

Sustainable Development and Investment Treaty Law

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Introduction

There is widespread consensus in the international community that foreign direct investment (FDI) is necessary for sustainable development. Agenda 21, the comprehensive plan developed at the 1992 *United Nations Conference on Environment and Development* (the Rio “Earth Summit”), highlighted the critical role investment plays in the ability of developing states to meet basic needs in a sustainable manner.¹ Ten years later, the Monterrey Consensus² identified mobilizing FDI as one of the “leading actions” to achieve the goals of “eradicating poverty, achieving sustained economic growth and promoting sustainable development.”³ The Johannesburg Plan of Implementation (Plan of Implementation) adopted a few months later at the 2002 World Summit on Sustainable Development (WSSD) identified “an enabling environment for investment”⁴ as one of

¹ *Agenda 21, Report of the UNCED, I*, UN Doc. A/CONF.151/26/Rev. 1 (1992), 31 ILM 874, at para. 2.23, online: UN <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>> [*Agenda 21*].

² *Monterrey Consensus of the International Conference on Financing for Development, Report of the International Conference on Financing for Development*, 22 March 2002, UN Doc. A/CONF.198/11, chapter 1, resolution 1, annex (2002), online: UN <<http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf>> [*Monterrey Consensus*].

³ *Monterrey Consensus, ibid.* at para. 1; para. 20 states: “Private international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes toward financing sustained economic growth over the long term.”

⁴ *Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development*, 4 September 2002, U.N. Doc. A/CONF.199/20 (2002), at para. 4, online: UN <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm> [*Plan of Implementation*].

the bases for sustainable development. The Plan of Implementation is replete with references to the need to increase and promote investment.⁵

While there have been vast increases in FDI flows and stock over the past 20 years,⁶ investments in and by developed states still account for the majority of these increases.⁷ Increasing FDI flows to developing states remains critical to sustainable development goals.⁸ In order to achieve this, developing states have significantly liberalized their foreign investment regimes to create an “enabling FDI regulatory framework.”⁹

⁵ *Ibid.* at paras. 16, 19, 21, 40, 42, 43, 62, 66, 67, 69, 83, 84, 106, 141; para. 84 addresses FDI and highlights the need to “[f]acilitate greater flows of foreign direct investment so as to support sustainable development activities, including the development of infrastructure, of developing countries, and enhance the benefits that developing countries can draw from foreign direct investment, with particular actions to: (a) Create the necessary domestic and international conditions to facilitate significant increases in the flow of foreign direct investment to developing countries, in particular the least developed countries, which is critical to sustainable development, particularly foreign direct investment flows for infrastructure development and other priority areas in developing countries to supplement the domestic resources mobilized by them.”

⁶ In 1982, FDI inflows were \$59 billion and total FDI inward stock amounted to \$0.647 trillion. In 2005, FDI inflows amounted to \$916 billion and total FDI inward stock amounted to \$10.13 trillion. Inflows peaked in 2000 at \$1.4 trillion. (UNCTAD, *World Investment Report 2006, FDI from Developing and Transition Economies: Implications for Development* (New York and Geneva: UN, 2006) at xvi and 9, online: UNCTAD <http://www.unctad.org/en/docs/wir2006_en.pdf> [*WIR 2006*]). *WIR 2006* defines foreign direct investment as “an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate).” FDI stock is the value of the share of their capital and reserves (including retained profits) attributable to the parent enterprise, plus the net indebtedness of affiliates to the parent enterprise. See *WIR 2006*, “Methodological Notes: Definitions and Sources,” online: UNCTAD <http://www.unctad.org/en/docs/wir2006_d&s_en.pdf>.

⁷ World FDI inflows in 2005 were \$916 billion, of which inflows to developed countries were \$542 billion (59%) and inflows to developing countries were \$334 billion (36%). The share of South-East Europe (SEE) and the Commonwealth of Independent States (CIS) was 4%. There have been significant increases in FDI *outflows* from developing states, which totaled \$133 billion—or 17% of world outflows—in 2005 (*WIR 2006, ibid.* at xvi).

⁸ FDI inflows are the most significant source of net resource flows to developing states. See *WIR 2006, ibid.* at 4.

⁹ UNCTAD, *World Investment Report 2003, FDI Policies for Development: National and International Perspectives* (New York and Geneva: UN, 2003) at 85 [*WIR*

The Monterrey Consensus identifies the key aspect of this framework as a “transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact.”¹⁰

FDI flows occur within a complex framework of public and private international law. The most significant recent development in the international FDI regulatory framework has been the creation of a vast network of over 2500 international investment agreements (IIAs) to promote and protect foreign investment. This paper surveys this IIA regime and asks whether the current web of IIAs acts as a structural impediment to sustainable development. If FDI is necessary to achieve sustainable development, it would be a searing indictment of the investment treaty regime if IIAs were antithetical to, or indeed subverted, principles of sustainable development. Yet this is a criticism often expressed by NGOs, academics and lawyers. For example, The Public Citizen, a prominent US based non-governmental organization (NGO), views investment treaties, not as providing an enabling FDI regulatory framework, but as an “extraordinary attack on governments’ ability to regulate in the public interest.”¹¹ At an international seminar in January 2006 entitled Sustainable Investment and Global Environmental Governance, Professor M. Sornarajah referred to the international law on foreign investment as a “law of greed” and Dr Howard Mann, a prominent commentator on investment treaties stated “that the current regime for

2003]). *WIR 2006*, *supra* note 6 at xviii states that “the bulk of regulatory changes have facilitated FDI” but notes the rise of economic protectionist and nationalist policies in a number of high profile case, such as Bolivia’s nationalization of its oil and gas industry. See also *WIR 2006*, *supra* note 6 at 23–25.

¹⁰ *Monterrey Consensus*, *supra* note 2 at para. 21.

¹¹ Abstract of Public Citizen, *NAFTA Chapter 11 Investor-State Cases: Lessons for the Central American Free Trade Agreement*, by Mary Bottari & Lori Wallach, (Washington, DC: Public Citizens Publications, 2005), online: Public Citizen <http://www.citizen.org/trade/nafta/CH_11/>. See J. Atik, “Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process” in T. Weiler, ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsey: Transnational Publishers, 2004) at 135 for an overview of critiques of investment arbitration under NAFTA [Atik].

foreign investment protects investors against environmental and health measures as opposed to supporting them.”¹²

This paper argues that the IIA regime taken as a whole does not pose a serious impediment to sustainable development. Recent treaty practice and investment treaty jurisprudence suggest that sustainable development principles are slowly being integrated into the IIA regime, even if this integration remains in many respects embryonic. For example, the new US and Canadian model bilateral investment treaties (BITs), based on these states’ experience with the investment chapter of the North American Free Trade Agreement (NAFTA),¹³ incorporate provisions that address many of the early criticisms of investor-state arbitration. This new generation of IIAs ensures greater transparency in the investor-state arbitration process and defines the scope of investment obligations in much greater detail. These best practices need to be incorporated into the corpus of existing IIAs. Looking towards the future, there is considerably more that the IIA regime could do to actively *promote* sustainable development. For example, IIAs could include requirements for environmental or sustainability impact assessments, reporting requirements on economic, environmental and social performance, and express obligations with respect to investor conduct. However, even if these requirements were routinely made part of IIAs, it is still unclear that the IIA regime is the best institutional mechanism for addressing wide ranging and complex sustainable development issues or that, practically, there is any likelihood of these issues being comprehensively addressed within the regime. In the short term, the regime will continue to evolve incrementally through developments in IIA jurisprudence and bilateral and regional treaty practice. This highlights the need for treaty interpreters and drafters to consider fully the application and integration of sustainable development principles.

The paper evaluates the IIA regime in light of the International Law Association’s 2002 *New Delhi Declaration of Principles of*

¹² See *Proceeding of the International Seminar*, 23 January 2006, Vrije Universiteit Amsterdam, online: <<http://www.ivm.falw.vu.nl/home/index.cfm>>.

¹³ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can T.S. 1994 No. 2, 32 I.L.M. 289, 32 I.L.M. 605 (entered into force 1 January 1994) [NAFTA].

*International Law Relating to Sustainable Development*¹⁴ (the Declaration). The Declaration defines sustainable development as:

...a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.

The Declaration identifies seven principles of international law relating to sustainable development:

1. The duty of States to ensure sustainable use of natural resources;
2. The principle of equity and the eradication of poverty;
3. The principle of common but differentiated responsibilities;
4. The principle of the precautionary approach to human health, natural resources and ecosystems;
5. The principle of participation and access to information and justice;
6. The principle of good governance; and
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

This paper proceeds from the premise that, if FDI is to be a positive force for sustainable development, the IIA regime should be consistent with, and at the very least, not antithetical to, the Declaration's principles. While I rely on the Declaration's principles as a baseline for

¹⁴ *New Delhi Declaration on Principles of International Law Relating to Sustainable Development*, ILA Resolution 3/2002, Report of the 70th Conference of the International Law Association, April 2002, online: Centre for International Sustainable Development Law <<http://www.cisd.org/pdf/ILAdclaration.pdf>> (now published as UN GAOR, 55th Sess., Annex, Agenda Item 89, UN Doc. A/57/329 (2002)).

assessing the sustainable development dimensions of the IIA regime, I make no claim with respect to the legal status of the Declaration's seven principles in public international law,¹⁵ recognizing that their status is contested. Some of the principles, or aspects of them, may have coalesced into binding rules (*lex lata*), while other aspects are aspirational or embodied in soft law (*lex ferenda*). Furthermore, the Declaration's concept of sustainable development, like that in the WSSD Plan of Implementation, is very broad. The WSSD Plan of Implementation expressly refers to social development as one of the pillars of sustainable development:

[E]fforts will also promote the integration of the three components of sustainable development—economic development, social development and environmental protection—as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption, and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, sustainable development.¹⁶

Duncan French, a leading commentator on international sustainable development law, has noted that this is a “new conceptualization of sustainable development,”¹⁷ an “extension”¹⁸ that “remains controversial and not without conceptual and practical difficulties.”¹⁹ The Declaration's and WSSD's conceptualization of sustainable development moves beyond the now classic formulation of sustainable development as focused on a reconciliation between economic growth and environmental protection,²⁰ extending the concept to social

¹⁵ The ILA, while an august body, has no international law making or codifying powers. It is simply one of a number of participants in the international law making process.

¹⁶ *Plan of Implementation*, *supra* note 4 at para. 2.

¹⁷ D. French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005) at 22.

¹⁸ *Ibid.* at 23.

¹⁹ *Ibid.*

²⁰ The ICJ stated that the “need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.” *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* [1997] I.C.J. Rep. 7 at para. 140; see also H.E. Judge C.G. Weeramantry's Separate Opinion.

development that incorporates concerns regarding public participation, good governance and human rights.

The meaning of sustainable development remains highly contested. Is it a legal rule, an objective or a process? Does it address primarily the reconciliation between economic development and environmental protection, or should social development, including good governance, human rights and health, be understood as one of its pillars? These questions are beyond the scope of this paper. Rather, this paper assesses the IIA regime against the high standards for achieving sustainable development set out by the Declaration. This provides an opportunity to assess how the IIA regime could evolve in the future if an effort were made within the IIA regime to actively promote a broad conception of sustainable development.

Part I provides a brief overview of the IIA regime. In part II, I assess the IIA regime in light of each of the Declaration's seven principles, evaluating the extent to which the regime is consistent with each principle and the challenges for the regime raised by each principle. The paper focuses on IIA treaty practice and investment treaty arbitration jurisprudence, both of which are evolving quickly. Part III concludes with some preliminary thoughts about how the IIA regime might do more to actively promote sustainable development. At the same time, I question whether the IIA regime is the best international instrument within which to address these issues.

I. A Brief Overview of the IIA Regime

The current international legal framework governing foreign investment consists of a vast network of over 2500 IIAs.²¹ By the end of 2005, this network comprised some 2500 BITs (of which 1,891 or 75.8 % had entered into force),²² 232 other international agreements (often in the form of bilateral comprehensive free trade agreements) containing investment provisions and a number of regional or sectoral agreements²³

²¹ *WIR 2006*, *supra* note 6 at xix.

²² UNCTAD, "The Entry into Force of Bilateral Investment Agreements (BITs)" (2006) IIA Monitor No. 3, UNCTAD/WEB/ITE/IIA/2006/9, online: UNCTAD <<http://www.unctad.org>>.

²³ These include NAFTA Chapter Eleven, the Energy Charter Treaty, The Framework Agreement for the ASEAN Investment Area, the Colonia and Buenos Aires

with investment protection provisions. In addition, there is a network of 2,758 double taxation treaties. While other international treaties and customary norms intersect and interact with this network, IIAs are the primary public international law instruments that govern foreign investment.²⁴ The purpose of IIAs is to promote and protect foreign investment by establishing disciplines on state measures relating to investment. Under the majority of IIAs, investors enforce these standards through investor-state arbitration.

Capital exporting states developed IIAs as a response to the uncertainties and inadequacies of the customary international law governing state responsibility for injuries to aliens and property.²⁵ Although there were some initial efforts at creating a multilateral legal framework for foreign investment, widespread disagreement between capital exporting and importing states about standards of treatment for foreign investment meant that there was little or no prospect of developing a multilateral treaty regime. As a result, capital exporting states began concluding BITs dedicated to foreign investment promotion and protection.²⁶ Germany was the first state to develop a BIT, signing its

Investment Protocols of Mercosur, the Unified Agreement for the Investment of Arab Capital in the Arab States, Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of Islamic Conference. See generally N. Rubins & N. S. Kinsella, *International Investment, Political Risk and Dispute Resolution* (Dobbs Ferry, New York: Oceana, 2005) at 193–200.

²⁴ The WTO's *Agreement on Trade Related Investment Measures*, being part of Annex 1A to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144, online : WTO <<http://www.wto.org>>, addresses investment measures that breach trade obligations with respect to national treatment and quantitative restrictions.

²⁵ See UNCTAD, *Bilateral Investment Treaties* (New York: United Nations, 1988) at 1.

