2011

The Return of the State

José E. Alvarez

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I. INTRODUCTION

International lawyers are both indebted to and at war with the state. Although we acknowledge, as we must, that states remain the primary actors in creating, interpreting, and enforcing international rules, we usually make this point in passing—as we try to puncture, evade, eclipse or overtake sovereignty. As Martti Koskenniemi's apology/utopia dialectic demonstrates, much of what we do attempts to reconcile the un-reconcilable.[1] This is epitomized by our efforts to portray *pacta sunt servanda* as a bridge between unilateralism and multilateralism.[2] We explain that states do not relinquish, but rather, exercise their sovereignty when they enter into a treaty.[3] This was, of course, the rationale adopted by the Permanent Court of International Justice in the Wimbledon case.[4]

International lawyers largely define success in terms of states' conviction of the Wimbledon rationale—by the victory of the supra—or multi—national over the parochial national. We

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This essay is an extended version of an address delivered on Nov. 20, 2010 at the University of Minnesota Law School. The author acknowledges the research assistance provided by the Filomen D'Agostino and Max E. Greenberg Research Fund.

1. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005) (demonstrating how international law's effectiveness to depoliticize international relations is limited by being either "an irrelevant moralist Utopia or a manipulable façade for State interests.").

2. *See id.* at 311 (describing *pacta sunt servanda* as the rule defining the binding force of consent in agreements).

3. Or as Jan Klabbers puts it, the contention is that the "state can become bound precisely because it is sovereign." Jan Klabbers, *Clinching the Concept of Sovereignty: Wimbledon Redux*, 3 AUSTRIAN REV. INT'L EUR. L. 345, 347 (1998).

4. *See generally* S.S. Wimbledon, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17) (establishing the principle that the right to enter into international engagements is an act of state sovereignty).

think of ourselves as greasing the wheels that drive global governance. This defines our professional outlook. Nearly all of our efforts involve encouraging states to delegate away some part of their "domestic jurisdiction." We do this by appealing to states' long-term self-interest, and especially by utilizing the multilateral side, transnational non-state actors (MNCs, NGOs, international civil servants, and even individuals as private attorney generals). Further, we enlist intra-state constituencies with discrete interests, such as traders of goods seeking to restrain the protectionist impulses of their own governments. Consequently, all of these courses of action can influence government policy-makers.

Our efforts to promote multilateralism or inter-state cooperation in lieu of unilateral sovereign action cut across the public/private international law divide. We establish global institutions as diverse as the UN, UN specialized agencies, and international financial institutions to centralize states' talents and resources or to supply needed supra-national neutrality and independence.[5] We promote these international organizations on the premise that they fulfill needs that each state cannot satisfy on its own.[6] The age of international organizations rests on the assumption that states, like first year law students, should not travel alone. However, even though global governance serves the needs of states, getting them to accept the Wimbledon premise in discrete contexts has not always been easy—for example, when a treaty imposes unexpected or, given changing circumstances, temporally inconvenient, obligations.[7]

5. *See* Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 14, 16 (1998) (describing the increased efficiencies derived from the "hierarchical" organization of IOs, in which the supervisory tasks are held by member states. Also, the independence of IOs preserves their effectiveness in achieving valued ends).

6. *See, e.g.*, *id.* at 4 (providing examples of how states prefer to use IOs as vehicles of cooperation. For instance, IOs provide collective security (the UN Security Council), solve coordination problems (such as those solved by ICAO with respect to aviation), arbitrate/adjudicate disputes, solve prisoners' dilemmas too numerous to mention, or address threats posed by non-state actors like pirates and terrorists).

7. Revealingly, political scientists have argued that governments resist hard commitments because of perceived "sovereignty costs." *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 436-41 (2000). Revealingly, political scientists have argued that governments resist hard commitments because of perceived "sovereignty costs."

For the builders of global governance, state sovereignty is most often a hindrance that needs to be overcome. It is not the favored ordering mechanism among today's leading thinkers of global governance, and as a result, there is an increasing tendency to reduce or eliminate its application.[8] For those focused on states' threats to the human rights of their citizens, such as the late great Louis Henkin, sovereignty was the hated "S" word that needed to be banned from polite lawyerly discourse.[9] Global and regional human rights systems respond almost entirely to the threat that sovereignty, unabated and unrestrained, poses.[10] Those who strengthened the GATT's weak dispute settlement scheme at the Uruguay Round devised end-runs around state sovereignty, such as the reverse consensus rule that makes WTO panel and Appellate Body rulings binding.[11] The WTO's house rests on the proposition that leaving matters to bilateral diplomatic leverage would impoverish us all.[12] Even modern regimes built on bilateralism—such as that governing international investment—turned to bilateral treaties only after various multilateral efforts failed.[13] Bilateral investment treaties (BITs) are efforts by states to bind themselves to the mast to avoid the tempting sirens calling for breaches of investment contracts or nationalizations without compensation.[14] BITs also

8. *See, e.g.*, Klabbers, *supra* note 3, at 346 (noting as examples Anne-Marie Slaughter's network of transnational regulators and John Tasioulas's defense of community values).

9. Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSLETTER (Am. Soc'y Int'l Law, Wash. D.C.), Mar. 1993, at par. 11, *available at* http:///www.asil.org/pres.htm.

10. *See id.* par. 8 (indicating that state sovereignty is subject to the social contract in the UN Charter).

11. *See WTO Bodies involved in the dispute settlement process*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm (last visited Feb. 1, 2011) (identifying that reverse consensus occurs "when the DSB [Dispute Settlement Body] establishes panels, when it adopts panel and Appellate Body reports and when it authorizes retaliation, the DSB must approve the decision unless there is a consensus against it.").

12. *See, e.g.*, Jose Alvarez, *The Once and Future Foreign Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 612 (Mahnoush H. Arsanjani et al eds., 2011)(providing an opinion of BITs as being "'contracts of adhesion' imposed on the willing poor by the rich.").

13. *See, e.g.*, *id.* at 625 (indicating how "by the end of 2008, more countries had entered into at least one investment protection agreement (179 countries) than had joined the WTO.").

14. *See id.* at 620 n.68 (describing BITs as reliable "commitment devices"

involve relinquishments of sovereign "policy space" in deference to the greater good.[15]

The papers presented at this conference on "International Economic Law in a Time of Change" demonstrate that the global governance tradition—and the urge to defend and improve it–is alive and well. A number of these papers continue to propose, in the best tradition carved out by those "present at the creation," new forms of supra-national governance, needed reforms to harden international regulation, or ways to fill regulatory gaps with more law. Included in this category are the articles of Adam Feibelman (who addresses the problem of unmanaged exchange rates),[16] Aldo Caliarai and Ioana Ciobanasu (on needed reforms for the IMF),[17] Galit Sarfaty (on the need to harmonize anti-corruption efforts among multilateral development banks),[18] Sarah Woo (on the need for regulatory reforms to respond to a group of non-state actors, namely credit rating agencies),[19] Markus Wagner (on how to improve the WTO's handling of disputes involving analysis of scientific evidence),[20] Janelle Diller (on the need for greater complementarity with respect to applicable regimes on international product standards),[21] Andrea Schneider and

since they extend protection in the absence of a contract and offer greater protection than political risk insurance).

15. *See, e.g.*, *id.* at 627 (demonstrating how the benefits of foreign investment come at the cost of decreased sovereignty through the granting of reciprocal rights to all investors).

16. Adam Feibelman, The IMF and the Future of International Monetary Law (Nov. 4, 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

17. Aldo Caliari, *Updating the International Monetary System to Respond to Current Global Challenges: Can It Happen Within the Existing Legal Framework?*, 20 MINN. J. INT'L L. (forthcoming 2011); Ioana C. Ciobanasu, *Expanded Mandate for the IMF: Global Financial Stability* 20 MINN. J. INT'L. L. ONLINE (forthcoming 2011).

18. Galit Sarfaty, Abstract, Harmonization of Anti-Corruption Efforts Among Multilateral Development Banks (unpublished manuscript) (on file with the Minnesota Journal of International Law).

19. Sarah P. Woo, Super Disclosure is Not Enough: Examining the Benefits and Costs of New Credit Rating Regulations (Nov. 11, 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

20. Markus Wagner, Abstract, Law Talk v. Science Talk: The Languages of Law and Science in WTO Proceedings (unpublished manuscript) (on file with the Minnesota Journal of International Law).

21. Janelle M. Diller, The Interaction of Private International Standardization with Public International Law (Nov. 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

Nancy Welsh (on whether the investment regime can be improved by a greater reliance on mediation),[22] and Krista Nadakavukaren Schefer (on the likely impact of R2P for international economic regimes).[23] Others explore lesser known reaches of global governance, such as Michelle Badin's look at the impact of the WTO's dispute settlement system on the civil aircraft sector,[24] or Doak Bishop and Ben Love's analysis of the use of soft law by investor-state arbitrators.[25] Some see new forms of global governance or describe old ones in new ways. For instance, Claire Kelly and Sungjoon Cho describe the G20 as the helm of a new global governance order that intersects with the WTO, UNCTAD and OECD.[26] David Zaring compares global regimes that deploy rule-making techniques with those who use adjudication.[27] Some, like Jessica Lawrence, Gareth Davies and Laurens Ankersmit, Elizabeth Trujillo, and Valentina S. Vadi explore fragmentations dilemmas posed by our disparate schemes for global governance.[28]

Still others address the issue of why multilateral

22. Nancy A. Welsh & Andrea K. Schneider, The Application of Dispute System Design Principles and Procedural Justice Theories to the Potential Use of Mediation and Other Consensual Processes in the Investor-State Context (unpublished manuscript) (on file with the Minnesota Journal of International Law).

23. Krista Nadakavukaren Schefer, Responsibility to Protect: A New Direction for International (Economic) Law? (unpublished manuscript) (on file with the Minnesota Journal of International Law).

24. Michelle Ratton Sanchez Badin, Public and Private Actors Redefining the WTO Adjudicatory System Role in the Global Arena: Examples from the Civil Aircraft Business (unpublished manuscript) (on file with the Minnesota Journal of International Law).

25. R. Doak Bishop & Ben Love, Abstract, The Increasing Influence of Soft Law in International Disputes (unpublished manuscript) (on file with the Minnesota Journal of International Law).

26. Sungjoon Cho & Claire R. Kelly, Promises and Perils of New Global Governance: A Case of the G20(unpublished manuscript) (on file with the Minnesota Journal of International Law).

27. David Zaring, Developing Paradigms For Thinking About International Financial Regulation (unpublished manuscript) (on file with the Minnesota Journal of International Law).

28. Laurens Ankersmit, Jessica Lawrence & Gareth Davies, Diverging EU and WTO Perspectives on Extraterritorial Process Regulation (Nov. 4, 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law); Elizabeth Trujillo, Abstract, Tuna/Dolphin Revisited: Trade Implications for Climate Change Regulation (unpublished manuscript) (on file with the Minnesota Journal of International Law); Valentina S. Vadi, Abstract, Unity in Diversity? Cultural Diversity Disputes and the Judicial Function in International Economic Law (unpublished manuscript) (on file with the Minnesota Journal of International Law).

regulation continues to elude us in distinct areas. This includes Odette Lienau's look at how basic notions of sovereignty constrain our solutions to sovereign debt problems,[29] Alexandra Koutoglidou's exploration of how immunity from execution, as "the last fortress, the last bastion of [s]tate immunity,"[30] continues to hinder international arbitral mechanisms, Chunbao Liu's examination of the challenges faced by those who seek to liberalize international labor flows,[31] Caroline Bradley's enumeration of the hazards of ad hoc efforts to develop transnational standards for financial regulation,[32] and Shashank Kumar and Mehana Sharafudeen's critical view of certain national laws seeking to protect intellectual property through extraterritorial effect.[33] Most of these authors take Henkin to heart; they too see the "S" word as a troublesome hindrance.

