hereinafter \textit{Bankrupting Democracy}], \textit{available at} http://www.citizen.org/documents/ACF186.PDF (predicting that the FTAA “would spread NAFTA’s rules to an additional 31 Latin American and Carribean nations”). \textit{See also Private Rights, supra note ___}, at 2 (explaining that the IISD and the WWF sought to ensure that negotiators would not repeat the NAFTA’s “mistakes” when adopting the investment rules for the FTAA).

\textsuperscript{25} \textit{See Private Rights, supra note ___}, at 1, 16, 33-34.

\textsuperscript{26} \textit{Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy} (2001), \textit{available at} http://www.citizen.org/documents/ACF186.PDF.

\textsuperscript{27} \textit{See Bankrupting Democracy, supra note ___} (adopting the subtitle “Lessons for Fast Track and the Free Trade Area of the America”).

\textsuperscript{28} \textit{Bankrupting Democracy, supra note ___}, at ii.
in liability.\textsuperscript{30} Given those stakes, the Public Citizen warned that foreign investors could “bully” host states and, thus, prevent them from adopting measures designed to protect the public interest.\textsuperscript{31}

Although the anti-globalist perspective represents standard fare among certain advocacy groups, it quickly and surprisingly found resonance in mainstream news outlets. Thus, in a 2001 article, the New York Times reported that secret tribunals operating under NAFTA’s Chapter 11 had already allowed foreign investors to revoke national laws, question the justice systems of host states, and challenge regulations. Furthermore, the journalist warned that “the clash between investor rights and public policy” could “grow [even] more intense.”

During a PBS television broadcast aired in 2002, respected journalist Bill Moyers declared that multinational corporations were using NAFTA’s investment chapter to “challenge democracy.”\textsuperscript{32} According to Moyers, that phenomenon included “attack[s]” on “public laws that protect our health—and our environment[,]” as well as “the American judicial system.”\textsuperscript{33} In deciding those matters, secret tribunals could “force taxpayers to pay billions of dollars” or,

\begin{small}
\begin{enumerate}
\item \textsuperscript{30} \textit{Bankrupting Democracy}, supra note ____, at iv.
\item \textsuperscript{31} \textit{Bankrupting Democracy}, supra note ____, at vi.
\item \textsuperscript{32} \textit{Bankrupting Democracy}, supra note ____, at vii.
\item \textsuperscript{33} Id.
\end{enumerate}
\end{small}
possibly, compel “radical changes in public policy.” In a grim assessment, Moyers described the situation as an “end-run around the Constitution.”

Despite the passage of time and the limited success of foreign investors in securing nine-digit awards, anti-globalist critiques of investment treaties continue to surface with some regularity in mainstream newspapers. For example, in 2004, the New York Times published an editorial that described investment treaty arbitration as a “one-sided” process favoring well-heeled corporations over poor countries. Furthermore, according to the newspaper, “secret trade courts” could award compensation to foreign investors harmed by government measures required to protect public health, the environment, or economic collapse. As a result, their decisions could discourage states from regulating, and could even encourage foreign investors to regard investment treaties as insurance policies against the normal “risks of doing business.”

In addition to voicing their own concerns, newspapers have provided a forum for scholars to reinforce anti-globalist perspectives on investment treaties. Thus, in November 2007, the Financial Times published a letter, in which a Harvard business professor described investment treaty arbitration as an expensive, unpredictable and unbalanced process that reflects the unequal bargaining power of developed and developing states. Likewise, in February 2010, the

---

34 Id.
35 Id.
37 Id.
38 Id.
Guardian published an opinion piece, in which a Boston University professor of international relations claimed that investment treaties “enable private firms to circumvent environmental laws and then parachute away with large sums of government money.” 40 In addition to demanding that firms “stop panning for gold” in investment treaty arbitration, he called on the Obama administration to change U.S. investment treaty practice as needed to “[s]top private firms [from] exploiting poor states.” 41

Turning from journalism to the academy as such, some of the nation’s most distinguished and influential scholars have expressed anti-globalist themes in their assessments of investment treaties. For example, Professor Joseph Stiglitz (a Nobel laureate, former chair of the President’s Council of Economic Advisers, and former chief economist at the World Bank) has publicly criticized investment treaties as “one-sided” and “unbalanced” arrangements that “have undermined democratic processes” and “inhibit[ed] legitimate government efforts” to regulate in the environmental, health, and employment contexts.