²⁶ Before the conclusion of BITs, some states had Friendship, Commerce and Navigation treaties (FCN Treaties) that provided, amongst other things, investment protection. See D. Blumenwitz, "Treaties of Friendship, Commerce and Navigation" in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, vol. IV (Elsevier, North-Holland, Amsterdam: Max Planck Institute for Comparative Public and International Law, 1992-2000) at 953. For a survey of the provisions in modern BITs see R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995). For specific BITs see the compilation of investment treaties in ICSID, *Investment Protection Treaties*, looseleaf (Washington: International Centre for Settlement of Investment Disputes, 1983) [*Investment Protection Treaties*]. The United Nations Conference of Trade and Development (UNCTAD) also has two comprehensive online IIA databases available at <http://www.unctadxi.org/templates/Startpage___718.aspx>.

first with Pakistan in 1959.²⁷ By 1987, 265 BITs had been concluded, the majority of which were between industrialized states and developing states.²⁸ There was exponential growth in new BITs in the 1990s, with the number of BITs quintupling.²⁹ By the end of the 1990s, 1857 BITs had been concluded.³⁰ Importantly, BIT practice was extended to include BITs between non-industrialized states.³¹ A number of major industrializing states, including India,³² Argentina, Brazil and Chile signed BITs for the first time in the 1990s.³³

One of the characteristics of BITs has been the asymmetrical relationship between capital exporting and importing states. While the obligations on the state parties are formally reciprocal, BITs were developed by capital exporting states to protect their nationals abroad. This is well-illustrated by the fact that in all early BITs at least one party was a member of the OECD. In fact, until Romania began concluding BITs in 1978,³⁴ Iraq/Kuwait (1964)³⁵ represented the only BIT signed between two non-OECD states. More recently, developing states have begun to conclude IIAs between themselves. In 1990, there were 42 BITs

²⁷ See J. Karl, “The Promotion and Protection of German Foreign Investment Abroad” (1996) 11:1 ICSID Review-FILJ 1.

²⁸ UNCTAD, *Bilateral Investment Treaties*, *supra* note 25 at 6. Many of these BITs were based on the OECD *Draft Convention on the Protection of Foreign Property*, 12 October 1967, 7 I.L.M. 117.

²⁹ UNCTAD, Press Release, TAD/INF/2877, “Bilateral Investment Treaties Quintupled During the 1990s” (15 December 2000); the press release notes that there were 1857 BITs by the end of the 1990s, up from 385 at the end of the 1980s.

³⁰ *Ibid.*

³¹ *Ibid.*, by the end of the 1990’s, 833 of the total of 1857 were between developing states and states in transition.

³² India’s first BIT was India/United Kingdom (1994) (see *infra* note 35). India had signed an exchange of notes with Germany in 1964 with respect to investment. See *International Investment Treaties*, *supra* note 26.

³³ Argentina/Italy (1990), Chile/Argentina (1991) and Brazil/Portugal (1994); for texts of BITs, see *supra* note 26.

³⁴ *Ibid.*; see also Romania/Pakistan (1978) and Romania/Sudan (1979).

³⁵ References to individual BITs in this paper are made by identifying the state parties, followed by the date the BIT was signed (i.e. India/United Kingdom (1994)).

between developing states. This number jumped to 644 by the end of 2005—26% of existing BITs.³⁶

The investment protection functions of IIAs are a direct response to the principle of permanent sovereignty over natural resources. Throughout the twentieth century there was intense controversy over the international standards of treatment applicable to foreign investment.³⁷ Capital exporting states claimed that foreign investors and investment must be treated according to international minimum standards, including a requirement for full compensation for expropriation. Many developing states, particularly in Latin America, claimed that foreign investors and investments were only entitled to the same treatment as the state's own nationals (national treatment). IIAs resolve this debate firmly in favour of providing minimum standards of treatment. Indeed, some commentators argue that IIA treaty practice is so consistent and widespread that minimum standards of treatment in IIAs, such as fair and equitable treatment, are now customary international law.³⁸

While there is variation in specific treaty language, the general approach and content of IIAs are remarkably similar. Convergence in treaty language has been promoted through the adoption by states of model agreements.³⁹ IIA preambles regularly refer to creating 'favourable conditions' or a 'stable framework' for investment and link this

³⁶ 73 new BITs were concluded in 2004. Of these 25% were between developing countries, 40% were between developed and developing countries and 8% were between developed countries. The remainder involved countries of the CIS and SEE. See UNCTAD, "Recent Developments in International Investment Agreements" (2005) IIA Monitor No. 2, UNCTAD/WEB/ITE/IIT/2005/1, at 4, online: UNCTAD <<http://www.unctad.org>>.

³⁷ For an overview of these developments see Rubins & Kinsella, *supra* note 23 and M. Sornarajah, *The International Law on Foreign Investment*, 2d. ed. (Cambridge: Cambridge University Press, 2004).

³⁸ For commentary on the fair and equitable treatment standard see OECD, Directorate for Financial and Enterprise Affairs, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment No 2004/3 (Paris: OECD, 2004); C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 J. World Inv. & Trade 357; and R. Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 Int'l Law. 87.

³⁹ Model agreements are reproduced in Dolzer and Stevens, *supra* note 26 and the UNCTAD IIA databases, *supra* note 26. As noted, *supra* note 28, many BITs are based substantially on the 1967 OECD model.

framework to economic development.⁴⁰ IIAs create these favourable conditions by imposing binding obligations on states with respect to their treatment of foreign investment. They typically do so through a number of provisions: (i) a wide asset-based definition of investment; (ii) guarantees of non-discrimination (national and most-favoured-nation treatment); (iii) a minimum standard of treatment often expressed as ‘fair and equitable treatment’ coupled with an obligation not to impose arbitrary or discriminatory measures; (iv) the right to transfer investments and profits out of the host state; and (v) compensation for measures tantamount to expropriation.⁴¹ A smaller number of IIAs provide for rights of entry for foreign investment, prohibitions on performance requirements, and ‘umbrella clauses’ under which a state agrees to observe its commitments to foreign investors.⁴²

In most IIAs, foreign investors enforce these rights through investor-state arbitration provisions under which the state provides its general consent to arbitrate claims under the IIA. The investment treaty system of direct and enforceable claims by foreign nationals against states is unique in international law.⁴³ Investment arbitration allows direct claims against states for their sovereign acts. Typically, there is no requirement to exhaust local remedies. Investment tribunals can award (substantial) damages for breaches of the treaty, and awards are usually enforceable under the *New York Convention*.⁴⁴ In many cases, IIAs

⁴⁰ For example, the preamble to China/Germany (2003) provides that the treaty is intended to “create favourable conditions for investment” and recognizes that “the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States” (online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2006/itn_germany_china_bit_2003.pdf>).

⁴¹ Canadian and US BITs also provide for establishment rights, prohibitions on performance requirements and ability to hire foreign managers. On US BITs, see K.J. Vandeveld, *United States Investment Treaties: Policy and Practice* (Boston: Kluwer Law and Taxation, 1992).

⁴² In this paper I focus on the most common provisions in IIAs. I do not take a position on whether entry and performance requirement provisions promote or impede sustainable development.

⁴³ For this reason, some commentators view investment treaty arbitration as a system of global administrative law. See G. Van Harten & M. Loughlin, “Investment Treaty Arbitration as a Species of Global Administrative Law” (2006) 17(1) *European J. Int’l L.* 121.

⁴⁴ United Nations Conference on International Commercial Arbitration, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June

provide for arbitration under the International Centre for the Settlement of Investment Disputes (ICSID), which provides a special treaty-based regime for challenge and enforcement of awards.⁴⁵ As of December 2005, 135 IIAs claims had been brought before ICSID.⁴⁶

Widespread criticism of the IIA regime first developed as a result of four controversial and high-profile investment claims under Chapter Eleven of the *North American Free Trade Agreement* (NAFTA):

- *Ethyl v. Canada*: export and interprovincial trade ban prohibitions on MMT, a fuel additive,⁴⁷
- *Azinian v. Mexico*: cancellation of a municipal waste concession;⁴⁸
- *Metalclad v. Mexico*: closure of a hazardous waste site,⁴⁹ and

1958 (entered into force 7 June 1959), online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> [*New York Convention*].

⁴⁵ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 4 ILM 524 (entered into force 14 October 1966, amended and effective 10 April 2006), online: ICSID <<http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>> [*ICSID Convention*]. ICSID was established in 1965 to provide a neutral forum to depoliticize the settlement of investment disputes. The convention is commonly called the ICSID or Washington Convention. As of 25 January 2006, 155 states have signed and 143 have ratified the ICSID Convention. Awards made by ICSID tribunals are binding on the parties and can only be annulled by an ad hoc committee established under the ICSID Convention. For legal commentary on the ICSID Convention and references to other sources see C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) and L. Reed, J. Paulsson & N. Blackaby, *Guide to ICSID Arbitration* (The Hague: Kluwer Law, 2004).

⁴⁶ See UNCTAD, *Investor-State Disputes arising from Investment Treaties: A Review* (United Nations: Geneva, 2005) at 4.

⁴⁷ *Ethyl v. Canada* (1999), 38 I.L.M. 708 (UNCITRAL) was settled after a jurisdictional award [*Ethyl*]. For background on the Ethyl dispute see J. Soloway, “Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy” (1999) 8 Minn. J. Global Trade 55.

⁴⁸ *Azinian et al. v. The United Mexican States* (1999), 14 ICSID Rev.—FILJ 538, 39 I.L.M 537, 121 I.L.R. 2, 5 ICSID Rep. 272 [*Azinian*].

⁴⁹ *Metalclad Corporation v. United Mexican States* (2000), 40 I.L.M. 36 (ICSID) [*Metalclad*]. For commentary on the case see L.J. Dhooge, “The North American Free Trade Agreement and the Environment: Lessons of *Metalclad Corporation v. United Mexican States*” (2001) 10 Minn. J. Global Trade 209; T. Weiler, “*Metalclad*

- *Methanex v. United States*: Californian ban on the use of MTBE, another fuel additive.⁵⁰

These four cases have given rise to considerable controversy regarding Chapter Eleven of NAFTA, and more generally, the IIA regime.⁵¹ Critiques run the gamut, from the re-assertion of the Calvo Doctrine and a rejection of international standards and adjudication, to more focused critiques about the scope of investment guarantees and deficiencies in the investor-state arbitration process.⁵² There are three main areas of concern. The first focuses on what is said to be the wide scope and indeterminacy of investment treatment standards and the claim that their interpretation has been too expansive and ‘pro-investment.’ The second concerns the process of investor state arbitration. Criticism has focused on (i) transparency—access to documents, tribunal hearings and the ability of non-parties to make submissions to the tribunal; (ii) the composition of tribunals—conflicts of interest and the legitimacy of private individuals making determinations regarding the “legality” of state laws; and (iii) the limited ability to review arbitral awards for errors of fact or law and the absence of mechanisms to ensure that conflicting decisions and inconsistent jurisprudence do not arise. The third broad critique is the asymmetry of obligations in IIAs. IIAs impose obligations on host states with respect to investments and investors. There are no corresponding international obligations imposed on foreign investors in

v. Mexico: A Play in Three Parts” (2001) 2 J. World Inv. & Trade 685; and C. Tollefson, “*Metalclad v. United Mexican States* Revisited: Judicial Oversight of NAFTA’s Chapter Eleven Investor-State Claim Process” (2002) 11 Minn. J. Global Trade 183.

⁵⁰ *Methanex Corp. v. United States of America*, Final Award, 3 August 2005, online: U.S. Department of State <<http://www.state.gov/s/l/c5818.htm>> [*Methanex*]. Methanex argued that its investment in the US oxygenate market had been taken by a discriminatory measure and handed over to the US domestic ethanol industry (see paras. 2-4, Part IV-Chapter D). The tribunal held that it lacked jurisdiction and, in any event, would have denied Methanex’s claims on the merits.

⁵¹ See *Atik*, *supra* note 11; see also C.H. Brower, II, “Structure, Legitimacy, and NAFTA’s Investment Chapter” (2003) 36 Vand. J. Transnat’l L. 37.

⁵² The International Institute for Sustainable Development (IISD) has published a number of reports on the IIA regime raising concerns about IIAs; see online: <<http://www.iisd.org/investment/>>. For a recent discussion, see IISD, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required*, by F. Marshall & H. Mann, (IISD, September 2006) at 2, online: IISD <http://www.iisd.org/pdf/2006/investment_uncitral_rules_revision.pdf> [*IISD UNCITRAL Report*].

the operation of investments, or on the investors' home state to ensure its nationals comply with standards of conduct in their operations abroad.

On a more general level, critics of the international economic law regime—in particular trade and investment agreements—view it as institutionalizing a 'disciplinary neoliberalism' or a global 'economic constitutionalism' that subverts democratic decision making.⁵³ From this perspective, trade and investment treaties are seen as quasi-constitutional because they establish disciplines on the state's ability to legislate. Norms are established that legislatures cannot override without breaching international law. They bind government over long periods of time. The rules generate 'constitution-like' entitlements legally enforceable before international tribunals and courts. While amendments to the disciplines are possible, amendments require consent from other states party to the treaties. Withdrawal from treaty obligations is technically possible, but the costs are too high, both politically and economically. As will be discussed in the context of Principle 6 "Good Governance" there is a fundamental ideological divide between those who view the IIA network or 'web' as promoting sustainable development through the provision of a supportive, stable and predictable framework for investment planning, and those that view it as trapping or strangling the public sector in the web-like disciplines of neo-liberalism.

Whatever position taken along the ideological spectrum, the impact of IIAs is by no means academic. At the end of 2005, there were 229 known investment treaty arbitrations.⁵⁴ Over two thirds of the claims were filed after 2001.⁵⁵ The cases to date involve a variety of investments, many of which have significant sustainable development impacts. These include investment treaty claims regarding water, gas and

⁵³ See D. Schneiderman, "Investment Rules and the New Constitutionalism" (2000) 25 *Law & Soc. Inquiry* 757; D. Schneiderman, "Investment Rules and the Rule of Law" (2001) 8:4 *Constellations* 521; D. Schneiderman, "Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism" (2000) 63 *Law and Contemp. Probs.* 83; S. Gill, "Globalisation, Market Civilisation, and Disciplinary Neoliberalism" (1995) 24:3 *Millennium* 399; K. Jayasuriya, "Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism" (2001) 8:4 *Constellations* 442.

⁵⁴ UNCTAD, Series on International Investment Policies for Development, *Investor State Disputes Arising from Investment Treaties: A Review* (New York and Geneva: UN, 2005), online: UNCTAD <<http://www.unctad.org>>.

⁵⁵ *Supra* note 46.

electricity concessions,⁵⁶ waste concessions,⁵⁷ waste disposal facilities,⁵⁸ bans on fuel additives⁵⁹ and land development projects.⁶⁰ In a number of cases, large damage awards have been made against the state—\$US 269 million in *CME Czech Republic B.V. v. Czech Republic*,⁶¹ \$US 269 million in *France Telecom v. Lebanon*⁶² and \$US 133 million in *CMS Gas Transmission Company v. Argentina*.⁶³ The combined effect of the protections afforded by the IIA regime, the increasing number of claims and the potential for large damage awards underlines the importance of assessing the regime from the perspective of sustainable development.

II. Assessing the IIA Regime in Light of the Principles in the IIA Declaration

1. The Duty of States to Ensure Sustainable Use of Natural Resources

1.1 It is a well-established principle that, in accordance with international law, all States have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause

⁵⁶ See *CMS Gas Transmission Company v. Argentine Republic* (2005), 44 I.L.M. 1205 (ICSID) [*CMS Gas Transmission*]; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (2002), 41 I.L.M. 1135 (ICSID); *National Grid plc v. Argentine Republic*, Decision on Jurisdiction, 20 June 2006 (UNCITRAL), online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/NationalGrid-Jurisdiction-En.pdf>>; *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 [*Aguas del Tunari*]; and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

⁵⁷ *Metalclad, supra* note 49, and *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (2004), 43 I.L.M. 133 (ICSID) [*Tecmed*].

