Brooklyn Journal of International Law

Volume 34 | Issue 2 Article 2

2009

The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement

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THE FUTURE OF BILATERAL INVESTMENT TREATIES: A DE FACTO MULTILATERAL AGREEMENT?

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INTRODUCTION

In the Doha trade negotiations round ("Doha Round") at the Fifth Session of the Ministerial Conference in Cancún ("Cancún Session"),[1] the "Singapore Issues"[2] were at the heart of the debate between developed and developing countries, revealing deep differences over the role of investment issues in trade negotiations and trade agreements. Hence, the Cancún Session intensified skepticism about the feasibility of achieving any compromise whatsoever in the near future.[3] In fact, it was only several years ago that the countries of the Organisation for Economic Co-operation and Development ("OECD")[4] failed to agree on the appropriate content of a multilateral agreement on investment ("MAI").[5]

While the Doha Ministerial Declaration explicitly included the relationship between trade and investment in its agenda,[6] reflecting optimism for a potential compromise in North-South economic disputes, the decision adopted by the World Trade Organization ("WTO") General Council on August 1, 2004 states that "investment issues will not form part of

1. The Fifth Session of the Doha Round took place in Cancún, Mexico, between September 10 and 14, 2003. *See* World Trade Organization, Ministerial Statement of 14 September 2003, WT/MIN(03)/20, *available at* http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_20_e.doc.

2. The so-called "Singapore Issues" in the Doha Ministerial Declaration are trade and investment; interaction between trade and competition policy; transparency in government procurement; and trade facilitation. *See* World Trade Organization—Cancún Fifth Ministerial Conference, Summary of 14 September 2003, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last visited Jan. 13, 2009). *See also* World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, ¶¶ 20–27, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf [hereinafter Doha Ministerial Declaration]. This Article will focus mainly on the relationship between trade and investment in the Doha negotiations.

3. *See* AARON COSBEY ET AL., INVESTMENT AND SUSTAINABLE DEVELOPMENT 25 (2004), *available at* http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf.

4. The OECD was founded in 1961 "to help its member countries to achieve sustainable economic growth and employment and to raise the standard of living in member countries while maintaining financial stability—all this in order to contribute to the development of the world economy." OECD, About OECD—History, http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html (last visited Jan. 13, 2009).

5. On the failure of OECD negotiations on an MAI, see, for example, DAVID HENDERSON, THE MAI AFFAIR: A STORY AND ITS LESSONS 20–32 (1999); Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1037–48 (2000); S. Zia-Zarifi, *The Multilateral Agreement on Investment: Special Report*, 9 Y.B. INT'L. ENV. L. 345 (1999). *See also* CHEN HUIPING, OECD'S MULTILATERAL AGREEMENT ON INVESTMENT: A CHINESE PERSPECTIVE (2002) (discussing the various elements of the MAI draft).

6. Doha Ministerial Declaration, *supra* note 2, ¶¶ 20–22.

the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round."[7] This political and diplomatic concession was necessary to bring the developed, developing, and emerging economies back to the trade negotiation table.[8] This moment was a turning point that enhanced hope for better diplomatic prospects.

We must therefore confront this question: what could serve as an alternative forum to the WTO for international investment regulation? A number of potential forums were found inappropriate for purposes of an MAI, and these are discussed at some length in Part I of this Article.[9] The recent failure of the Cancún Session has forced the international community to deal with investment regulation on unilateral, bilateral, and regional dimensions. This raises afresh the question whether bilateral and regional forums are, in fact, suitable for international investment regulation. Although many scholars have creatively theorized ways of integrating investment regulation into a future multilateral framework,[10] an exploration of the legal and political environment needed for such integration is beyond the scope of this Article. Rather, this Article will focus on recent trends in the bilateral sphere.

As a result of the failure of multilateral negotiations, the number of bilateral investment treaties ("BITs"), free trade agreements ("FTAs"), and regional trade agreements that include investment provisions has increased dramatically.[11] Through their inclusion of most-favored-nation ("MFN") clauses,[12] these agreements form a complex network that resembles a de facto multilateral agreement. Thanks to the MFN mechanism, developing countries are now able to sign such agreements with in-

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7. General Council, *Doha Work Programme*, WT/L/579 (Aug. 1, 2004).

8. G8 RESEARCH GROUP, UNIV. OF TORONTO, SEA ISLAND FINAL COMPLIANCE RESULTS: FINAL REPORT 56 (2005), *available at* http://www.g8.utoronto.ca/evaluations/2004seaisland_final/2004_seaisland_final.pdf.

9. Several attempts to regulate international investment on the multilateral level have failed. For a detailed discussion of these attempts in the International Trade Organization, OECD, and WTO, as well as a discussion of a potential World Investment Organization, see Jurgen Kurtz, *A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment*, 23 U. PA. J. INT'L ECON. L. 713 (2002).

10. *See, e.g.*, *id.* at 779–88.

11. The number of BITs today exceeds 2200. *See* U.N. Conf. on Trade & Dev. [UNCTAD], *World Investment Report 2004: The Shift Towards Services*, 221–31, U.N. Doc. UNCTAD/WIR/2004 (2004) [hereinafter *World Investment Report 2004*]; UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, 21, U.N. Doc. UNCTAD/WIR/2003 (2003) [hereinafter *World Investment Report 2003*].

12. For an example of an MFN clause, see *infra* note 139 and accompanying text.

ternational consent, something that cannot currently be achieved through participation in the multilateral negotiation regime.[13] Part II of this Article will examine this de facto multilateralism[14] based on the content of BITs, the BIT signing mechanism, and the case law that has arisen from bilateral and regional agreements.

Furthermore, the new era of bilateralism brings formidable challenges for shaping economic relationships between international investors and developing countries, as the latter seek foreign investments that support sustainable development values.[15] In Part III, this Article will examine if and how the new BITs should strike a balance between investment protection for multinational corporations ("MNCs") and the enforcement of corporate responsibility. I will assess how to advance these two objectives, addressing the ways that human rights and labor provisions counterbalance a broad protection of corporate investment. This issue is highly sensitive; it has played a key role in developing countries' decisions to reject investment agreements.[16] It should be noted that the unprecedented power of MNCs in the multilateral arena may be mitigated at the bilateral level as a "humanized," de facto MAI is developed.[17] This Article concludes by analyzing various models for integrating corporate responsibility safeguards into BITs.

I. BILATERALISM: THE FORCE AGAINST MULTILATERALISM

Given its undeniable importance, foreign direct investment ("FDI")[18] would seem worthy of regulation by an international organization comparable to the WTO, which regulates international trade in goods.[19] In-

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13. *See* Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=616242.

14. The concept of de facto multilateralism presented in this Article refers to a multilateral practice resulting from the combined effect of bilateral relations in the absence of an express multilateral agreement and not necessarily out of a sense of legal obligation.

15. *See generally* LUKE ERIC PETERSON, BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING (2004); Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 514–25 (1998).

16. *See* Muchlinski, *supra* note 5, at 1046, 1048 (referring to disagreements over labor and environmental standards as "deal breakers" contributing to the failure of the MAI).

17. For a discussion of the potential for a "humanized" de facto MAI, see *infra* notes 320–24 and accompanying text.

18. *See World Investment Report 2003*, *supra* note 11, at 3–5.

19. The WTO is an international organization that supervises and liberalizes international trade through multilateral negotiations among its members. It was created on January 1, 1995 and replaced the General Agreement on Tariff and Trade ("GATT"), which

deed, some scholars have called for the establishment of just such an institution.[20] However, host-investor agreements, a variety of national laws, and a range of international and regional regimes presently govern FDI.[21] All of these regulatory structures create a competitive environment among States where FDI plays a crucial role.[22] Moreover, such competition has been intensified by States' concession of some of their domestic legislative power on account of trade blocks, multilateral agreements, and the mobility of capital.[23] In light of the existing tensions among adverse regulatory powers, particularly between multilateral institutions and bilateral instruments in investment regulation, the role of BITs is essential.[24]

Globalization, specifically the constant growth in FDI inflows and outflows that began in the 1960s and gained momentum in the 1990s, has created a need for legal mechanisms that promote and protect foreign investment.[25] While treaties have been developed to regulate areas of international economic law such as trade,[26] evidently, no legal framework has addressed international investment regulation *per se*. There are several reasons for this phenomenon. First, most international economic activity has traditionally operated through trade rather than through investment, a state of affairs that existing legal instruments have perpetuated.[27] However, recent developments (i.e., the increasingly pervasive

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had served as a de facto international trade organization since 1948. *See* WORLD TRADE ORG., UNDERSTANDING THE WTO (2007), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited Jan. 13, 2009).

20. *See, e.g.*, Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization*, 42 COLUM. J. TRANSNAT'L L. 5 (2003); Muchlinski, *supra* note 5, at 1050.

21. For an overview of the different levels of investment regulation, see Alfred Escher, *Current Developments, Legal Challenges and Definition of FDI*, *in* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 1, 3–8 (Daniel D. Bradlow & Alfred Escher eds., 1999).

22. *See generally* THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT (1998).

23. *See generally* Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 499 (2000) (discussing the restrictive effect of the current legal regime on the ability to regulate economic activity in the host State).

24. *See* Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 128 (2003).

25. For background on investment regulation on the bilateral level, see RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995). *See also* UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, U.N. Doc. UNCTAD/ITE/IIT/7 (1998).

26. *See, e.g.*, World Trade Organization, Legal Texts—A Summary of the Uruguay Round, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#General (last visited Jan. 15, 2009).

27. *See* ROBERT HOWSE, REGULATION OF INTERNATIONAL TRADE 335–37 (1999).

role of FDI) have departed from the status quo.[28] Second, economic, political, and cultural barriers have impeded an appreciable number of markets from opening up to foreign investment, especially when such investment would have involved intervening in domestic firms' decision-making.[29] Countries at various stages of economic development have been compelled to protect local economies, the domestic manufacturing sector, and employees from the risks of foreign investments.[30] In addition, countries have taken defensive measures to protect their national currencies.[31] Finally, with respect to investment promotion and protection, and dispute settlement issues, developed and developing countries have been guided by divergent underlying values and were consequently unable to develop legal tools based on mutual understanding.[32]

Over the past three decades, this picture has changed, primarily during the 1990s, when foreign investment became a central aspect of the global economy and effectively the principal engine of sustainable growth and development.[33] Eventually, developing countries enacted broad policy changes, deregulating local industries and opening up these emerging markets to foreign investors.[34] Previous protective measures, such as performance requirements and limitations on transfers of currency, became less common.[35] Perhaps most importantly, developed and developing countries began espousing similar values regarding core investment-related issues. An illustrative example of this confluence is the achieve-

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28. *See* Escher, *supra* note 21, at 3.

29. For a detailed discussion of the relationships between such protection, and trade and development, see THEODORE MORAN, THE IMPACT OF TRADE-RELATED INVESTMENT MEASURES ON TRADE AND DEVELOPMENT: THEORY, EVIDENCE AND POLICY IMPLICATIONS (1991).

30. *See id.*

31. For example, some of these measures impose restrictions on the transfer of investments' principal funds and returns, and force conditions on the conversion of foreign exchange. *See* Duncan E. Williams, Note, *Policy Perspectives on the Use of Capital Controls in Emerging Market Nations: Lessons From the Asian Financial Crisis and a Look at the International Legal Regime*, 70 FORDHAM L. REV. 561, 570–90 (2001).

32. *See* Kurtz, *supra* note 9, at 718–23.

33. *Id.*

34. *Id.*

35. Host countries employ such measures to increase the local benefits of the foreign investment in the host State, but their economic impact is questionable. However, the Trade-Related Investment Measures Agreement prohibits such measures when they are inconsistent with GATT provisions requiring national treatment and the elimination of quantitative restriction provisions. Many Canadian and U.S. BITs also prohibit the formerly-common local content requirement. U.N. CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2007: TRANSNATIONAL CORPORATIONS, EXTRACTIVE INDUSTRIES AND DEVELOPMENT at 168, U.N. Sales No. E.07.II.D.9 (2007).

ment of a global consensus under customary international law on the formula used to determine compensation for expropriation.[36]

While it was too early for multilateral negotiations at the time, investment exporter countries, widely known as "home countries," found it necessary to protect investors' rights with BITs. "Host countries" were generally regarded as open but unsafe environments for investment.[37] Home countries were concerned about potential prejudicial practices, such as arbitrary "access to markets," discrimination among different investors, expropriation of assets, and devaluation of investment values due to regulatory changes.[38] In contrast, host countries considered BITs a necessary tool to attract foreign investors, a tool that would send positive, reassuring signals to the markets.[39]

These concurrent considerations triggered negotiation between home and host countries with common economic interests, which led to the signing of BITs as part of their foreign economic policies.[40] Whereas in theory BITs are reciprocal, they turned out to be rather single-sided. First, BITs are typically agreements between developed and developing countries, and the developed country usually initiates the negotiations.[41] The economic disparity between the parties creates for the less developed country a stronger interest in signing such an agreement.[42] Second, the developed country imposes the terms of the BIT on the developing country, usually in the form of a pre-structured draft known as a "model

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36. *See* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 397–403 (2002) (discussing the Hull Rule in international economic law, which provides "prompt, adequate and effective compensation" in case of expropriation).

37. *Id.*

38. *See* Vandevelde, *supra* note 23, at 488–91.

39. *But see* Neumayer & Spess, *supra* note 13; Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite* (World Bank Policy Research Paper No. 3121, 2003), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf.

40. *See, e.g.*, Agreement Concerning the Promotion and Reciprocal Protection of Investments, F.R.G.-Bangl., May 6, 1981, *available at* http://www.iisd.org/pdf/2006/investment_bangladesh_germany.pdf; Agreement Concerning the Reciprocal Encouragement and Protection of Investment, Malta-Fr., Aug. 11, 1976, 1080 U.N.T.S. 117.

41. Canada, for example, initiated BIT negotiations in 2008 with Tanzania, Madagascar, Indonesia, and other developing countries. *See* Foreign Affairs and International Trade Canada, Canada's Foreign Investment and Protection Agreements (FIPAs), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx (last visited Feb. 6, 2009).

42. *See* Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 458 (2008).

BIT."[43] Developing-country parties, in turn, have very limited, if any, negotiating power.[44] Consequently, most of the provisions in a BIT are aligned with investors' interests instead of the sovereignty of the developing country.[45] Third, as will be discussed in Part II of this Article, the enforcement part of BITs is centered in the investor-state dispute settlement provision, which allows investors to bring claims directly against a host country in an international arbitral tribunal in response to a violation of BIT obligations.[46] Again, this mechanism mainly focuses on investors' rights and nearly ignores investors' obligations, thereby preserving the dominance of investment interests in developed countries.[47]

Although the proposed International Trade Organization ("ITO") facilitated negotiations on economic relations at Bretton Woods in 1944,[48] the United States Congress refused to ratify the ITO Charter in 1950, and the ITO was never established.[49] Since the 1960s, when the BIT phenomenon began to develop steadily, international and multilateral forums have attempted to negotiate investment rules without much success.[50] The OECD, a collective of industrialized States, failed to regulate MNCs both during the 1960s[51] and in 1998, when MAI negotiations were held.[52] In addition, the U.N. Commission on Transnational Corporations failed

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43. *E.g.*, U.S. Trade Representative, 2004 U.S. Model Bilateral Investment Treaty, *available at* http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf [hereinafter 2004 U.S. Model BIT].