A closer look at some of the papers presented at this conference, however, suggests some cross-currents at odds with the expected Grotian narrative. Some of their authors describe, but do not endorse, the particular global regimes under consideration. Jide Nzelibe (who writes of the unholy alliance between Republicans and Democrats in the United States that has led to differing results with respect to U.S. participation in multilateral regimes),[34] Julian Ku (who criticizes judicial assumptions on the status of corporations),[35] Jason Yackee (who questions whether BITs promote flows of foreign direct

29. Odette Lienau, Emerging Norms of Sovereignty in International Debt (unpublished manuscript) (on file with the Minnesota Journal of International Law).

30. Alexandra Koutoglidou, Abstract, Foreign Investors' Right Of Access To International Justice vs. State Immunity From Execution (unpublished manuscript) (on file with the Minnesota Journal of International Law).

31. Chunbao Liu, Abstract, Liberalizing Labour Mobility Through Regional Trade Agreements: The Experience of China (unpublished manuscript) (on file with the Minnesota Journal of International Law).

32. Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INT'L L. (forthcoming 2011).

33. Shashank P. Kumar & Meghana Sharafudeen, Abstract, Extraterritoriality of Intellectual Property Law in an Era of Globalization: The Doctrine of "Manufacturing Fiction" and Goods in Transit (unpublished manuscript) (on file with the Minnesota Journal of International Law).

34. Jide Nzelibe, Strategic Globalization: International Law as an Extension of Domestic Political Conflict (unpublished manuscript) (on file with the Minnesota Journal of International Law).

35. Julian G. Ku, The Limits of Corporate Rights Under International Law (Nov. 7, 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

investment),[36] and Anu Bradford and Travis Bradford (who contend that multilateral negotiations on climate change are self-defeating),[37] evince no enthusiasm for the international regimes they address.

A number of the presenters remind us of the serious gaps—in coverage or effectiveness—of our existing forms of global governance, but do not propose that we fill these with more global law. Aunpam Chander, for example, addresses the problems of regulating cloud computing by focusing on very traditional conflict of laws questions, namely, which territory is best suited to address the question.[38] Some presenters appear to be entertaining second thoughts about the turn to global governance itself, questioning whether additional global regulation or binding international adjudication is really a good idea. Juscelino Colares, who identifies the limits of WTO adjudication as a source of the regime's strength,[39] Alexia Marks, who outlines the beneficial deterrence impact of national product liability laws,[40] Jarrod Wong, who examines the bottom-up aspects of clawback statutes on corporate governance without need for international regulation,[41] or Joseph Yackey, who suggests that extraterritorial national regulation for passive corruption might be a good idea,[42] fall into this camp.

Some presenters echo my theme here, namely that states are staging a comeback. Tania Voon's and Andrew Mitchell's

36. Jason Webb Yackee, Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence (Mar. 22, 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

37. Anu Bradford & Travis Bradford, The Peril of a Weak Climate Treaty: When Markets Will Do (Nov. 8, 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

38. Anupam Chander, Abstract, Law in the Cloud (unpublished manuscript) (on file with the Minnesota Journal of International Law).

39. Juscelino F. Colares, The Limits of WTO Adjudication: Is Compliance the Problem? (Oct. 25, 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

40. Alexia Brunet Marks, Check Please: Evaluating the Means of Deterrence in the Food Industry (unpublished manuscript) (on file with the Minnesota Journal of International Law).

41. Jarrod Wong, The International Phenomenon of Clawbacks (unpublished manuscript) (on file with the Minnesota Journal of International Law).

42. Joseph W. Yackey, Abstract, Passive Corruption and Transnational Firms: A Regulatory Analysis (unpublished manuscript) (on file with the Minnesota Journal of International Law).

paper on the Australian federal government's efforts to establish a company, majority owned by the government, to deliver superfast broadband services,[43] signals that even with respect to that most "global" of phenomena—the web—states are not helpless supplicants beholden to external developments and forms of regulation. Their paper reminds us that countries such as China appear to be surprisingly resilient when it comes to protecting themselves as sovereigns from the web's effects. Similarly, Efraim Chaiamish's paper on "state-run capitalism"[44] illustrates that states continue to exist as economic actors as a result, or independently of, the global economic crisis. Despite the rise of the market, states have not been privatized out of the picture. Mariana Prado's study of Brazilian privatization efforts with respect to the electricity versus telecommunications sectors takes us even further.[45] It is second-generation privatization scholarship, which demonstrates that, notwithstanding global efforts to encourage privation, governments retain considerable discretion regarding privatization and whether their actions remain subject to transnational scrutiny.

My own theme—the return of the state—is most directly suggested by Koutoglidou's paper on sovereign immunity,[46] Yackee's questioning the desirability of BITs,[47] and the work of Alvaro Santos, Nicole Foster, and John Baloro, which critiques international development policy from the perspective of the "South."[48] Some of these authors remind us that the

43. Andrew Mitchell & Tania Voon, International Trade Law Implications of Australia's National Broadband Network (unpublished manuscript) (on file with the Minnesota Journal of International Law).

44. EfraimChaiamish, Abstract, International Law and State Capitalism (unpublished manuscript) (on file with the Minnesota Journal of International Law).

45. Mariana Mota Prado, Transnational Influences on National Regulatory Reform in Large Developing Countries: Brazil's Contrasting Experiences in Electricity and Telecommunications Governance (Nov. 2010) (unpublished manuscript) (on file with the Minnesota Journal of International Law).

46. Koutoglidou, *supra* note 30.

47. Yackee, *supra* note 36.

48. Alvaro Santos, Carving out Policy Autonomy for Developing Countries in the WTO (unpublished manuscript) (on file with the Minnesota Journal of International Law); Nicole D. Foster, Abstract, The WTO, Developing Countries and the Problem of Development (unpublished manuscript) (on file with the Minnesota Journal of International Law); John Baloro, Abstract, The BIT Gold Rush: Emerging Voices of Dissent from the South with Specific Reference to the Experience of South Africa (unpublished manuscript) (on file

international investment regime—the contemporary regime that has displaced the WTO among critics of globalization and has been seen as the greatest threat to sovereignty—is actually in the throes of serious sovereign backlash. The regime most criticized for ignoring the will of states[49] has become the foremost example of their persistent power.

II. THE INTERNATIONAL INVESTMENT REGIME AND SOVEREIGNTY

The United States established its BIT program in the 1980s.[50] Though a latecomer to the investment regime, when the United States decided to join the movement away from trade-oriented treaties of Friendship, Commerce and Navigation (FCNs)—whose *raison d'etre* was undercut by the emergence of the GATT—to investment protection agreements, it elevated investor protection to a new high. The United States' early Model BITs of 1984-87 were the most investor-protective in the world.[51] Those treaties deployed every lawyerly device imaginable to achieve a single unitary object and purpose: to protect the foreign investor. Unlike many of the earlier European BITs, the U.S. Model BITs of 1984-87 protected the entry and post-entry treatment of investment.[52] These treaties gave investors the better of national and most favored treatment, subject only to delimited sectoral exceptions; provided additional assurances against any other discriminatory or arbitrary treatment; gave investors a treaty right to demand access to national court remedies; accorded them the better of any treatment accorded under national law, customary international law, and the absolute guarantees of "fair and equitable treatment" and "full protection and

with the Minnesota Journal of International Law).

49. *See, e.g.*, Press Release, Osgoode Hall Law School of Law, Public Statement on the International Investment Regime, at (Aug. 31, 2010), *available at* http://www.osgoode.yorku.ca/public_statement/. (expressing concern regarding the "hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.").

50. For a description of the origins of the U.S. BIT program, see Kenneth J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 7–43 (1992).

51. *See, e.g.,* José E. Alvarez, *The Evolving BIT*, 4 TRANSNATIONAL DISPUTE MGMT. 1, 2–6 (2010) (recalling the 1984 Model BIT's history and impact).

52. *See* VANDEVELDE, *supra* note 50, at 35 (remarking on concern that a tougher US BIT would be hard to negotiate when countries were familiar with the weaker European version).

security;" extended the Hull Rule assuring prompt, adequate and effective payment if expropriated to all measures, including indirect regulatory acts that were "tantamount to expropriation;" included a comprehensive umbrella clause that turned all breaches of host state-investor contracts into treaty breaches; and provided an iron-clad guarantee that violations of any of these rights could be taken at the option of the investor to international arbitration, notwithstanding any clause to the contrary in the investors' contract with the host state.[53] The U.S. Model BIT of that period set out to regulate the state. It set a new standard for investor protection that became widely emulated when the Berlin Wall fell and countries donned Thomas Friedman's "golden straightjacket"[54] as everyone sought to at least appear a capitalist.[55] Most of the U.S. BIT's measures to protect investors became standard during the golden age of the proliferation of BITs, namely the 1990s.[56]

Foreign investment protection is now practiced globally. Today, some 3000 international investment agreements (IIAs) exist, including BITs and investment chapters in free trade agreements (FTAs).[57] More countries are party to at least one BIT than are members of the WTO.[58] BITs are not just popular with Western capital exporting nations. Today's leading BIT nations include China and Egypt, as even developing nations have multilateral enterprises requiring protection elsewhere.[59]

53. José E. Alvarez, *The Once and Future Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 616 (Mahnoush H. Arsanjani, et al. eds.,) (forthcoming 2011).

54. *See* Thomas L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 101–11 (First Anchor Books 2000).

55. *See* Alvarez, *supra* note 53, at 614-23.

56. *Id*.; *See* Kenneth J. Vandevelde, *A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests*, Y.B. ON INT'L INV. L. & POL'Y 2008-2009 283, 284 (Karl P. Sauvant ed., 2009).

57. *See, e.g.,* United Nations Conference on Trade and Development, 2010, *World Investment Report 2010: Investing in a Low-Carbon Economy*, 81–82 [hereinafter World Investment Report 2010] (*available at* http://www.unctad.org/en/docs/wir2010_en.pdf).

58. *See, e.g.,* Trade and Development Board: Investment, Enterprise and Development Commission Multi-Year Expert Meeting on Investment for Development (UNCTAD), Geneva, Feb. 10-12, 2009, *The Development Dimension of International Investment Agreements*, 2, TD/B/C.II/MEM.3/2 (Dec. 2, 2008) (noting that 179 countries had entered into at least one investment protection agreement through 2008).

59. See, e.g., Lisa E. Sachs and Karl P. Sauvant, "BITs, DTTs, and FDI

Cuba has concluded more BITs than the U.S.,[60] and today, about a third of the total number of IIAs have been concluded between developing states.[61] Moreover, although the international investment regime consists largely of bilateral agreements, investment protections increasingly appear in multi-party agreements such as the Energy Charter[62] and the CAFTA.[63] The rights accorded investors also find significant support in multilateral instruments promulgated by the OECD, and the advice and actions of the IFC, the World Bank, the IMF, and regional development banks. Indeed, one scholar plausibly portrays the IMF and its approach to conditionality as a de facto international investment regulator.[64]

These international efforts also have a domestic component. As the annual UNCTAD surveys of domestic investment laws indicate, since 1992 when these studies began, the vast proportion of new regulatory changes were—consistent with the proliferation of BITs—"liberalization" or "promotion" measures.[65] Throughout the 1990s, UNCTAD characterized over 90 percent of national regulatory changes as intended to be more hospitable to aliens with capital.[66] In addition, starting in the mid-1990s but especially since 2000, the amount of investment treaty arbitrations disclosed to the public have dramatically increased.[67] Today, with over 350 known investor-state claims either pending or concluded,[68] the driving force of international investment law is not the proliferation of treaties or the adoption of liberalizing national laws, but is rather, the ever more abundant (and usually effective) arbitral awards.