⁵⁸ *Tecmed, ibid.*; *Waste Management, Inc. v. United Mexican States* (2004), 43 I.L.M. 967 (ICSID); and *Azinian, supra* note 48.

⁵⁹ *Ethyl, supra* note 47.

⁶⁰ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, (2005) 44 I.L.M. 91.

⁶¹ Final Award, 14 March 2003 (UNCITRAL) [*CME v. Czech Republic*].

⁶² Award, 22 February 2005 (UNCITRAL).

⁶³ *Supra* note 56, Award 12 May 2005.

significant damage to the environment of other States or of areas beyond the limits of national jurisdiction.

1.2 States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems. States must take into account the needs of future generations in determining the rate of use of natural resources. All relevant actors (including States, industrial concerns and other components of civil society) are under a duty to avoid wasteful use of natural resources and promote waste minimization policies.

1.3 The protection, preservation and enhancement of the natural environment, particularly the proper management of climate system, biological diversity and fauna and flora of the Earth, are the common concern of humankind. The resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of humankind.

Principle 1 focuses on the manner in which states exercise their sovereign right to manage their natural resources. The principle emphasizes the state's duty to manage natural resources in a rational, sustainable and safe way so as to contribute to the development of its peoples. IIAs are generally consistent with this principle. While IIAs do not differentiate between sustainable and non-sustainable investment, they do not limit a state's ability to prohibit non-sustainable investment or impose conditions on investment to ensure sustainability.

Neither do IIAs impose obligations on states to manage their natural resources in "a rational, sustainable and safe way so as to contribute to the development of their peoples." IIAs, in their roles as investment *promotion* and *protection* agreements, do not distinguish between investment activities that are sustainable and those that are not. IIAs are generally agnostic about the quality or potential negative effects of FDI. Entitlement to protection under the IIA regime does not require that the investment in question benefit the host state based on any specific qualitative or quantitative criteria.

Most IIAs define investment broadly as “every kind of asset” followed by a non-exhaustive list of various types of assets including moveable and immovable property, shares, intellectual property rights and concession contracts.⁶⁴ Some IIAs, including US/Uruguay (2005), based on the 2004 new US model BIT, impose functional requirements as part of the definition of investment—the commitment of capital or other resources, the expectation of profit, or the assumption of risk—but do not specify any qualitative criteria or social purpose for the investment in question.⁶⁵ With respect to investment disputes under the ICSID regime, in *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, the tribunal noted that there is no requirement under the ICSID Convention for investment to promote economic development.⁶⁶

Is it a major failing of the IIA regime that it protects all forms of investment regardless of whether the particular investment is environmentally and socially destructive? While it is true that investments are not disqualified from the benefits of IIA protection based on sustainability criteria, the result is not a legal lacuna. Under international law, natural resource management and regulation, environmental protection and social regulation remain firmly within each state’s jurisdiction. Each state has primary responsibility for establishing the regulatory and sustainability parameters for investment activities within its territory. States retain the capacity to determine what activities may be carried out and how they should be carried out, subject to their international commitments, including those in international environmental agreements and IIAs. While it is well established that state responsibility

⁶⁴ See e.g. the definition of “investment” in China/Germany (2003), *supra* note 40; see UNCTAD, *Scope and Definition*, UNCTAD Series on Issues in International Investment Agreements (Geneva: UNCTAD, 1999).

⁶⁵ US/Uruguay (2005), Art. 1, online: Office of the United States Trade Representative <http://www.ustr.gov/World_Regions/Americas/South_America/Uruguay_BIT/Section_Index.html>.

⁶⁶ *LESI, S.p.A. and ASTALDI, S.p.A. v. People’s Democratic Republic of Algeria*, Decision on Jurisdiction, 12 July 2006, ICSID Case No. ARB/05/3 at para. 72. The only reference to economic development in the *ICSID Convention*, *supra* note 45, is in the preamble which refers to “the need for international cooperation for economic development, and the role of private international investment therein.” But see *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, 16 July 2001, 42 I.L.M. 609 at para. 52, where the tribunal noted that “the contribution to the economic development of the host state of the investment as an additional condition” for there being an investment under the ICSID Convention.

may arise where activities within states cause transboundary harm,⁶⁷ states retain significant sovereignty in balancing environmental protection and economic and social development within their territories.

The IIA regime reflects these principles. States have the primary responsibility for determining the desirability of any specific investment activity and the regulatory framework within which the investment is carried out. This approach arguably reflects the subsidiarity principle⁶⁸ by acknowledging that it is more appropriate that the balancing of social, economic and environmental impacts of any specific investment project be made at a local level.

There are good reasons why IIAs do not (and should not) create qualitative distinctions between sustainable ‘friendly’ investment and ‘non-friendly investment.’ First and foremost, this would be an exercise fraught with conceptual uncertainty because there is no consensus on how the various elements of sustainable development can be optimally balanced. Given the enormous variation in investments, it would be extremely difficult to establish criteria that would be sufficiently specific and justiciable. The balancing of economic, environmental and social impacts of large investment projects is invariably context and project specific. Second, the ‘right’ balance and the steps to be taken to mitigate negative effects of any specific project is ultimately a political decision that must be made by the local community according to the merits of each project. Third, the approach is paternalistic and is imbued with the assumption that developing states are not capable of making decisions in their best interests. Finally, creating qualifying criteria would occasion significant uncertainty and potential unfairness. An investment that had complied with local laws and had operated for some time might nevertheless be deprived of protection.

Of course, the problem is that the balancing of social, economic and environmental impacts may not occur as a result of lack of capacity or resources, or from a failure of good governance. It may be that the state wishes to make economic development a priority. This remains a challenge not only for the IIA regime but also for sustainable

⁶⁷ P.W. Birnie & A. E. Boyle, *International Law and the Environment*, 2d ed. (Oxford: Oxford University Press, 2002) at 44-47.

⁶⁸ P. Craig & G. de Burca, *EU Law: Text, Cases, and Materials*, 3d ed. (Oxford: Oxford University Press, 2003) at 135.

development generally. One way to address this issue is to focus on processes that promote sustainable development, rather than trying to impose substantive criteria to judge whether investment is sustainable or not. For example, IIAs could promote sustainable development by requiring that investments meeting certain criteria must undergo sustainability impact assessments.⁶⁹ Further, as IIAs rarely have institutional mechanisms to promote ongoing cooperation, they do little to assist in building local capacity. IIAs could promote sustainable development by providing mechanisms to build local capacity for implementing and enforcing appropriate regulatory regimes.

Principle 1 states that “[a]ll relevant actors” including industrial concerns “are under a duty to avoid wasteful use of natural resources and promote waste minimization policies.” IIAs do not require either the host state (the state in which the investment is located) or the home state (the state of which the investor is a national) to impose obligations on investors in the carrying out of investment activities. Under IIAs and public international law, investor conduct that has sustainability impacts is generally regulated by the home or host state.⁷⁰ State regulation will generally be based on territorial jurisdiction—the state will regulate investor conduct and investment activities that occur within its borders. The host state’s laws will establish the foreign investor’s primary obligations with respect to the sustainable use of natural resources. Where the state grants a foreign investor the right to extract and develop resources, the state may impose specific contractual obligations, such as, for example, obligations concerning wasteful use and waste minimization, to ensure sustainability.⁷¹ Finally, whether foreign investors should have international legal obligations under the IIA regime or otherwise is an enduring and controversial issue.⁷²

As discussed above, the overall approach of the IIA regime to sustainable investment is state-centric. Consistent with general principles of international law, the emphasis is on the state’s sovereign right to manage its natural resources pursuant to its environmental and

⁶⁹ See Principle 4 and part III, below.

⁷⁰ See generally P. Alston, ed., *Non-state Actors and Human Rights* (Oxford: Oxford University Press, 2005) for an assessment of the responsibilities of businesses under international human rights law.

⁷¹ See P. Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell, 1995).

⁷² See part III, below.

developmental policies. While the IIA regime places limits on management policies that relate to investment (i.e. non-discrimination and equitable treatment), throughout this paper I argue that IIAs do not prevent states from engaging in or regulating rational and sustainable use of resources. For example, despite claims to the contrary, expropriation provisions in IIAs have not turned out to be a threat to environmental regulation.⁷³ Nevertheless, future IIAs could include mechanisms for sustainability impact assessments and institutional cooperation to promote sustainable development.

2. The Principle of Equity and the Eradication of Poverty

2.1 The principle of equity is central to the attainment of sustainable development. It refers to both *inter-generational equity* (the right of future generations to enjoy a fair level of the common patrimony) and *intra-generational equity* (the right of all peoples within the current generation of fair access to the current generation's entitlement to the Earth's natural resources).

2.2 The present generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the long-term impact of its activities and to sustain the resource base and the global environment for the benefit of future generations of humankind. 'Benefit' in this context is to be understood in its broadest meaning as including, *inter alia*, economic, environmental, social and intrinsic benefit.

2.3 The right to development must be implemented so as to meet developmental and environmental needs of present and future generations in a sustainable and equitable manner. This includes the duty to co-operate for the eradication of poverty in accordance with Chapter IX on International Economic and Social Co-operation of the Charter of the United Nations and the Rio Declaration on Environment and Development as well as the duty to co-operate for global sustainable development and the attainment of equity in the development opportunities of developed and developing countries.

⁷³ See discussion in Principle 4 and A. Newcombe, "The Boundaries of Regulatory Expropriation in International Law" (2005) 20 ICSID Review—FILJ 1.

2.4 Whilst it is the primary responsibility of the State to aim for conditions of equity within its own population and to ensure, as a minimum, the eradication of poverty, all States which are in a position to do so have a further responsibility, as recognized by the Charter of the United Nations and the Millennium Declaration of the United Nations, to assist States in achieving this objective.

Principle 2 focuses on equity and poverty reduction. Two main issues emerge in assessing the IIA regime through the lens of principle 2. The first issue is whether the IIA regime promotes FDI. One of the primary purposes of IIAs is to encourage FDI so that basic needs can be met in a sustainable manner. The international policy consensus, as expressed in the WSSD Plan of Implementation and the Monterrey Consensus, is that foreign investment plays a crucial role in the process of sustainable development and in creating economic opportunities for poverty reduction. IIAs are based on the premise that a stable and predictable framework for investment will promote investment, which in turn will contribute to economic development. The second issue is whether IIAs impede the ability of states to redistribute wealth in order to achieve equity and poverty reduction. The issues of wealth creation and distribution are addressed in turn.

Given the rate at which states have concluded BITs it is perhaps surprising that the empirical literature is inconclusive on whether BITs actually promote FDI. In a recent article Susan Franck has highlighted the polarized views of what she calls ‘Treaty Protagonists’ and ‘Market Protagonists.’ ‘Treaty Protagonists’ argue that IIAs attract FDI, while ‘Market Protagonists’ suggest that market factors are determinative.⁷⁴ The 2003 UNCTAD World Investment Report (WIR) concluded, with a ‘Market Protagonist’ argument, that “BITs play a minor role in influencing global FDI flows.”⁷⁵ The WIR nevertheless highlights, with a

⁷⁴ S. D. Frank, “Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law” (2007) 19 *McGeorge Global Bus. & Development L.J.* 337, online: Social Science Research Network <<http://ssrn.com/abstract=882443>>.

⁷⁵ *WIR 2003*, *supra* note 9 at 89. This conclusion is based on a 1998 aggregate statistical analysis conducted by UNCTAD. See also M. Hallward-Driemeier, “Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... and They Could Bite” (June 2003), World Bank Policy Research Working Paper Series No. 3121, online: Social Science Research Network <<http://ssrn.com/abstract=636541>>; S. Rose-Ackerman & J. Tobin, “Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties” (2 May 2005), Yale Law & Economics Research Paper

‘Treaty Protagonist’ argument, the “enabling” function of IIAs in allowing a state’s economic determinants to assert themselves:

The policy framework is at best enabling, having by itself little or no effect on FDI flows. It has to be complemented by economic determinants that attract FDI, especially market size and growth, skills, abundant competitive resources and good infrastructure. As a rule, IIAs tend to make the regulatory framework more transparent, stable, predictable and secure—that is, they allow the economic determinants to assert themselves. And when IIAs reduce obstacles to FDI and the economic determinants are right, they can lead to more FDI. But it is difficult to identify the specific impact of the policy framework on FDI flows, given the interaction and relative importance of individual determinants.⁷⁶

While later studies provide support for a more robust relationship between IIAs and FDI levels,⁷⁷ the existence of a causal relationship and the strength of that relationship remain disputed.⁷⁸ For example, despite the fact that Brazil has ratified neither a BIT nor the ICSID Convention, it

No. 293, online: Social Science Research Network <<http://ssrn.com/abstract=557121>>; and J.W. Yackee, “Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital” (November 2006), USC CLEO Research Paper No. C06-15, online: Social Science Research Network <<http://ssrn.com/abstract=950567>>.

⁷⁶ *WIR 2003*, *supra* note 9 at 91.

⁷⁷ J. Salacuse & N. Sullivan, “Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and their Grand Bargain” (2005) 46 *Harvard Int’l L.J.* 67; E. Neumayer & L. Spess, “Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?” (May 2005), online: Social Science Research Network <<http://ssrn.com/abstract=616242>>; P. Egger & M. Pfaffermayr, “The Impact of Bilateral Investment Treaties on Foreign Direct Investment” (2004) 32 *Journal of Comparative Economics* 788; and S. Kim, “Bilateral Investment Treaties, Political Risk, and Foreign Direct Investment” (2006), online: Social Science Research Network <<http://ssrn.com/abstract=909760>>.

⁷⁸ S. Rose-Ackerman & J. Tobin, “When BITS Have Some Bite: the Political-Economic Environment for Bilateral Investment Treaties” (2006), online: Yale Law School <http://www.law.yale.edu/documents/pdf/When_BITS_Have_Some_Bite.doc>. The authors find, in contrast to their earlier paper, *supra* note 75, that there is a positive relationship between BITs and FDI. However, the marginal impact of BITs decreases as the number of BITs worldwide grows. The study also highlights the importance of the political, economic and institutional features of the host state.

was the largest recipient of FDI in South America in 2005.⁷⁹ Nevertheless, even if empirical evidence of a causal relationship is inconclusive, there remains strong competitive pressure for developing states to enter into IIAs, thereby signaling to foreign investors that the state has an enabling environment for foreign investment.⁸⁰ In addition, firms from developing states are increasingly investing abroad, providing an incentive for these states to enter into IIAs to protect their nationals' FDI. This trend will likely continue as more developing states become FDI exporters.⁸¹

Of course, increasing FDI is not a goal in itself. FDI is desirable if it results in sustainable economic growth. As with the relationship between IIAs and FDI levels, the empirical evidence of the causal relationships between FDI, economic growth and income distribution also appears to be inconclusive.⁸² Even if the empirical evidence is unclear, the international policy as reflected in the Monterrey Consensus identifies

⁷⁹ *WIR 2006*, *supra* note 6 at 69. The author is indebted to Omar Garcia-Bolivar, Washington for highlighting this point. See posting on OGEMID, 21 September 2005, online: TDM <<http://www.transnational-dispute-management.com>>.