44. *See* Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 958 (2007).

45. Vandevelde, *supra* note 15, at 514 (discussing the investment liberalization effect of BITs).

46. *See infra* notes 265–75 and accompanying text.

47. *See infra* notes 288–90 and accompanying text.

48. The Bretton Woods Conference, held in July 1944, established multinational economic institutions to govern international economic relations in the post-World War II era. In addition to the World Bank and the International Monetary Fund, the Bretton Woods negotiations discussed a proposed International Trade Organization to serve as the multilateral forum for trade negotiations. Bretton Woods Project, What Are the Bretton Woods Institutions?, http://www.brettonwoodsproject.org/item.shtml?x=320747 (last visited Jan. 30, 2009).

49. *See* PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES, AND MATERIALS 80 (2d ed. 2008).

50. *See* Lowenfeld, *supra* note 24, at 123–25.

51. *See* Organisation for Economic Co-operation and Development [OECD], Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, O.E.C.D. No. 23081, 7 I.L.M. 117 (1968).

52. *See* OECD, Negotiating Group on the Multilateral Agreement on Investment (MAI), *Multilateral Agreement on Investment: Draft Consolidated Text*, OECD Doc. DAFFE/MAI(98)7/REV1 (Apr. 22, 1998), *available at* http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf.

to agree on a code of conduct for MNCs,[53] following several controversial resolutions reflecting the adverse views of developed and developing countries.[54]

In light of these failures, the OECD was probably not the appropriate forum for the development of an MAI. The breakdown of the negotiations begs the question: which alternative forum would be more suitable for a renewed effort to create an MAI? The WTO has emerged as the best-suited existing forum, mainly because it has addressed several issues the OECD was ineffective in handling. First, the WTO has offered an open stage for developed *and* developing countries, and even welcomed nongovernmental organizations ("NGOs").[55] Despite the harsh criticism directed at the WTO, it was and still is considered a diversified forum for international economic negotiations.[56] It has facilitated an earnest North-South discussion on investment issues.[57]

Second, in the WTO forum, investment has not been examined as a stand-alone, but rather in the context of trade negotiations.[58] As with other economic issues, a more cohesive approach towards international investment regulation has been adopted.[59] As previously mentioned,[60] the

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53. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Transnat'l Corps., Intergovernmental Working Group on a Code of Conduct, *Work Related to the Formulation of a Code of Conduct*, ¶ 22, U.N. ESCOR, 7th Sess., Supp. No. 9, U.N. Doc. E/C.10/92 (1981).

54. The Charter of Economic Rights and Duties of States (1974), for instance, did not receive any support from the industrialized countries. *See* Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT'L L. 769, 780 (2006) (describing how the "capital-exporting states" responded to developing countries' expansion of nationalization rights with bilateral investment treaties programs, guarantees for their investors abroad, and threats to retaliate against expropriators).

55. According to Maura Blue Jeffords, writing in 2003, "More than 1,490 NGOs have had some interaction with the WTO[,] most of which are from Europe and North America." *See* Maura Blue Jeffords, *Turning the Protester into a Partner for Development: The Need for Effective Consultation Between the WTO and NGOs*, 28 BROOK. J. INT'L L. 937, 951 (2003).

56. This diversity of interests can be perceived as a representation of "cosmopolitics" in the WTO. *See* Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. INT'L L. & POL. 299 (2002).

57. *See* Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOUR OF ROBERT E. HUDEC 285 (Daniel L.M. Kennedy & James D. Southwick eds., 2002).

58. *See, e.g.*, Doha Ministerial Declaration, *supra* note 2, ¶¶ 20–22.

59. *See generally* Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 731–35 (1998).

60. *See supra* note 6 and accompanying text.

strong linkage between trade and investment in the global economy has created a rationale for adopting international investment rules under the umbrella of a new, post-World War II international trade regime. Consequently, and under the leadership of the United States, developed countries made several attempts to include investment rules in multilateral trade negotiations.[61] Although efforts to incorporate comprehensive investment agreements in the Trade-Related Investment Measures Agreement ("TRIMs") and the General Agreement on Trade in Services ("GATS") have generally been unsuccessful, TRIMs and GATS do contain a limited number of investment rules.[62] Similarly, the Doha Round brought the investment regulation agenda to the trade negotiation forum.[63] The "golden age" of multinational investment, together with recent studies on the relationship between trends in investment and trade,[64] have helped integrate negotiations on investment regulations with the Doha Ministerial Declaration and with negotiations on a range of other issues.[65]

Additionally, insofar as the Doha Round was declared the "development round," investment regulation, an area that influences sustainable development in a large number of markets, became a necessary part of the Doha agenda.[66] The trade and investment working group became busier than ever; unfortunately, though, this did not last for long.[67]

61. *See* Lowenfeld, *supra* note 24, at 123–25. Despite several attempts to include investment rules under the GATT jurisdiction as part of the Havana Charter, the GATT did not include such rules. *See* LOWENFELD, *supra* note 36, at 103. Lowenfeld suggests that the failures of such attempts resulted in the GATT maintaining its stability and avoiding disagreements between East and West, South and North. *See id.*

62. *See* Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77, 100–40 (2003) (discussing investment rules in the GATS and the TRIMs under the WTO regime).

63. The Doha Ministerial Declaration explicitly included investment in its agenda. Doha Ministerial Declaration, *supra* note 2, ¶¶ 20–22.

64. For a detailed discussion of this linkage between trade and investment trends, see generally *World Investment Report 2004*, *supra* note 11; *World Investment Report 2003*, *supra* note 11.

65. *See supra* note 6 and accompanying text.

66. On the Doha agenda as the "development round," see Working Group on the Relationship Between Trade and Investment, *Report (2002) to the General Council*, WT/WGTI/6 (Dec. 9, 2002); Conference, *Linking Trade and Sustainable Development*, 18 AM. U. INT'L L. REV. 1271 (2003).

67. *See* Kevin C. Kennedy, *Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 585, 602 (2001).

In a dramatic shift, investment, along with agriculture, became the deal-breakers of the Doha Round.[68] Most commentators describe the negotiation of international investment regulation within trade forums as a battle between developed and developing countries on the critical issue of host-economy independence.[69] The failure in Cancún suggests a more complex picture. Hence, I will now briefly consider the new dynamic that revealed itself at the Cancún Session, which ultimately obscured the investment agenda and its potential implications.

First, the Cancún Session took place at a time when the political and economic power of some WTO Members—certain developing countries that have historically rejected MAIs—was on the rise.[70] These States used their new political status to promote their interests, shifting the focus of the negotiations to the European and American subsidies of domestic industries.[71] Second, the proliferation of bilateral and regional trade and investment agreements discussed above[72] has encouraged developing countries to participate in this trend and negotiate bilaterally and regionally, as their interests are less likely to be promoted on the multilateral level, given the clout of the G-22 countries.[73]

Moreover, as the distinction between "free trade" and "fair trade" has grown dramatically in recent years, developing countries have been successful in bringing real development concerns to the global arena.[74] Yet, as trade negotiations became increasingly complex, requiring challenging adjustments by developing countries due to high levels of protective local legislation, simply renewing the entire WTO agenda seemed overwhelming; negotiation was thus restricted only to core traditional trade issues.[75]

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68. *Tequila Sunset in Cancún*, ECONOMIST, Sept. 17, 2003 (addressing the failure of the Cancún Summit in the context of the disagreements on the Singapore Issues).

69. *See The Doha Round: The WTO Under Fire*, ECONOMIST, Sept. 20, 2003, at 26.

70. This mainly refers to the G-22 group, led by Brazil, China, and India, which insisted upon ending negotiations over the Singapore Issues because of a lack of concessions on agricultural subsidies and import barriers on agricultural products by the developed side. *See* Mario E. Carranza, *MERCOSUR, the Free Trade Area of the Americas, and the Future of the U.S. Hegemony in Latin America*, 27 FORDHAM INT'L L.J. 1029, 1052 (2004).

71. Daniel Pruzin & Gary G. Yerkey, *WTO Talks Crash as Developing Nations Balk at 'Singapore Issues*,*'* 20 Int'l Trade Rep. (BNA) 1533 (Sept. 18, 2003).

72. *See supra* note 11 and accompanying text.

73. Pruzin & Yerkey, *supra* note 71, at 1533.

74. *Id.*

75. In fact, the legal status of the Singapore Issues in the WTO was unclear from the beginning of the negotiations. *See id.*

II. THE NETWORK OF BILATERAL INVESTMENT TREATIES AS A DE FACTO MULTILATERAL AGREEMENT

A. Bilateral Agreements and the Need for Coordination

I considered above the reasons for the Cancún Session negotiations' failure, especially with respect to investment issues.[76] Although the WTO forum is more transparent and diversified than the OECD, and notwithstanding the fact that most disputes were resolved at the working-group level and through bilateral negotiations that produced numerous signed BITs, the delegations left Cancún without agreement on any issue, except perhaps the agreement to abandon investment regulation in the Doha Round.[77]

As developing countries and other emerging markets used the negotiations as a platform for again raising fundamental questions about distributive justice in international economic agreements, the issue of international investment regulation became a negotiation leveraging tool: the United States and Europe were willing to consider reductions in agricultural subsidies in exchange for inaction on investment regulation.[78] Thus, developed countries agreed to table investment regulation in order to keep alive the multilateral negotiations on trade.[79]

Has the absence of multilateral action on investment regulation since the failure of the Doha Round encouraged countries to regulate investment unilaterally? Should it? Both questions can be answered in the negative. The pragmatic view, which was bolstered as a result of the Doha Round, holds that countries prefer to coordinate investment regulation on bilateral and regional levels.[80] As aforementioned, there are currently more than 2200 BITs that have been executed, and many more are being

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76. *See supra* notes 1–3 and accompanying text.

77. *See Doha Work Programme*, *supra* note 7, ¶ 1(g) (stating that the Singapore Issues "will not form part of the Work Programme set out in . . . [the Doha Ministerial] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round").

78. *See* Pruzin & Yerkey, *supra* note 71, at 1533.

79. *Id.*

80. After the failure of the Cancún Session, even strong developed economies that have traditionally regulated foreign investment unilaterally expanded their efforts to negotiate many new BITs, the United States being a prime example. For a description of U.S. policy and a list of BITs signed by the United States, see Office of the U.S. Trade Representative, Trade Compliance Center, http://www.ustr.gov/Trade_Sectors/Investment/Section_Index.html [hereinafter List of U.S. BITs] (last visited Jan. 16, 2009).

negotiated.[81] Moreover, even in the post-Cancún landscape, most arguments proposing regulation of FDI through multinational coordination are compelling. Although home and host countries are traditionally seen as having conflicting interests, globalization arguments suggest that these interests are actually convergent to some extent, and recent economic theories have reinforced this perspective.[82] For instance, broad investment protection not only limits the power of the host government; it actually serves to enhance the availability of credit and the liquidity of assets in host markets.[83] It is therefore in the host government's interest to comply with wide investment protection. Accordingly, most BITs express the parties' *common* goals in investment promotion and protection.[84]

Second, whereas customary international law is regularly used to construe investment protection provisions in expropriation cases, developed and developing countries have had diverging views on related questions, such as what kinds of investment a BIT should protect.[85] Moreover, MFN and national treatment have evolved into the main rights of foreign investors under most BITs, whereas it is unclear whether these rights apply to pre- and post-establishment of an investment in the same manner.[86] Coordination on bilateral and regional levels, either through negotiations or regional centralization of the treaty interpretation process, could provide answers to such questions and could help elucidate these thorny legal concepts.

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81. *See* UNCTAD, Quantitative Data on BITs and DTTs, http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1 (last visited Jan. 16, 2009) (providing a chart and graph indicating that in 2002 there were 2181 BITs).

82. *See* Vandevelde, *supra* note 23, at 472–87.

83. *See id.* at 489–90.

84. *See* Calvin I. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT'L L. REV. 1, 30 (2005).

85. For example, as a result of North American Free Trade Agreement case law, a more limited definition of "investment" was recently adopted in the U.S.-Chile FTA, which includes investment provisions in Chapter 10. Free Trade Agreement, U.S.-Chile, ch. 10, June 6, 2003, 117 Stat. 909, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html [hereinafter U.S-Chile FTA].

86. While most host countries do provide those rights on a postestablishment basis, several countries have concluded BITs that provide the rights even before the investment has been established. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, Feb. 19, 2008, *available at* http://www.ustr.gov/assets/Trade_Agreements/BIT/Rwa/asset_upload_file743_14523.pdf; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Oct. 25, 2004, *available at* http://www.ustr.gov/assets/Trade_Agreements/BIT/Uruguay/asset_upload_file748_9005.pdf [hereinafter U.S.-Uruguay BIT].

Finally, the dispute settlement mechanism of investment agreements makes coordination on the bilateral level necessary. This mechanism allows private investors, as individuals, to bring claims against host governments before international arbitral tribunals based on alleged violations of a BIT.[87] Without such provisions for dispute settlement, a BIT would represent merely an abstract declaration of the importance of FDI and its protection. The nonexistence of a forum for multilateral investment disputes underscores the fact that enforcement of investors' rights under international rules is not viable without the consent of both parties to a bilateral dispute settlement mechanism.[88]

It is essential, though, to understand that a State's enthusiasm for concluding bilateral agreements on the promotion and protection of international investments will never supersede the State's will to regulate certain domestic industries unilaterally. Thus, most countries maintain their security industries and relations with foreign markets, for example, through unilateral regulation or through separate mutual understandings.[89]

B. The Multilateral Aspect of Bilateralism

At first glance, the bilateral dynamic previously discussed has little, if anything, to do with multilateralism. In fact, bilateralism has been successful exactly where multilateralism has failed.[90] Still, recent attempts to regulate investment have raised the possibility of a future MAI and have

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87. *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 246–57 (2004).

88. *Id*. at 250.

89. For example, Israel, a State under constant military threat, concludes BITs that exclude military and security industries from the wide protection of the treaties, including MFN and national treatment rights; Israel effects its policy regarding national security industries through bilateral security agreements and centralized local industry regulation. *See, e.g.*, Security Memorandum of Agreement, U.S.-Isr., Oct. 31, 1998, *available at* http://www.aipac.org/Publications/SourceMaterialsU.S.IsraelBilateral/U.S._Israel_Security_memorandum.pdf. The centralized local defense industry is managed and supervised by SIBAT, the Israeli Defense Ministry's defense assistance division. SIBAT, About Sibat, http://www.sibat.mod.gov.il/SibatMain/sibat/about/overview.htm (last visited Feb. 2, 2009). For an overview of Israel's investment policy, see Efraim Chalamish, *An Oasis in the Desert: The Emergence of the Israeli Investment Treaties in the Global Economy* (forthcoming 2009) (manuscript on file with Brooklyn Journal of International Law).