Flows: An Overview," in The Effect of Treaties on Foreign Direct Investment xxvii, at xxx fig. 8 (Karl P. Sauvant and Lisa E. Sachs, ed. 2009) (table of ten countries with highest number of BITs).

60. World Investment Report 2010, *supra* note 57, at 178, 181.

61. *Id.* at 177-81.

62. *See generally* About the 1994 Energy Charter, ENERGY CHARTER, http://www.encharter.org/index.php?id=28.

63. *See generally* Dominican Republic-Central America Free Trade Agreement (CAFTA), Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta.

64. *See* Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 SOC. & LEG. STUD. 104, 113-119 (2004).Daniel Kalderimis, "IMF Conditionality as Investment Regulation: A Theoretical Analysis," 13 Soc. & Leg. Stud. 104, at 113-19 (2004).

65. World Investment Report 2010, *supra* note 57, at 76

66. *Id.*

67. *Id.* at 84.

68. *Id.*

These rulings have considerably elaborated the bare bones guarantees contained in BITs or FTAs.

History, however, did not stop with the end of the Cold War. As Yackee's paper in particular reminds us, the international investment regime has been the victim of its own success and is buffeted by opposing cross currents.[69] The proliferation of investor-state disputes have come with a price: many of the states that established the regime are having second thoughts about the amount of sovereign "policy space" they have ceded. Many are exercising some of their exit and voice options (this includes, as we shall see, most prominently the regime's once most prominent cheerleader, the United States, which is, at this writing, among the most frequent respondent states under investor-state dispute settlement).[70] To be sure, states have not stopped concluding BITs and they have not ceased making their national laws and practices investor-friendly. Over the course of 2009 alone, states concluded eighty-two new BITs along with another twenty IIAs.[71] UNCTAD's latest report of national policy developments tells us that in that year, of 102 policy measures affecting FDI, a little less than 70 percent supported its liberalization and promotion.[72]

At the same time, the report indicates that more than 30 percent of national policy changes surveyed were in the opposite direction, providing for greater regulation and restriction, the highest proportion since UNCTAD began its surveys in 1992.[73] UNCTAD's examples of these restrictions reveal how some countries are re-asserting their "sovereign rights" vis-à-vis foreign investors. Measures enacted in 2009 that restricted the entry of foreign investors included Algeria's new requirement of a 49 percent equity share limit on foreign investors seeking to produce for the domestic market; Australia's tightening of its rules on foreign investment in residential real estate; and Canada's and Germany's revisions

69. Yackee, *supra* note 36.

70. According to UNCTAD, by the end of 2009, the number of countries subject to known investor-state claims stood at eighty-one (including 489 developing countries, 17 developed countries and 15 economies in transition). World Investment Report 2010, *supra* note 57, at 83.

71. World Investment Report 2010, *supra* note 57, at 82.

72. *Id.*, at 76.

73. By comparison, according to UNCTAD's annual surveys, in 2000 only 2 percent of national investment measures were non-liberalizing or restrictive. *Id.* fig.III.1.

to their respective laws to authorize governmental review of investments that impair or threaten national security.[74] Meanwhile, measures in that year adversely affecting established investors included Bolivia's nationalization of several electric generation companies; Venezuela's nationalization of a foreign controlled bank; Indonesia's requirement for divestment of foreign investments in mining to local parties; Kazakhstan's imposition of Kazakh content requirements and its requirement that Kazakh service provides need to employ no less than 95 percent Kazakh nationals; and Nigeria's domestic content requirements with respect to oil and gas.[75]

Furthermore, the fact that many states continue to enter into BITs or FTAs is a bit misleading. The most recent crop of these treaties tends not to resemble the investor-protective U.S. Model BIT of 1984. Instead, many recent investment protection treaties accord FDI host states greater room to maneuver,[76] while simultaneously granting foreign investors fewer rights.[77] The changes to the U.S. Model BIT over time—clearly manifested if we use the language of the U.S. Model BIT of 1984 for comparison, from the heyday of investor-protection, to the considerably more hedged terms of its Model BIT of 2004—suggest what is happening elsewhere.[78] If the United States led the charge in favor of investor protections, it now appears to be leading the drive in the opposite direction. The 2004 U.S. Model BIT is at least twice as long as it once was—and as every lawyer knows, the length of a treaty is often inversely related to the rights that it accords. The 2004 U.S. Model BIT has now shrunk, sometimes dramatically, virtually every right originally accorded to foreign investors while at the same time increasing, sometimes vastly, the discretion accorded host states. That Model:

- "re-balances" through preamblar language and exceptions, the rights accorded investors in favor of states' rights to protect health, safety, and the environment;

74. *Id.* at 80 box III.4

75. *Id.*, box III.5.

76. *See, e.g.,* OECD, Novel Features in OECD Countries' Recent Investment Agreements: An Overview, 12 Dec. 2005, para. 10.

77. *See, e.g., id.* para. 1577.

78. For a comparison chart of the two texts, see Annex A, *supra* note 51, at 22–32.

- narrows the definition of covered investment by, for example, excluding some forms of debt or licenses;
- narrows national and MFN treatment by, for example, imposing fewer constraints on the sectors that a state can exclude from such obligations, exempting local government measures, and by indicating that the MFN clause in post 2004 BITs does not provide investors under them the right to claim any better rights accorded under the US's older BITs;
- eliminates the additional protection against arbitrary or discriminatory measures;
- eliminates the umbrella clause;
- reduces the scope of fair and equitable treatment and full protection and security guarantees to those which would have been accorded under the "customary international law minimum standard of treatment of aliens;"
- omits the old provision assuring investors' rights to pursue claims in national courts;
- excludes from investor-state dispute settlement any claims based on denial of transparency in administrative proceedings;
- restricts the scope of cognizable regulatory takings claims, indicating that "except in rare circumstances," non-discriminatory regulatory actions taken to protect public welfare do not constitute an indirect taking;
- requires investors to first seek the approval of government tax authorities before taking certain investment claims based on tax measures to arbitration;
- otherwise restricts the ambit of investment arbitrators' discretion and/or elevating the costs of bringing such claims by imposing new 90 day notice of claims, a three year statute of limitations, and new transparency and participation requirements;
- permits the state parties to the treaty to issue binding interpretations of their agreement, even in anticipation of known claims or in the course of pending arbitrations;
- permits state parties to invoke much more expansive exceptions to justify measures "relating to financial services for prudential reasons;" "in pursuit of monetary and related credit policies or exchange rate

policies;" and to protect their "essential security."[79]

As a result of these changes, it is hard to say exactly what the object and purpose of the 2004 U.S. Model BIT is. The combination of the changes to its preamble, more restricted investor rights, and its more expansive list of state exceptions, suggest that its object and purpose now includes the right of host states to regulate as they please. The elevation of the power of the host state is perhaps most evident with respect to the United States' efforts to clarify that a state's decision to invoke "essential security" to justify any measure, no matter how detrimental to a foreign investor's rights, is a non-reviewable, self-judging action that renders an investor's arbitration claim inadmissible.[80]

As with respect to its pro-investor Model predecessor, the United States is influencing other countries' Model BITs by the power of its example. If the world's leading capital exporter, the state responsible for establishing the Hull Rule, for discrediting the Calvo Clause, and for creating a perfected investor-state arbitration clause is now emphasizing the need to protect its sovereign prerogatives, others are sure to follow. They have. The latest Canadian Model Investment Protection Treaty closely resembles the 2004 U.S. Model,[81] and many of the sovereign-protective innovations in post-2004 U.S. investment agreements are now appearing in recent Chinese treaties, including those between China and Mexico, China and New Zealand, and China and India.[82] UNCTAD's latest investment

79. *See* Alvarez, *supra* note 51, at 9-11.

80. *See* 2004 U.S. Model BIT, art. 18 http://www.state.gov/documents/organization/117601.pdf (permitting a state party to take measures "which it considers" necessary to protect its "essential security"). Note that the self-judging nature of this exception is made even more express in the 2006 Peru-U.S. FTA which, in addition, provides that "if a party invokes [the essential security clause] in an arbitral proceeding . . . the tribunal or panel hearing the matter shall find that the exception applies." U.S.-Peru Trade Promotion Agreement, June 28, 2007, 22-1 n.2 (*available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file841_9542.pdf). For a discussion of the evolving position of the U.S. toward the "essential security" exception contained in its investment treaties, see José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse Into the Heart of the Investment Regime*, *in* Y.B. ON INT'L INV. L. & POL'Y 2008-2009 379, 421–24 (Karl P. Sauvant ed., 2009).

81. *Compare* Canada 2004 Model Foreign Investment Protection Agreement, http://ita.law.uvic.ca/documents/ Canadian2004-FIPA-model-en.pdf), *with* 2004 U.S. Model BIT, http://www.state.gov/documents/organizati on/ 117601.pdf.

82. Alvarez, *supra* note 51, at 12.

report tells us that Russia, France, Columbia, Mexico, Austria and Germany have all recently concluded a review process of their respective model BITs while comparable reviews are ongoing in Argentina, Venezuela, Ecuador, Morocco, Bolivia, South Africa and Turkey.[83] In most cases, the stated reasons are to ensure consistency with the public interest, adjust the old model to new developments, and seek a "balance between protecting investor and host country."[84] Like the changes to the U.S. Model, more recent BITs include more general exceptions that allow host states greater regulatory space, restrictions (or "clarifications") to specific investor rights, and greater carve outs from investor-state arbitration.[85]

The power of the U.S. example has also been felt with respect to the screening of incoming foreign investment to protect the states' "essential" or "national security" interests. The United States, which adopted an elaborate statutory scheme permitting the President to bar mergers and acquisitions involving foreign investors that pose such threats, strengthened its scrutiny over incoming investments after the Dubai Ports deal debacle and perceived threats from the entry of state-owned enterprises, particularly from China.[86] As a result, in the United States today, more potential M&As involving a foreigner are scrutinized, delayed, or, in rare instances, derailed, under governmental scrutiny.[87] Other states are following the U.S. lead in adopting or strengthening their own national security screening mechanisms.[88] Countries,

83. World Investment Report 2010, *supra* note 57, at 85.

84. *Id.*

85. *Id.* at 86–88.,

86. *See, e.g.,* Mark E. Plotkin & David N. Fagan, *Foreign Direct Investment and U.S. National Security: CFIUS Under the Obama Administration*, 24 COLUM. FDI PERSP., No. 24, June 7, 2010, http://www.vcc.columbia.edu/files/vale/print/Fagan_and_Plotkin-_Final_0.pdf [hereinafter FDI and U.S. National Security]; Mark E. Plotkin & David N. Fagan, *The Revised National Security Review Process for FDI in the US*, COLUM. FDI PERSP., No. 2, Jan. 7, 2009, http://www.vcc.columbia.edu/pubs/documents/Perspective2-PlotkinandFagan.pdf.

87. *See FDI and U.S. National Security*, *supra* note 86 (indicating that the United States has escalated the percentage of transactions that proceed to the second stage, a 45 day investigation before the CFIUS, and that the pace of such reviews has slowed down "materially" in 2009).