⁸⁰ Z. Elkins, A. Guzman & B. Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000" (August 2004), UC Berkeley Public Law Research Paper No. 578961, online: Social Science Research Network <http://ssrn.com/abstract=578961>; see also A. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of BITs" (1998) 38 *Virginia J. Int'l L.* 639.

⁸¹ See *supra* note 36, highlighting that as of 2005, 26% of BITs are between developing states; see also *WIR 2006*, *supra* note 6 at 228 highlighting the expansion of FDI from developing states.

⁸² A recent paper by the International Institute for Sustainable Development (IISD Study) argues that the evidence as to whether FDI leads to economic growth is inconclusive and that the appropriate conclusion may be that FDI is "one of several necessary elements that can lead to economic growth." The IISD Study concluded the impact of FDI on income distribution and poverty reduction is to "[...] exacerbate income inequalities, but does increase absolute wage levels in even the unskilled workers among which the poor obviously number. See A. Cosby, *International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals* (Winnipeg: International Institute for Sustainable Development, 2005), online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2005/investment_iias.pdf>. On the other hand, *WIR 2006*, *supra* note 6, states at 19 that the evidence of transnational operations worldwide suggests that "workers directly employed by foreign affiliates enjoy better wages, working conditions and social security benefits than those employed by domestic firms."

mobilizing FDI as one of the “leading actions” to achieve the goals of “eradicating poverty, achieving sustained economic growth and promoting sustainable development.”⁸³

While IIAs are often formally called investment promotion and protection treaties, promotion is largely the assumed byproduct of protection. The premise is that investment protection creates a stable and predictable, and as a result, an enabling framework for foreign investment. In other words, minimal legal safeguards are necessary to promote wealth creation. Since IIAs protect wealth in order to promote its creation, IIAs expressly limit the state’s ability to redistribute resources from foreign investors to its own nationals.

Principle 3 emphasizes intra-generational equity: “the right of all peoples within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources.” What constitutes “fair access” has been a long-standing issue in the context of the foreign investment, as reflected by the wave of nationalizations of foreign-held property in the era of decolonialization and the intense controversy over compensation standards for expropriation.⁸⁴ IIAs reflect customary international law in recognizing that states may nationalize or expropriate, but may only do so provided compensation is paid.⁸⁵ Further, the majority of IIAs provide that the state must pay the investor the equivalent of market value compensation if it nationalizes or expropriates investment. IIAs do not provide for lower compensation based on the state’s lack of resources or the purpose of the expropriation (for example a generalized program of land reform to redistribute land to subsistence farmers). IIAs generally resolve the long-standing controversy over the standard of compensation for expropriation in favour of a fair market value standard.⁸⁶

On the other hand, the state retains its sovereign capacity to redistribute resources through taxation and social programs. International

⁸³ *Supra* note 2.

⁸⁴ See generally A. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2002) and T. M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).

⁸⁵ Dolzer & Stevens, *supra* note 26.

⁸⁶ See, however, *CME v. Czech Republic*, *supra* note 61, Final Award and Separate Opinion, both dated 14 March 2003, for differing views of the application of compensation standards.

authorities are clear that a significant tax burden can be imposed on foreign investment. Taxes of 50% to 60% are common in some states. However, international authorities are also clear that some forms of taxation may amount to expropriation.⁸⁷ For example, in *Link-Trading v. Moldova*, an investment treaty tribunal, addressing a claim that changes in customs and tax regulations were expropriatory, held that fiscal measures become expropriatory when they amount to an “abusive taking.” It then defined abusive in terms of unfairness, arbitrariness and discrimination or the violation of a state undertaking.⁸⁸ In principle, this represents a balanced approach—a state cannot arbitrarily transfer resources by expropriating or nationalizing without compensation, but it can tax the foreign investment subject to its IIA commitments.

While, in principle, the state’s right to tax foreign investors is uncontroversial, investment treaty tribunals sometimes find that states tax investments in ways that breach national treatment (by discriminating between foreign investors and nationals) and the fair and equitable treatment standard.⁸⁹ The non-discrimination provisions in IIAs mean that there must be equality of tax treatment between foreign investors and nationals. A heavier tax burden cannot be placed on foreign investors merely because they are foreigners.

While critics have suggested that foreign investment law is a “law of greed”⁹⁰ because of its strong investment protection emphasis, I would suggest that governments retain significant discretion to engage in wealth redistribution through taxation and other measures. IIA requirements of non-discrimination, due process and compensation for expropriation are

⁸⁷ See generally A. Kolo & T. Wälde, “Confiscatory Taxation under Customary International Law and Modern Investment Treaties” (1999) 4:17 CEPMLP Internet Journal, online: University of Dundee <http://www.dundee.ac.uk/cepmlp/journal/>; and W. Park, “Expropriation and Taxation in the NAFTA” in T. Weiler ed., *Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley: Transnational, 2004) 93.

⁸⁸ *Link-Trading Joint Stock Company v. Moldova*, Final Award, 18 April 2002, paras. 64-91 (UNCITRAL).

⁸⁹ *Marvin Feldman v. Mexico* (2002), 42 I.L.M. 625 (ICSID); *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004 [*Occidental*]; and *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, Partial Dissenting Opinion, 3 February 2006.

⁹⁰ *Supra* note 12.

not inconsistent with the principle of equity, nor with a state's role in eradicating poverty. On the contrary, the international policy consensus is that these protections play an important role in economic development.

3. The Principle of Common but Differentiated Responsibilities

3.1 States and other relevant actors have common but differentiated responsibilities. All States are under a duty to cooperate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should cooperate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter-pays principle.

3.2 Differentiation of responsibilities, whilst principally based on the contribution that a State has made to the emergence of environmental problems, must also take into account the economic and developmental situation of the State, in accordance with paragraph 3.3.

3.3 The special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognized.

3.4 Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, *inter alia* by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development.

Principle 3 emphasizes the common but differentiated responsibilities of states. In general, the IIA regime is not based on a model of common but differentiated responsibilities. Unlike the WTO regime, IIAs generally do not contain specific provisions on special and

differential treatment.⁹¹ Instead, IIAs impose reciprocal and equal obligations of promotion and protection. While the legal reality is that IIAs provide equal and reciprocal legal obligations, the economic reality until recently has been that IIAs were negotiated between capital exporting and capital importing states with investment flows essentially being one way. In practice, an IIA, such as the Canada/Peru (2006) primarily protects Canadian investment in Peru.⁹² As already noted, however, investors from some developing states are becoming significant sources of FDI and developing states are increasingly concluding IIAs with other developing states.⁹³

Differentiated responsibilities may still exist in some IIAs as a result of exceptions or reservations to treaty obligations. For example, some IIAs provide for express reservations to relative standards of treatment. This is particularly so where relative standards extend to admission and establishment (the right to enter a state and make investments). Reservations are made in a number of ways. Certain sectors, subsectors or activities may be entirely excluded. This is often the case in economic sectors with particular strategic, political or economic significance to the state, such as defence industries.⁹⁴ Reservations may be made for existing or future non-conforming measures.⁹⁵ This allows states to maintain existing, or adopt new and more restrictive, measures that do not conform with its obligations.⁹⁶

⁹¹ See online: WTO <http://www.wto.org/English/tratop_e/devel_e/dev_special_differential_provisions_e.htm>.

⁹² *Infra* note 136.

⁹³ *Supra* notes 7 and 36.

⁹⁴ Reservations are often industry specific, such as the exception for cultural industries in NAFTA, Annex 2106, *supra* note 13.

⁹⁵ See NAFTA, Art. 1108(1) and Annex 1 entitled “Reservations for Existing Measures and Liberalization Requirements.” Canada annexed measures with respect to foreign investment screening and foreign ownership restrictions that would have violated national treatment. Art. 1108(1)(c) NAFTA further provides a “standstill” obligation with respect to amendments to non-conforming measures. Reservations apply to amendments to nonconforming measures provided they do not decrease the conformity of the measure with the applicable obligation. For certain non-conforming measures, the parties agreed to phase out the measures over time.

⁹⁶ *Ibid.*; see NAFTA, Art. 1108(3) and Annex II entitled “Reservations for Future Measures.” The US Schedule included measures with respect to the ownership of oceanfront land, communications, social services, preferences to economically disadvantaged minorities, legal services, newspaper publishing and maritime transportation services.

Reservations may also be made to allow for specific social policies, such as development considerations⁹⁷ or the protection of disadvantaged groups.⁹⁸

In applying IIA standards, an outstanding question is the relevance of the host state's level of development in interpreting the minimum standards provided in treaties.⁹⁹ In other words, should minimum standards, such as 'fair and equitable treatment' and 'full protection and security,' apply differently depending on whether the investment is in Canada or Benin, the latter of which has been identified by the IMF as a Heavily Indebted Poor Country?¹⁰⁰ Recent jurisprudence has focused on the protection of the investor's legitimate expectations as an element of the fair and equitable treatment standard.¹⁰¹ Tribunals have assessed legitimate investor expectations in light of the level of economic, social and political instability in a state.¹⁰² In addition, the conduct of the investor in making a reasonable assessment of the investment risk may be

⁹⁷ Protocol, Indonesia-Switzerland (1974); Art. 3, Jamaica-Switzerland (1990); Art. 3(6) Jamaica-Netherlands (1991) and Art. 3(3), Italy-Morocco (1990). BIT texts are available in *Investment Protection Treaties*, *supra* note 26.

⁹⁸ In NAFTA, the parties made reservations for Aboriginal Affairs or Minority Affairs. See Annex II, Reservations for Future Measures, NAFTA, *supra* note 96.

⁹⁹ N. Gallus, "The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection" (2005) 6 J. World Investment & Trade 711.

¹⁰⁰ See International Monetary Fund <<http://www.imf.org/external/np/hipc/index.asp>>.

¹⁰¹ See OECD, Directorate for Financial and Enterprise Affairs, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment Law, Working Paper No 2004/3 (2004); C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 J. World Investment & Trade 357; and R. Dolzer, "Fair and Equitable treatment: A Key Standard in Investment Treaties" (2005) 39 Int'l Law. 87.

¹⁰² *Alex Genin et al. v. Republic of Estonia* (2001), 17 ICSID Rev.—FILJ 395 at para. 348 (ICSID): "[T]he Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest in an Estonian financial institution, EIB." See also *Nagel v. Czech Republic*, SCC Case No. 49/2002, (2004) 1 Stockholm Arbitration Report 141 at 156; *Generation Ukraine Inc. v. Ukraine* (2003), 44 I.L.M. 404 at para. 20.37 (ICSID); and *Eudoro A. Olguín v. Republic of Paraguay* (2001), 18 ICSID Rev.—FILJ 143, 18 ICSID Rev.—FILJ 160 at para. 75 (ICSID).

relevant.¹⁰³ In the case of ‘full protection and security’ tribunals have required states to exercise a reasonable level of due diligence under the circumstances.¹⁰⁴ The resources available to a state will likely be a relevant factor in assessing the extent of its due diligence obligations. Tribunals have, nevertheless, found developing states responsible for violating minimum standards.¹⁰⁵ While there are minimum standards of conduct, in practice tribunals will consider the state’s level of development and stability as relevant circumstances in determining whether there has been a breach. In addition, economic, social and political instability may also be considered when measuring damages arising from a breach of a treaty standard.¹⁰⁶ If the investment was risky and profits uncertain, it will be more difficult for the investor to prove that government action, rather than endemic business risk, was the cause of any loss.

Principle 3 also refers to the responsibility of developed states to contribute to capacity-building in developing countries. As a rule, IIAs do not have specific provisions addressing cooperation. A number of free trade agreements, such as regional free trade agreements and NAFTA, MERCOSUR and bilateral free trade agreements such as the Canada-Chile and US-Chile Free Trade Agreements have side agreements that establish frameworks for environmental cooperation. Unlike free trade agreements, stand-alone IIAs as a rule do not provide institutional mechanisms for cooperation or capacity building. This is potentially an area where a future generation of IIAs could assist in promoting sustainable development.

¹⁰³ See P. Muchlinski, “‘Caveat Investor’? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard” (2006) 55 I.C.L.Q. 567.

¹⁰⁴ *Asian Agricultural Products Ltd. (AAPL) v. The Republic of Sri Lanka* (1990), 30 ILM 577 (ICSID) [AAPL] and *American Manufacturing & Trading, Inc. v. Republic of Zaire* (1997), 36 I.L.M. 1531 (ICSID) [AMT].

¹⁰⁵ *AAPL* and *AMT*, *ibid.*; *MTD*, *supra* note 60; *Metalclad*, *supra* note 49; *CMS Gas Transmission*, *supra* note 56; *Pope & Talbot Inc. v. Canada*, Award on the Merits, 10 April 2001 (UNCITRAL), online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/phases.aspx?lang=en>>.

¹⁰⁶ *Supra* note 104 referring to *AMT*.

4. The Principle of the Precautionary Approach to Human Health, Natural Resources and Ecosystems

4.1 A precautionary approach is central to sustainable development in that it commits States, international organizations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty.

4.2 Sustainable development requires that a precautionary approach with regard to human health, environmental protection and sustainable utilization of natural resources should include:

- (a) accountability for harm caused (including, where appropriate, State responsibility);
- (b) planning based on clear criteria and well-defined goals;
- (c) consideration in an environmental impact assessment of all possible means to achieve an objective (including, in certain instances, not proceeding with an envisaged activity); and
- (d) in respect of activities which may cause serious long-term or irreversible harm, establishing an appropriate burden of proof on the person or persons carrying out (or intending to carry out) the activity.

4.3 Decision-making processes should always endorse a precautionary approach to risk management and in particular should include the adoption of appropriate precautionary measures.

4.4 Precautionary measures should be based on up-to-date and independent scientific judgment and be transparent. They should not result in economic protectionism. Transparent structures should be established which involve all interested parties, including non-state actors, in the consultation process. Appropriate review by a judicial or administrative body should be available.

IIAs do not specifically address the precautionary principle or how issues of scientific uncertainty should be addressed in state regulatory activity affecting investments. A lingering issue is whether a state that

regulates on a precautionary basis could be found to have breached investment treaty guarantees.¹⁰⁷ For example, assume that a state prohibits or stringently regulates the use of a chemical substance produced in a foreign investor's plant. The foreign investor might claim that the regulation is an indirect expropriation of its investment. The investor might also claim a breach of national treatment because chemicals with similar uses produced by national industries are not regulated or prohibited. In addition, the investor might claim that the state regulation breached the fair and equitable treatment standard because the regulation was arbitrary, discriminatory, contrary to the investor's legitimate expectations or that there was a lack of due process in its enactment.