90. *Cf.* KATHERINE LYNCH, THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION 145–58 (2003) (discussing the relative success of bilateralism through the International Centre for Settlement of Investment Disputes).

reinforced the importance of investment regulation as a bargaining chip in international economic negotiations.[91]

We shall now examine what I describe as the "multilateral" aspect of BITs. This concept has tremendous implications for the future of international economic law. For example, it could foreclose the development of a multilateral agreement or render one redundant. Moreover, the multilateral dimension of bilateralism will enable arbitrators in investor-state disputes to turn to comparable BITs as interpretative tools. It will also justify the integration of corporate responsibility commitments into BITs, in response to potential arguments against integration based on the lack of a true MAI.

1. The Substance of BITs and Regulatory Competition

During the past century, political and economic movements have advanced through centralized structures, a national market in the United States, a Common Market in the European Union,[92] and a "global marketplace."[93] These movements have relied upon the assumption that different standards for products or production processes can block market access for MNCs[94] or constitute illegitimate comparative advantages[95] (i.e., externalities or strategic choices), and thus, impede economic integration. Harmonization is considered the remedy for another undesirable implication of FDI: a surge of foreign investment to low-standard jurisdictions.[96] Such a development, which would further loosen regulatory standards in many States, might create a so-called race to the bottom.[97]

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91. *See* Kurtz, *supra* note 9, at 779–88.

92. The Common Market is the informal name for the European Economic Community ("EEC"), which was established in 1958 following the EEC treaty, signed in 1957. The Common Market's goal was to create an economic union, and subsequently a political union, through united economic policies, such as liberalization of the movement of labor and capital. *See generally* Europa, SCADplus: Treaty Establishing the European Economy Community, http://europa.eu/scadplus/treaties/eec_en.htm (last visited Feb. 2, 2009).

93. *See* David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 759 (2000).

94. *But see* ALAN O. SYKES, PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS AND MARKETS (1995) (contending that market pressures will produce an optimal degree of harmonization with respect to product standards).

95. Comparative advantages might be legitimate if diverging production standards were explained by different circumstances, such as geography or resources. *Id.*

96. *See* Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, 14 YALE L. & POL'Y REV. 177 (1996) (discussing harmonization as a potential solution for the race to the bottom problem).

97. For a description of this competition in the environmental law context, see DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE (1994).

Notably, competition theorists are more open to government intervention and harmonization of international regulation in scenarios that exhibit externalities or other market failures than in scenarios that involve a race to the bottom,[98] as the latter tend to produce inconsistent empirical results and involve controversial normative arguments.[99]

Harmonization is not always a net-positive phenomenon. Regulatory competition theory is concerned with government failure created by harmonization and intervention, which can be more severe than market failure.[100] Thus, regulatory competition can establish a market in locational rights, allowing MNCs to quit inefficient or high-cost countries.[101] Applying Tiebout's classic model, competition among States provides an MNC decision-maker with a range of locational preferences reflecting different economic priorities.[102] As a result, such competition also improves social welfare and encourages governmental efficiency.[103]

To assist legislators in regulating dissimilar legal regimes more effectively, a number of scholars have developed models based on the advantages of competition versus harmonization in international regulation.[104] Since governmental failures and market failures tend to exhibit different patterns in various legal disciplines, Professor Avi-Yonah, for example, has examined each discipline separately.[105] He divides these disciplines based on two criteria: the consensus on the norms among States with a need for extraterritoriality, and the extent to which the MNC community supports or objects to the norms.[106] The policy interests involved in applying extraterritorial regulations to MNCs—that is, comity or harmoni-

98. For an introduction to the race to the bottom concept, see *supra* notes 96–97 and accompanying text.

99. *See, e.g.*, WILLIAM BAUMOL & WALLACE OATES, THE THEORY OF ENVIRONMENTAL POLICY 7–154 (1988) (addressing the theory of externalities as it relates to market regulation).

100. *Cf.* Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L.J. 447, 447–53 (2008) (introducing the concept of "regulatory competition theory" with respect to the regulation of global financial markets).

101. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

102. *Cf. id.* at 421 (describing a model for local, municipal expenditures, where, "[i]n so far as there are a number of communities with similar revenue and expenditure patterns, the solution will approximate the ideal 'market' solution").

103. *Id.*

104. *See, e.g.*, Avi-Yonah, *supra* note 20.

105. Avi-Yonah's discussion of the applicability of national norms to international entities clarifies the modalities of using harmonization and competition approaches in international regulation. *Id.* at 8–13.

106. *Id*. at 10–13 (illustrating the interplay of these two factors using a matrix diagram).

zation—should be determined using these criteria.[107] Thus, when the MNC community cannot readily achieve the consensus voluntarily, multilateral legal tools should force similar norms. As mentioned above, the enforcement mechanisms of these legal tools are indispensable to the maintenance of a stable harmonization environment.[108]

Bilateral treaties can play an important role in the evolution of international legal harmonization. Sometimes, however, BITs can have a disruptive effect, such as when regulatory competition results in a proliferation of bilateral agreements with a panoply of different arrangements, frustrating the realization of a truly harmonized regime.[109] Such disruption is evident in international taxation, wherein harmful tax competition reduces tax rates and developing countries are forced to sacrifice tax revenues in order to join bilateral double-taxation treaties.[110]

Having considered the potential role of BITs in fostering harmonization, we turn now to an examination of the specific competitiveness factor of BITs in shaping the international legal environment of FDI. Competitiveness in this context refers to how investors use a BIT as a legal tool to determine their preference for one legal regime at the expense of another. Although there is an array of studies about how signing BITs affects future potential inflows of investments, such scholarship has not adequately considered various elements of the treaties and the treaty-making process.[111]

In short, the competitiveness factor of BITs is relatively insignificant. BITs differ based on two principal elements: the level of protection the host State affords to foreign investors, and the level of enforcement the host State undertakes.[112] A host State can offer potential investors a more favorable investment environment by agreeing to a BIT that protects investors more extensively than other BITs. Including more investors un-

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107. *Id*. at 13–31.

108. *See supra* notes 87–88 and accompanying text.

109. For example, as discussed later in this Article, the MFN principle has various incarnations in different BITs, which create some confusion as to how this principle is to be applied in a specific set of circumstances.

110. *See* Tsilly Dagan, *The Costs of International Tax Cooperation*, *in* THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW 49–78 (Eyal Benvenisti & Georg Nolte eds., 2004) (analyzing the role of bilateral treaties in the complex scheme of international taxation).

111. *See* Hallward-Driemeier, *supra* note 39.

112. Investors' protection is executed through the substantive rights of the treaty, mainly MFN, national, and fair and equitable treatment. The procedural rights of the treaty provide investors with the opportunity to enforce their direct claims against the host State in the event of any violation of substantive rights. *See* PETROCHILOS, *supra* note 87, at 246–57.

der the BIT's protection, expanding the scope of protected investments, or granting more rights to investors can all help to provide broader protection. Yet, a close examination reveals that States do not actually use BITs to compete among themselves in investor protection.

Most model BITs use similar definitions to identify the investors or investments covered by the treaty.[113] When new financial instruments (e.g., derivatives) are recognized as a common tool of FDI, all BIT models typically incorporate them uniformly.[114] Similarly, model BITs also afford the same set of limited rights: MFN status, national treatment, fair and equitable treatment of investors, and compensation for expropriation based on the customary international law formula of "prompt, adequate, and effective compensation."[115]

In recent legal and economic literature, some have called for the inclusion of investment incentive regulation within international legal agreements.[116] The need for incentive regulation comes from the race to the bottom theory, which suggests that competition for FDI among States, especially among developing countries, causes a degradation of labor, environmental, and human rights standards.[117] Hence, a significant reduction in tax rates by a developing country to attract foreign investors might damage the public fisc of the host State, making tax coordination among developing countries an absolute necessity.[118] Nevertheless, most BITs have not yet incorporated incentive regulation, and it would be an ambitious goal at the bilateral level, considering States' reluctance to bear the costs of high-standard regulation.[119] As long as BITs continue to follow current models, it is difficult to understand how BITs will facilitate lawmaking competition that would create new rights or obligations.

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113. Most BITs include definitions of the following: "investment," "investor," "person," and "host State." *See* Gabriel Bottini, *Indirect Claims Under the ICSID Convention*, 29 U. PA. J. INT'L L. 563, 618 (2008).

114. *See, e.g.*, 2004 U.S. Model BIT, *supra* note 43, art. 1 (including "futures, options, and other derivatives" in the definition of "investment").

115. *See, e.g.*, *id.* art. 6(1)(c).

116. *See Japan Grows Positive on Bilateral Investment Treaties*, JAPAN ECON. REV., Feb. 15, 2004, at 3 (proposing inclusion of investment-incentive regulation in Japanese investment treaties).

117. *See* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 688 (1998) (concluding, after a comprehensive analysis of the race to the bottom phenomenon, that the least developed countries should act as a group instead of competing against each other as individual States).

118. *See* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000).

119. *See id.*

In terms of dispute settlement, BITs could differ—and therefore compete—by providing for various enforcement mechanisms, including the currently prevalent forum, the international arbitral tribunal. In theory, BITs could take divergent positions on core issues in investment arbitration, such as jurisdiction, privilege, confidentiality, and place of arbitration. Indeed, some model agreements already reflect such differences.[120] For the most part, however, BITs take very similar positions on dispute settlement questions.[121] This can be explained by an international consensus on dispute settlement norms, a proliferation of international agreements accompanied by reciprocal influences, and attempts to create an international jurisprudence for international investment law, notwithstanding that such jurisprudence is developed by numerous ad hoc international tribunals.[122] This analysis reinforces the view that the substance of the treaties, along with their lack of differentiation and competitiveness, strengthens BITs' role as an investment regulatory regime on a multilateral, not just a bilateral, level.

2. The Signing Mechanism

BITs have traditionally been negotiated between developed and developing countries, and this has an interesting impact on the design and signing mechanism of these treaties. It has been common for the developed country to require its developing-country counterpart to sign a BIT to protect its own investors' interests as part of an attractive economic package,[123] which usually includes other economic agreements that appeal to the developing country.[124] In view of the marginal economic im-

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120. For example, the 2004 U.S. Model BIT offers the possibility of a bilateral appellate mechanism. 2004 U.S. Model BIT, *supra* note 43, Annex D ("Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.").

121. *See* Jason Webb Yackee, *Bilateral Investment Treaties*, *Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 805 (2008).

122. For a discussion of the development of investor-state jurisprudence, see *infra* Part II.D.

123. *See, e.g.*, Press Release, U.S. Trade Representative, United States, Uruguay Sign Bilateral Investment Treaty (Oct. 24, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/October/United_States,_Uruguay_Sign_Bilateral_Investment_Treaty.html ("U.S. BITs . . . ensure that U.S. investors are protected when they establish businesses in other countries."). This U.S.-Uruguay BIT was the first to be concluded based on the 2004 U.S. Model BIT. *Id.*

124. These agreements can include double-taxation treaties, research and development treaties, and economic cooperation arrangements. *See* UNCTAD, Quantitative Data on

portance of some BITs, parties to such treaties use them mainly to enhance diplomatic relations.[125] As a result, developing countries largely lack the ability to negotiate provisions of approved models, that is, models drafted and signed in advance by developed States.[126]

Nowadays, intergovernmental institutions and international organizations play an important role in defining the need for BITs and in bringing parties to negotiate them. The United Nations Conference on Trade and Development ("UNCTAD") and the World Bank, the main players in this field, actively initiate negotiations on BITs and then monitor the process from their inception to the signing stage.[127] Both institutions envision a desirable form for the BIT text and its implementation, and thus work towards a consistent policy in all stages of the negotiations.[128] Although they can recommend adjusting the text to the specific circumstances affecting the States involved, they tend to promote near-identical drafts. Therefore, they effectively function as centralized institutions that transform the network of BITs into a de facto multilateral agreement.

Thus far, these institutions have yet to receive the appropriate mandate to promote an MAI.[129] However, they can currently promote suprana-

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Bilateral Investment Treaties and Double Taxation Treaties, http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1 (last visited Feb. 2, 2009).

125. For example, Israel signed a BIT with Mongolia in 2003 as part of its efforts to begin active diplomatic relations. *See* Agreement for the Reciprocal Promotion and Protection of Investments, Isr.-Mong., Nov. 25, 2003, *available at* http://www.financeisrael.mof.gov.il/FinanceIsrael/Docs/En/InternationalAgreements/POI/MongoliaPoI.pdf.

126. The 2004 U.S. Model BIT, for example, was approved by the U.S. Department of State ("State Department") and the Office of the U.S. Trade Representative ("USTR"), as they share responsibility for the BIT program. The State Department and the USTR "consulted their respective advisory committees and relevant congressional committees" in the process of developing the new model BIT. *See* Office of the U.S. Trade Representative, U.S. Model Bilateral Investment Treaty, http://www.ustr.gov/Trade_Sectors/Investment/Model_BIT/Section_Index.html (last visited Jan. 16, 2009).

127. *See* Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1058–59 (2007); UNCTAD, International Investment Agreements, http://www.unctad.org/Templates/Startpage.asp?intItemID=2310&lang=1&mode=more (last visited Jan. 16, 2009).

128. In response to the Bangkok mandate, UNCTAD developed a special technical cooperation program that seeks to help developing countries in this respect. This program was adapted and expanded to reflect the needs of member countries in light of the Doha mandate, and subsequently implemented in close collaboration with the WTO. The Work Programme on International Investment Agreements principally encompasses policy research and human resources capacity-building, with a view towards consensus-building. *See* UNCTAD, *Progress Report on Work Undertaken on UNCTAD's Work Programme on International Investment Agreement*, 3–11, UNCTAD/ITE/Misc.58 (2002).

129. On the failure of the MAI, see *supra* note 5 and accompanying text.

tional goals through the network of BITs.[130] UNCTAD, for example, facilitates BITs primarily for the developing world, balancing the interests of MNCs with principles of international law such as sovereignty.[131] UNCTAD thereby furthers its mission to assure that the developing world receives its fair share in the economic benefits of globalization.[132]

The World Bank also plays a key role in facilitating the enforcement of BITs by hosting a leading dispute settlement body, the International Centre for Settlement of Investment Disputes ("ICSID").[133] The primary purpose of the ICSID is to provide a forum for the conciliation and arbitration of international investment disputes.[134] The World Bank offers loans to developing countries to encourage production and development, thereby fostering international investment by the private sector. Thus, investment protection is a natural and essential element of the World Bank's agenda.[135]

3. The Most-Favored-Nation Principle and Harmonization in BITs

As we have seen, international investment agreements tend to contain similar provisions on rights and obligations as a result of the extensive involvement of international organizations such as UNCTAD, and the power dynamics of negotiations between developed and developing countries.[136] In fact, BITs signed by countries from the same region that frequently experience similar macroeconomic conditions often share

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130. The fact that UNCTAD is not as multilateral a forum as the WTO allows it to focus on bilateral and regional arrangements. *See* UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, UNCTAD/ITE/IIA/2007/3 (2007) [hereinafter *Investor-State Dispute Settlement*]. The WTO, as a more comprehensive multilateral forum, may find engagement in bilateral or regional efforts more difficult due to its commitment to wide-reaching, multilateral goals.