88. *See, e.g.,* Subrata Bhattacharjee, *National Security with a Canadian Twist: The Investment Canada Act and the New National Security Review Test*, COLUM. FDI PERSP., No 10, July 30 2009, http://www.vcc.columbia.edu/files/ vale/print/ICA_Perspective-_Final.pdf.

including the United States, tend not to adopt clear definitions of what exactly threatens their "security" or, particularly after 9/11, transparent procedures for making such determinations. These factors, particularly when combined with the self-judging element essential to security clauses in BITs, threaten to eviscerate the right of entry once enjoyed by foreign investors (at least under older U.S. BITs). Of course, many countries, including Canada, have a long history of screening incoming foreign investment on a variety of other grounds; national security is merely the latest governmental tool.[89]

BIT signatories have also found other ways to re-assert their sovereign prerogatives. In January 2008, Ecuador expressed its intention to withdraw from its BITS with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania, and Uruguay.[90] That country's constitutional court ruled another four BITs unconstitutional and Ecuador has further withdrawn from the ICSID Convention.[91] Bolivia has similarly withdrawn from ICSID.[92] For its part, Venezuela, along with some of its Andean neighbors, has introduced significant changes to its national laws in derogation of the rights of foreign investors while refusing to renew its BIT with the Netherlands.[93] Russia

89. *See id.*

90. World Investment Report 2010, *supra* note 57, at 85.

91. *Id.* at 85–86. Ecuador withdrew from the ICSID Convention in January 2010. Joshua M. Robbins, *Ecuador Withdraws from ICSID Convention*, PRACTICAL LAW COMPANY (12-Aug-2009), http://arbitration.practicallaw.com/2-422-1266.

92. For a discussion of the implications of Bolivia's May 2, 2007 notice to the World Bank indicating its intent to withdraw from ICSID, see Marco E. Schnabl & Julie Bédard, *The Wrong Kind of 'Interesting'*, NAT'L L. J. (London), Jul. 30, 2007 (*available at* http://www.arbitralwomen.org/files/publication/1910231238362.pdf). For a description of other developments demonstrative of sovereign "backlash" against the investment regime, see, e.g., Karl P. Sauvant, *Regulatory Risk and the Growth of FDI*, *in* WORLD INVESTMENT PROSPECTS TO 2011: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF POLITICAL RISK 67 (*available at* http://www.vcc.columbia.edu/pubs/documents/WorldInvestmentProspectsto2011.pdf).

93. For an account of the changes in foreign investment laws in Venezuela and other Andean countries, see Leonardo Stanley, Natural Resources & Foreign Investors: A *Tale of Three Andean Countries*, WORKING GROUP ON DEV. & ENV'T IN THE AMERICAS, Discussion Paper 16 (April 2008), http://ase.tufts.edu/gdae/Pubs/rp/DP16StanleyApr08.pdf. For an analysis of the implications of Venezuela's termination of its BIT with the Netherlands, see Ramon Ramirez Quijada, *The "Survival Clause" In the Netherlands-Venezuelan BIT: A Salvation Gateway for Foreign Investment in the Oil Sector or a Curse for the Venezuelan Government?*, CTR. FOR ENERGY, PETROLEUM &

decided not to become a party to the Energy Charter, while several European countries have abrogated intra-EU BITs.[94] Indeed, renegotiating old BITs is now keeping a number of foreign ministries busy.[95] UNCTAD reports that nineteen BITs were renegotiated in 2009 alone, with the Czech Republic being the most active.[96]

Nor is this the end of the story. At this writing, the U.S. Model BIT remains a work in progress and may continue to evolve. Back in the United States, the Obama Administration has suspended at least some pending BIT negotiations while it undertakes yet another review of the 2004 U.S. Model BIT.[97] A recent divided and inconclusive advisory committee report to the U.S. State Department makes it doubtful that the Administration will release a revised U.S. model any time soon.[98] That report, like recent testimony before Congress, revealed sharp divisions between business representatives and the regime's critics, including representatives of the labor movement, academics and NGOs.[99] While business groups would welcome a return to the more investor-protective provisions of earlier U.S. Model BITs, others contend that the post-2004 changes to U.S. agreements do not go far enough to protect sovereign "policy space."[100] Some recommend adopting a general exceptions clause comparable to that in Article XX of the GATT, replacing absolute guarantees like fair and equitable treatment with a simple ban on discrimination,

MINERAL L. & POL'Y, 1 (June 4, 2009), http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-12_29_262236660.pdf.

94. World Investment Report 2010, *supra* note 57, at 86.

95. *See* Ravinder Casley Gera, *International Investment: End of the Boom?* 22 CHAMBERS MAGAZINE (London) (2007) (*available at* http://www.chambersmagazine.co.uk/Article/International-arbitration-INVESTMENT-ARBITRATION---The-end-of-the-boom).

96. World Investment Report 2010, *supra* note 57, at 86.

97. *See, e.g.,* "US Suspends *Talks on BIT with Pakistan*, PAK. TRIB. (Lahore), Sept. 17, 2010, http://www.paktribune.com/news/index.shtml?231620 .http://www.bilaterals.org/spip.php?page=print&id_article=18130http://www.bilaterals.org/spip.php?page=print&id_article=18130.

98. *See* Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, Sept. 30, 2009, *available at* http://www.state.gov/e/eeb/rls/othr/2009/131118.htm ("The key reality reflected very clearly in our twenty-four page Subcommittee report is that our group was divided on the most fundamental question.").

99. *See id*, annex B (providing viewpoints of subcommittee members).

100. *See, e.g.*, *id*. (statement of Shaun Donnelly, Senior Dir. for Int'l Bus. Pol'y, Nat'l Ass'n of Mfg.).

requiring investors to exhaust local remedies prior to seeking international arbitration, or, most radical of all, eliminating investor-state dispute settlement altogether in deference to resolution by the local courts of the host state.[101]

Business groups fear that at some point the effort to protect sovereign discretion will render a BIT negotiation an entirely pointless exercise. That such an outcome is possible is suggested by the example of Norway, which in 2007, released a model BIT so protective of Norway's sovereign prerogatives to regulate that Norwegian business groups withdrew their support from the effort.[102] Norway's effort to please all sides ended with a suspended BIT program. For some, the 2004 U.S. Model BIT may have already gone too far in the direction of protecting sovereign discretion.[103] Daniel Price, a former BIT negotiator, fears that changes to the U.S. Model will only lessen the value of these treaties; he argues that a BIT that merely affirms that investors have the right to be treated like all other national investors and have their rights decided only by local courts returns us to the days of Carlos Calvo, when South American states reacted to U.S. gunboat diplomacy in favor of U.S. investors by refusing to participate in international arbitration altogether.[104] Despite Price's fears, the odds are good that if the United States were to release a new model treaty, the starting point will be the 2004 model and more sovereignty-protective changes will be added.

But if, as indicated, international investment law is driven by the jurisprudence produced by investment arbitrators, does that jurisprudence provide a firewall to protect foreign investors against trends in favor of "re-balancing?" This is far from clear. Consider, by way of example, three of the most recent annulment rulings rendered in the on-going saga of the

101. For background on the Subcommittee and the options being urged on the U.S. as it reviews its BIT program, see Kevin P. Gallagher, *U.S. BITs and Financial Stability*, COLUM. FDI PERSP., No 19, Feb. 23, 2010, http://www.vcc.columbia.edu/files/vale/print/Gallagher-_Final.pdf.

102. *See, e.g.*, Damon Vis-Dunbar, Norway *S*helves its *Draft Model Bilateral Investment Treaty*, Investment Treaty News, (Int'l Inst. for Sustainable Dev., Geneva, Switz.), June 8, 2009, at 7, http://www.iisd.org/itn/wp-content/uploads/2009/06/ITN-June-2009.pdf.

103. *See, e.g.*, Stephen M. Schwebel, The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law, 3 Transnational Dispute Management, Apr. 2006 (online journal article at transnational-dispute-management.com).

104. *See* Daniel M. Price, Keep *International Protections; Bilateral Treaties and Free Trade Agreements Are Key*, WASH. TIMES, May 14, 2009, at A17.

leading respondent state in investor-state arbitration, Argentina. All of these cases involved claims by U.S. companies operating privatized utilities in Argentina. In all cases, the underlying claims, involving alleged breaches of the umbrella clause, fair and equitable treatment, and expropriation clauses of the U.S.-Argentina BIT, resulted from Argentina's "emergency legislation," adopted in response to the country's economic and political crisis starting in 2001.[105] In all cases, a principal issue concerned the interpretation of the treaty's 'measures not precluded clause' which permits state parties to take measures to maintain public order or to protect their essential security interests.[106] The three underlying decisions under challenge before ICSID annulment committees involved the companies of CMS, Sempra, and Enron; all three had rendered multi-million dollar decisions in favor of the U.S. claimants.[107] All three panels decided that the measures not precluded clause in the U.S.-Argentina BIT should be read in light of the underlying customary defense of necessity, requiring states to demonstrate that any measures taken in response to an essential or grave peril were the "only" measures possible and that the state invoking such measures did not significantly contribute to the underlying peril.[108]

The first annulment decision, in CMS, upheld the underlying award but not without extensive dicta indicating that had the scope of review been more generous and not restricted as it is under ICSID, they would have found the original panel's ruling as to the meaning of the measures not precluded clause to have been erroneous.[109] The CMS annulment committee opined that it was wrong to equate the

105. For a thorough description of these cases, see Alvarez & Khamsi, supra note 80, at 379–407.

106. Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124 (1992) [hereinafter U.S.-Arg. BIT].

107. Sempra Energy Int'l. v. Argentine Rep. (*Sempra Decision*), ICSID Case No. ARB/02/16, Award, para. 486 (Sept. 28, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action Val=showDoc&docId =DC694_En&caseId=C8; Enron Corp., Ponderosa Assets, L.P. v. Argentine Rep. (*Enron Decision*), ICSID Case No. ARB/01/3, Award, para. 450 (May 22, 2007), http://ita.law.uvic.ca/documents/Enron-Award.pdf; CMS Transmission Co. v. Argentine Rep. (*CMS Decision*), ICSID Case No. ARB/01/8, Award, para. 472 (May 12, 2005), 14 ICSID Rep. 152 (2009).

108. *See* Alvarez & Khamsi, supra note 80 , at 396–402.396-402.

109. *CMS Decision*, ICSID Case No. ARB/01/8, paras. 120–27, 129–36, 144–49.

treaty clause—which in their view was a "primary" rule obviating liability—to the secondary rule contained in the customary defense of necessity (which arguably does not eliminate liability even when properly invoked).[110]

The second annulment decision, in Sempra, applied the dicta of the CMS decision and decided that the original Sempra panel manifestly exceeded its powers in applying the customary defense of necessity instead of the measures not precluded clause of the BIT.[111] It annulled the award in its entirety.[112]

The third annulment decision, in Enron, upheld the underlying finding that the measures not precluded clause of the U.S.-Argentina BIT should be read in light of the customary defense of necessity.[113] To this extent, the Enron annulment committee rejected both the dicta in the CMS annulment and the Sempra annulment ruling. However, the Enron annulment committee nonetheless annulled the underlying Enron award on a different ground. It found that the original panel had failed to apply the relevant law because it relied on the wrong reasons and the wrong evidence in rejecting Argentina's customary defense of necessity.[114] The Enron annulment committee ruled that the original panel did not address the meaning of the customary defense's requirement that the state relying on the defense not have "contributed to the situation of necessity."[115] It found that the panel had erroneously relied on evidence presented by an economic expert who failed to address the underlying legal questions, such as whether the aspect of the defense requires the state to have been shown to be "blameworthy" for its conduct, "regardless of whether or not the State could have in any way foreseen that its conduct would contribute to a situation of necessity."[116]

All of these annulment rulings evince strongly sovereignty protective interpretations of the U.S.-Argentina BIT. All three come up with striking and surprising conclusions in the context of a treaty that is, on all relevant matters, indistinguishable from the strongly investor-protective U.S. Model of 1984.