Likewise, Professor John Ruggie (an influential political scientist from Harvard, former Assistant Secretary-General of the United Nations, and current Special Representative of the Secretary General for Business and Human Rights) has expressed sharp criticism of investment


41 Id. Substantively, Professor Gallagher recommended changes that would afford host states greater flexibility to regulate. Procedurally, he recommended a shift from investor-state to inter-state arbitration (in which host states must decide whether to espouse the claims of their nationals against host states), or at least the imposition of a requirement that foreign investors exhaust local remedies before commencing investment treaty claims.
treaties in official reports to the United Nations Human Rights Council. At the outset of his 2008 report, Professor Ruggie sought to focus attention on “governance gaps created by globalization,” which can “permit corporate-related human rights harm to occur even where none may be intended.” As an example of “imbalances between firms and States that may be detrimental to human rights,” he cited the “more than 2,500 bilateral investment treaties currently in effect”:

While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards—even when the legislation applies uniformly to all businesses, foreign and domestic.

Later, in a section on “policy alignment,” Ruggie described the problem of “horizontal” policy incoherence, defined as the situation where various departments within a single government, “such as trade, investment promotion, development, [and] foreign affairs—work at cross purposes with the State’s human rights obligations and the agencies charged with implementing them.” As an example of this phenomenon, he again cited investment treaties:

. . . They promise to treat investors fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions. But investor protections have expanded with little regard to States’ duties to protect [human rights], skewing the balance between the two. Consequently host states can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.

This imbalance creates potential difficulties for all types of countries. . . . During the investment’s lifetime, even social and environmental regulatory changes that are applied equally to domestic companies can be challenged by foreign investors claiming exemption or compensation.

The imbalance is particularly problematic for developing countries. . . . [because] it is precisely in developing countries that regulatory development may be most needed.
In his 2009 report, Professor Ruggie reiterated concern about the negative effects of investment treaties on the regulatory capacities of host states:

. . . [R]ecent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government’s ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations, or seek compensation from the Government for the cost of compliance.

Viewed from this perspective, one might draw on human rights narratives not to reinforce the freedoms granted to foreign investors, but to (1) expose the potentially dangerous consequences of their operations, and (2) strengthen the capacity of host states to protect local populations from harm. In fact, this hypothesis mirrors two lines of cases in which tribunals have invoked human rights principles either to invite scrutiny of foreign investments or to limit international scrutiny of host-state actions to protect local interests. Thus, in a series of investment disputes involving the operation of privatized water distribution and sewage services in metropolitan areas, tribunals have accepted amicus curiae submissions from organizations seeking to emphasize the controversies’ implications for human rights, including the right of access to potable water. Likewise, while not uniformly embraced, at least one investment treaty tribunal has drawn on human rights doctrine for the proposition that host states deserve a “margin of appreciation” when adopting measures to uphold public order or protect essential security interests during periods of grave economic crisis. In other words, while foreign investors can invoke human rights narratives to validate the wide zones of autonomy granted to them under investment treaties, skeptics can turn the tables by invoking human rights narratives to protect host states and their citizens against the dangers posed by the operations of foreign investors.
Coming full circle, the narrative for corporations as *plaintiffs* under international law might come to resemble the narrative for corporations as *defendants* under international law. According to that view, when granted too much autonomy, foreign investors may conduct their operations in ways that pose serious threats to the environment, the safety of workers, and protection of human rights in host states. Worse yet, instead of providing a means to redress some of those dangers (as the Alien Tort Statute arguably does), investment treaties establish a legal environment that permits foreign investors to undertake harmful activities, to avoid discipline, and to demand compensation when host states alter the rules of the game. In other words, investment treaties transform international law from a source of hope into an instrument of harm.