No investment treaty tribunal to date has specifically addressed the precautionary principle; nor has any state specifically relied on the precautionary principle as the basis for its regulatory activity. Nevertheless, two NAFTA investor state arbitrations involving the regulation of chemicals (*S.D. Myers* and *Methanex*) provide some insight into whether investment obligations are inconsistent with the precautionary principle. The reasoning in these cases suggests that a state may regulate based on the precautionary principle provided that it does not act arbitrarily or in bad faith and that there is no lack of due process.

In *S.D. Myers v. Canada*, a US-based waste disposal company, with an office in Canada, claimed that Canada breached its investment obligations under NAFTA as a result of a 1995 ministerial order made under the *Canadian Environmental Protection Act*. This order banned the export of polychlorinated biphenol (PCB) waste to the United States.¹⁰⁸ When the ban came into force, few options were available in Canada for the disposal of wastes with high concentrations of PCBs, with the exception of a permanent PCB treatment facility established in Alberta with the support of the Alberta provincial government and a number of mobile incinerators located in Quebec. While the border between Canada

¹⁰⁷ For a discussion of these issues, see M. Orellana, "Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines" forthcoming, 2006, in report of 2004 Research Seminar on International Investment Law of the Hague Academy of International Law.

¹⁰⁸ *S.D. Myers, Inc. v. Government of Canada*, First Partial Award on Merits, 13 November 2000, at para. 98 (UNCITRAL) [*S.D. Myers*] (PCBs are highly toxic and can harm human and animal health).

and the United States had traditionally been closed to shipments of PCB wastes, in 1995 S.D. Myers obtained the US Environmental Protection Agency's approval to import PCBs into the US from Canada for disposal. The result of the Canadian ministerial order and subsequent regulation was to prohibit such exports to the US.

S.D. Myers claimed there had been breaches of national treatment and the minimum standard of treatment as well as expropriation. The tribunal concluded that the Canadian ban on exports was aimed at protecting the Canadian PCB disposal industry from US competition and that there were no legitimate environmental reasons for the ban.¹⁰⁹ The tribunal noted that Canadian environmental officials had initially embraced the border opening as a technically sound solution to an environmental problem and as being in conformity with Canada's legal obligations.¹¹⁰ The tribunal concluded that Canada had breached both the national treatment provision¹¹¹ and a majority of the tribunal held that Canada had also breached the fair and equitable treatment guarantee in NAFTA.¹¹²

Canada had argued that, as a party to the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal*,¹¹³ it was required to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes.¹¹⁴ The tribunal noted, however, that Article 11 of the Basel Convention expressly allows treaty parties to enter into bilateral agreements for the cross-border movement of waste "provided that these agreements do not undermine the Basel Convention's own insistence on environmentally sound management."¹¹⁵ Although, the US had not ratified the Basel Convention, Canada and the US had concluded the *Transboundary Agreement on Hazardous Waste* (the Transboundary

¹⁰⁹ *S.D. Myers, ibid.* at paras. 194-5.

¹¹⁰ *Ibid.* at paras. 164-167.

¹¹¹ *Ibid.* at paras. 255-256.

¹¹² *Ibid.* at para. 266.

¹¹³ 22 March 1989, (entered into force May 5, 1992, accession by Canada 29 August 1992, entered into force in Canada 26 November 1992), online: <<http://www.basel.int/>> [*Basel Convention*].

¹¹⁴ *Ibid.*, art. 4(2)(b).

¹¹⁵ *S.D. Myers, supra* note 108 at para. 213.

Agreement), Article 2 of which provides that: “The parties shall permit the export, import and transit of hazardous waste across their common border for treatment, storage or disposal pursuant to the terms of their domestic laws, regulations and administration practices, and the provisions of this agreement.” The tribunal also noted that Art. 104 of NAFTA, which expressly addresses conflicts with international environmental treaties, including the Basel Convention, provides that “where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.”¹¹⁶

In interpreting the national treatment obligation, the tribunal noted that its legal context included the *North American Agreement on Environmental Co-operation*, which affirms the principles in the Rio Declaration. The tribunal held that the relevant principles were: states have the right to establish high levels of environmental protection; states should avoid creating distortions to trade; and environmental protection and economic development can and should be mutually supportive.¹¹⁷ In a Separate Opinion, arbitrator Bryan Schwartz considered the application of the precautionary principle and noted that:

It may well be that government measures that are challenged under Article 1102 (National Treatment) can sometimes be found in compliance by taking into account the need for government to adopt provisional measures. Whether nationals and non-nationals are in “like circumstances” is an evaluation that can reasonably change, in the eyes of a reasonable and competent government, in light of the available information. It seems to make sense that a tribunal that is measuring a government’s compliance with Article 1102 can take into account the way a government reasonably perceives a matter, rather than judging government conduct on the basis of hindsight.¹¹⁸

While certain aspects of the reasoning of the *S.D Myers* award may be questioned, the overall approach of the tribunal is consistent with Principle 4. The evidence before the tribunal suggested that the ban was

¹¹⁶ *Ibid.* at para. 215 [emphasis in original].

¹¹⁷ *Ibid.* at para. 247.

¹¹⁸ *Ibid.* at para. 166.

not based on a precautionary approach to risk management; rather, it arose out of economic protectionism. In addressing the Rio Declaration principles, the tribunal also highlighted that environmental protection and economic development can and should be mutually supportive. Canada could comply with its Basel Convention obligations and allow transboundary transfers of PCB waste to regulated destruction facilities in the US. In addition, the separate opinion highlights that provisional measures can be taken based on how a government reasonably perceives the situation to be addressed, rather than judging government conduct on the basis of hindsight.

The second case is *Methanex v. United States*, another NAFTA Chapter Eleven arbitration.¹¹⁹ Methanex claimed that the United States had breached its NAFTA obligations as a result of California's ban on the sale and use of the gasoline additive known as "MTBE." California's ban was based on its finding that MTBE contaminated groundwater making it unfit to drink.¹²⁰ Methanex, which produces methanol—a prime ingredient of MTBE—claimed that the ban's real purpose was to protect competitors in the ethanol industry. The tribunal, in addition to rejecting all of Methanex's substantive claims, held that it did not have jurisdiction over the claim because the Californian measures did not relate to Methanex's investment—methanol production.¹²¹

The *Methanex* award provides some guidance with respect to assessment of scientific evidence in the context of investment treaty claims.¹²² In *Methanex* the tribunal assessed the scientific evidence upon which California relied in banning MTBE. California's decision to ban MTBE was based primarily on a research report by the University of California (the UC Report), which concluded, among other things, that

¹¹⁹ *Methanex*, *supra* note 50.

¹²⁰ MTBE has a turpentine-like taste and odor that renders water undrinkable even at extremely low concentrations (*Methanex*, *ibid.*, U.S. Amended Statement of Defense, at paras. 32, 44-47, online: U.S. Department of State <<http://www.state.gov/s/l/c5818.htm>>.

¹²¹ The *Methanex* Tribunal held that the phrase "relating to" in Article 1101(1) NAFTA signified something more than the mere effect of a measure on an investor or an investment and that it required a legally significant connection between them. *Methanex*, *ibid.* at para. 147.

¹²² This discussion of the *Methanex* case draws on the author's discussion of the case in "The Boundaries of Regulatory Expropriation in International Law" (2005) 20 ICSID Review—FILJ 1.

there were significant risks and costs associated with water contamination due to the use of MTBE.¹²³ In its findings on the scientific evidence, the tribunal held that the UC Report reflected a “serious, objective and scientific approach.”¹²⁴ The mere fact that there was scientific disagreement about the effects of MTBE did not warrant a conclusion that the UC Report was a political sham, particularly given that it was based on public hearings, testimony and had been peer-reviewed.¹²⁵ Moreover, the tribunal was not persuaded that the UC Report was scientifically incorrect and accepted without reservation the conclusions of the American scientific expert witnesses. In conclusion, the tribunal held that the Californian ban was “motivated by the honest belief, held in good faith and on reasonable scientific grounds that MTBE contaminated groundwater and was difficult to clean up.”¹²⁶

The scientific standard in the *Methanex* award—honest belief, good faith and reasonable scientific grounds—is consistent with the precautionary principle approach. The *Methanex* tribunal added the further proviso that there be no bad faith in instituting the measure. While the *Methanex* tribunal also held that the UC report was not “scientifically incorrect,”¹²⁷ the tribunal does not suggest that ‘scientifically correct’ is the standard for assessing the legitimacy of an environmental measure. Nor did it suggest that there was a requirement for California to use the least investment-restrictive measure to address the risk of ground water contamination. This is significant as Methanex had argued that MTBE was present in groundwater because of leaking underground fuel tanks, and that the appropriate risk management technique would have been to address the leaky fuel tank problem.

In *Methanex*, California based its regulation on substantial scientific evidence. The award does not address what happens where there is significant scientific uncertainty. Nonetheless, the reasoning highlights that governments may regulate risks where there are competing scientific views. The reasoning also points to the importance of the process by which precautionary measures are taken. Precautionary

¹²³ *Methanex*, *supra* note 50, Part III-Chapter A at para. 9.

¹²⁴ *Ibid.* at para. 101.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at para. 102.

¹²⁷ *Ibid.* at para. 101.

measures are unlikely to violate investment treaty obligations if there is an open and transparent public process of information gathering, an opportunity for those affected by the measure to be heard and an objective decision-making process for assessing risks. This is consistent with Principle 4.4, which provides that:

Precautionary measures should be based on up-to-date and independent scientific judgment and be transparent. They should not result in economic protectionism. Transparent structures should be established which involve all interested parties, including non-state actors, in the consultation process. Appropriate review by a judicial or administrative body should be available.

Another element of the precautionary approach identified in Principle 4 is the use of environmental impact assessments (EIAs) to identify potential harms. The need for EIAs is reflected in Principle 17 of the 1992 Rio Declaration: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.” Despite this exhortation, the general view is that under international law EIAs are only obligatory in the case of transboundary risk to the marine environment or the environment of other states.¹²⁸

EIA has been defined as “a national procedure for evaluating the likely impact of a proposed activity on the environment.”¹²⁹ Over 100 states require EIAs, although the scope and frequency of EIAs vary widely.¹³⁰ A number of international treaties also provide for EIAs. The *Espoo Convention* requires that states establish EIA procedures with respect to activities listed in the annex that are likely to cause significant adverse transboundary impact.¹³¹ The procedures include requirements for public participation.¹³² A number of other treaty regimes require

¹²⁸ Birnie & Boyle, *supra* note 67 at 132.

¹²⁹ *Convention on Environmental Impact Assessment (EIA) in a Transboundary Context*, 25 February 1991, 30 I.L.M. 800 (entered into force 10 September 1997), Art. 1(vi), online: United Nations Economic Commission for Europe [http://www.unece.org/env/eia/\[Espoo Convention\]](http://www.unece.org/env/eia/[Espoo%20Convention]).

¹³⁰ Cordonier Segger & Khalfan, *infra* note 179 at 177.

¹³¹ *Supra* note 129, Art. 2(2) (the activities are listed in Appendix I).

¹³² *Ibid.*, Arts. 2(6), 3(8).

impact assessments in specified circumstances.¹³³ In addition, international financial institutions impose EIA requirements as a condition of funding. The World Bank requires bank-funded projects to be assessed in accordance with its environmental and social safeguard policies. These include environmental assessment, social assessment for impact on indigenous peoples and management of cultural property. In order to harmonize requirement for EIAs, international financial institutions (IFIs) have agreed to a *Common Framework for Environmental Impact Assessment*.¹³⁴

In addition to project-related impact assessments, some states are undertaking environmental and sustainability impact assessments of international trade and investment agreements. For example, the European Union undertook a comprehensive Sustainability Impact Assessment (SIA) study of the Doha Round of the World Trade Organization negotiations and has adopted a policy of carrying out SIAs for all major multilateral and bilateral trade negotiations.¹³⁵ In the investment context, Canada has begun this practice in the context of BIT negotiations with Peru, India and Korea. In the case of Peru, the results of the initial environmental assessment found that the agreement was not expected to yield large economic changes in Canada as Peru's total investment in Canada is miniscule (\$1 million in 2003) and not likely to significantly increase. As a result, the assessment did not proceed to the next stage. However, unlike the EU SIA process which, where possible, analyzes impacts on negotiating parties and is carried out in cooperation with other states, the Canadian impact assessment does not assess "the potential for positive or negative environmental impacts that could occur in Peru because of these negotiations, or to judge the measures in place

¹³³ See Art. 23(1), *Protocol to the Antarctic Treaty on Environmental Protection*, 4 October 1991, 30 I.L.M. 1461; and Arts. 205-206, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1245 (entered into force 16 November 1994).

¹³⁴ Multilateral Financial Institutions Working Group on Environment (MFI-WGE), February 2005, online: Aid Harmonization & Alignment <<http://www.aidharmonization.org/download/255377/EACcommonframework-apr05.pdf>>.

¹³⁵ See Commission of the European Communities, *Communication from the Commission on Impact Assessment*, COM(2002) 276 Final (5 June 2002), online: European Commission <<http://ec.europa.eu>>. The EU has conducted SIAs with respect to negotiations with the African Caribbean and Pacific (ACP) countries; see online: European Commission <<http://ec.europa.eu/comm/trade/issues/global/sia/faqs.htm>>.

within Peru to enhance or mitigate such impacts.”¹³⁶ Given the one-way flows of investment in many BIT contexts—in the case of Canada-Peru \$1.79 billion of Canadian investment, dominated by investments in the mining sector,¹³⁷—this type of EIA process does little to promote sustainable investment. In part III, I return to the issue of including impact assessment obligations in IIAs.

5. The Principle of Public Participation and Access to Information and Justice

5.1 Public participation is essential to sustainable development and good governance in that it is a condition for responsive, transparent and accountable governments as well a condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions. The vital role of women in sustainable development should be recognized.

5.2 Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. It also requires a right of access to appropriate, comprehensible and timely information held by governments and industrial concerns on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without imposing undue financial burdens upon the applicants and with due consideration for privacy and adequate protection of business confidentiality.

5.3 The empowerment of peoples in the context of sustainable development requires access to effective judicial or administrative procedures in the State where the measure has been taken to challenge such measure and to claim compensation. States should ensure that where transboundary harm has been, or is likely to be, caused, individuals and peoples affected have non-discriminatory

¹³⁶ *Initial Environmental Assessment (EA) of the Canada-Peru Foreign Investment Protection and Promotion Agreement (FIPA)*, September 2005.

¹³⁷ *Ibid.*; in comparison, there is \$1 million of Peruvian investment in Canada.

access to the same judicial and administrative procedures as would individuals and peoples of the State in which the harm is caused.

Commentators have raised several issues regarding public participation and access to justice and information in investor-state treaty arbitrations. These concern three distinct but interrelated subjects: (a) participation by non-disputing parties; (b) access to documents produced or created for the arbitration; and (c) attendance at arbitral hearings.¹³⁸ With respect to the “right of access to appropriate, comprehensible and timely information held by governments and industrial concerns” in Principle 5.3, some recent IIAs require that governments publish laws and regulations and that investors be notified of proposed changes to law and regulations that may affect them. These provisions are addressed in the context of good governance, Principle 6.