110. *Id.* paras. 130–33,130-33, 146.
111. *Sempra Decision*, ICSID Case No. ARB/02/16, paras. 216–19, 221–22.
112. *Id.*
113. *Enron Decision*, ICSID Case No. ARB/01/3, para. 356.
114. *Id.* paras. 368-95.
115. *Id.* paras. 385–94.
116. *Id.* para. 387.

Whether or not the annulment committees came to the proper conclusion—and, of course, this is doubtful given the differences among them—these decisions demonstrate that at least some investor-state arbitral decisions are also now serving to re-empower the state. These annulment rulings do so in three different ways.

As indicated, the CMS annulment formally upheld the investor's award. However, by going out of its way to severely criticize the legal merits of that award, the CMS annulment committee, consciously or not, made enforcement of the original award considerably more difficult. Whether or not the CMS annulment committee intended the result, the underlying award in this case (as well as others rendered against Argentina) have not been paid.[117] As Koutoglidou's paper reminds us, it is always hard to secure payment from an entity that enjoys sovereign immunity.[118] Although ICSID awards are more enforceable than most international obligations, they are not immune from the fundamental weakness of all such obligations: namely, that enforcement rests in the end on the legitimacy of the obligation and a state's desire to comply.[119] By casting doubt on the legitimacy of the underlying award, the CMS annulment committee made it easier for Argentine authorities to justify their continued refusal to pay. This annulment decision, in effect, licensed Argentina's continued civil disobedience. Indeed, even assuming that the Argentine authorities had been inclined to comply with the underlying award if it had survived the annulment process, the CMS annulment's criticisms of the basis for the award renders the public payment of such an award by a democratically accountable body much more difficult to explain to Argentine taxpayers. The CMS annulment, in short, empowers state defiance of the law.

The Sempra award defers to state sovereignty in a different way. Its controversial finding that what it deems to be

117. *See, e.g.*, Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449, 469 (2007) (quoting Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARBITRATION 1, 2 (2006)) (explaining that the Argentine Ministry of Economy has taken the position that all such awards are subject to local court review in Argentina because they are "'unconstitutional, illegal or unreasonable.'").

118. Koutoglidou, *supra* note 30.

119. *See, e.g.*, Goodman, supra note 117, at 465–469; ;Baldwin, *supra* note 117.

an erroneous interpretation of the measures not precluded clause constitutes a manifest "excess of powers,"[120] and therefore requires annulment, threatens to turn the limited ICSID annulment process into a forum for full appellate review of the legal findings issued by original ICSID panels. This is, as is suggested by the CMS annulment ruling, not consistent with what the states agreed to pursuant to the ICSID Convention or the U.S.-Argentina BIT itself in reliance on that Convention.[121] Moreover, the Sempra annulment's finding that the measures not precluded clause does not mean the customary defense of necessity,[122] appears to be a re-interpretation of the treaty in light of what one of the state parties now argues is the case, instead of an effort to give effect to what both of the parties intended when they concluded their agreement in 1991.[123] This is a highly contestable approach to treaty interpretation.[124]

There does not appear to be any evidence that both parties to the U.S.-Argentina BIT share a common view of what should be the proper meaning of its measures not precluded clause even today. Of course, the traditional rules of treaty interpretation license resort to the "subsequent practice of the parties."[125] As the plural indicates, these rules do not license interpretation based on the current views of one of the treaty parties and those rules do not authorize treaty interpreters to speculate about what might be the views of both state parties in the absence of evidence. The apparent contemporary view of the U.S. Executive branch (as expressed in a letter written after the Argentina claims were submitted and in the course of another claim) was that a state party's reliance on the measures not precluded clause of a U.S. BIT would render the underlying dispute inadmissible or non-justiciable since that

120. *Sempra Decision*, ICSID Case No. ARB/02/16, Annulment Decision, para. 219 (June 29, 2010).

121. *CMS Decision*, ICSID Case No. ARB/01/8, paras. 135–36 (Sept. 25, 2007), 14 ICSID Rep. 251 (2009).

122. *Sempra Decision*, ICSID Case No. ARB/02/16, paras. 198–200, 208–09.

123. *Cf*. Alvarez & Khamsi, *supra* note 80, at 427–440.

124. *But see* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L.AJIL 179 (2010) (proposing to "recalibrate the interpretative between states and tribunals" by increasing tribunals' reliance on the subsequent practice of states even when that subsequent practice is in the context of other BITs or where the "common practice" of the states in question is determined by their separate practices).

125. Vienna Convention on the Law of Treaties, art. 31(3)(a), May 31, 1969, 1155 U.N.T.S 331, 8 I.L.M. 679.

question was not subject to review by an arbitral body.[126] Although Argentina in the course of the proceedings discussed here also made the same claim, it accepted, in the Sempra case among others that arbitral tribunals have the power to examine whether Argentina's invocation of necessity was in good faith.[127] Interestingly, none of the tribunals, including on annulment, accepted either of these contentions by the United States or Argentina. None accepted the proposition that invocation of the measures not precluded clause renders an underlying dispute inadmissible or non-justiciable and none accepted the alternative argument that arbitral review was limited to an examination of whether a party invokes this clause in good faith.[128]

The *Sempra* annulment committee's interpretation of the relevant clause cannot therefore be justified on the basis of the subsequent practice of the parties. There is no evidence cited that both the United States and Argentina were of the entirely different view, which ultimately convinced the annulment committee, that the measures not precluded clause was a rule of *lex specialis* intended to depart from the ordinarily applicable rule, namely the customary defense of necessity (indeed, given the U.S. government's position, expressed in BITs concluded after the U.S.-Argentina BIT, that the measures not precluded clause is wholly self-judging, that government apparently sees no need even today to take a position on that question).

Moreover, there is an even more fundamental objection to the conclusion reached in the *Sempra* annulment. Even assuming that the state parties had reached a common understanding concerning the meaning of the measures not precluded clause in their treaty, it is very doubtful that such a view, nowhere expressed as an amendment to the treaty or

126. *Sempra Decision*, ICSID Case No. ARB/02/16, para. 382 (quoting part of a letter from James H. Thessin, Principal Deputy Legal Adviser and Designated Agency Ethics Official, United States Department of State, to Abraham D. Sofaer, dated Sept. 15, 2006 (stating: "notwithstanding the decision of the ICJ in the Nicaragua case, the position of the U.S. Government is that the essential security language in our FCN treaties and Bilateral Investment Treaties is self-judging, i.e., only the party itself is competent to determine what is in its own essential security interests.").).

127. *See, e.g.*, *Sempra Decision*, ICSID Case No. ARB/02/16, paras. 297–298.

128. *See* Alvarez & Khamsi, supra note 80, at 417–26; *see also* José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, Y.B. INT'L INVESTMENT L. & POL. 2010-2011 (2011), *available at* investmentclaims.com.

licensed as a binding understanding that can bind investment arbitrators in the U.S.-Argentina BIT (as compared to the NAFTA for example),[129] should retroactively be applied such as to affect the rights of a third party investor who relies on a different original understanding when making its investment.[130] For these reasons, the Sempra annulment ruling wrongly empowers the state through a retroactive re-interpretation not clearly endorsed by the subsequent practice of the parties and also derogates from the rights that the treaty originally accorded to a third party.

The Enron annulment ruling may be the most expansive precedent in deference to sovereignty of the three. While that decision avoids some of the flaws committed by the CMS or Sempra annulment committees, it potentially expands the scope of the customary defense of necessity. That defense, as is well known, applies to all international obligations not subject to special *lex specialis* rules.[131] Although the precise rationale of the Enron findings on this point is not altogether clear, the annulment committee suggested that the underlying panel had not clarified what amounts to "fault" in the context of contribution to the situation of necessity.[132] It further faulted that tribunal for not answering questions such as the following: "Must the conduct of the State in question be deliberate (in the sense of being deliberately intended to bring about the situation of necessity), or does it suffice that the conduct was reckless or negligent, or is some even lesser degree of fault sufficient?"[133] It also accused the original tribunal of "cursory

129. North American Free Trade Agreement, art. 1131(2), Dec. 17, 1992, 32 I.L.M. 289 (1993) (authorizing the parties to issue binding interpretations of the treaty).

130. Even Roberts, who generally supports the use of states' subsequent practices in the context of interpreting BITs, expresses doubts about whether practices that effectively amend a treaty undertaken after an investor has made its investment, should be permitted to detrimentally affect the settled expectations of the investor through retroactive application. *See* Roberts, *supra* note 124 , at 212-13 (arguing that late and unreasonable interpretations should only have prospective effect).

131. *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 178–186, 306–308 (2002) (commenting on the ILC's articles 25, "*Necessity*," and 55, "*Lex specialis*").

132. *Enron Decision*, ICSID Case No. ARB/01/3, Annulment Decision, paras. 385–
90 (July 30, 2010), http://ita.law.uvic.ca/documents/EnronAnnulmentDecision.pdf.

133. *Id.* para. 389.

reasoning," insofar as it accepted the testimony of an economic expert for the conclusion that "Argentina's own 'misguided' policies contributed to the magnitude of the economic crisis,"[134] and indicated that an economist's conclusion was not relevant to a determination that, as a matter of law, the state had contributed to the situation of necessity.[135]

What is most surprising about the *Enron* annulment is that it does not appear that any of these interpretative questions were raised by the litigants themselves and argued before the original panel. The *Enron* annulment appears to make new law insofar as it finds that economic evidence cannot serve to justify an application of a legal rule, namely the customary defense of necessity.[136] That annulment ruling also fails to address clearly the issue of burden of proof. Prior to this decision, most assumed that the burden of proving an affirmative defense like the customary defense of necessity rested on the party invoking it.[137] (This would appear to be all the more the case to the extent the *Enron* annulment committee is suggesting that the motivation for the underlying Argentine actions that allegedly contributed to the situation of necessity might be relevant since Argentina is presumably in the best position to prove whether its contributing actions were negligent or deliberate.) The *Enron* annulment, however, says nothing about the traditional allocation of burden of proof but the committee was apparently not swayed by the fact that Argentina failed to prove that it had not contributed to the situation of necessity. This suggests that, for the annulment committee, the burden of proof on this point rests with the claimant. Finally, the *Enron* annulment says nothing about the contention, based on the ILC's articles of state responsibility, that even assuming the defense of necessity had been properly invoked, this does not absolve the invoking state from any

134. *Id.* para. 392.

135. *See id.* para. 393 (explaining that other evidence besides the expert's testimony should have been taken into consideration when making the determination that the state had contributed to the situation of necessity).

136. *See id.* paras. 391–393 ("While an economist might regard a State's economic policies as misguided, and might conclude that such policies led to or amplified the effects of an economic crisis, that would not of itself necessarily mean that as matter of law, the State had '*contributed to the situation of necessity*' such as to preclude reliance on the principle of necessity under customary international law.").