131. *See id.*

132. UNCTAD, About UNCTAD, http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1 (last visited Jan. 7, 2009) ("[UNCTAD] promotes the development-friendly integration of developing countries into the world economy. UNCTAD has progressively evolved into an authoritative knowledge-based institution whose work aims to help shape current policy debates and thinking on development, with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development.").

133. *See* International Centre for Settlement of Investment Disputes, About ICSID, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last visited Jan. 16, 2009).

134. *Id.*

135. In fact, in its early days, the World Bank mediated investment disputes as a neutral party. *See* David Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN. ST. INT'L. L. REV. 147, 160 (2004).

136. *See* Chung, *supra* note 44, at 956–59.

identical texts.[137] Moreover, developing countries' new approach favoring investment liberalization has reshaped their views on investment promotion and protection. This approach has led to the adoption of similar investment protection provisions and international law formulas, which stipulate the extent and type of compensation in the event of expropriation.[138] Next, I explore one such provision in investment agreements—the MFN principle and its role in harmonizing international investment regulation.

The MFN clause is one of the most salient provisions of investment protection agreements. Originally developed in trade agreements, the MFN principle prevents a host State from discriminating among different investors of different nationalities.[139] Where a host country has signed a more favorable BIT with another country, an investor from a third country is entitled to an equal level of investment protection.[140]

Since MFN treatment has become one of the most effective and popular legal tools for international investment protection, I examine the MFN case law of international arbitral tribunals as a law-harmonizing force. Recent case law in the international arbitration of investment agreement disputes, beginning with *Maffezini v. Kingdom of Spain*,[141] highlights the attempt to harmonize investors' rights and reaffirms the quasi-multilateral aspect of BITs. First, I analyze the *Maffezini* case and the reactions it provoked in the international economic law community, and then draw several conclusions about the future implications of the BIT regime.

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137. *See* Nigel Blackaby, *Arbitration Under Bilateral Investment Treaties in Latin America*, *in* INTERNATIONAL ARBITRATION IN LATIN AMERICA 379, 387–412 (Nigel Blackaby ed., 2002) (examining commonalities among the BIT drafts of Latin American countries).

138. *But see* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 89–90 (2005) (noting that "the formulas used to determine compensation in recent treaties vary from country to country").

139. A typical MFN clause reads: "[e]ach Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory . . . ." 2004 U.S Model BIT, *supra* note 43, art. 4.

140. *See* LOWENFELD, *supra* note 36, at 397–403 (discussing the role of the MFN rule in international economic law as an element of BITs).

141. Maffezini v. Kingdom of Spain, ICSID (W. Bank) No. ARB/97/97 (Jan. 25, 2000) (Decision of the Tribunal on Objections to Jurisdiction), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163 [hereinafter *Maffezini* Decision on Jurisdiction].

On July 18, 1997, Emilio Agustín Maffezini, an Argentine investor and a national of the Argentine Republic, sent a request to the ICSID[142] for arbitration against the Kingdom of Spain regarding his investment in an enterprise named EAMSA, which was to produce and distribute chemical products in the Spanish region of Galicia.[143] Maffezini subscribed to seventy percent of the capital, while the *Sociedad para el Desarrollo Industrial de Galicia* ("SODIGA"), a Spanish entity, subscribed to the remaining thirty percent.[144] Both Maffezini and SODIGA used private research to evaluate the project before investing in it.[145] Nevertheless, roughly two years after the initial investment was made, EAMSA began experiencing financial difficulties, its construction stopped, and EAMSA's employees were dismissed.[146] Attempts were made to raise capital and to secure loans and subsidies in order to avoid financial failure, but most of these efforts were fruitless.[147]

Consequently, Maffezini instituted an ICSID proceeding against the Spanish government.[148] Maffezini based his claim on the provisions of the 1991 Agreement for the Reciprocal Promotion and Protection of Investment between the Kingdom of Spain and the Argentine Republic ("Argentina-Spain BIT").[149] I will now examine Maffezini's arguments to understand his grounds for filing the ICSID claim.

Maffezini alleged that the project failed because of SODIGA's poor advice regarding the costs of the project, as the costs turned out to be significantly greater than predicted.[150] Furthermore, according to Maffezini, SODIGA forced EAMSA to start its operations before an environmental impact assessment had cleared, causing EAMSA to incur additional unforeseen costs.[151] Maffezini asserted that SODIGA is, in fact, a Spanish public entity, and thus, all of SODIGA's acts and omissions are attributable to Spain, thereby allowing him to sue Spain in an international arbitral tribunal under the Argentina-Spain BIT.[152]

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142. *See supra* note 133 and accompanying text.
143. *Maffezini* Decision on Jurisdiction, *supra* note 141, ¶¶ 1, 65.
144. Maffezini v. Kingdom of Spain, ICSID (W. Bank) No. ARB/97/97 (Nov. 13, 2000), ¶ 39 (Arbitral Award), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC566_En&caseId=C163 [hereinafter *Maffezini* Award].
145. *Id.* ¶¶ 40–41.
146. *Id.* ¶¶ 42–43.
147. *Id.*
148. *Id.* ¶¶ 43–44.
149. *Id.* ¶ 4; *Maffezini* Decision on Jurisdiction, *supra* note 141, ¶ 1.
150. *Maffezini* Award, *supra* note 144, ¶ 44.
151. *Id.*
152. *Id.*; *Maffezini* Decision on Jurisdiction, *supra* note 141, ¶ 72.

The ICSID tribunal sustained most of Maffezini's claims, and on November 9, 2000, determined that the total amount of compensation, including interest, Spain must pay Maffezini is about 58 million Spanish pesetas.[153] However, the January 25, 2000, preliminary decision of the tribunal on objections to jurisdiction received much more attention in the international economic law community,[154] and indeed, constitutes the heart of this Article's discussion of the *Maffezini* case.

Spain challenged the jurisdiction of the ICSID tribunal and its competence, among other defensive arguments, on the ground that Maffezini failed to comply with the requirements of Article X of the Argentina-Spain BIT, which deals with the exhaustion of domestic remedies.[155] The Argentina-Spain BIT requires an eighteen-month waiting period before an investor can submit his or her claims to arbitration; during this period, domestic courts have the opportunity to dispose of a dispute.[156] Maffezini submitted his claim before the expiration of this period.[157]

While the tribunal found that Maffezini failed to comply with Article X of the Argentina-Spain BIT, this was not dispositive.[158] Maffezini argued in the alternative that he has the right to rely on the MFN clause contained in the Argentina-Spain BIT.[159] Like similar investment treaties, Article IV of the Argentina-Spain BIT states: "[i]n all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country."[160] Using the MFN clause in the Argentina-Spain BIT, Maffezini invoked the provisions of a 1991 BIT between the Republic of Chile and Spain ("Chile-Spain BIT").[161] Article 10(2) of the Chile-Spain BIT allows an investor to opt for arbitration after a six-month negotiations

153. *Id.* ¶¶ 35, 97.

154. *See, e.g.*, Jürgen Kurtz, *The Delicate Extension of Most-Favored-Nation Treatment to Foreign Investors:* Maffezini v. Kingdom of Spain, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES, AND CUSTOMARY INTERNATIONAL LAW 523–55 (Todd Weiler ed., 2005); Jarrod Wong, *The Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions in Bilateral Investment Treaties*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 171, 181–84 (2008).

155. *Maffezini* Decision on Jurisdiction, *supra* note 141, ¶ 19.

156. *Id.* (quoting Agreement for the Reciprocal Promotion and Protection of Investments, Arg.-Spa., Oct. 3, 1991, art. X [hereinafter Argentina-Spain BIT]).

157. *See id.* ¶ 26 ("Claimant admits that the dispute was not referred to a Spanish court prior to its submission to the [ICSID].").

158. *Id.* ¶¶ 36–37.

159. *Id.* ¶¶ 37–38.

160. *Id.* ¶ 38 (quoting Argentina-Spain BIT, *supra* note 156, art. IV(2)).

161. *Id.* ¶¶ 2, 39–40.

period has expired; it does not require an eighteen-month waiting period.[162] Maffezini claimed that as Chilean investors in Spain are treated more favorably than Argentine investors, the Argentina-Spain BIT should be construed as giving Maffezini the option to submit the dispute to arbitration without prior referral to domestic courts.[163]

Spain rebutted Maffezini's arguments. It contended that, under international law principles, the MFN clause may only apply in respect to the same matter and may not be extended to matters different from those contemplated by the basic treaty.[164] The MFN clause of the Argentina-Spain BIT does not encompass questions of jurisdiction and other procedural issues, unlike the material aspects of the treatment granted to investors, as discrimination cannot take place in connection with procedural matters.[165] According to Spain, only if Maffezini showed that local courts in Spain are less favorable to the foreign investor than is ICSID arbitration would he be able to claim that the jurisdictional question has a material effect on FDI treatment.[166]

Discussing the application of the MFN clause to the BIT dispute settlement mechanism, the *Maffezini* tribunal found that the clause did apply to procedural rights related to the mechanism, including jurisdictional rights.[167] It based its decision on the language of the BIT, the policies that shaped the parties' negotiation of the BIT, and the practice of the Spanish government in concluding its BITs.[168] As a result, the tribunal held that Maffezini was entitled to the more favorable dispute settlement terms in the Chile-Spain BIT, permitting him to submit his claim to arbitration after only six months.[169]

The *Maffezini* tribunal extended dispute settlement provisions in other BITs without a clear reference in the MFN provision,[170] since it found that the parties did not intend to omit this reference based on their treatment of foreign investors as well as their own investors.[171] However, the

162. *Id.* ¶ 39 (citing Agreement on the Reciprocal Protection and Promotion of Investments, Spa.-Chile, Oct. 2, 1991, art. 10(2)).

163. *Maffezini* Decision on Jurisdiction, *supra* note 141, ¶ 40.

164. *Id.* ¶ 41.

165. *Id.*

166. *Id.* ¶ 42.

167. *Id.* ¶ 64.

168. *Id.* ¶¶ 43–64.

169. *Id.* ¶ 64. The tribunal arrived at this conclusion despite rejecting Maffezini's jurisdictional arguments based on the Argentina-Spain BIT. *See id.* ¶¶ 19–37.

170. *See* Argentina-Spain BIT, *supra* note 156, art. IV(2) ("In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.").

171. *See Maffezini* Decision on Jurisdiction, *supra* note 141, ¶¶ 52–61.

Maffezini tribunal warned that investors should not "override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question."[172] Among the various examples referenced are replacing the arbitration forum chosen by the parties and exhausting local remedies.[173]

I now analyze the tribunal's decision and its importance to the creation of harmonization in international bilateral treaties. As mentioned above, foreign direct investors seeking to protect their investments have extensively relied upon BITs' MFN clauses in international arbitrations.[174] The MFN clause, originally one of the most important principles in international trade law, prevents a host State from discriminating among different investors from different nationalities by allowing investors to claim more favorable protection terms granted to other investors by, *inter alia*, legislation, practice, or other BITs.[175]

Therefore, an international arbitral tribunal's interpretation of an MFN clause is enormously important in defining the coverage of investment protection under BITs. Moreover, since most of the MFN clauses in BITs are drafted using the same language, as previously noted,[176] each decision related to the MFN clause has a powerful impact on the interpretation and drafting of many other BITs. While international arbitrators are not bound by previous decisions made by other international tribunals,[177] arbitral tribunals respect these decisions and integrate their reasoning into their own judgments and awards.[178]

BITs also offer a limited number of investors' rights, and these have been developed over the years by international economic law and practice and have been influenced by FDI trends.[179] Accordingly, the MFN clause, which serves as the practical mechanism for investment protection, can be, in fact, a law-harmonizing tool.[180] By forcing different

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172. *Id.* ¶ 62.

173. *See id.* ¶ 63.

174. *See* LOWENFELD, *supra* note 36, at 397–403.

175. Most treaties extend the MFN treatment to a wide range of economic activities. *See, e.g.*, 2004 U.S. Model BIT, *supra* note 43, art. 4.

176. *See supra* note 137 and accompanying text.

177. For a discussion on precedents in international arbitration law in the context of investment disputes, see PETROCHILOS, *supra* note 87.

178. *See* Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT'L L. 35 (2003) (making the case for the application of international economic law principles even across various international legal institutions).

179. *See supra* note 112 and accompanying text.

180. *See* Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32

countries to converge on similar standards in international investment protection, the MFN clause, if widely applied, can increase the level of law-harmonization in the FDI realm.[181]

Following the *Maffezini* decision, one would expect to see international arbitral tribunals explicitly adopting or rejecting its broad interpretation of the MFN clause. Adoption of the *Maffezini* approach, like the decision itself, will signal the continued expansion and harmonization of protections for international investors against host States. Alternatively, highlighting the limitations of the *Maffezini* decision can suggest a balance between protection for international investors and the interests of host States.

It appears that current ICSID jurisprudence is endorsing the *Maffezini* decision, further harmonizing international investors' protections. In *Siemens, A.G. v. Argentine Republic*,[182] another ICSID decision, the tribunal followed *Maffezini* and concluded that it had jurisdiction over Siemens' claims against Argentina, although the Germany-Argentina BIT required a waiting period of eighteen months.[183] Like the claimant in *Maffezini*, Siemens invoked the MFN provision in this BIT to avoid waiting eighteen months and submitted the claim directly to the ICSID, as the Argentina-Chile BIT does not contain such a requirement.[184] The *Siemens* tribunal was convinced that the dispute settlement mechanism—access to ICSID arbitration—is among investors' protections under the Germany-Argentina BIT.[185] The *Siemens* decision also cites the policy restrictions expounded in *Maffezini*.[186]

Two other cases have followed the *Maffezini* and *Siemens* rationale, allowing investors from Luxembourg and Spain to immediately commence an ICSID arbitration against Argentina during the eighteen-month waiting period required by the respective BITs.[187] The tribunals in both cases,

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YALE J. INT'L. L. 125, 142 (2007) (citing several scholars who identify the MFN clause as a law-harmonization tool).

181. *See id.*

182. Siemens, A.G. v. Argentine Republic, ICSID (W. Bank) No. ARB/02/8 (Aug. 3, 2003) [hereinafter *Siemens* Decision on Jurisdiction].