IIAs do not impose requirements on the types of information that foreign investors must provide to governments or local communities that might be or are affected by investment activities. Requirements to disclose information are governed by local law. In part III, I highlight a number of international initiatives with respect to corporate disclosure and reporting requirements that might provide mechanisms to address these concerns.

(a) Investor-state treaty arbitration

Investor-state arbitration under investment treaties has led to conflicts between the international arbitration regime and the public’s expectation that challenges to regulation by private parties will be adjudicated in a transparent, public and open forum. A traditional hallmark of international arbitration has been its guarantee of privacy.¹³⁹ The parties may also be under a duty of confidentiality with respect to the

¹³⁸ Commentators have raised other areas of concern, such as the selection of arbitrators and the lack of an appeal mechanism. For example, the IISD, *Model International Agreement on Investment for Sustainable Development*, by H. Mann *et al.* (Winnipeg: IISD, 2005), proposes a standing panel of arbitrators to decide disputes with an appellate division, online: International Institute for Sustainable Development <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> [IISD *Model Agreement*].

¹³⁹ A. Redfern & M. Hunter, *The Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet and Maxwell, 2004) at 32.

existence of the proceedings, documents created for or produced in the proceedings and any orders, decisions or awards. Since the arbitration rules that apply to an investment treaty arbitration may vary from treaty to treaty, the ability of non-parties to participate in the arbitration will necessarily depend on the applicable arbitration. As noted above, the majority of investment treaty claims to date have occurred under the ICSID Convention.¹⁴⁰

(i) Participation of non-disputing parties (*amici curiae*)

The NAFTA tribunal in *Methanex v. United States* was the first investment treaty arbitral tribunal to address the participation of non-disputing parties (*amici curiae*) in tribunal proceedings.¹⁴¹ Three environmental NGOs requested permission to submit written *amici curiae* briefs to the tribunal, to make oral submissions and to have observer status at the oral hearings. The *Methanex* tribunal held that under Art. 15(1) of the *UNCITRAL Arbitration Rules*, which governed the proceedings, it had the power to accept *amici* submissions. The tribunal expressly distinguished accepting *amici* submissions from making *amici* parties to the proceedings.¹⁴² Subsequently, another NAFTA tribunal also operating under the *UNCITRAL Rules* followed *Methanex* and allowed *amici* to make submissions. In *United Parcel Service v. Canada*, a dispute involving allegations of anti-competitive conduct by the Canadian postal service, the tribunal permitted the union representing postal works,

¹⁴⁰ *Supra* note 5.

¹⁴¹ *Methanex*, *supra* note 50, Decision of the Tribunal on Petition from Third Persons to Intervene as “*Amici Curiae*,” 15 January 2001. *Amicus curiae* is a Latin phrase that literally means “friend of the court” and has its origins in Roman law. *Amici* are not technically parties to the proceeding. Rather, they provide information to a court or tribunal so as to assist the court or tribunal come to a proper determination of the matter before it. See A. Newcombe & A. Lemaire, “Should *Amici Curiae* Participate in Investment Treaty Arbitrations?” (2001) 5(1) *Vindabona J. Int’l Comm. L. & Arb.* 22.

¹⁴² Newcombe & Lemaire, *ibid.* at para. 30. Art. 15(1), *Arbitration Rules of the United Nations Commission on International Trade Law*, GA Res. 31/98, UN GAOR, 31st Sess., Supp. No. 17, UN Doc. A/31/17 (1976), chap. V, sect. C [*UNCITRAL Rules*] provides: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

the Council of Canadians (a Canadian NGO) and the Chamber of Commerce of the United States to submit *amicus* briefs.¹⁴³

In October 2003, the NAFTA Free Trade Commission issued a statement on “non-disputing party participation” (the Statement). The Statement confirmed that NAFTA does not limit a tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party and recommended procedures for tribunals to follow when accepting such submissions.¹⁴⁴ In *Glamis Gold Ltd. v. United States*, an ongoing NAFTA investment claim involving an open pit mining operation, a number of organizations, including the Quechan Indian Nation, the Sierra Club, Earthworks and the National Mining Association have made non-

¹⁴³ The tribunal, citing *Methanex*, *supra* note 50, held that it has the power to accept *amicus* briefs; see *United Parcel Service of America v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, at paras. 61, 64 (ICSID). The decision and briefs are available online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/parcel.aspx?lang=en>>.

¹⁴⁴ *Statement of the Free Trade Commission on non-disputing party participation*, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/Nondisputing-en.pdf>>. Para. 2 of the Statement provides that the application for leave to file a non-disputing party submission will:

- (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
- (b) be no longer than 5 typed pages;
- (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
- (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
- (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
- (f) specify the nature of the interest that the applicant has in the arbitration;
- (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
- (h) explain, by reference to the factors specified in paragraph 6, why the Tribunal should accept the submission; and
- (i) be made in a language of the arbitration.

disputing party submissions under the procedures provided in the Statement.¹⁴⁵

UNCITRAL is currently considering revisions to the UNCITRAL Rules,¹⁴⁶ which have been used in at least 65 investment treaty claims.¹⁴⁷ A recent report on amendments to the UNCITRAL Rules has recommended adding a new article to the UNCITRAL Rules confirming that tribunals have the power to accept *amici* submissions unless the parties have agreed otherwise.¹⁴⁸ This amendment would reflect the growing practice of tribunals operating under the UNCITRAL Rules.

The position taken by NAFTA tribunals applying the UNCITRAL Rules can be compared with tribunals operating under the ICSID Arbitration Rules (ICSID Rules). The issue was first considered by an ICSID tribunal in *Aguas Del Tunari*. This was a controversial dispute

¹⁴⁵ See submissions in *Glamis Gold, Ltd. v. United States* (UNCITRAL), online: <<http://www.state.gov/s/l/c10986.htm>>.

¹⁴⁶ See Commission on International Trade Law, Working Group II (Arbitration), *Settlement of commercial disputes: Revisions of the UNCITRAL Arbitration Rules*, Note by the Secretariat, 45th Sess., UN Doc. A/CN.9/WG.II/WP.143 (2006), online: Official Documents System of the United Nations <<http://daccessdds.un.org/doc/UNDOC/LTD/V06/558/61/PDF/V0655861.pdf?OpenElement>>.

For background documents on the UNCITRAL Revisions, see online: http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html. UNCITRAL commissioned Jan Paulsson and Georgios Petrochilos to report on recommendations for revisions; see J. Paulsson & G. Petrochilos, “Revisions of the UNCITRAL Rules” (2006), online: <<http://www.uncitral.org/uncitral/en/index.html>> [*Paulsson/Petrochilos Report*].

¹⁴⁷ UNCTAD, *Investor-State Disputes Arising From Investment Treaties: A Review*, UNCTAD Series on International Investment Policies for Development, UNCTAD/ITE/IIT/2005/4 (2006) at 5, online UNCTAD <<http://www.unctad.org>>.

¹⁴⁸ The *Paulsson/Petrochilos Report*, *supra* note 146 at 78, recommends adding a new article to the *UNCITRAL Rules* which expressly confers on tribunals the power to accept non-party submissions unless the parties have agreed otherwise. New Article 15(5) would read as follows: “Unless the parties have agreed otherwise, the Arbitral Tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the Tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are unable to present. The Arbitral Tribunal shall determine the mode and number of such statements after consulting with the parties.” Online: <<http://www.uncitral.org/uncitral/en/index.html>>.

arising out of a water concession in Bolivia,¹⁴⁹ in which the tribunal received a petition from a group of NGOs seeking to participate in the proceedings.¹⁵⁰ In its response to the petition, the tribunal held that under the ICSID Rules it did not have the power to join non-parties to the proceedings, to provide access to hearings to non-parties or to make documents public.¹⁵¹ The tribunal noted that at the jurisdictional phase of the proceedings there was no need to call for non-party submissions.¹⁵² The tribunal also noted that the arbitrators had signed a declaration to maintain the confidentiality of the proceedings under ICSID Rule 6(2). The ADT case was subsequently settled and the tribunal did not revisit the question of whether the tribunal would accept submissions from non-parties with respect to the merits of the claim.

Subsequently, tribunals operating under the ICSID Rules have accepted that they have the power to accept *amici* submissions.¹⁵³ In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universa, S.A. v. Argentine Republic*, a dispute involving a water concession, the tribunal held that it would consider three criteria in deciding whether it would accept *amicus* submissions: (i) the appropriateness of the subject matter of the case; (ii) the suitability of a given non-party to act as *amicus curiae* in that case, and (iii) the procedure by which the *amicus* submission is made and considered.¹⁵⁴ With respect to subject matter it noted:

¹⁴⁹ *Aguas del Tunari*, *supra* note 56.

¹⁵⁰ *Ibid.*, petition dated 29 August 2002, online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/Aguaaboliviapetition.pdf>>.

¹⁵¹ Letter from Professor David Caron, President of the Tribunal to J. Martin Wagner dated 29 January 2003, online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/Aguas-BoliviaResponse.pdf>>.

¹⁵² The tribunal noted that “[w]e hold this view without in any way prejudging the question of the extent of the Tribunal’s authority to call witnesses or receive information from non-parties on its own initiative.”

¹⁵³ Tribunals have relied on Art. 44 of the *ICSID Convention*, *supra* note 45, which provides that the tribunal may decide questions of procedure that are covered by the Convention, the Arbitration Rules or the parties’ agreement.

¹⁵⁴ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005, 21 ICSID Rev.—FILJ 342 at para. 17 (ICSID) [*Suez/Vivendi*].

The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations.¹⁵⁵

The tribunal further held that “[p]ublic acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest is strengthened by increased openness and increased knowledge as to how these processes function.”¹⁵⁶ As for the suitability of the *amici*, the tribunal, drawing on the NAFTA experience and the Statement, held that non-parties seeking to make amicus submissions must seek the leave of the tribunal to submit a petition. These submissions must set out:

- a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute.
- b. The nature of the petitioner’s interest in the case.
- c. Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.
- d. The reasons why the Tribunal should accept petitioner’s *amicus curiae* brief.¹⁵⁷

In a later decision in another Argentinian water concession case,¹⁵⁸ a tribunal composed of the same three arbitrators confirmed that it had the power to accept *amici* submissions, but rejected the petition of the Fundació para el Desarrollo Sustentable and three individuals on the basis that the petition did not provide enough information on the identity and

¹⁵⁵ *Ibid.* at para. 19.

¹⁵⁶ *Ibid.* at para. 22.

¹⁵⁷ *Ibid.* at para. 25.

¹⁵⁸ *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006 [*InterAguas*].

background of the petitioners.¹⁵⁹ Effective 10 April 2006, the ICSID Rules were amended.¹⁶⁰ Rule 37(2) now expressly provides that the tribunal may allow a “non-disputing party” to file a written submission with the Tribunal regarding a matter within the scope of the dispute.¹⁶¹

Provisions for non-disputing party submissions are also now reflected in the new US and Canadian Model BITs, both of which authorize tribunals to accept and consider submissions by non-disputing parties. The models have been used in the most recent US and Canadian BITs—US/Uruguay (2005) and Canada/Peru (2006).¹⁶²

(ii) Confidentiality/Access to documents

Access to information regarding investment treaty arbitrations has been another area of concern. While international arbitration proceedings have historically been considered confidential, the existence and scope of

¹⁵⁹ *Ibid.* The tribunal noted at para. 34 that the petitioners could submit a new application for leave.

¹⁶⁰ See online: <<http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/main-eng.htm>>.

¹⁶¹ Rule 37(2) *ICSID Rules* provides:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

¹⁶² US-Uruguay (2005), *supra* note 65 and Canada/Peru (2006), online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/tna-nac/documents/Canada-Peru10nov06-en.pdf>>. These BITs are based on the new US and Canadian model BITs, online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/investmenttreaties.htm>>.

confidentiality obligations in international commercial arbitration are now subject to much uncertainty.¹⁶³ Where the arbitral rules governing the arbitration do not specifically address confidentiality, there still may be an implied term of confidentiality under the arbitration agreement or under the law governing the arbitral proceedings (the *lex arbitri*). Further, various aspects of confidentiality must be distinguished: the existence of the arbitration; documents produced voluntarily or by order of the tribunal, witness statements, reports and pleadings submitted in the arbitration; and tribunal's orders, decisions and awards. Further, it may be unclear whether a confidentiality obligation exists only during the proceeding or continues after the arbitration is concluded.

Confidentiality became an issue in the first NAFTA investment arbitrations and led the NAFTA parties to address the issue explicitly. The NAFTA Free Trade Commission adopted the interpretation that NAFTA does not impose a general duty of confidentiality on disputing parties or preclude the parties from providing public access to documents submitted to or issued by a tribunal.¹⁶⁴ Access to documents is subject to the condition that documents can be redacted for confidential business information, privileged information or information that had to be withheld under applicable arbitral rules. Pleadings, orders and awards in Chapter Eleven arbitrations are now regularly made public. This practice is also reflected in the new US and Canadian BITs, both of which provide for public access to documents.¹⁶⁵

In the ICSID context, tribunals have not expressly ruled on *amici* request for access to documents. The *Agua Del Tunari* tribunal noted that, absent the agreement of the parties, it does not have the power to make documents public. ICSID does not publish documents related to ICSID cases, including procedural orders, decisions and awards, unless the parties have consented. The amended ICSID rules provide that ICSID “shall not publish the award without the consent of the parties. The

¹⁶³ Redfern & Hunter, *supra* note 139 at 32ff; See also discussion of confidentiality in *Paulsson/Petrochilos Report*, *supra* note 148 at 78.

¹⁶⁴ NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, 31 July 2001, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en>>.

¹⁶⁵ US/Uruguay (2005), *supra* note 65, Art. 29, and Canada/Peru (2006), *supra* note 162, Art. 38.

Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.”¹⁶⁶

In the recent *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*,¹⁶⁷ a controversial dispute involving a water and sewerage infrastructure project in Dar es Salaam, the ICSID Tribunal addressed the issue of confidentiality of documents in ICSID arbitration proceedings. In *Biwater*, Tanzania unilaterally disclosed two procedural orders to a third party.¹⁶⁸ As a result, Biwater filed a request for provisional measures requesting the tribunal to order that the parties refrain from disclosing all documents and pleadings related to the arbitration. In its order on confidentiality, the tribunal framed the issue as requiring a careful balancing between two competing interests: “(i) the need for transparency in treaty proceedings such as these, and (ii) the need to protect the procedural integrity of the arbitration.”¹⁶⁹ With respect to transparency the tribunal noted that there has been a marked trend towards transparency in investment treaty arbitration¹⁷⁰ and affirmed that “there is no provision in the ICSID Arbitration Rules which expressly provides for the confidentiality of pleadings, documents or other information submitted by the parties during the arbitration.”¹⁷¹ On the other hand, the tribunal held that the tribunal is entitled “to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute.”¹⁷² Importantly, however, it notes that limitations on transparency to protect the integrity of the proceedings are logically time-limited. Once the arbitration is concluded, restrictions would not normally continue to apply.¹⁷³

¹⁶⁶ Rule 48(4), *Rules of Procedure for Arbitration Proceedings* (adopted by the Administrative Council of the ICSID pursuant to Art. 6(1)(c) of the *ICSID Convention*, *supra* note 45) [*ICSID Arbitration Rules*].