137. *See* Alvarez & Khamsi, *supra* note 80, at 473.

financial liability otherwise due.[138] The fact that the financial award was annulled suggests that this annulment committee assumed otherwise.

Like the *Sempra* annulment, the *Enron* annulment empowers states by giving them a second bite at the apple despite the limited basis for annulment permitted under ICSID.[139] More troubling is the possibility that the *Enron* annulment may empower all states by making it easier to get out of most of their international obligations. The *Enron* annulment implies that the defense of necessity, formerly seen as an exceedingly and purposely narrow excuse that has to be affirmatively proven by those seeking to evade their international obligations and a defense that does not, in any case, absolve states from liability otherwise due, may be far more expansive in scope and effect as well as easier to invoke than was previously assumed—including by the International Law Commission when it drafted Article 25 codifying that defense.[140]

These arbitral rulings, among the few that have proceeded through the full ICSID annulment process, demonstrate that investor-state dispute settlement, long disparaged for its supposedly "pro-investor" bias, ultimately may bend to the will of those who built it, namely states. Investment arbitration was sold on the premise that, like U.S. passage of its Foreign Sovereign Immunities Act,[141] neutral apolitical adjudication would displace the politicized alternative, namely espousal of investor claims by the U.S. State Department.[142] The Argentina

138. *See* CRAWFORD, *supra* note 131, at 189–190.

139. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 52, Mar. 18, 1965, 575 U.N.T.S 159, 4 I.L.M. 532 (permitting annulment if the original "Tribunal was not properly constituted; . . . [it] manifestly exceeded its powers; . . . there was corruption on the part of a member of the Tribunal; . . . there has been a serious departure from a fundamental rule of procedure; . . . or the award has failed to state the reasons on which it is based.").

140. *See* CRAWFORD, *supra* note 131, at 178–186; *see also* Alvarez & Khamsi, *supra* note 80, at 396–404, 427–440, 455–60 (discussing the understanding and application of necessity under customary international law).

141. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583 §§ 1602–1605, 90 Stat. 2891, 2892 (codified at 28 U.S.C. §§ 1330, 1602–1605).

142. *See, e.g.*, Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. LAW. 159, at 160–61 (1993) ("[T]he function of the BIT was to insulate private investment from politically driven foreign or domestic public policy—in effect, to depoliticize investment matters by placing the protection of private investment under an apolitical

annulments—like some of those under the NAFTA involving the United States as respondent[143]—suggest that this was naïve. Politics does not stop at the door to ICSID. Investment arbitrators, which, after all, invariably include one appointed by the respondent state, do not necessarily ignore the political concerns of those who could, if sufficiently dissatisfied with the result, deploy their powers of exit and voice to undermine the entire edifice of investor-state dispute settlement. These arbitral decisions and possibly others can best be explained by one salient political reality: in the wake of the latest global economic crisis, BIT parties, including the United States, want discretion to respond to such crises through any means necessary.[144] The state parties to investment protection agreements—and at least some investment arbitrators—appear to view the Argentina crisis cases through different eyes. They are now saying to themselves, "there but for the grace of God go I."

A number of recent investor-state arbitral decisions confirm the trend towards "re-balancing." Another recent decision, again involving Argentina, reads the GATT XX jurisprudence, complete with its proportionality analysis, into the U.S.-Argentina BIT, to the benefit of the respondent state.[145] Moreover, even the underlying awards criticized or annulled in *CMS*, *Sempra* and *Enron*, suggested that a successful claim of expropriation requires an act that is effectively a government seizure of the investors' entire property and not merely a decrease in the profitability of an enterprise.[146] Those awards also suggested some sensitivity to the needs of states; even those decisions indicated that

legal regime."). For a critique of this common justification for investor-state arbitration, see Martins Paparinskis, The Limits of Depoliticisation in Contemporary Investor-State Arbitration (Oct. 1, 2010).

143. For criticism of the decision rendered in *Loewen v. United States*, see Don Wallace, Jr., *Fair and Equitable Treatment and Denial of Justice: Loewen v. US and Chattin v. Mexico*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 669 (Todd Weiler, ed., 2005).

144. Thus, concerns over whether U.S. investment agreements would adversely impact the United States government's and other states' powers to prevent or mitigate future financial crises was one of the issues that divided the U.S. Department of State's subcommittee charged with reviewing the current U.S. model BIT. *See, e.g.*, Gallagher, *supra* note 101.

145. *Continental Casualty v. Argentine Rep.*, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008), http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf. For a critique of this decision, see Alvarez & Brink, *supra* note 128.

146. *See* Alvarez & Khamsi, *supra* note 80, at 394.

Argentina's economic crisis and its impact needed to be taken into account for purposes of determining the amount of liability imposed on the state.[147] Other investment arbitrations seem to be incorporating or relying implicitly on a form of proportionality reasoning that balances the rights of investors with those of the state, including with respect to applying the guarantee to accord investors fair and equitable treatment.[148] Some recent arbitral decisions suggest, for example, that in determining whether government action violates the legitimate expectations of the investor, "the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well."[149] Moreover, within the NAFTA, now subject to the NAFTA parties' interpretation indicating that the FET guarantee in that treaty means nothing more than what aliens were entitled to under the customary rule assuring the international minimum standard of treatment, one recent decision, *Glamis Gold*, limits that right to the bare bones protections protected by denial of justice claims circa 1927.[150] In light of such rulings, fears that investor claims under BITs and FTAs would dramatically reduce the capacity of states to regulate appear overstated.[151]

III. SOVEREIGNTY REVISITED

There is a broader context to these developments. The efforts to re-balance the rights of sovereigns vis-à-vis foreign

147. *See id.* at 403–04, 471; *see also* Alvarez & Brink *supra* note 128.

148. *See, e.g.*, Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS OF HUMAN RIGHTS 62 (2010).

149. *See* Saluka BV v. Czech Republic ¶ 305 (Perm. Ct. Arb. 2006), http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf.

150. *Glamis Gold, Ltd. v. United States*, UNCITRAL Award ¶ 21 (2009) (agreeing with United States' contentions that FET remains subject to the standard articulated in the *Neer* v. *Mexico* (4 R. Int'l Arb. 1926) case, but suggesting that that standard, requiring a demonstration of "egregious" conduct by the state, has evolved over time). *But see* Merrill & Ring Forestry L.P. and Canada, ICSID Award, ¶¶ 190–213190-213 (Mar. 31, 2010) (finding that the *Neer* standard was no longer the applicable customary international law standard with respect to the treatment of aliens in relation to business, trade and investment).

151. *Cf.* Osgoode Hall School of Law, Public Statement on the International Investment Regime, http://www.osgoode.yorku.ca/public_statement/ (discussing "[A] shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.").

investors increasingly evident in the text of BITs, national laws, and even some arbitral awards, coincides with a much chastened view of the "Washington Consensus."[152] Much of the world has lost faith in the policy prescriptions that seem to underlie BITs of the first generation; we have lost faith in deregulation, privatization, the un-abashed protection of property, and wholly unrestricted trade and capital flows. This formula for state disempowerment in economic affairs has been undermined by perceptions that it has not served to raise all boats as anticipated. Empirical work casts doubt on whether adherence to the formula—and entering into investment protection agreements to evince a creditable commitment to following it—produces enhanced capital flows or whether, even when such capital comes, it will produce the sustained economic development and beneficial spillovers anticipated.[153] Columbia's Joseph Stiglitz and Harvard's Dani Rodrik, among others, have seeded doubts about neo-liberal growth strategies and whether history's success stories—from the Asian Tigers to the turn of the century industrializing United States—truly adhered to them.[154] Others have emphasized the negative externalities often accompanying incoming capital flows, including more unequal income distribution, politically disruptive dislocations of people, and adverse social or environmental effects.[155] Some have suggested that properly managing these challenges require actions that not anticipated

152. For an understanding of the Washington Consensus, *see*, *e.g.*, John Williamson, *A Short History of the Washington Consensus* (Fundación CIDOB, 2004), http://www.iie.com/publications/papers/williamson0904-2.pdf.

153. *See generally* Lisa Sachs & Karl P. Sauvant, THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (2009) (collection of studies considering the impact of BITs on the flow of foreign investment and on economic development); José E. Alvarez, The NAFTA's Investment Chapter and Mexico, in FOREIGN INVESTMENT: ITS SIGNIFICANCE IN RELATION TO THE FIGHT AGAINST POVERTY, ECONOMIC GROWTH AND LEGAL CULTURE (R. Dolzer, et al. eds., 2006) (surveying the reasons why the NAFTA's investment chapter continues to elicit mixed views even as foreign investment flows into Mexico have increased).

154. *See, e.g.*, Joseph E. Stiglitz, GLOBALIZATION AND ITS DISCONTENTS (2002) (criticizing the promulgation of the "Washington Consensus"); Dani Rodrik, Growth Strategies, in *Handbook of Economic Growth* (P. Aghion & S.NN. Durlauf eds., (Amsterdam: Elsevier, 2005), available at http://econ2.econ.iastate.edu/classes/econ502/tesfatsion/GrowthStrategies.DRodrik.GrowthHB2005.pdf (arguing that pursuit of the Washington Consensus model has not produced economic development as anticipated).

155. *See, e.g.*, Alvarez, supra note 153, at 250.

or even prohibited by some BITs.[156] In any case, handling such externalities requires more, not less, government.

Of course, the global economic meltdown, and the perception that this time it started with us, has also undermined confidence in Western states' and international financial institutions' advice on how best to achieve "good governance." IMF conditionality is viewed with more skepticism today. This is particularly true for those who think, as do many Argentineans, that IMF conditions led to the over 40 ICSID claims (face value said to be over $80 billion) against their country.[157] The age is past when the United States can get away with handing out its Model BIT circa 1984 to developing nations while saying, as early BIT negotiators did, "here are the minimum conditions for a successful economy."[158] The United States' evolving BIT sends a very different message; it says that even the United States is experimenting with the balance between the market and regulation and is no longer confident that there is a one-size-fits-all formula for success.

The chastened U.S. BIT program may be part of the historical dialectic between champions of the market and regulation described by Karl Polanyi in his 1944 classic, "The Great Transformation", or much more recently, by Amy Chua.[159] The challenge to the turn to the market marked by the

156. This may be the case, for example, to the extent a state seeks to restrict foreign investors to particular sectors or particular regions or seeks to impose on foreign investors performance requirements (such as requiring the transfer for technology) barred by certain BITs or FTAs.

157. W.W. Burke-White, The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System, 3 ASIAN J. OF WTO & INT'L HEALTH LAW AND POLICY, 199, 200 (2008); Aktion Finanzplatz International Conference on Illegitimate Debts Berne, Aktion Finanzplatz Schweiz, Argentina 1976–2007: The Paradigmatic Case of an Extraordinarily Legitimate Debt (Oct. 3–4, 2007), http://www.aktionfinanzplatz.ch/pdf/kampagnen/illegitime/Keene_handout_en.pdf.

158. *See generally* Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 501 (1998) (discussing "the extent to which BITs contribute to the creation of a liberal investment regime and the place of BITs in economic development").