183. *Id.* ¶¶ 79–110.

184. *Id.* ¶ 32.

185. *Id.* ¶¶ 94–103. The *Siemens* decision suggests an alternative to the classic view of the dispute-settlement mechanism as a procedural rights provider; the classical view is embodied by the *Salini* and *Plama* cases, which are discussed in detail later in this Article. *See infra* notes 201, 208.

186. *Id.* ¶¶ 75, 109, 120.

187. *See* Camuzzi Int'l S.A. v. Argentine Republic, ICSID (W. Bank) No. ARB/03/7 (May 11, 2005), *available at* http://www.asil.org/pdfs/cvajd050614.pdf [hereinafter *Camuzzi* Decision on Jurisdiction]; Gas Natural SDG, S.A. v. Argentine Republic, ICSID

Camuzzi International S.A. v. Argentine Republic and *Gas Natural SDG, S.A. v. Argentine Republic*, emphasized the notion that procedural arbitration provisions in BITs are a significant substantive incentive and source of protection for foreign investors; thus, unless it appears that the parties agreed to another method of dispute resolution, the MFN principle should be broadly construed to embrace dispute resolution provisions.[188] *Camuzzi* and *Gas Natural* reinforced the function that the MFN principle plays in the harmonization of international investment law.

Nevertheless, recent negotiations over the Central America-Dominican Republic Free Trade Agreement ("CAFTA-DR")[189] fascinatingly reveal the complex role of the *Maffezini* decision in international forums. The CAFTA-DR, based on the North American Free Trade Agreement ("NAFTA"), aims to promote trade liberalization among the United States, Costa Rica, El Salvador, Nicaragua, Honduras, Guatemala, and the Dominican Republic.[190] This agreement is part of the current trend in international trade law: a proliferation of bilateral and regional trade agreements that contain a separate investment chapter.[191] The U.S. government, for instance, has recently signed such agreements with Chile and Singapore.[192]

The final draft of the CAFTA-DR sheds light on the parties' ostensible intention to reject the *Maffezini* interpretation of the MFN clause. It limits the reach of the MFN clause to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments,"[193] excluding from the scope of the MFN clause procedural and jurisdictional questions related to the dispute resolution mechanism. In fact, a footnote in the CAFTA-DR draft expli-

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(W. Bank) No. ARB/03/10 (June 17, 2005), *available at* http://www.asil.org/pdfs/GasNat.v.Argentina.pdf [hereinafter *Gas Natural* Decision on Jurisdiction].

188. *Camuzzi* Decision on Jurisdiction, *supra* note 187, ¶¶ 131–34; *Gas Natural* Decision on Jurisdiction, *supra* note 187, ¶ 49.

189. Dominican Republic-Central America-United States of America Free Trade Agreement, Aug. 5, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA-DR].

190. *Id.*

191. *See supra* note 11 and accompanying text.

192. Some of those agreements, such as the U.S.-Chile FTA, include an investment chapter based on the NAFTA model incorporating post-NAFTA case law, while other agreements are accompanied by negotiations on separate investment agreements, such as the recent U.S.-Uruguay Bilateral Investment Treaty. *See* U.S.-Chile FTA, *supra* note 85; U.S.-Uruguay BIT, *supra* note 86.

193. *See* Organization of American States, Foreign Trade Information System, Central America Free Trade Agreement Draft, art. 10.4, Jan. 24, 2004, *available at* http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf [hereinafter CAFTA Draft].

citly states that the MFN clause "does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case."[194] The parties agreed to include this footnote in the "negotiation history" of the Agreement, even though the footnote was to be deleted from the final text.[195]

The CAFTA-DR is a notable example of a regional trade and investment agreement that does not follow the legal language of many similar agreements on some significant issues in the investment protection chapter.[196] Among these variations are provisions for greater transparency in the investor-state dispute settlement mechanism, and for an appeal mechanism for investor-state arbitration.[197] It will be interesting to see whether the CAFTA-DR represents the beginning of a new trend, and whether future BITs will offer a variety of investment protection models, thereby increasing the competitiveness of the BIT as an international legal instrument.[198] Other arbitral tribunals might reject *Maffezini*, perhaps influenced by the CAFTA-DR approach[199] as well as some host States' criticism of *Maffezini*.[200] If they do so, it might result in conflicting views on what qualifies as a case matter before a given tribunal.

In fact, several recent ICSID decisions have explicitly criticized the *Maffezini* decision, expressing an unwillingness to extend the MFN clause to dispute settlement mechanisms and other procedural elements of investment protection treaties. However, a careful review of these decisions suggests that they are exceptions to the general rationale of *Maffezini*, giving effect to the public policy caveat raised by the *Maffezini* tribunal. In the recent case of *Salini Costruttori S.p.A. v. Hashemite*

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194. *Id*. art. 10.4 n.1. This footnote was not included in the 2004 U.S. Model BIT; it is therefore unclear if the United States intends to integrate it into any future BIT. *See* Mark A. Cymrot, *Investment Disputes with China*, 61-OCT. DISP. RESOL. J. 80, 83 n.20 (2006).

195. *Id.*

196. *See* David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 344–86 (2007).

197. *See id.* at 379–80, 386.

198. As the investment chapter of the CAFTA Draft incorporates provisions similar to those of the 2004 U.S. Model BIT, we need to examine if other States will follow this model, which offers a more protective and limited version of investors' regulations. Japan, for example, tends to focus on investment liberalization. *See Japan Grows Positive on Bilateral Investment Treaties*, *supra* note 116, at 3.

199. For a discussion of CAFTA-DR, see *supra* notes 189–98 and accompanying text.

200. *See* Bernardo M. Cremades, *Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59-JUL. DISP. RESOL. J. 79, 82 (2004).

Kingdom of Jordan,[201] an ICSID tribunal considered an argument made by Salini, an Italian investor in Jordan, that the tribunal should have jurisdiction over contractual claims based on the MFN clause found in the Italy-Jordan BIT.[202] Salini claimed that U.S. and U.K. investors in Jordan enjoyed a more favorable dispute settlement mechanism than did Salini, since the U.S.-Jordan and U.K.-Jordan BITs provide for ICSID jurisdiction over contractual claims, whereas Article IX of the Italy-Jordan BIT sends contractual claims to local Jordanian courts.[203] According to this argument, the MFN provision should offer Italian investors the same procedural treatment available to U.S. and U.K. nationals.[204]

However, the tribunal concluded that the Italy-Jordan BIT cannot be applied to the dispute settlement process, and distinguished MFN provisions that expressly include dispute settlement in their language from provisions that do not.[205] The *Salini* tribunal was aware of the *Maffezini* caveat, which states that interpretations of MFN clauses should not overwhelm public policy concerns, such as honoring the intent of the parties that drafted the BIT or other existing principles of BIT interpretation.[206] Nevertheless, the *Salini* tribunal was unconvinced that the public policy caveat of the *Maffezini* tribunal can prevent investors from exploiting varying MFN provisions by "treaty shopping," as investors can operate in the country with the most favorable dispute settlement mechanism in its BIT.[207]

Another recent ICSID case, *Plama Consortium Ltd. v. Republic of Bulgaria*,[208] followed the rationale of the *Salini* decision, asserting that "the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration . . . ."[209] In this case, Plama, a Cypriot investor, claimed that the MFN provision effectively permits replacement of the Bulgaria-Cyprus BIT's dispute resolution mechanism—ad hoc interna-

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201. Salini Construttori S.p.A. v. Hashemite Kingdom of Jordan, ICSID (W. Bank) No. ARB 02/13 (Nov. 29, 2004) [hereinafter *Salini* Decision on Jurisdiction].

202. *Id.* ¶ 17.

203. *Id.* ¶ 36.

204. *Id.*

205. The MFN clause in question was silent on its application to the dispute settlement mechanism. *See id.* ¶ 66 (quoting Agreement on the Promotion and Protection of Investments, Italy.-Jord., July 21, 1999, art. 3).

206. *Id.* ¶ 113.

207. *Id.* ¶ 115.

208. Plama Consortium Ltd. v. Republic of Bulgaria, ICSID (W. Bank) No. ARB/03/24 (Feb. 8, 2005) [hereinafter *Plama* Decision on Jurisdiction].

209. *Id.* ¶ 184.

tional arbitration for compensation purposes only—with arbitration before the ICSID, as provided in the Bulgaria-Finland BIT.[210]

The *Plama* tribunal pointed out that the circumstances in *Maffezini* were exceptional, as the *Maffezini* tribunal had to find a way to avoid applying a nonsensical provision requiring domestic remedies to be pursued in local courts during the first eighteen months before the dispute could be submitted to the ICSID.[211] The *Plama* tribunal criticized the *Maffezini* decision, along with two decisions that it considered to be incorrectly based on *Maffezini*,[212] for articulating a general rule and then qualifying it with multiple public policy exceptions.[213] The *Plama* tribunal recommended that the MFN provision be applied to the dispute settlement mechanism only when it is supported by the clear language of the BIT between the parties and their specific intent.[214] A treaty's historical context or any other parol evidence is insufficient to authorize a broader interpretation of an MFN provision.[215]

Further, the *Plama* tribunal questioned the way the *Maffezini* tribunal treated the harmonization of international standards: "[it failed] to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision."[216] The tribunal described as "chaotic" and counterproductive to harmonization the phenomenon where an investor can use an MFN provision to cherry-pick a dispute settlement provision from one of the other BITs to which the host State is party.[217] According to this analysis, host States might find themselves exposed to several dispute settlement mechanisms to which they have not necessarily agreed.[218]

To summarize, some international arbitral decisions tend to follow the *Maffezini* wave, extending the MFN provision and harmonizing international arbitration law standards,[219] whereas a few others avoid this path, restricting MFN coverage of dispute resolution provisions to those cases where the parties' intention to embrace this construction is made clear

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210. *Id.* ¶ 183.
211. *Id.* ¶ 224.
212. *Id.* ¶ 226 (discussing Siemens A.G. v. The Argentine Republic, ICSID (W. Bank) No. ARB/02/08 (Aug. 3, 2004); Tecnicas Medioambientales Tecmed v. United Mexican States, ICSID (W. Bank) No. ARB(AF)/00/2 (May 29, 2003)).
213. *See Plama* Decision on Jurisdiction, *supra* note 208, ¶ 224.
214. *Id.* ¶¶ 204, 218.
215. *See id.* ¶ 223.
216. *Id.* ¶ 219.
217. *Id.*
218. *See id.*
219. *See, e.g.*, *Siemens* Decision on Jurisdiction, *supra* note 182; *Camuzzi* Decision on Jurisdiction, *supra* note 187; *Gas Natural* Decision on Jurisdiction, *supra* note 187.

through express language.[220] While acknowledging these different approaches to interpreting BIT provisions, several scholars have pointed out that the general principles of *Maffezini* are still widely accepted when parties give their basic consent to ICSID jurisdiction.[221] This lively debate, which is taking place in several international arbitration forums,[222] reveals how the MFN clause can be used as a law-harmonizing tool in international investment arbitration.

In this context, it is worth mentioning that commentators increasingly call for a more harmonized approach towards international arbitration, including its classical aspects such as advocacy.[223] Arbitrators must be sensitive in the way they interpret rights and certain obligations, for their decisions contribute to the law of international investment arbitration.[224] In any case, embodying "multilateralist bilateralism," *Maffezini* and other decisions that followed it demonstrate the impact of international investment arbitration case law on the harmonization of investment regulation.

C. The Need for a Future Multilateral Agreement: Implications

To this day, multilateral forums have failed to develop a common approach towards an MAI. The United Nations, the OECD, and now the WTO have struggled to separate investment issues from the general discussion on North-South economic integration,[225] leaving countries to negotiate investment treaties on bilateral and regional levels. Any discussion on the prospects for a future MAI must take into account the foregoing analysis of the multilateral aspect of BITs, and the fundamental questions that arise: is a multilateral agreement even necessary when one can identify an effective network of more than 2200 BITs? And even if

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220. *See, e.g.*, *Salini* Decision on Jurisdiction, *supra* note 201; *Plama* Decision on Jurisdiction, *supra* note 208.

221. *See, e.g.*, Egli, *supra* note 127, at 1077–78 (addressing the inconsistency in applying the MFN provision in international investment law); Vesel, *supra* note 180, at 169–81.

222. The ICSID is the leading institution where this discussion is occurring.

223. *See* R. Doak Bishop, *Toward a Harmonized Approach to Advocacy in International Arbitration*, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 451 (R. Doak Bishop ed., 2004).

224. For example, note the dialogue between the *Siemens* tribunal and the *Maffezini* tribunal. *See supra* notes 182–86 and accompanying text.

225. Developed and developing countries have been negotiating several legal instruments that aim to increase the exchange of investment and trade inflows in both, while advancing sustainable development in the latter's economies, especially during the transition period of this integration. *See generally* Ostry, *supra* note 57, at 285.

an MAI is still found necessary, how will the BIT network impact the development and evolution of an MAI?

Several commentators have called for the establishment of a World Investment Organization[226] to serve as a platform for multilateral negotiations on investment issues, and as an enforcement forum similar to the Dispute Settlement Body ("DSB") of the WTO.[227] Avi-Yonah argues, for example, that the only suitable forum to discuss serious international investment dilemmas is a multilateral one where both developed and developing countries have legitimate representation.[228] Both UNCTAD and the OECD suffer from a substantial bias towards various interest groups.[229] Although the WTO could have been an appropriate forum, linking trade and investment would undermine the credibility of the WTO negotiation process as the principal forum for world trade issues, as well as the DSB.[230] The proposed World Investment Organization would benefit from a narrower mission.

The development of the BIT network supports such an argument. As discussed above, BITs grant investors limited rights that focus mainly on antidiscrimination and compensation in the event of expropriation.[231] The enforcers of BITs—international arbitral tribunals—can help promote investment liberalization without becoming implicated in distinct international economic principles such as trade.[232] A future multilateral in-

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226. *See, e.g.*, Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781 (2000) (theorizing the establishment of such an institution for international antitrust purposes).

227. The DSB was founded as part of the Uruguay Round of trade negotiations in order to institutionalize and expand the dispute settlement mechanism of the GATT. *See* Faten Sabry, *The Development and Effectiveness of the WTO's Dispute Settlement Body*, 10 MICH. ST. J. INT'L L. 521, 523–28 (2001) (providing an overview of the development of the DSB).

228. *See* Avi-Yonah, *supra* note 20, at 31–34.

229. Traditionally, UNCTAD advances the interests of the developing world, while the OECD furthers the welfare of industrialized States. About UNCTAD, *supra* note 132; OECD, About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Jan. 16, 2009).

230. For a discussion of the WTO's legitimacy as a result of several attempts to extend its limited agenda, see Robert Howse, *The Legitimacy of the World Trade Organization*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355–407 (J. Coicaud & V. Heiskanen eds., 2001).