¹⁶⁷ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No.3, 29 September 2006 [*Biwater, PO3*].

¹⁶⁸ The orders were published on the author’s investment treaty arbitration website; see *Biwater, PO3, ibid.* at para. 13.

¹⁶⁹ *Ibid.* at para. 112.

¹⁷⁰ *Ibid.* at para. 114.

¹⁷¹ *Ibid.* at para. 125.

¹⁷² *Ibid.* at para. 135.

¹⁷³ *Ibid.* at para. 140.

In *Biwater*, the tribunal was satisfied that the risk of aggravation warranted restrictions on document disclosure and held that the parties were entitled to engage in general discussion of the case in public provided public discussion was restricted to what was necessary. In particular, Tanzania was entitled to comply with its “duty to provide the public with information concerning governmental and public affairs.”¹⁷⁴ The tribunal held that for the duration of the proceedings, and in the absence of any agreement between the parties, the parties must refrain from disclosing to third parties: (i) the minutes or record of any hearings; (ii) any of the documents produced in the arbitral proceedings by the opposing party, whether pursuant to a disclosure exercise or otherwise; (iii) any of the pleadings or written memorials (and any attached witness statements or expert reports); and (iv) any correspondence between the parties and/or the arbitral tribunal exchanged in respect of the arbitral proceedings.¹⁷⁵

It is beyond the scope of this paper to conduct an in-depth analysis of the *Biwater* decision and, in particular, to examine whether protecting the integrity of the proceedings and preventing the aggravation or exacerbation of the dispute should serve as principled grounds for limiting disclosure of documents in investment treaty arbitrations. My preliminary response is that transparency in investment treaty arbitration should trump, except for limited and specific cases of protected information. This approach, now adopted in the new US and Canadian BITs, is more consistent with sustainable development principles and the development of public confidence in the IIA regime. The fallacy in the logic of integrity, aggravation and exacerbation is that investment treaty arbitration is somehow endangered by vigorous and even vociferous challenges to investment treaty claims. The fact that the US and Canada have agreed to open investment treaty arbitration processes belies the seriousness of the threat of transparency. With respect to aggravation and exacerbation, I suggest that this is simply a cost of taking transparency seriously. I acknowledge that there may be cases where confidentiality may be required. For example, it may be that in a controversial case a witness is unwilling to make a statement because of publicity concerns. Or a witness may fear reprisals if he or she makes allegations of

¹⁷⁴ *Ibid.* at para. 149.

¹⁷⁵ *Ibid.* at para. 163.

corruption. In these unique cases, the public interest may be served by imposing confidentiality obligations.¹⁷⁶

(iii) Attendance at hearings

Tribunals under the UNCITRAL Rules and the ICSID Rules have held that *amici* are not entitled to attend tribunal hearings without the consent of both parties.¹⁷⁷ Arbitral hearings in the NAFTA cases, *Methanex* and *UPS*, were public, but this was based on the consent of the parties. In the NAFTA context, Canada and the US have stated that they will consent to open hearings in NAFTA arbitrations. The amended ICSID Rules now provide that the Tribunal may allow non-parties to attend, unless either party objects.¹⁷⁸ The proposal for amending the ICSID Rules would have provided the tribunal authority to open hearings to third parties after consultation, but did not provide for a veto. The

¹⁷⁶ The *Paulsson/Petrochilos Report*, *supra* note 148 at 79, on revisions to the UNCITRAL Rules recommends that all material in UNCITRAL arbitration proceedings be treated as confidential unless otherwise agreed by the parties. The report notes at 78 that Article 74(a) of the World Intellectual Property Organization, *Arbitration Rules* (effective 1 October 2002), online: WIPO <<http://www.wipo.int/amc/en/arbitration/rules/>>, Article 30.1 of the London Court of International Arbitration, *Arbitration Rules* (effective 1 January 1998), online: LCIA <<http://www.lcia-arbitration.com/>>, Article 34 of the American Arbitration Association, *International Dispute Resolution Procedures* (amended and effective 1 September 2007), online: AAA <<http://www.adr.org/sp.asp?id=28144>> and Article 43(1) of the Swiss Chambers' Court of Arbitration and Mediation, *Swiss Rules of International Arbitration* (entered into force 1 January 2004), online: <https://www.sccam.org/sa/en/rules.php> all provide that any materials used in the arbitration are confidential. On this issue see also IISD, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required*, *supra* note 52.

¹⁷⁷ Under Art. 25(4) UNCITRAL Rules hearing are to be held in camera. ICSID Arbitration Rules, r. 32(2) requires party consent to non-party attendance at tribunal hearings. See *Suez/Vivendi*, *supra* note 154, *InterAguas*, *supra* note 158 and *Aguas Del Tunari*, *supra* note 56.

¹⁷⁸ ICSID Rules, r. 32(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

amended version is more restrictive and reflects the reluctance of some state parties to permit open hearings.

(iv) Conclusion on public participation

There have been a number of positive developments regarding the transparency of the investor-state arbitration regime. The NAFTA experience suggests that there can be transparency with respect to the existence of arbitrations, arbitration documents and hearings without endangering the arbitration process. Further, the desire of non-parties to make submissions on public interest issues can be accommodated effectively within the arbitration regime. While transparency is certainly not without its costs (financial and otherwise), continued and enhanced transparency is necessary to maintaining public legitimacy and taking dissenting views seriously. The innovations in US and Canadian BITs demonstrate that transparency concerns can be integrated into treaty texts. The current reality, however, is that there continues to be a significant lack of transparency in investment treaty arbitrations because the majority of existing IIAs do not provide expressly for transparency.

6. The Principle of Good Governance

6.1 The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development. It commits States and international organizations:

- (a) to adopt democratic and transparent decision-making procedures and financial accountability;
- (b) to take effective measures to combat official or other corruption;
- (c) to respect the principle of due process in their procedures and to observe the rule of law and human rights; and
- (d) to implement a public procurement approach according to the WTO Code on Public Procurement.

6.2 Civil society and non-governmental organizations have a right to good governance by States and international organizations.

Non-state actors should be subject to internal democratic governance and to effective accountability.

6.3 Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development as well as the full participation of women in all levels of decision-making. Good governance also calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market aimed at a fair distribution of wealth among and within communities.

In the late 1980s and early 1990s the World Bank issued a number of reports highlighting the importance of good governance to sound economic growth.¹⁷⁹ The 1992 World Bank report, *Governance and Development*, was a landmark in the development of policy consensus amongst international governmental financial institutions that good governance is an “essential complement to sound economic growth.”¹⁸⁰ The report focused on four areas of governance: public sector management, accountability, the legal framework for development and information and transparency. The same year the World Bank also issued its *Guidelines on the Treatment of Foreign Direct Investment* (the Guidelines), representing a “desirable overall framework which embodies essential principles meant to promote foreign direct investment in the common interest of all members.”¹⁸¹ The Guidelines advocate fair and equitable treatment, non-discrimination, the prevention and control of corrupt business practice, the promotion of accountability and transparency in dealings with foreign investors, compensation for expropriation and binding international dispute settlement.

IAs can be viewed as imposing disciplines of good governance on states. IAs provide an enforceable set of standards: the rule of law, due process, non-discrimination, prohibitions on arbitrary conduct and the

¹⁷⁹ See M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford, New York: Oxford University Press, 2004) at 167.

¹⁸⁰ Foreword, *World Bank Guidelines on the Treatment of Foreign Direct Investment*, in World Bank, *Legal Framework for the Treatment of Foreign Investment* (Washington D.C.: The World Bank, 1992) [*Guidelines on the Treatment of Foreign Direct Investment*], online: Investment Treaty Arbitration <<http://ita.law.uvic.ca/documents/WorldBank.pdf>>.

¹⁸¹ *Guidelines on the Treatment of Foreign Direct Investment*, *ibid.*, preamble.

protection of legitimate expectations and property rights. From this perspective, the web of treaties supports sustainable development by guaranteeing a secure and predictable ‘enabling’ framework for foreign investment. For example, in interpreting the ‘fair and equitable treatment standard’ tribunals have held “that a stable legal and business environment is an essential element of fair and equitable treatment”¹⁸² and that fair and equitable treatment is inseparable from stability and predictability.¹⁸³ States must act transparently¹⁸⁴ and consistently with the legitimate expectation of investors.

Other commentators, however, have questioned whether IIAs contribute to a virtuous cycle of good governance. Mary Hallward-Driemeier, a World Bank economist, has argued that BITs have “not acted as a substitute for broader domestic reform. Rather, those countries that ... already have reasonably strong domestic institutions are most likely to gain from ratifying a treaty.”¹⁸⁵ Other commentators have suggested that the fact that the IIA regime allows investors to avoid domestic courts by proceeding directly to international arbitration may have a detrimental impact on the development of the rule of law. Tom Ginsburg notes that the “decision to bypass domestic courts may reduce courts’ incentives to improve performance by depriving key actors from a need to invest in institutional improvement.”¹⁸⁶ Ron Daniels is even more critical. He suggests that investment treaties have “subverted the evolution of robust rule of law institutions in the developing world... [because] foreign investors rationally refrain from championing good and generalized rule of law reforms in the developing state, preferring instead to protect their interests by relying on the BIT rule of law enclave.”¹⁸⁷ As a result:

It is not simply that the potential voice of foreign investors in favor of good rule of law reforms is lost, but that foreign investors

¹⁸² *CMS Gas Transmission*, *supra* note 56 at 274.

¹⁸³ *Ibid.* at 276. See also *Metalclad*, *supra* note 49 and *Tecmed*, *supra* note 587.

¹⁸⁴ *Tecmed*, *ibid.*

¹⁸⁵ Hallward-Driemeier, *supra* note 75.

¹⁸⁶ T. Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance” (2005) 25 *Int’l Rev. L. & Econ.* 107 at 108.

¹⁸⁷ R. J. Daniels, “Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World,” draft dated 23 March 2004, online: Università degli Studi di Siena <<http://www.unisi.it/lawandeconomics/stile2004/daniels.pdf>>.

will actively seek to retard the development of certain regulatory initiatives that are the hallmarks of the mature social welfare state. In this manner, the formation of these rule of law enclaves inflicts a double whammy on law reform efforts in developing states, first by dulling the interest of foreign investors in building good domestic rule of law institutions and then by encouraging foreign investors to devise alternative institutional arrangements that are inimical to the development of sound regulatory institutions and policies.¹⁸⁸

Daniels concludes that the “BIT regime constitutes an urgent priority for those who believe that rule of law reform is one of the most effective ways in which developing countries can achieve the freedom, prosperity and dignity enjoyed by citizens in the West.”

The difficulty with Daniels’ “enclave” approach is that it views the IIA regime as hermeneutically distinct from domestic legal institutions. In practice, however, there is often a symbiosis between investment treaty arbitration and domestic courts.¹⁸⁹ This is most evident in cases of denial of justice where the complaint concerns the investor’s treatment in domestic courts.¹⁹⁰ In seeking security for their investments, investors do not simply recede to an IIA enclave. In many investment treaty cases, before engaging in arbitration, investors have made significant efforts to resolve the disputes in local fora.¹⁹¹ There is little evidence that foreign investors simply rely on their IIA rights as trump cards. Indeed, until recently, many foreign investors were not even aware of the existence of IIAs. Investment treaty arbitration involves significant legal, commercial and political costs. While investors can recoup their legal costs if the arbitration is successful, they may be subject to significant cost awards if unsuccessful.¹⁹² Taking a dispute to

¹⁸⁸ *Ibid.*

¹⁸⁹ Franck, *supra* note 74.

¹⁹⁰ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 and *Azinian*, *supra* note 48.

¹⁹¹ See e.g. *Azinian*, *ibid.*; *Metalclad*, *supra* note 49; *Occidental*, *supra* note 89; and *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006 (UNCITRAL), online: Permanent Court of Arbitration <http://www.pca-cpa.org/showpage.asp?pag_id=1149>.

¹⁹² *Methanex*, *supra* note 50 and *International Thunderbird Gaming Corporation v. Mexico*, Award, 26 January 2006 (UNCITRAL).

international arbitration may effectively sever any potential for future business relationships with the state. The point is simply that the stakes are high in investment treaty arbitration and, despite the availability of investment arbitration, local remedies may be preferable. While there has been a significant number of investment arbitration disputes—226 by the end of 2005—given the magnitude of FDI worldwide, the number does not itself suggest that foreign investors are abandoning domestic legal institutions and law reform for an IIA enclave.

Does the IIA regime then contribute to or impede good governance? The difficulty in answering this question is that the meaning of ‘good governance’ is “heavily value-laden.”¹⁹³ Even if there were meta-agreement that the rule of law, due process, absence of corruption, protection of fundamental human rights (including property rights) and a functioning commercial law system are necessary elements of good governance, there is little agreement on the design of specific substantive laws or institutions. Further, in the investment treaty context, there has been little empirical work on the optimal system of investment governance leaving the analysis at a conceptual and anecdotal level.

Another aspect of good governance is the need for transparency and the “right of access to appropriate, comprehensible and timely information” referred to in Principle 5.2. A number of recent IIAs have included express provisions on publication of laws,¹⁹⁴ notice of regulatory changes and the identification of contact points. For example, Art. 16, Bosnia-Finland (2000), provides that:

“Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the

¹⁹³ Cordonier Segger & Khalfan, *supra* note 179 at 167.

¹⁹⁴ Article XIV, entitled “Transparency” of the Canada-Croatia (2001) provides: “1. Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them.” Art. II(7), Argentina-US (1991) provides: “Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.”

investments of investors of one Contracting Party in the territory of the other Contracting Party.”