159. The 1984 U.S. Model BIT can be seen as the embodiment of Polanyi's concept of utopian market liberalism, while the 2004 U.S. Model embodies his "inevitable" protective countermovement to restore the "proper" role of government in regulating the market. *See generally*, Joseph E. Stiglitz, Foreword to Karl Polanyi, THE GREAT TRANSFORMATION (2d ed. 2001) ("suggest[ing] that the challenge facing the global community today is whether

rise of BITs is now evident in, for example, scholarly and civil society challenges to the International Finance Corporation's advice (including with respect to its indices for "progress" produced in its annual "Doing Business" reports which confidently rank countries on how business-friendly the national rule of law is).[160] Eroding confidence in the global structures for economic governance—and the perception that these failed to prevent the latest global economic crisis and were not particularly relevant to our painful recovery from it[161]—has resulted in a more humble and slightly more transparent IMF, no longer as confident about having the answer. That institution, charged with advancing "good governance," now seems preoccupied with figuring out how best to apply "good governance" to itself. Notably, the IMF's on-going efforts to change its weighted voting procedures are also a form of sovereign empowerment as it is obvious that these will give more clout to distinct states, such as Brazil and India.[162] Of course, the trend in favor of greater sovereign "policy space" in the investment regime finds echoes in older demands for the re-calibration of the WTO to permit its adjudicators to have greater discretion to respect states' capacity to comply with their non-trade obligations, including those demanded by the Covenant on Economic, Social and Cultural Rights (such as to ensure the right to water or health).[163] That trend is also a component of those regimes that remain dominated by national laws with extraterritorial effect,

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it can redress these imbalances before it is too late"). *See also* Amy Chua, WORLD ON FIRE (2002) (arguing that national cycles oscillating between efforts to privatize and to renew government economic intervention are driven by and have differing effects on minorities within certain countries); Amy Chua, *The Privatization-Nationalization Cycle: The Link between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995) (challenging "the prevailing assessment of the historical "lessons" of privatization.").

160. *See, e.g.*, Kevin Davis and Michael Kruse, Taking the Measure of Law: The Case of the Doing Business Project, 32 LAW & SOCIAL INQUIRY 1095, 1096 (2007).

161. *See*, *e.g.*, David Zaring, *International institutional Performance in Crisis*, 10 CHI. J. INT'L L. 475, 475 (2010).

162. *See, e.g.*, Final Report, Comm. on IMF Governance Reform 14, Mar. 24, 2009, *available at* http://www.imf.org/external/np/omd/2009/govref/032409.pdf.

163. *See generally* Symposium: The Boundaries of the WTO, 96 AJIL 1 (2002) (discussing the positives of revisiting questions regarding facing "[a] vast array of potential recipes for linkage to particular nontrade issues, as well as cautionary tales against such linkage.").

such as what David Gerber's "global competition" regime.[164]

What Hollywood would call "the revenge of the state" is suggested, of course, by the revival of—if not nostalgia for—old-fashioned government regulation, including in the United States. To the chagrin of the Tea Party movement, the actions of the Obama Administration suggest a belated backlash to the Reagan years, which memorably portrayed "government as the problem." The touted revival of government regulation in the United States preceded Obama, of course, and included the adoption of Sarbanes-Oxley,[165] but it garnered public notice given governments' responses worldwide to the global economic crisis. The consequential impact on governmental involvement in the financial sector is particularly stark. Katharina Pistor points out how, starting with a series of transactions that began in the fall of 2007 that involved turning to sovereign wealth funds to secure fresh capital, the largest financial intermediaries have become increasingly dominated by governments.[166] She reports that at least as of 2009, the largest stakeholder of the following banks was the United States government: AIG (with an 85 percent stake), Bank of America (6), and Citigroup (32).[167] The second largest stakeholder in Citigroup was also governmental: the government of Singapore Investment Corporation with an 11 percent stake.[168] The Qatar Investment Authority was the leading stakeholder in Barclays (12) and Credit Swiss (8), while the UK government was the leading owner of HBOS (43), Lloyds (75), RBS (75).[169] Pistor also notes the obvious: the global crisis has expanded the role of the home government of these banks from regulator (including as part of corporate governance as with respect to executive compensation) to that of capital provider or investor of last

164. *See* DAVID J. GERBER, GLOBAL COMPETITION LAW, MARKETS, AND GLOBALIZATION (2010) (presenting how "decision-makers in many parts of the world recognize the potential value of economic competition and increasingly seek to protect it from private restraints.").

165. Sabarnes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).

166. Katharina Pistor, *Sovereign Wealth Funds, Banks and Governments in the Global Crisis: Towards a New Governance of Global Finance*, 10 EUR. BUS. ORG. L. Rev. 333, 335-36 (2009) (involving turning to sovereign wealth funds to secure fresh capital, making the largest financial intermediaries become increasingly dominated by governments).

167. *Id.* at 336, tbl. 1.

168. *Id.* at 341.

169. *Id.* at 336, tbl. 1.

resort.[170] She notes that even without formal voting rights, the government owners of these banks are in a position to exert substantial leverage over them and perhaps even over the home governments of these banks.[171]

Whether we (or governments) should be pleased or distressed by these developments is not the subject of this essay. It may very well be true that old-fashioned protectionism—including exaggerated concerns over the "out-sourcing" of jobs—lies behind U.S. policy-makers' concerns over, for example, the state-owned enterprises of China. What is clear is that governments' efforts to re-secure their borders and replenish their regulatory prowess responds at least in part to the fact that the state is making a comeback through the return of state-owned enterprises and the renewed clout of impressively endowed sovereign wealth funds, whether based in Norway, Qatar or Singapore. The changes to the investment regime respond in part to doubts about whether we should treat these entities—or long established Chinese owned enterprises—as if they were no different from privately owned multinational enterprises operating for commercial gain.[172] We are not as sure as we once were whether we should welcome all foreigners so long as they come with lots of cash.

What this means is that governments are empowering themselves along multiple dimensions. They are, as noted, re-entering the economic marketplace. Despite widespread privatization, they still or now control many enterprises that seek to invest and direct the investment strategies of SWFs. At the same time, they are shoring up their regulatory abilities to better protect themselves from other governments' exercises in "state capitalism."

To the proverbial "man armed with a hammer," much resembles a nail. To this author, the return of the state with respect to finance and investment appears to be part of a greater trend in favor of empowering the state that is occurring outside international economic law as well. It is now commonplace that the "war on terror" has given states a highly persuasive new rationale to enhance their powers—whether

170. *Id.* at 332–44; 349–50.

171. *Id.* at 343.

172. *See, e.g.*, Charles Kovacs, *Sovereign Wealth Funds: Much Ado About Some Money*, http://www.vcc.columbia.edu/content/sovereign-wealth-funds-much-ado-about-some-money; Veljko Fotak and William Megginson, *Are SWFs Welcome Now?*, http://www.vcc.columbia.edu/content/are-swfs-welcome-now.

with respect to its use of force (as in Afghanistan and through drones) or through enhanced surveillance over individuals and organizations. September 11th has created a vast new battleground with respect to states and human rights where the sites of contestation are not always subject to easy answers. Henkin's "S" word seems less curse word than blessing if "S" claims to be protecting us from non-state actors armed with WMDs.[173] In human rights regimes as well as the investment regime, states are increasingly resorting to their "security" needs as ultimate trumps over the rights of non-state actors. Whether we like the comparison or not, there are parallels between these arguments—whether made in ICSID or before UN human rights treaty bodies—and Carl Schmitt's notorious "law of the exception."[174]

At least when it comes to security and perhaps more generally, the Lotus presumption—states can act unless explicitly forbidden—may be making a comeback.[175] Charles Tilly famously noted that "war made the state,"[176] and even our Supreme Court has suggested that the U.S. civil war made the United States.[177] Threats to security, real or imagined, empower governments. Today, as is suggested by Argentina's

173. Notably, the "S" word may actually serve to protect human rights when the threat to these emerges from institutions of global governance, such as the UN Security Council. *See, e.g.*, Yassin Abdullah Kadi and al Barakaat International Foundation v. Council of the European Union, European Court of Justice, Cases C-402/05 P and C-415/05 P 2008 E.C.R. X (hereinafter *Kadi*). For some the European Court of Justice's *Kadi* decision is an implicit judicial affirmation that the European Union is now sufficiently "state-like" or "sovereign" that its institutions, like the U.S. Supreme Court, can serve as a bulwark against international law when it (or international organizations acting under international law's authority) threatens "constitutional" values. *See* Grainne de Burca, The European Court of Justice and the International Legal Order after Kadi, 51 Harv. Int'l L. J. 1 (2009) (comparing the *Kadi* decision to the U.S. Supreme Court decision in *Medellin*).

174. CARL SCHMITT, POLITICAL THEOLOGY, FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 10 (1922) (G. Schweb trans. 2005). *See also* DAVID DYZENHAUS, THE CONSTITUTION OF LAW, LEGALITY IN A TIME OF EMERGENCY (2006).

175. This may even be true within the venerated International Court of Justice. *See, e.g.*, Declaration by Judge Simma, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141 (July 22).

176. Charles Tilly, *Reflections on the History of European State-Making*, in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 42 (Charles Tilly ed. 1975).

177. Missouri v. Holland, 252 U.S. 416, 434 (1920) (". . . it has taken a century and has cost their successors much sweat and blood to prove that they created a nation," J. Holmes).

increasingly successful arguments before arbitral bodies, a state's "security" includes its economic security. Perhaps an embracive notion of security and states' desire to be free to deal with all threats to it, more than any other factor, is serving to re-make the investment regime—just as it appears to be transforming other international regimes, including that governing the use of force, the powers of the UN Security Council, or the rules governing military occupation.[178]

Once we start appreciating how states empower themselves, scholarly projects seeking to correct the flaws of global governance regimes that we find take on a somewhat different meaning. The many flaws in global governance may be conscious (and successful) efforts by states or groups of states to avoid supra-national regulation. They may not be simply failings of the international legal imagination. Perhaps fragmentation dilemmas among international regimes are the product of forum-shifting/shopping by empowered states whose interests are served by fragmented law.[179] If so, these may be all the more difficult to remedy. On the flip side, perhaps some of the things we commend as "new forms of global governance" may be something else when viewed through the "wrong" end of the telescope—and we see them as exercises of state power.[180]

178. *See generally*, José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873 (2003) ([S]urvey[ing] the recent practice of the Council to argue that, despite that body's refusal to give explicit approval to Operation Iraqi Freedom in advance, worries about the hegemonic capture of the Security Council (along with other forms of global HIL) should not be relegated to science fiction"). For a concrete example, see, e.g., Ellen Nakashima, *Blair Says U.S. May Target Americans, Terrorism*, WASH. POST, Feb. 4, 2010 (quoting U.S. Director of National Intelligence who asserted that the U.S. government can kill even U.S. nationals abroad if they are involved in terrorist activities).

179. *See, e.g.*, Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) ("[A]rgu[ing] that the problem of fragmentation is more serious than is commonly assumed because it operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the reputation of international law for integrity.").

180. Jean Cohen argues, for example, that the morphing of international organizations into global governance institutions does not herald the taming of sovereignty as much as the instrumentalization of these institutions by powerful nations. Cohen challenges the view that the world is steadily advancing towards to a progressive, cosmopolitan order without sovereigns, but argues instead that our global governance institutions authorize new hierarchies and gradations of sovereignty, citing examples such as the Security Council's counter-terrorism "legislation." Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETH. & INT'L. AFF. (2004/2005).