231. *See* Vandevelde, *supra* note 15, at 506–14.

232. On the legitimacy of investors' claims when they also have an impact on trade, see Todd Weiler & Thomas W. Wälde, *Investment Arbitration Under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation*, 1 TRANSNAT'L DISP. MGMT. 1, ¶ 6 (2004), *available at* http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_51.htm.

vestment forum, which would adopt such a disciplined approach to investment regulation and enforcement, is more likely to produce an MAI with the support of both investors and host States.[233] While NGOs consistently fight against multilateral economic forums that seem to be dominated by industrialized countries or Western capitalist interests,[234] the case of the extensive and evenly spread BIT network demonstrates an acceptable legal framework.

However, given the relatively harmonious character of this network, the added value of a future MAI to the process of refining an international investment regulatory framework remains an open question. Although any potential MAI will not necessarily threaten the BIT network, the limited, additional value of an MAI may not justify the utilization of precious resources and the foreseeable annulment or adaptation of existing bilateral treaties. The preservation of the current BIT network helps sustain the fine balance among the interests of multiple parties and reflects a consensus in state practice.

A multilateral agreement under the umbrella of a putative World Investment Organization would monitor States' compliance with investment regulation more effectively.[235] Similarly, a permanent investment tribunal would promote consistency in investment jurisprudence, offering a comprehensive, cohesive interpretation of the MAI, thereby preventing conflicting decisions by a multitude of investment tribunals.[236] When a State faces a financial crisis that has a significant impact on several industries and many companies, numerous claims are concurrently submitted to numerous investor-state tribunals, but raise similar legal questions.[237]

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233. *Cf.* Kurtz, *supra* note 9, at 779–88 (suggesting a similar model for a future multilateral investment agreement in the WTO). The 2004 U.S. Model BIT is a possible prototype for a future MAI. *See* 2004 U.S. Model BIT, *supra* note 43.

234. *See* Robert Howse, *Trade Negotiations and High Politics: Drawing the Right Lessons from Seattle*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOUR OF ROBERT E. HUDEC, *supra* note 57, at 430.

235. In 2004, UNCTAD created a database of BITs on its website. *See* UNCTAD, Investment Instruments Online, http://www.unctadxi.org/templates/Page____1006.aspx (last visited Jan. 16, 2009).

236. For a discussion on the proliferation of new bodies charged with resolving international disputes, see Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003).

237. The multiple investment arbitration cases in various international tribunals related to the 2001 financial crisis in Argentina are a highly fitting example. *See* Jurgen Kurtz, *Adjusting the Exceptional at International Law: Security, Public Order and Financial Crisis* 12–13 (Jean Monnet Working Paper No. 06/08, 2008), *available at* http://www.jeanmonnetprogram.org/papers/08/080601.doc (reviewing the Argentine financial crisis of 2001 and the litigation proceedings in its aftermath).

Such scenarios can result in multiple inefficient decisions,[238] inconsistent findings on similar financial facts, and a lack of political power to enforce these decisions separately. For instance, following the financial crisis in Argentina in 2001, investors simultaneously brought their claims against Argentina to the ICSID and other tribunals, pursuant to the relevant provisions in the BITs between Argentina and investors' home States.[239] The separate cases repeatedly scrutinized the same 2001 Argentine legislation enacted after the currency crisis in the local market.[240]

A consolidation of claims arising from the same financial crisis or similar pattern of state behavior will help arbitrators gain a better understanding of the crisis or state conduct, its scope and implications, in addition to saving time and litigation costs. The decisions of investor-state arbitral tribunals in consolidated cases will have a stronger political power, which is still needed to enforce the award against the host government, despite the legally binding effect of arbitral judgments.[241] In international law, it is generally difficult to enforce awards and other obligations against governments, and investor-state arbitration provides a useful illustration.[242] Argentina, for example, constantly ignored international obligations, such as repaying International Monetary Fund ("IMF")

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238. *Compare, e.g.*, Azurix Corp. v. Argentine Republic, ICSID (W. Bank) No. ARB/01/12 (Dec. 8, 2003) [hereinafter *Azurix* Decision on Jurisdiction], *with* CMS Gas Transmission Co. v. Argentine Republic, ICSID (W. Bank) No. ARB/01/8 (July 17, 2003) [hereinafter *CMS* Decision on Jurisdiction]. In both cases, the tribunals, while upholding shareholders' direct right of action, rejected Argentina's argument that the investor lacked standing to pursue a claim under the U.S.-Argentina BIT, because Argentina was not a party to the contract that was the subject of the state action about which the investor complained. *See Azurix* Decision on Jurisdiction, *supra*, ¶ 57; *CMS* Decision on Jurisdiction, *supra*, ¶¶ 53–56.

239. For the significance of the claims against Argentina based on the Argentine financial crisis in 2001, see UNCTAD, *International Investment Disputes On the Rise* 1–2, UNCTAD/WEB/ITE/ITT/2004/2 (Nov. 29, 2004) (showing that of 106 investment cases pending in the ICSID in November 2004, thirty-four were such claims).

240. *See generally* MARK WEISBROT & DEAN BAKER, WHAT HAPPENED TO ARGENTINA? (2002) (discussing the reasons for and implications of the 2001 Argentine financial crisis).

241. *See* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION: A STUDY BY THE PANEL ON STATE RESPONSIBILITY OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (David D. Caron & John R. Crook eds., 2000).

242. On enforceability in international arbitration, see generally DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS—THE NEW YORK CONVENTION OF 1958 (2001).

loans, though the loan agreements were absolutely valid.[243] Although governments have, for the most part, respected the arbitral awards of international investor-state tribunals, this practice could change dramatically due to many governments' growing protectionism and their increasing lack of trust in international tribunals.[244] Of course, a consolidated procedure should not prevent the tribunal from granting different awards to different investors, based on variation in the extent of damages suffered. Moreover, if an MAI is ultimately unfeasible, the structural problem discussed above—multiple, fragmented arbitrations arising from common events—should be avoided through the negotiation and drafting of future BITs.[245] The class action common in U.S. civil procedure might be a helpful model in this context as well.[246]

Not every aspect of investment regulation can be analyzed solely on the bilateral level. Where unilateral or bilateral investment regulations have externalities and impact other countries, there is a need for coordination through multilateral agreement. For this reason, most commentators believe that multilateral agreements will regulate international antitrust or international tax in a more effective way.[247]

Of course, bilateral agreements do have distinct advantages for their signatories, which should be considered in the negotiation of future multilateral agreements. Bilateral forums can allow parties to tailor models to their own needs. Common variations include, *inter alia*: protective conditions on foreign investment before it is accepted by the host State (the pre-admission model) versus protective conditions only after it has

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243. *See The Insouciant Debtor*, ECONOMIST, June 3, 2004, *available at* http://www.economist.com/surveys/displaystory.cfm?story_id=E1_NSDQVNS (addressing the economic situation in Argentina following the declaration of default on IMF bank loans).

244. For example, following the tribunal's award in the case of Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID (W. Bank) No. ARB/97/4 (Dec. 29, 2004), the Slovak Republic publicly refused to pay the record award, although it ultimately settled this award payment with the investor directly. *See Slovak Republic Agrees to Pay 800 Million+ Claim*, INVESTMENT L. & POL'Y NEWS BULL. (Int'l Inst. for Sustainable Dev.), Feb. 22, 2005, at 5–6, *available at* http://www.iisd.org/pdf/2005/investment_investsd_feb22_2005.pdf.

245. *See* Eloïse Obadia, *ICSID, Investment Treaties and Arbitration: Current and Emerging Issues*, CEPMLP, Jan. 25, 2002, *available at* www.dundee.ac.uk/cepmlp/journal/html/vol10/article10-8.html (recommending that all cases be sent to the same tribunal, as the current models do not allow joint claimants).

246. *See* FED. R. CIV. P. 23.

247. *See* Daniel Shaviro, *Some Observations Concerning Multi-Jurisdictional Tax Competition for an Analysis of International Tax Coordination*, *in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (Daniel C. Esty & Damien Geradin eds., 2001).

been accepted by the host State (the post-admission model);[248] exclusion of certain investors or industries from protection under the treaty; or even the inclusion of dispute settlement mechanisms that emulate certain legal traditions, usually those of the home country. For example, as a result of Israel's security policy, which prevents foreign investors with hostile motives from entering the Israeli market, its model BIT bars foreign investors from State A who control entities in State B from bringing investor-state claims against Israel under a BIT between State B and State C.[249] Similarly, France excludes foreign investors from obtaining controlling ownership in the French film industry in order to protect French hegemony over its culture.[250] Recent U.S. BIT negotiations raised the possibility of including an appellate procedure in investor-state dispute settlement, in response to internal political pressures to pursue such an objective.[251] Although some of these variations can be accommodated through restrictions in and reservations to a future MAI, most of them are essentially bilateral in nature, and therefore cannot be integrated into a multilateral instrument.

Moreover, negotiations on multilateral agreements tend to be conducted by political blocks that share common interests.[252] The interests are definitely not identical, though. Disagreements among some developed countries during the negotiations on an MAI at the OECD in 1998 illustrate variation within what seemed at the time to be a homogeneous group.[253] While the multilateral dynamic empowers unified groups and

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248. *See, e.g.*, *Japan Grows Positive on Bilateral Investment Treaties*, *supra* note 116, at 3 (discussing the differences between the U.S. and Japanese approaches with respect to the pre-admission and post-admission models).

249. *See* Israel Ministry of Finance, Israel 2004 Model Bilateral Investment Treaty, *available at* http://www.mof.gov.il/beinle/beinfr_eng.htm.

250. In fact, the disagreement between the French film industry and the Motion Picture Association of America was one of the factors behind the collapse of the Multilateral Agreement on Investment. *See* JOOST SMIERS, ARTISTIC EXPRESSION IN A CORPORATE WORLD: DO WE NEED MONOPOLISTIC CONTROL? 26 (2004), *available at* http://www.culturelink.org/news/members/2004/Smiers_Artistic_Expression.pdf.

251. *See, e.g.*, 2004 U.S. Model BIT, *supra* note 43; U.S.-Uruguay BIT, *supra* note 86.

252. Thus, for example, the MAI negotiations in 1998 were mainly facilitated through negotiations between the block of developed countries and the block of developing countries, known as the G-22. *See* Muchlinski, *supra* note 5, at 1033 (describing the failure of the negotiations following rifts between these political blocks).

253. The United States, Canada, and EU Member States disagreed on several critical issues. For example, France and Canada wanted to include a general exception for culture in the MAI, while the United States challenged this proposal; similarly, the United States rejected the EU's proposal to include a general exception for regional economic organizations. For a detailed analysis of these and other disagreements in the MAI negotiations, see Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment:*

fosters international concessions, it can never completely address the needs of individual States within the blocks. Bilateral agreements can better reflect the unique interests of the various parties. In addition, enforcement mechanisms between States can sometimes be more effective, as the parties usually negotiate economic agreements on a repetitive basis.[254]

In sum, the current BIT movement maintains a unique, sensitive status quo between home and host States and serves as a de facto MAI. The BIT network can be a reliable long-term solution, while an MAI is unlikely to be signed in the near future. Nevertheless, as mentioned earlier, the implementation of BITs is fraught with several structural problems, including the inconsistent interpretation of treaty language and a multiplicity of arbitral decisions on similar fact patterns, and lacks a strong institutional element. Thus, the international community should act to establish a World Investment Organization to develop, execute, and monitor an MAI based on a credible, legal, and diplomatic consensus, and supported by the BIT network.

An intermediate solution is for BITs to be supervised by a multinational organization that includes a permanent arbitral or judicial tribunal[255] and for all BITs to then select this institution to handle monitoring and dispute settlement. In the absence of a multilateral agreement, States prefer to keep the jurisdictional issue to themselves as part of their bilateral negotiation power, which makes such an arrangement unfeasible. However, most BITs already choose the ICSID as their arbitration tribunal, and UNCTAD functions as the main monitoring authority for BITs;[256] thus, the intermediate regime is already, albeit informally, in action.[257] The vital role that the ICSID mechanism plays in investment treaties and

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Lessons for the Regulation of International Business, *in* FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 114, 129–31 (Fletcher et al. eds., 2001).

254. For example, Israel and Vietnam signed an FTA in August 2004 and a double taxation treaty in April 2008, although BIT negotiations between these countries are still in an early stage. The application of their existing agreements will have an impact on negotiations for a BIT, as well as its adoption and enforcement. Israel Ministry of Industry, Trade and Labor, Israel-Vietnam Economic Relations, http://www.moital.gov.il/NR/exeres/84EF90FE-5BBC-4353-A2EA-C1649C05550F.htm (last visited Jan. 16, 2009).

255. A discussion of the advantages of having investor-state disputes in an arbitral, rather than a judicial, setting is beyond the scope of this Article.

256. *See* About UNCTAD, *supra* note 132 (describing UNCTAD's essential role in the monitoring of BITs).

257. While there are significant differences among the various dispute settlement mechanisms, exploring such differences is beyond the scope of this Article. For an overview of international arbitration law procedures, see PETROCHILOS, *supra* note 87, at 246–57.

investment arbitration jurisprudence supports the view that the ICSID can become a leading forum in a centralized BIT-monitoring process.[258]

D. The Establishment of Investor-State Arbitration Jurisprudence

Over the past decades, investment arbitration has become one of the most prominent developments in international law. A strong recognition of nonstate actors, along with the need to make individual rights enforceable, have advanced the use of the investor-state dispute settlement mechanism.[259] This mechanism allows private investors to sue States directly in international arbitral tribunals under BITs concluded between home and host States for violations of their rights.[260] Alternative dispute resolution has flourished in international commerce, with investor-state arbitration existing as an integral part of this wave.[261] While the new paradigm accepts investors or private companies as coequal newcomers to the international law community, the general principles of international arbitration, such as the requirement that the parties consent to the arbitration procedure, are still observed.[262]

I have thus far identified the multilateral aspect of the BIT network and made the case for de facto multilateral regulation through this network.[263] Insofar as traditional international law draws a distinction between treaty law and customary law,[264] this novel concept of a de facto multilateral agreement suggests that bilateral treaties are evolving into customary international law due to their multilateral character. Given the absence of

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258. It is unclear what the legal status of current bilateral agreements that reflect a de facto multinational understanding will be once an MAI is signed. *See* Marie-France Houde & Katia Yannaca-Small, *Relationships Between International Investment Agreements* 8–9 (OECD Working Paper No. 2004/1, 2004). A similar question has been asked in the trade context, which can lead to a fascinating analysis. *See, e.g.*, Paul R. Krugman, *Is Bilateralism Bad?*, *in* INTERNATIONAL TRADE AND TRADE POLICY (Elhanan Helpman & Assaf Razin eds., 1991). However, it should be noted that a trade perspective is inherently different from an investment framework and any analysis must carefully identify which features and concepts are, in fact, compatible between the two.