Given the strength and resilience of concerns expressed by not just by advocacy groups, but also by influential journalists, leading academics, and distinguished figures in intergovernmental organizations, one must give serious consideration to the anti-globalist narrative about investment treaties. However, one must also consider the extent to which antagonists exaggerate the inherently dangerous qualities of investment treaties. In fact, one might more accurately describe their characteristics in terms of weakness and mutability. With respect to the weakness of investment treaties, one should observe that the resistance of NGOs, developing states, and other opponents has foiled serious efforts by the Organization for Economic Cooperation and Development, the World Trade Organization, and the states of the Americas to conclude a comprehensive multilateral agreement on foreign investment during the last fifteen years, just as all similar efforts have failed for the last eight decades. In other words, a truly global or comprehensive regional system for the protection of foreign investment does not
exist and its prospects seem dim. Viewed from this perspective at least, it becomes hard to accept descriptions of investment treaties as ominous and growing threats.

Moving from the multilateral to the bilateral context, states have concluded an impressive stock of more than 2,700 BITs. However, the limited scope and bilateral character of those instruments leave broad avenues for states to retreat from commitments thought to produce socially undesirable results. To illustrate the mutable character of bilateral treaties, one may begin by recalling the obvious fact that (unlike human rights treaties) none of their undertakings rises to the level of *jus cogens*. Also, many bilateral agreements enter into force only for limited intervals. Thus, they lend themselves to periodic renegotiation and updating according to models that currently emphasize substantial reductions of the autonomy granted to foreign investors and a corresponding reinforcement of the capacity of host states to protect health, safety, and the environment.

Although there may have been a time when capital-exporting states would have resisted such trends, their leadership in the rebalancing of model treaties indicates that they might accept the renegotiation of treaties already in force. Even if they do not, denunciation of bilateral treaties remains a possibility now openly discussed and occasionally used by states eager to change the rules of the game.\(^42\) While it represents a serious step and may produce a certain loss of reputation, denunciation of bilateral agreements on a narrow topic entails relatively few

\(^42\) Admittedly, many treaties provide that obligations remain in force for a period of years following unilateral denunciation. As a result, denunciation may not produce rapid change. However, the realistic threat of denunciation may encourage tribunals to exercise greater caution in framing the obligations of host states.
consequences and, therefore, constitutes a viable option for resetting (formally or informally) the balance between foreign investors and host states.\textsuperscript{43}

Perhaps of greater concern should be the growing number of investment chapters contained in bilateral or regional free trade agreements. Unlike stand-alone investment treaties, these instruments place the treatment of foreign investment into a larger package that includes disciplines on trade in goods, trade in services, intellectual property, government procurement, and technical standards, as well as annexes that set forth a range of carefully negotiated exceptions. In this context, the revision of investment disciplines even by like-minded states becomes unappealing, as it opens up the entire package for renegotiation. Likewise denunciation becomes unrealistic because states cannot withdraw from their investment obligations without sacrificing interlocking compromises on trade in goods, trade in services, intellectual property, government procurement, and technical standards. Furthermore, to the extent that free trade agreements cover relations among three or more states parties, the potential costs of renegotiation or denunciation grow accordingly. Thus, despite perceived flaws, the text of NAFTA’s investment chapter has remained stable, and states parties to that agreement (and similar agreements) will likely remain unreceptive to any formal “rebalancing” or “recalibration” of their obligations.

Although the investment chapters of free trade agreements may thus seem immutable in a formal sense, one should recall the existence of mechanisms designed to achieve a significant measure of informal but effective rebalancing. Though once a feature unique to the NAFTA’s investment chapter, agreements increasingly empower states parties to adopt binding

\textsuperscript{43} As previously noted, a credible threat of denunciation can push tribunals towards more conservative positions when drafting awards and, thus, towards an informal resetting of the balance between foreign investors and host states.
interpretations of treaty provisions. As demonstrated by the Free Trade Commission’s practice under the NAFTA’s investment chapter, this mechanism can facilitate substantial changes in doctrine without formal amendment of treaty provisions. Even in the absence of such mechanisms, the jointly held views of states parties may represent subsequent practice establishing an authoritative (re)interpretation of relevant provisions.