That global governance regimes can manifest the "international rule of law" and the interests of sovereigns should not surprise us. The decision to expand the trade regime to encompass intellectual property, after all, is commonly seen as a victory for global regulation and the rule of law—as well as a controversial exercise in hegemonic international law.[181] In terms of the papers presented at this conference, perhaps we should see the G20, for example, as both a new form of global governance and as revival of a (very old)"Concert of Europe."[182]

Recognizing the continuing role of sovereignty has value. As noted, it improves our descriptions of reality. It enables us to see things as they are and not as we would like them to be. It is also likely to improve our policy prescriptions. Marian Pardo's examination of Ecuador's distinct approaches to privatization, for example, suggests that all too often we international lawyers wrongly assume that a problem is solved once a treaty is concluded or an international organization is established and we fail to consider how the purpose of the treaty or of the organization might be altered, sometimes dramatically, given what states do by way of implementation. Pardo's sovereignty-focused work connects with other scholarship indicating that national institutions, practices and laws, and not only the form or structure of global regulation, may determine whether efforts at international regulation or adjudication succeed. Work by Laurence Helfer and Karen Alter on the mixed experiences of the Andean Tribunal of Justice, which was modeled on the European Court of Justice, to cite another example, provides a sharp reminder of the continued relevance of the states—and differing cultural and legal traditions—in which supra-national institutions are embedded.[183] Theirs is a sharp rebuke to those who believe that there is a standard global law toolbox containing mostly European models that can be deployed across the planet to

181. *See* Ruth Rikowski, *A Marxist Analysis of the World Trade Organization's Agreement on Trade-Related Aspects of intellectual Property Rights*, 4 POL'Y FUT. IN EDUC. 396, 407 (2006) ("[E]xamin[ing] the World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)."). For a comparable argument involving the "legislative" actions of the UN Security Council, see Alvarez, *supra* note 178 at 873.

182. *Compare* Kelly & Cho, *supra* note 26, *with* Zaring, *supra* note 27.

183. Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and Its Interlocutors: Understanding Preliminary Reference Patterns in The Andean Community*, 41 N.Y.U. J. Int'l L. & Pol. 871 (2009).

yield comparable results. Grounding the "transnational legal process" in, among other things, the actions and reactions of receiving states, the demands of their domestic elites, and local structures for governance is precisely the point as well of Gregory Shaffer's recent work.[184] All of these are concrete examples of why the return of the state matters. Paying attention to the continuing role of sovereigns may make us more effective builders of regimes enabling global governance.

IV. CAVEATS

My "return of the state" should not be misunderstood. I am not suggesting that all states have been equally empowered, even within the changing investment regime. Sovereign equality, if it ever existed, has not miraculously returned. A more proper, but less catchy, title for this essay might be "the return of some states." The fact that an economic power like the United States is leading the drive to "re-balance" the investment regime is no accident. Moreover, even those states that are re-balancing their BITs are not necessarily doing so in the same way or to the same degree. Although many states are emulating the sovereignty-enhancing aspects of the post 2004 U.S. Model BIT, not all states will enhance their relative powers over investors using the same tools. Some, like China, may decide to reserve greater policy discretion over their exchange rates or their ability to allocate foreign investors to particular parts of the country, for example. Other states may not be able to assert their own sovereign preferences in quite the same way as the Chinese or the United States. Many African states will likely remain parties to older much more pro-investor BITs based on models comparable to those of the U.S. Model BIT of 1984. Not all states will be able to deploy their "exit and voice" options equally, whether within the investment regime or in other international regimes. Despite its multilateral aspirations and effects, the international investment regime remains subject to bilateral leverage. Inter-state power dynamics will, as always, continue to determine which state gets a chance to adapt a new BIT model, re-negotiate its old BITs, ignore unfavorable arbitral rulings, or leave ICSID. Nor are the political dynamics in investment arbitrations likely to benefit all respondent states equally.

184. *See* Gregory Shaffer, *Transnational Legal Process and State Change: Opportunities and Constraints*, (IILJ Working Paper 2010/4, 2010) *available at* http://www.iilj.org/publications/documents/2010-4.Shaffer.pdf.

The claim here should not be confused with those made by those who disparage the power or worth of international law. The changes to the U.S. Model BIT over time reflect, on the contrary, the power of international law and its remedies. The U.S. and other states are engaging in "re-balancing" the investment regime precisely because they are afraid of the political and legal consequences of investor-state dispute settlement. One does not deploy exit and voice against a regime that has no relevance. Nor should my claims about the United States' role in leading the sovereign backlash to the investment regime be conflated with U.S. resistance to other international legal regimes. While some U.S. critics of investor-state arbitration may be hostile to all forms of supra-national adjudication, many draw distinctions based on subject matter or the perceived threat to "democratic governance" posed by distinct international regimes. Indeed, the leading NGO voices against the international investment regimes based in the United States are far more likely to support strongly sovereignty-intrusive regimes if these concern the protection of human rights or the environment.

Changing attitudes toward the investment regime within the U.S. government reflect, more than anything else, the fact that the United States, which has long been the world's leading capital exporter and its leading importer, now faces the serious threat of suit from foreign investors within its borders. Other states, including those who are strong supporters of international law and international legal regimes, such as Canada, are reacting the same way. The global backlash against the international investment regime has little to do with U.S. political attitudes towards international regimes—and are not likely to change dramatically as between the Bush and Obama Administrations.[185] It also has little, if anything, to do with the United States' arguably declining status as a super-power. The United States shares its status as capital importer/exporter with many others, including economic super-powers such as China. That both the United States and China are reacting to this reality by changing their respective investment treaties demonstrates the enduring power of the reciprocal application of international law.

The examples of state empowerment discussed here are not signposts indicating the end of history. The return of the state

185. Indeed, nearly all of the changes to the U.S. Model BIT from 1984–2004 described here occurred during the Bush Administration.

does not mean that renewed efforts to regulate internationally on economic or other matters will not occur. On the contrary, as noted, the return of the state may be a cyclical turn in a never-ending dialectic. Indeed, some of the developments noted in this essay—such as the expanding power of SWFs—are likely to lead to new efforts by states to protect themselves at the international level. SWFs may assert untoward powers vis-à-vis countries in which they invest. Although SWFs are examples of state empowerment, the United States is not empowered by Norway's or Qatar's SWF. The existence of powerful SWFs and other state-run ventures is likely to lead to new ventures to cooperate internationally—as appears to be occurring as guidelines emerge with respect to SWFs.[186]

My "return of the state" describes reality but does not celebrate it. While some lawyers, such as human rights advocates, have tended to assume that "the erosion of sovereignty is a bell-weather of progress,"[187] no such claim is made here. Nor do I claim the opposite. Perhaps restoring greater sovereign policy space is a needed corrective measure within the investment regime, perhaps not. My simple point is that both critics and proponents of the investment, and other international, regimes need to recognize empowerment when it occurs – and must take it into account in their assessments and in their proposals for reform.

V. CONCLUSION

We live in an age of such massive and continuous change that announcements of new paradigms are routinely expected. This essay is bound to disappoint. It adheres to a very old paradigm indeed: Westphalia. It's obvious target are those many scholars who have argued, for over a decade, that the state is "withering away," is "waning," is in "decline," "retreat," is already gone, or perhaps was always a "myth."[188] Those

186. *See, e.g.*, *The Santiago Principles, Elaborated by the International Working Group on Sovereign Wealth Funds in Nov. 2008* Based on earlier work undertaken by the IMF, http://www.iwg-swf.org/pubs/gapplist.htm; *see also* OECD Declaration on Sovereign Wealth Funds and Recipient Countries, June 4–5,4-5, 2008, http://www.oecd.org/dataoecd/18/14/41816692.pdf.

187. *See* Karima Bennoune, *'Sovereignty vs. Suffering'? Re-examining Sovereignty and Human Rights through the Lens of Iraq*, 13 EJIL 243, 243 (2002).

188. For articles making these arguments see, e.g., Eli Lauterpacht, *Sovereignty–Myth or Reality?*, 73 INT'L. AFF. 131 (1997); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for*

political scientists and lawyers have been a tad premature in declaring the death of the state. Perhaps some of them have confused their normative agenda with reality. Perhaps some have seen "global governance" as a purely binary proposition. Whatever the reason, they are wrong. The state is changing, as it always has, but it is not extinct. Indeed, even with respect to so-called "failed states," the international community typically seeks to restore the status quo. In such cases, we try to re-create something that resembles a state because no one knows what to do with something that is not a state or part of one.[189] The Westphalian system may be a blink of an eye in the scope of human history but we are living in its time. No one unfortunate enough to be outside Koskenneimi's "wonderful artificiality" of statehood[190]believes that it is a myth. Ask a Palestinian. As Michael Walzer put it in a recent lecture, only those lucky enough to live in a functioning state can afford to suggest that it is "withering away."[191]

At the same time, those of us working to improve the structures of global governance are not wasting our time. State power and global governance are not defining end points in a zero sum game. The Wimbledon case had it right. State power co-exists with and may be enhanced by global governance—even if sometimes the cyclical pendulum swings more towards one end.[192] At times, global institutions like the UN Security

International Law?, 4 EJIL 447 (1993); Weiss et. al, *Sovereignty Under Siege: From Intervention to Humanitarian Space*, *in* BEYOND WESTPAHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 87 (G. Lyons and M. Mastaduno, eds.1995); CAMILLERI & J. FALK, THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD (1992); Rosas, *The Decline of Sovereignty: Legal Perspectives*, *in* THE FUTURE OF THE NATION STATE IN EUROPE (Livonen, ed. 1993); Vincent Cable, *What Future for the Nation State?*, 124 DAEDALUS 23 (1995). *See also* Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN L. REV. 1 (1993).

189. *See generally* Chiara Giorgetti, A PRINCIPLED APPROACH TO STATE FAILURE: INTERNATIONAL COMMUNITY ACTIONS IN EMERGENCY SITUATIONS 43-65 (2010).

190. Martti Koskenniemi, *The Wonderful Artificiality of States*, 88 ASIL ANN. MEETING PROCEEDINGS 22 (1994). *See also* Benedict Kingsbury, *Sovereignty and Inequality*, 9 EJIL 599 (1998) (arguing that "discarding sovereignty…will intensify inequality, weak[en] restraints on coercive intervention, dimini[sh] critical roles of the state as the locus of identify and an autonomous zone of politics, and redivid[e] the world into zones", as between "liberal" and "non-liberal" states); Bennoune, *supra* note 187 at 243 (arguing that sovereignty may sometimes serve to protect human rights).

191. Michael Walzer*, Global and Local Justice*, Straus Lecture at N.Y.U (Nov. 16, 2010), http://www.nyustraus.org/events/PublicLecture_Walzer.html.

192. The dichotomous reasoning of those who have suggested that global

Council or the WTO Appellate Body empower some states more than others. This essay does not suggest that global governance is in decline or that attempts to make it better are futile. Its only claim is that the state continues to matter the most to our schemes for global law—as Grotius, on behalf of his state clients, would have been the first to acknowledge.

governance efforts imply the withering away of the state is suggestive of the absolutist notions of sovereignty associated with Thomas Hobbes and Jean Boudin. Few international lawyers or political scientists should espouse such absolutist conceptions of statehood today. Such binary thinking ignores the fact that sovereign power lies along a spectrum. *See* José E. Alvarez, *The Future of State Sovereignty*, *in* THE FUTURE OF INTERNATIONAL LAW—FOR A REALISTIC UTOPIA (Antonio Cassese, ed. forthcoming 2011). Indeed, even Bodin contended that his "absolute" sovereign was somehow still bound by natural law, custom, and the need to respect property rights. JEAN BODIN, ON SOVEREIGNTY 44, 45 (Julian H. Franklin, ed. and trans. 1992). Interestingly, the United States' adoption of a self-judging essential security exception in its post-2004 investment treaties (*see* Price, *supra* note 104) suggests a more absolutist vision of governments' power to destroy rights to property than was entertained by even Bodin.