259. *See* Weiler & Wälde, *supra* note 232, ¶ 122.

260. *See Investor-State Dispute Settlement*, *supra* note 130.

261. *See International Investment Disputes on the Rise*, *supra* note 239 (demonstrating that investment disputes are growing and that these disputes involve all sectors of developed and developing countries, both at the re-establishment and operational stages).

262. As discussed earlier in this Article, the *Salini* and *Plama* tribunals, in the limitations they impose upon the *Maffezini* doctrine, emphasize the importance of the consent requirement to establishing the arbitral tribunal's jurisdiction. *See Salini* Decision on Jurisdiction, *supra* note 201; *Plama* Decision on Jurisdiction, *supra* note 208.

263. *See supra* Part II.

264. *See* Lowenfeld, *supra* note 24, at 128 (referring to "the traditional classification of international law into two categories—customary law and treaty law").

a de jure MAI, it is difficult to argue that comprehensive customary international law on investment would have otherwise developed. As illustrated below, this fact has a tremendous effect on the progression of investor-state arbitration jurisprudence.

The concept of investment multilateralism allows arbitral tribunals to interpret similar terms or provisions in different BITs in the same manner. This is true both for provisions setting forth substantive rights as well as for procedural provisions.[265] Indeed, despite the fact that arbitrators are not obligated to follow other investment tribunals' awards as precedents, they increasingly follow substantive and procedural trends in investment arbitration, and are influenced by the notions of investment liberalization and international economic law's general code of conduct.[266] In addition, recent BITs, including the 2004 U.S. Model BIT, have increased multilateral governmental intervention in this interpretation process.[267]

Furthermore, obligations that are widespread throughout the BIT network can be used as a regulatory framework even when no such framework exists. As Andreas Lowenfeld has demonstrated, arbitrators may use the general BIT framework as a source of law when there is no BIT signed between the investor's home State and the host State, provided that the host country has signed other BITs or has become a party to an investor-state arbitration convention, like the Washington Convention.[268] The fact that BITs do not include a concrete set of international arbitration law rules supports this view.[269] Even if the host State has not signed such bilateral treaties or conventions, the framework can still apply, pro-

265. Thus, ambiguous substantive concepts, such as the rapidly developing and important concept of a "national security" defense to the charge of breaching investors' protection, can have a similar interpretation. This defense can also be applied to procedural rights, such as the jurisdictional requirements for admission to arbitration, yielding significant substantive implications.

266. *See* Weiler, *supra* note 178 (discussing these principles in the context of NAFTA's requirement that the three NAFTA governments treat foreign investors in accordance with international law).

267. The U.S.-Chile FTA, for example, provides that both the U.S. and Chilean governments have the authority to issue interpretations of the investment provisions that are binding on arbitral tribunals. Moreover, both governments are to be involved in the ensuing litigation process. FTA partners that are not litigants in the dispute (amicus curiae) may submit comments during litigation on the interpretation of the investment provisions. The FTA also authorizes the tribunal to order "interim measure[s] of protection to preserve the rights of . . . disputing[] part[ies]." *See* U.S.-Chile FTA, *supra* note 85, art. 10.19.

268. *See* Lowenfeld, *supra* note 24, at 128–30 (showing that BITs can constitute a modern model of international customary law).

269. *See* PETROCHILOS, *supra* note 87, at 246–57.

vided that the State has never rejected the principles embodied in the BIT network.[270] From this point of view, legal obligations that have been accepted by a large number of States for a long period of time will become part of customary international economic law and fill the multilateral regulation gap.[271] However, it is important to note that the BIT framework cannot be used as a source of regulation when the host country has not given its consent to the particular arbitration procedure.[272] In keeping with the fact that arbitrators can and do use other BITs as a source of substantive legal obligations and look to awards given by other arbitral tribunals interpreting a variety of BITs, what substantive and procedural trends can be identified?

When an investor-state arbitral tribunal examines the status of an investment, it must balance between the competing interests of investment protection and the legislative power of the host country. This is especially true when it comes to a host country's need to protect domestic industries and promote national economic welfare. Arbitrators consistently feel the political tension between the obligation to comply with the BIT's goals, on the one hand, and the interest in maintaining the host State's acceptance of the tribunal's procedure and decision, on the other.[273] A tribunal's efforts to remain within the scope of its jurisdiction based on the BIT's language are crucial to the success of the process, especially given the need for state consent to both jurisdiction and enforcement.[274] Consequently, arbitrators consider the multilateral effect of their decisions in order to preserve credibility in future claims brought by investors before the same or other tribunals.[275]

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270. *See* Lowenfeld, *supra* note 24, at 129–30.

271. Lowenfeld himself is aware of the fact that most of the developing States do not accept these principles from a pure sense of legal obligation, a necessary condition for customary law; he calls for a rethinking of its traditional definition. *See id.*

272. Such consent is usually provided through the host State's consent to the general jurisdictional framework in the specific treaty. Then, the host State responds to the claim against it when the foreign investor expresses his or her own consent and brings the case before the appropriate tribunal. *But see* Chung, *supra* note 44, at 969–75 (discussing defiance of investment arbitration by Indonesia, Pakistan, and other developing countries that act as host States in BITs).

273. *See* Kurtz, *supra* note 9, at 713.

274. This is tremendously important when a State is ordered to pay a huge amount of compensation as a result of an investment dispute. *See, e.g.*, Luke Eric Peterson, *Czech Republic Hit with Massive Compensation Bill in Investment Treaty Dispute*, INVESTMENT L. & POL'Y NEWS BULL. (Int'l Inst. for Sustainable Dev.), Mar. 21, 2003, at 11–12, *available at* http://www.iisd.org/pdf/2003/investment_investsd_march_2003.pdf

275. For a discussion on the multilateral effect of tribunals' decisions, see, for example, *Plama* Decision on Jurisdiction, *supra* note 208, ¶ 219 (discussing the consequences

Reviewing recent developments in investment arbitration law indicates that while tribunals do not provide investors with easy recoveries for unsound investments, investment tribunals have broadly interpreted procedural provisions in order to expand jurisdiction.[276] Additionally, in terms of substantive law, the tribunal in *Mondev International Ltd. v. United States* recognized the need to protect investors beyond the minimum standards of customary international law, following the trend of higher standards expressed in the BIT network.[277] In the *Mondev* case, the multilateral consensus caused the tribunal to suggest a higher level of protection.[278]

Arbitral tribunals have loosened many procedural requirements that factor into jurisdictional issues in order to allow more investors to bring claims, as discussed below. The multilateral consensus among international arbitral tribunals has shifted the sensitive balance between the need to protect investors and the need to preserve state sovereignty towards a more investor-friendly regime. In *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, for example, the ICSID tribunal found that according to international law, actions of a political subdivision of a State are attributable to the central government, regardless of the State's constitutional structure.[279] This decision granted foreign investors standing for a claim against Argentina.[280] The *Compañía de Aguas* tribunal followed the long-standing international principle of state responsibility and broadened the jurisdictional umbrella of the BIT.[281] Moreover, it decided that the claim could be heard even though the dispute had already been

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of the *Maffezini* decision on the application of other treaties, and decisions by investment tribunals).

276. *See supra* note 219 and accompanying text.

277. *See* Mondev Int'l Ltd. v. United States, ICSID (W. Bank) No. ARB(AF)/99/2 (Oct. 11, 2002), ¶ 125 [hereinafter *Mondev* Award] (integrating current investment law into the traditional standards in the NAFTA Article 1105(1) context). In this case, Mondev, a Canadian real estate developer, brought a NAFTA claim against the United States following a bank foreclosure on a shopping mall in Boston. *Id.* ¶¶ 1–2. The investor claimed, *inter alia*, a breach of contract by the City of Boston and the Boston Redevelopment Authority. *Id.* ¶¶ 1, 76.

278. *Id.* ¶¶ 151–53.

279. Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID (W. Bank) No. ARB/97/3 (Nov. 21, 2000), ¶ 49 [hereinafter *Compañía de Aguas* Award] (second annulment proceeding pending).

280. *Id.* ¶¶ 49–55.

281. For an articulation of customary international law on state responsibility, see *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) (adopting the report of the International Law Commission on Responsibility of States for Internationally Wrongful Acts).

brought to the national courts; the claims were not barred under collateral estoppel because the BIT did not fall under the exclusive jurisdiction of the national courts.[282] As discussed earlier in the *Maffezini* case, the tribunal eased the exhaustion requirement, determining that the Argentina-Spain BIT, which calls for exhaustion of Spanish domestic remedies before submitting a claim to an arbitral tribunal, was inconsistent with the understanding of exhaustion under international law.[283]

The *Mihaly International Corp. v. Sri Lanka* decision permitted an American company to proceed with its claim despite its partnership with a Canadian entity that was not covered by the scope of the tribunal's jurisdiction.[284] Finally, the *Ceskoslovenska Obchodni Banka A.S. v. Slovakia* case recognized the possibility of bringing a claim based on continuing state behavior that commenced before the treaty entered into force, even if the BIT's jurisdiction is explicitly based only on behavior that started after the treaty went into effect.[285] In this case, it was unclear if the Slovak Republic's behavior followed the BIT's entry into force, so the tribunal based its jurisdiction on an older BIT that had been incorporated by reference into an agreement between the parties.[286]

III. INTEGRATING CORPORATE RESPONSIBILITY INTO THE BIT NETWORK

Thus far, this Article has examined how the BIT network has evolved as a "de facto" multilateral agreement, or as customary international economic law. This evolution has provided broader protection to foreign investors and, therefore, has led us to question the very necessity of a future MAI.[287] However, developing countries and NGOs that have consistently objected to the multilateral negotiation of investment regulation without provisions on corporate responsibility are certainly unsatisfied

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282. The *Compañía de Aguas* tribunal reached this decision notwithstanding that the France-Argentina BIT allowed foreign investors to choose between recourse to domestic remedies and an ad hoc ICSID arbitration. *See* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Fra.-Arg., July 3, 1991, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/france_argentina_fr.pdf.

283. *Maffezini* Decision on Jurisdiction, *supra* note 141, ¶ 28.

284. Mihaly Int'l Corp. v. Democratic Socialist Republic of Sri Lanka, ICSID (W. Bank) No. ARB/00/2 (Mar. 15, 2002), ¶ 22.

285. *See* Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic, ICSID (W. Bank) No. ARB/97/4 (May 25, 1999), ¶¶ 43–59.

286. *Id.*

287. States have reacted differently to this new paradigm: while Brazil, for example, is trying to avoid international obligations following several recent investment arbitration decisions, Japan submitted an explanatory note regarding the accurate interpretation of its BITs. *See* Noah D. Rubins, *Investment Arbitration in Brazil*, 4 J. WORLD INVESTMENT & TRADE 1073, 1080–81, 1091 (2003).

with this temporary solution.[288] Indeed, drafts of BITs only include investors' rights, while their responsibilities as nonstate actors in the international community are conspicuously absent,[289] a situation that may be traced to several factors. The inability to strike the fine balance between corporate rights and responsibilities has repeatedly led to failures in negotiations on an MAI.[290]

All BIT models follow this structure and have been well respected due to their limited objectives to promote and protect foreign investment based on acceptable international law principles.[291] Integrating corporate responsibilities into BITs has not been considered desirable under these circumstances. As a result of an industrialized country's dominant position during the negotiation of a BIT, a developing country cannot negotiate the inclusion of provisions on corporate responsibility. Therefore, only collective action will allow developing countries to negotiate regulation of corporate responsibilities. Is the BIT network as a multilateral framework appropriate for such an endeavor? The answer appears to be positive. I now examine this proposition and suggest different ways of integrating corporate responsibilities into existing and future bilateral treaties.

A discussion of the potential integration of corporate responsibilities into the BIT network should be able to answer three core questions: First, despite failure on the multilateral level, is the BIT network the appropriate forum for institutionalizing corporate responsibility? Second, what responsibilities should be included in the BIT network? Third, what kind of enforcement mechanism, if any, should the BIT network adopt with regard to corporate responsibility?

While in the extensive scholarship on corporate responsibility there is debate over what MNCs should be accountable for[292] and how accountability can be instituted and enforced, there is also a strong normative voice in favor of MNCs' accountability for violations of human rights

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288. *See* Muchlinski, *supra* note 5, at 1050.

289. *See* Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 COLUM. J. TRANSNAT'L L. 131, 138–39 (2003).

290. On the other hand, the inclusion of several corporate responsibilities provisions in recent U.S. BITs has raised many developing countries' level of confidence in the U.S. BIT program. As of this writing, Rwanda was the last developing country to sign a BIT with the United Sates, on February 19, 2008. *See* List of U.S. BITs, *supra* note 80.

291. *But see* Chung, *supra* note 44, at 969–75.

292. *See*, *e.g.*, Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 519–25 (2001); Picciotto, *supra* note 289, at 133–39.

and labor standards under international law.[293] Since MNCs play an important role in the modern State, executing governmental functions either as business partners or government agents, or through outsourcing missions,[294] the line between state and nonstate actions is increasingly vague. Several commentators have made the case for applying international human rights and international labor law obligations to MNCs and other nonstate actors, particularly when a corporation cooperates with local governments or performs governmental functions.[295] Indeed, even when the host State only serves as a platform for private investment activities without jointly participating in the foreign investment or delegating governmental functions, some international legal instruments impose direct obligations on MNCs.[296]

While imposing such obligations on States has raised many objections,[297] regulation of foreign-investor responsibilities seems to be an easier case. First, developing countries are worried about harmonizing human rights and labor law, as they are afraid of losing their sovereignty and ability to implement local policies.[298] When it comes to foreign investors, intervention in local policies is less effective, especially as MNCs can be regulated by standards other than those of the host State. If such standards are enforced only against foreign investors in a particular country, it might well reduce foreign investment in that country, or even provide for a discrimination claim.[299]

Furthermore, the international community has traditionally punished States that violate human rights and labor laws through trade sanctions

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293. *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461–75 (2001) (making the case for the imposition and enforcement of corporate responsibilities under international law norms).

294. On the phenomenon of the outsourcing of services and the role of MNCs, see *World Investment Report 2004*, *supra* note 11, at 221–33.

295. *See, e.g.*, Ratner, *supra* note 293, at 497–506 (citing several cases in international tribunals and U.S. courts that apply this approach).

296. *See id.* at 504–06 (applying the doctrine of superior or command responsibilities to individual responsibility in the corporate context).

297. *See, e.g.*, Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1 (2001).

298. For a detailed discussion of the "new imperialism," see Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L.J. 577 (1998).