Furthermore, investment treaty tribunals themselves can play an important role in the rebalancing of obligations through adjudication. Thus, as discussed above, a series of recent awards under the NAFTA’s investment chapter marks a sharp departure from early practice and signals a growing appreciation for the proposition that investment treaties preserve meaningful regulatory space for host states and protect foreign investors only from serious abuse by host states. While the ad hoc nature of investment treaty arbitration does not guarantee the perpetuation of this trend, the present trajectory of jurisprudence casts substantial doubt on assertions that investment treaties empower allow multinational corporations to inflict harm, frustrate democracy, or undermine the capacity of host states to protect the welfare of citizens.

V. CONCLUSION

The foregoing discussion has sought to examine the limits of three narratives or analogies frequently used to describe the function of and, thus, to guide the application of investment treaties. First, while the business planning narrative emphasizes role of dispute-settlement provisions in promoting certainty for international commercial transactions between private parties, the fact remains that states do not negotiate investment treaties with private parties, that states pursue a variety of goals in treaty practice, and that investment treaties consequently do not emphasize certainty to the same extent as contracts. Second, while the human rights narrative emphasizes the capacity of investment treaties to protect foreign investors from serious
abuse by host states, one quickly discovers that claimants under human rights treaties and claimants under investment treaties occupy fundamentally different positions. Whereas human rights claimants represent relatively powerless individuals with limited access to weak enforcement mechanisms that at best result in modest awards of damages, investment treaty claimants often possess substantial economic and political resources, as well as liberal access to robust enforcement mechanisms capable of producing awards that may drain or even exhaust national treasuries. Third, while the anti-globalist narrative emphasizes the capacity of investment treaties to liberate foreign investors (and to restrict host states) in ways that may undermine the public interest, it often ignores the existence of formal and informal avenues to facilitate the recalibration of treaty obligations and, thus, create the necessary opportunities to pursue more socially desirable results.

Having tested the limits of several narratives, one feels the temptation to close with an analogy that better captures the functions of investment treaties. Indulging that desire, one might compare investment treaties to health insurance plans that provide a measure of protection when traveling “out-of-network,” but do not seem particularly generous and leave beneficiaries exposed to serious risks. However, the point is that analogies by definition never capture the full picture and, thus, tend to obscure nuance. Under these circumstances, it seems wiser to draw conclusions based on the combined strengths and weaknesses of the foregoing narratives.

Taken together, the three narratives suggest that foreign investors need and should receive a measure of protection against political risks in their host states. Although investment treaties have a role to play in providing the necessary assurances, they do not guarantee the success of investments, protect against disappointment, or require host states to satisfy best practices in the conduct of public affairs. To the contrary, they provide recourse against serious
abuse by government officials in host states, though that leaves open the question as to exactly what constitutes “serious abuse” in the twenty-first century, and whether the concept might vary depending on the particular characteristics of the investor or the host state. While recognizing that foreign investors deserve effective protection from serious abuse, one must not lose sight of the fact that their economic resources and political leverage often rival those of their host states. Because investment treaties add direct access to an international dispute settlement process that can produce nine-digit awards capable of enforcement worldwide, they represent powerful tools that may be applied in useful or pernicious ways. While that justifies public discussion and monitoring of investment treaty practice, one should recall that investment treaties have a second characteristic: a mutability that facilitates the adjustments needed to achieve socially desirable outcomes.

In other words, the ebb and flow of practice suggests that investment treaties lie on a path traversing the territory among competing paradigms. Although the meandering track may represent a source of confusion at times, one hopes that it embodies a middle path that draws on the best of human experience and avoids the destructive tendencies associated with any of the extremes.