299. Since the foreign investors are exposed to higher standards of local regulation in comparison to local investors, the former can assert an MFN claim based on a BIT, and request the abolition of such regulation.

imposed by other States.[300] These sanctions reduce the welfare of both States (i.e., home and host) and, in many cases, are ineffective, which tends to undermine the legitimacy of trade sanctions.[301] Thus, Arie Reich, among other scholars, has called for promoting multilateral legal instruments and international cooperation in order to enforce international standards in a manner that raises fewer objections by the international community than do unilateral sanctions.[302] The enforcement of corporate responsibilities in the sphere of international investment law is a desirable policy objective that should garner more of a consensus. Core international standards accepted by the majority of States would be imposed extraterritorially on MNCs actively involved in human rights or labor law violations, and only on these MNCs.[303]

An MAI, developed either within the OECD or by WTO mandate, could be a proper venue for a binding codification of corporate responsibility provisions on four different levels: the MAI could express commitment to promoting investment in a way that is fully compatible with human rights obligations,[304] ensure that implementation does not interfere with the protection of human rights,[305] include human rights organizations among its constituency,[306] and lastly, provide enforcement me-

300. *See* Cleveland, *supra* note 297 (examining the current model of using economic sanctions against States that violate human rights and international labor standards, with a special focus on the U.S. use of sanctions).

301. Barry Carter, for example, has shown that U.S. sanctions imposed on the basis of human rights violations have had a forty percent success rate. *See* BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 233 (1988).

302. Arie Reich, *Core Labor Standards and the WTO: Beware of Unilateralism!—A Response to Werner Meng*, *in* THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW, *supra* note 110, at 395–410.

303. *See* Avi-Yonah, *supra* note 20, at 25–26 (calling for extraterritorial enforcement in the case of child labor violations).

304. OECD members, for example, examined the possibility of integrating the OECD Guidelines for Multilateral Enterprises with the negotiated draft of the Multilateral Agreement on Investment. *See* Muchlinski, *supra* note 5, at 1050. *See also* OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

305. *See* KONRAD VON MOLTKE, A MODEL INTERNATIONAL INVESTMENT AGREEMENT FOR THE PROMOTION OF SUSTAINABLE DEVELOPMENT 15–17 (2004), *available at* http://www.iisd.org/publications/pub.aspx?pno=660 (suggesting a model that can also be implemented on the multilateral level).

306. The GATT's agreements on the Application of Sanitary and Phytosanitary Measures and on Technical Barriers to Trade, which use international organizations as sources for standards and advice, could also be a model for an MAI. *See* Saman Zia-Zarifi, *Protection Without Protectionism: Linking a Multilateral Investment Treaty and Human*

chanisms to deal with human rights violations. The MAI could thereby gain wider political support from developing countries and the NGO community, which would enhance the legitimacy of the agreement. Additionally, States would likely accept regulation based on the NAFTA model to prevent a race to the bottom dynamic according to which competition for foreign investment would lower social standards.[307]

Yet, when several attempts were made to conclude an MAI, the developing world and the NGO community strongly objected to what, at the time, was called the "Charter of Multinational Corporations," an agreement that aimed to serve the interests of the international business community and the industrialized countries.[308] This opposition, together with disagreements among developed States,[309] led to the systematic failure of the negotiations, leaving the world with merely general, nonbinding declarations on corporate responsibility.[310]

MNCs have encountered consistent criticism of their corporate practices in developing countries since the early 1990s, which has pushed many to adopt corporate codes of conduct.[311] These codes are developed and exercised on a voluntary basis, with the strong participation of other nonstate actors, and usually concentrate on core labor norms universally recognized by the international community.[312] While some of these "codes" are general in nature, most are specific, covering particular corporations,

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Rights, *in* MULTILATERAL REGULATION OF INVESTMENT 101, 132–33 (E.C. Nieuwenhuys & M.M.T.A. Brus eds., 2001).

307. *See* VON MOLTKE, *supra* note 305, at 19–20.

308. The "Charter of Multinational Corporations" refers to the draft MAI that had been negotiated in 1998 by the developed countries, and has been perceived as an agreement that protects only the interests of MNCs based in industrialized countries. *See supra* note 5.

309. *See supra* note 253 and accompanying text.

310. *See* Muchlinski, s*upra* note 253, at 114. At the same time, several NGOs have continued to develop draft models of investment agreements that will address some of the concerns expressed above. One of these drafts was published in April 2005 by the International Institute for Substantial Development, a well regarded Canadian research institute. *See* INT'L INST. FOR SUSTAINABLE DEV., MODEL INVESTMENT AGREEMENT, Apr. 2005, *available at* http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.

311. *See* ECOSOC, Comm'n on Hum. Rts., Sub-Comm'n on the Promotion and Protection of Hum. Rts., 52d Sess., *Principles Relating to the Human Rights Conduct of Companies: Working Paper*, ¶ 10 n.23, U.N. Doc. E/CN.4/Sub.2/2000-WG.2/WP.1 (May 25, 2000) (*prepared by* David Weissbrodt) (listing several multinational corporations that have adopted internal codes of conduct, such as 3M, Body Shop, BP Amoco, British Telecom, C&A, Cargill, Carlson Companies, and The Gap).

312. For an overview of the codes of conduct movement, see Picciotto, *supra* note 289, at 144–50.

industries, or specific geographical areas, and as a result, they differ from each other in terms of substance, structure, and spirit.[313]

Such methods of self-regulation suffer from some significant disadvantages. First, an impartial international body does not monitor compliance with the codes,[314] and third-party auditing mechanisms have often been recognized as corruptive measures.[315] Secondly, corporate codes of conduct do not include an international enforcement mechanism of any kind, which often causes them to look merely like a public relations tool.[316] The International Labor Organization ("ILO") has been considered ineffective for the very same reason: it lacks enforcement powers.[317] Furthermore, the codes' diversity and the consistent objections they receive from business interest groups make the chances of adopting the codes on an international level and with legally binding effect very slim indeed.

Therefore, human rights activists, with support from various legal circles, have adopted a mixed-tools strategy: soft law regulation of corporate practices accompanied by hard law regulation, mainly through U.S. and European tort law, the enforcement of which has brought several high-profile MNCs to trial.[318] In addition, media campaigns and consumer boycotts have led to several changes in corporate behavior.[319] Legal scholars should continue to seek international regulation of corporate responsibility that is binding and enforceable.

The BIT network, conceptualized as a de facto multilateral agreement, provides a unique opportunity to establish, for the first time, an international enforcement mechanism of corporate responsibilities recognized by participating MNCs. Whereas traditional international law provides state-to-state dispute mechanisms based on the principle of mutual con-

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313. *Id.*

314. *Id.*

315. *See* Dara O'Rourke, *Monitoring the Monitors: A Critique of Corporate, Third-Party Labor Monitoring*, *in* CORPORATE RESPONSIBILITY AND LABOR RIGHTS 196 (Rhys Jenkins et al. eds., 2002).

316. *See generally* Peter T. Muchlinski, *Human Rights and Multinationals—Is There a Problem?*, 77 INT'L AFFAIRS 31 (2001).

317. The ILO is the U.N. agency dedicated to promoting rights at work, encouraging decent employment opportunities, enhancing social protections, and strengthening dialogue in work-related issues. *See* International Labor Organization, About the ILO, http://www.ilo.org/global/About_the_ILO/Origins_and_history/lang—en/index.htm (last visited Feb. 3, 2009) (providing an overview of the ILO's mission and history).

318. Among those MNCs that have been brought to trial are The Gap, Nike, and Shell. *See* International Labor Organization, Codes of Conduct, http://actrav.itcilo.org/actrav english/telearn/global/ilo/code/main.htm (last visited Jan. 16, 2009).

319. *Boycotting Corporate America*, ECONOMIST, May 26, 1990 (describing the effect of consumers' boycott on corporations in the United States).

sent, the modern investor-state arbitration mechanism allows MNCs to bring claims against States in international arbitral tribunals for violations of their rights and to seek compensation for damages.[320] A mechanism that already allows nonstate actors such as MNCs to sue host States directly should be normatively justified in imposing responsibilities on the same MNCs, and, where appropriate, finding them accountable for human rights violations. Modern international law recognizes the need to grant nonstate actors rights and responsibilities, based on international economic law and international human rights law, and supplemented by individuals' right to be compensated for their damages.[321]

Along the same lines, individuals who suffer damages as a result of MNCs' violations of corporate responsibilities recognized by both the home and host countries under the BIT will be able to bring claims directly against them before an arbitral tribunal. The plaintiff would give his or her consent to the procedure by submitting the claim to the tribunal, while the investor would manifest consent by bringing a counterclaim against a State pursuant to a BIT.

An investor entitled to sue the host State in an investor-state tribunal should be aware of the exposure, in the same proceeding, to a claim based on a breach of corporate responsibilities. However, this mechanism should not be limited to a "clean hands" requirement[322] in an investor-state arbitration procedure, or even to claims brought against an investor only after the investor brought an investment claim under the BIT. BITs should explicitly state the jurisdictional ambit of such corporate responsibility claims. The scope of the corporate responsibility protection (i.e., a "clean hands" requirement, counterclaims asserted against investors bringing affirmative claims on the BIT, or independent claims against corporations) will be determined based on support from corporations, governments, and the legal community.

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320. *See Investor-State Dispute Settlement*, *supra* note 130.

321. For example, in addition to the ICSID, nonstate parties may appear before the European Court of Justice, the Iran-United States Claims Tribunal, and the European Court of Human Rights, subject to certain conditions. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2360 n.71 (1991) (analyzing modern litigation in private and public international law).

322. The concept of "clean hands," which sometimes appears in civil litigation in U.S. courts, requires the claimant, as a prerequisite to pursuing his or her remedies, to demonstrate that he or she was not at fault; otherwise, the court is required to balance the claimant's faults and actions. *Cf.* Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 59–64 (2007) (discussing the development of the "clean hands" doctrine in public international law).

In addition, the latest trend, establishing corporate codes of conduct, demonstrates the importance of involving the companies in the very process of asserting claims for breaches of corporate responsibility. It was the concept of consent, along with the limited scope of the treaty, that earned the investor-state arbitration mechanism of BITs wide support among both the investment community and host States. In the same way, only core responsibilities that reflect international human rights and labor law principles, principles broadly recognized by the international community *and* MNCs, are likely to receive the support necessary to include them in future treaties.

As discussed above, several self-adopted corporate codes of conduct provide MNCs with certification of good behavior based on monitoring reviews, allowing them to insulate themselves against possible claims of bad practices.[323] These codes can be annexed to existing BITs to reflect the norms on which future claims may be based.[324] Associating BITs with certain corporate codes of conduct will also help investment arbitrators determine which international corporate responsibilities should be applied in a particular case, in light of the large number of international nonlegally binding instruments. The recognition of the BIT network as a de facto multilateral agreement could transform the bilateral mechanism for FDI into a multilateral enforcement mechanism for corporate responsibilities. It will be fascinating to follow such jurisprudence as it evolves based on classical investor-state arbitration.

Several potential drawbacks should be addressed, though. First, investor-state arbitral tribunals have traditionally been comprised of experts in international economic law.[325] It is necessary to include experts in international human rights law and international labor rights law to adjudicate future claims against MNCs. NGOs and other international organizations with relevant expertise can be part of the process, either during the tri-

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323. For example, SA8000 is an international workplace standard with a built-in verification system. *See* Social Accountability International, Overview of SA8000, http://www.sa-intl.org/index.cfm?%20fuseaction=Page.viewPage&pageId=473 (last visited Feb. 2, 2009). SA8000 was developed by Social Accountability International and is based on international employment and workplace norms taken from the ILO Conventions, the Universal Declaration of Human Rights, and the U.N. Convention on the Rights of the Child. *Id.* Companies apply to be certified for compliance with SA8000 standards, a process that entails independent audits. *Id.*

324. *See* Elliot Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153 (2003) (discussing several ways to transform corporate codes of conduct from "soft law" to "hard regulation").

325. The vast majority of these experts are academics or practitioners in the field of international economic law, with limited knowledge of international human rights law.

bunal selection or during the hearings, duplicating the NAFTA model of labor and environment side agreements.[326]

Second, the process of integrating corporate responsibility provisions into investment treaties and implementing them is likely to be time consuming and sui generis.[327] Resultantly, it will be daunting to achieve harmonization of corporate responsibilities through the investor-state dispute mechanism. As previously noted, multiple inefficient decisions may result due to tribunals' inconsistent interpretations of similar fact patterns, and a lack of political power to enforce each decision separately. Such a challenging path is inevitable, but worthwhile, as an enforcement mechanism for international corporate responsibility would be a seminal achievement.

CONCLUSION

The Cancún Session and the diplomatic negotiations that followed it herald the temporary disappearance of investment regulation in the multilateral trade forum. While the prospects for renegotiating a multilateral agreement in the near future are limited, the existing network of BITs can serve as an effective multilateral framework for investment regulation. Evolving beyond traditional concepts of international law, BITs can create a multilateral base through their unique MFN principle, signing patterns, and parallel content and concepts.

This innovative notion of multilateral bilateralism offers much more than a temporary solution for proponents of harmonization in international investment regulation. It affords arbitrators of investor-state cases a treaty interpretation tool, regulatory framework, and point of reference for BIT jurisprudence. While investment treaties have developed sporadically on the bilateral level for more than four decades, recent developments in international economic law call for a new multilateral regime. The current regime empowers foreign investors politically, legally, and economically, perpetuating inequality between developed and developing countries. Developing countries, which have thus far been extremely reluctant to negotiate a multilateral agreement on investment, find themselves confronting a new bilateral regime that reflects their concessions on investment protection and limits their own sovereign, legislative power.

326. *See, e.g.*, North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Jan. 1, 1994, (NAFTA "side agreement" on labor); North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 10(7), Sept. 13, 1993, 32 I.L.M. 1480, 1486–87 (NAFTA "side agreement" on the environment).

327. As seen in the discussion of the investors' rights mechanism, harmonization can develop out of a sustained dialogue between tribunals and BIT negotiators.

Looking ahead, and acknowledging that this new regime is unlikely to soon disappear, developing countries have a valuable opportunity to integrate corporate responsibilities into the current and future network of BITs. Since existing BITs are typically concluded for limited terms, many of them will be up for renewal in the coming years.[328] The investor-state arbitration mechanism constitutes a credible forum in which to balance investors' rights with their own corporate responsibilities. Arbitral tribunals will be able to hold MNCs accountable and compensate individual victims for violations of corporate responsibilities; in turn, tribunals will award investors compensation for discrimination or expropriation by host States. The BIT network should go far beyond a general declaration of corporate responsibilities, or even a "clean hands" requirement for investment claims: it should bring about a new era of tribunals empowered not only to bring justice to investors, but also to bring investors to justice. The failures of the Doha Round can paradoxically spawn groundbreaking progress in international investment law based on the BIT network.

328. For example, Israel signed most of its BITs during the 1990s following the post-Soviet era of investment liberalization in Eastern Europe. Almost all of these BITs have been in force for ten or fifteen years and, thus, are up for renewal or amendment before the end of this decade. *See, e.g.*, Agreement for the Reciprocal Promotion and Protection of Investments, Isr.-Alb., Jan. 29, 1996 (entered into force Feb. 18, 1997).