Some more recent BITs, including US-Uruguay, in addition to the requirement to publish laws, provide for contacts to facilitate communications between the state parties and “to the extent possible” provide “interested persons and the other Party a reasonable opportunity to comment on such proposed measures.”¹⁹⁵ In addition, some IIAs provide an express requirement with respect to transparency, although ‘transparent’ remains undefined.¹⁹⁶ A series of transparency obligations are imposed in the new US-Uruguay BIT as an element of “good governance.” There is a broad obligation on the state to ensure that laws, regulations, procedures, and administrative rulings of general application and adjudicatory decisions affecting investments are made publicly available.¹⁹⁷ The treaty also provides for the designation of contact points to facilitate communication between the states,¹⁹⁸ a requirement for advance publication of law and regulations and a reasonable opportunity for “interested persons” to comment on the proposed measures.¹⁹⁹ In the case of administrative proceedings there are a number of due process requirements such as providing reasonable notice of the proceedings, an opportunity to be heard and an independent and impartial system for the review of administrative actions.²⁰⁰

Another third aspect of good governance in the Principles concerns the activities of foreign investors. The Declaration calls for corporate social responsibility (CSR) and socially responsible investments. IIAs do not impose obligations on foreign investors or

¹⁹⁵ Uruguay-US BIT (2005), *supra* note 65, Art. 11(2). These provisions are similar to those appearing in the new generation of US and Canadian FTAs. See e.g. Chapter 20, Chile-US FTA (2003); Chapter 17, Bahrain-United States FTA (2004); Chapter 20, Australia-United States FTA (2004); Chapter L, Canada-Chile FTA (1997); Art. 8, Canada-Israel FTA (1997); Chapter 12, Canada-Costa Rica FTA (2002), which have specific requirements with respect to publication of measures, notification of changes in measures, reasonable opportunities to comments on changes provision of contact or enquiry points for information.

¹⁹⁶ See Bosnia-Finland (2000); Art. 2(1) states that the parties “shall encourage... transparent conditions...”

¹⁹⁷ Uruguay-US BIT (2005), *supra* note 65, Art. 10.

¹⁹⁸ *Ibid.*, Art. 11.1.

¹⁹⁹ *Ibid.*, Art. 11.2.

²⁰⁰ *Ibid.*, Art. 11.4-5.

require home or host states to impose any particular obligations regarding their organization. The current IIA regime does not address CSR and socially responsible investment obligations. These matters are essentially left to domestic law and market forces. This issue is addressed in part III.

7. The Principle of Integration and Interrelationship, in Particular in Relation to Human Rights and Social, Economic and Environmental Objectives

7.1 The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind.

7.2 All levels of governance—global, regional, national, sub-national and local—and all sectors of society should implement the integration principle, which is essential to the achievement of sustainable development.

7.3 States should strive to resolve apparent conflicts between competing economic, financial, social and environmental considerations, whether through existing institutions or through the establishment of appropriate new institutions.

7.4 In their interpretation and application, the above principles are interrelated and each of them should be construed in the context of the other principles of this Declaration. Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter of the United Nations and the rights of peoples under that Charter.

Integration of social development, environmental protection and economic growth considerations in all aspects of decision-making is a bedrock principle of sustainable development. The ILA Committee on the International Law of Sustainable Development (the Committee) has noted that “sustainable development will only be realized when the principle of integration is properly—and fully—implemented.”²⁰¹ The

²⁰¹ International Law Association, *Report of the Committee on the International Law on Sustainable Development*, Toronto Conference (2006), online: ILA <http://www.ila-hq.org/html/layout_committee.htm>.

Committee has noted that integration has a range of meanings. At the global level, integration can be viewed as a conceptual framework for sustainable development where all decision-making reflects the interdependence of social, economic, financial, environmental and human rights concerns. Integration may occur functionally between institutions, or within institutional programs. Alternatively, integration may occur at the normative level by the integration of sustainable development considerations into applicable rules or the application of sustainable development principles in judicial reasoning. Thus far, the paper has addressed how the Declaration's six principles are integrated into the IIA regime. This last section focuses on the extent to which social and environmental considerations have been expressly integrated into the structure of IIAs.

Historically, there has been little express mention of sustainable development principles in IIAs. The preambles of IIAs focus almost universally on the objective of promoting and protecting investment and providing favourable conditions for foreign investment. These references regularly occur in older IIAs and continue to be reflected in current treaty practice. China/Germany (2003) provides an example:

Intending to create favourable conditions for investment by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing that the encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors and will increase prosperity in both States,

Desiring to intensify the economic cooperation of both States...²⁰²

A review by the author of 71 IIAs dated between 2000–2005²⁰³ found very limited reference to sustainable development issues in the treaty preambles or texts.²⁰⁴ The treaties focus uniformly on increasing

²⁰² China/Germany (2003), *supra* note 40, preamble.

²⁰³ The IIAs selected were those published, as of June 2006, in volume 9 of *International Investment Treaties*, *supra* note 26.

²⁰⁴ Austria/Azerbaijan (2000), Austria/Bangladesh (2000), Bahrain/Jordan (2000), Bangladesh/Switzerland (2000), Bolivia/Costa Rica (2000), Bosnia and Herzegovina/Sweden (2000), Cambodia/France (2000), China/Costa Rica (2000), Costa Rica/Switzerland (2000), Croatia/Sweden (2000), Egypt/Thailand (2000),

and promoting investment without consideration of how that investment should occur. Of 71 treaties concluded since 2000, the preambles of nine treaties refer to a commitment to the observance of internationally recognized labour rights.²⁰⁵ Four treaties refer to achieving the treaty's objectives "without relaxing health, safety and environmental measures of general application."²⁰⁶ In contrast, newer model IIAs, in particular the model US and Canadian BITs—developed in the context of NAFTA Chapter Eleven—address sustainable development issues expressly. The new Canadian model BITs expressly refer to sustainable development,²⁰⁷ while the new US model speaks of achieving the agreement's objectives "in a manner consistent with the protection of health, safety, and the

Greece/Mexico (2000), India/Portugal (2000), India/Sweden (2000), India/Thailand (2000), Israel/Thailand (2000), Lebanon/Switzerland (2000), Mexico/Sweden (2000), Netherlands/Panama (2000), Sweden/Thailand (2000), Australia/Egypt (2001), Austria/Belarus (2001), Austria/Belize (2001), Austria/Egypt (2001), Austria/Federal Republic of Yugoslavia (2001), Austria/Jordan (2001), Austria/Lebanon (2001), Austria/Macedonia (2000), Austria/Mongolia (2001), Austria/Oman (2001), Austria/Slovenia (2001), Austria/UAE (2001), China/Netherlands (2001), Costa Rica/Ecuador (2001), Costa Rica/Finland (2001), Cuba/Mexico (2001), Cyprus/Lebanon (2001), Ecuador/Sweden (2001), Gabon/Lebanon (2001), Guatemala/Netherlands (2001), Hungary/Lebanon (2001), Jordan/Syria (2001), Kuwait/Netherlands (2001), Mozambique/Netherlands (2001), Portugal/Turkey (2001), Qatar/Switzerland (2001), Bahrain/Thailand (2002), Belgium-Luxembourg/Costa Rica (2002), Belize/Netherlands (2002), Bosnia and Herzegovina/United Kingdom (2002), Gambia/Netherlands (2002), Namibia/Netherlands (2002), Netherlands/Tajikistan (2002), Netherlands/Yugoslavia (2002), United Kingdom/Vietnam (2002), Algeria/Sweden (2003), Bulgaria/Thailand (2003), Cambodia/Netherlands (2003), France/Iran (2003), France/Madagascar (2003), France/Uganda (2003), Korea/Netherlands (2003), Lao PDR/Netherlands (2003), Mali/Netherlands (2003), Afghanistan/Turkey (2003), Bahrain/France (2004), Oman/Switzerland (2004), United States/Uruguay (2004), Armenia/Netherlands (2005), Netherlands/Suriname (2005).

²⁰⁵ For example, the preambles to several Austrian BITs reaffirm the parties "commitment to the observance of internationally recognized labour standards." See Austria/Azerbaijan (2000) and Austria/Belize (2001).

²⁰⁶ Mozambique/Netherlands (2001). See also Namibia/Netherlands (2002), US/Uruguay (2005) and Netherlands/Suriname (2005), *supra* note 26.

²⁰⁷ The Canadian model, *supra* note 162, states: "Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development."

environment, and the promotion of consumer protection and internationally recognized labor rights.”²⁰⁸

In the substantive provisions, however, there has been almost no express integration of environmental or social considerations or transparency. Eight of the 71 treaties contained provisions requiring the publication of law, regulations and policies.²⁰⁹ Only US-Uruguay (2005) has provisions addressing transparency and public health, safety or the environment.²¹⁰ Art. 12(2) of US-Uruguay (2005) provides that:

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent with this Treaty* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns [emphasis added].

This provision, similar to the one in Art. 1114 of NAFTA,²¹¹ is declaratory and tautological. While the provisions may assist in the interpretation of other substantive norms in a way that recognizes the legitimacy of environmental protection, it does not limit the scope of investment protection in a substantive way.

²⁰⁸ The US model forms the basis for US/Uruguay BIT (2005), *supra* note 65.

²⁰⁹ See, for example, Art. 4(1)(a), Austria/Jordan (2001), *supra* note 26.

²¹⁰ See Art. 8 on exceptions to performance requirements, Arts. 12 and 13 regarding weakening environmental and labour laws, Annex B regarding the scope of expropriation, Art. 11 regarding publication of laws and notification requirements, Art. 28 regarding *amici curiae*, Art. 29 regarding access to documents and public hearings and Art. 32 regarding appointment of experts on environmental, health safety or other scientific measures, *supra* note 65.

²¹¹ NAFTA, *supra* note 13, Art. 1114: Environmental Measures provides:

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

In contrast to BITs, recent comprehensive free trade agreements and multilateral agreements with investment protection provisions contain more express references to sustainable development. The 2005 *India-Singapore Comprehensive Economic Cooperation Agreement* (India-Singapore CECA) states in its preamble that “economic and trade liberalisation should allow for the optimal use of natural resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.” The US/Australia FTA refers to implementing the agreement “in a manner consistent with their commitment to high labour standards, sustainable development, and environmental protection.” Chapter 19 (Environment) of the US/Australia FTA recognizes the “right of each Party to establish its own levels of environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies.” This is buttressed by Art. 11.2 of the investment chapter, which provides that, in the event of any inconsistency, other chapters (including the environmental chapter) shall prevail to the extent of the inconsistency.

A more robust approach is to provide a “carve out” for environmental measures. A number of Canadian BITs use this approach, modeled on the provisions for general exception in Art. XX of the General Agreement on Tariffs and Trade (GATT). Canada/Uruguay (1999) provides that:

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health; or
- (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.²¹²

²¹² Art. III, Annex I, General and Specific Exceptions.

A similar approach is taken in India-Singapore CECA, which provides an exception for measures to protect public morals or to maintain public order, and to protect human, animal or plant life or health, provided that these measures are not applied arbitrarily or are unjustifiably discriminatory.²¹³

Concerns about the scope of expropriation and “fair and equitable treatment” have been addressed in the new model US and Canadian BITs. The new US model equates fair and equitable treatment with the customary international law minimum standard of treatment of aliens.²¹⁴ Admittedly, however, the scope of the minimum standard of treatment remains an area of uncertainty even in light of developing investment treaty jurisprudence.²¹⁵ With respect to expropriation, the text highlights that the scope of protection reflects customary international law and that “except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”²¹⁶

²¹³ Art. 6.10: Measures in the public interest. Nothing in this Chapter shall be construed to prevent: (a) a Party or its regulatory bodies from adopting, maintaining or enforcing any measure, on a non-discriminatory basis; or (b) the judicial bodies of a Party from taking any measures; consistent with this Chapter that is in the public interest, including measures to meet health, safety or environmental concerns.

Art. 6.11: General exceptions

1 Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of a Party in the territory of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health.

²¹⁴ US/Uruguay (2005), *supra* note 65, Art. 5; Annex A provides that “The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.” In addition it provides that the breach of a separate international agreement does not establish that there has been a breach of this Article.

²¹⁵ See commentary, *supra* note 38.

²¹⁶ On the issue of regulatory expropriation, see A. Newcombe, “The Boundaries of Regulatory Expropriation in International Law,” *supra* note 122.

The previous discussion of Principle 6 respecting investor-state arbitration noted a number of developments in investment treaty practice and jurisprudence. These include the participation of *amici curiae* and access to documents and hearings to allow non-parties to bring social, economic, cultural and environmental concerns before investment treaty tribunals.

Despite these various developments, the integration of sustainable development principles into the majority of IIAs is minimal. Recent treaty practice and jurisprudence suggests that the regime can be adapted to address sustainable development issue. Nevertheless, incorporating these principles into the corpus of the IIA regime remains a challenge.

III. The IIA Regime: Assessment, Challenges and Opportunities

IIAs were never intended to be comprehensive sustainable development treaties. Like all international treaty regimes, IIAs have a defined and limited purpose. The focus of IIAs to date has been economic—to facilitate, promote and protect investment through binding and enforceable disciplines of host state regulatory measures. As a result there has been very little express integration of social or environmental issues into the structure of IIAs. Nevertheless, the analysis in part II suggests that IIAs are consistent with the Declaration's Principles in a number of important ways despite the improvements that could be made to many existing IIAs.

In my view, the IIA regime does not act as an impediment to or subvert principles of sustainable development. Under the IIA regime, states retain plenary regulatory authority to promote economic development and engage in economic, social and environmental regulation. In appropriate circumstances, regulation may be based on the precautionary principle. Further, redistributive taxation and other policies are permitted. Various elements of good governance including the rule of law, due process and non-arbitrariness are reinforced and the regime promotes the establishment of stable and predictable frameworks for investment planning and decision making. Despite the overwhelming lack of express textual references to sustainable development principles in IIAs, investment treaty tribunals have—within the bounds of the specific treaty in question—integrated sustainable development principles by: allowing *amici curiae* to participate in investment treaty arbitrations, holding that non-discriminatory regulation is not expropriatory, and

emphasizing good governance principles such as the rule of law, transparency and accountability and prohibitions on arbitrary and discriminatory conduct.

On the other hand, the regime does not actively promote sustainable investment. It does nothing to ensure that investment is sustainable, leaving this to regulation by host and home states. In my discussion of Principle 1, I argued in favour of subsidiarity—the idea that the sustainable development calculus with respect to specific projects is best made at the local level. The answer is not to create qualitative distinctions between sustainable “friendly” and “non-friendly” investment. Nevertheless, while substantive decisions about whether investments are sustainable should be left to the states, one potential role for the IIA regime would be to require environmental impact assessments (EIAs) and/or sustainability impact assessments (SIAs) for foreign investment projects that meet threshold impact criteria.

While most major investment projects will already be subject to EIA or SIA requirements, because of state laws or the requirements of project funders, imposing the requirements in IIAs would ensure new projects using FDI are subject to an assessment. IIAs, for example, could incorporate international standards, such as the *Equator Principles*, which were launched by the International Finance Corporation (IFC) in 2004.²¹⁷ The principles provide benchmarks for determining, assessing and managing social and environmental risk in project financing. They have been adopted by over 40 major banks and financial institutions that provide project financing. Financing institutions that have adopted the principles agree to refuse loans to projects “where the borrower will not or is unable to comply with our respective social and environmental policies and procedures that implement the Equator Principles.”²¹⁸ The Principles apply globally across all industry sectors to new project financings with total project capital costs of US\$10 million or more. When a project is proposed for financing, the financing institution is required to categorize the project based on the magnitude of its potential impacts and risks in accordance with the environmental and social screening criteria of the IFC. For projects assessed with high or medium

²¹⁷ Online: <<http://www.equator-principles.com>>.

²¹⁸ Preamble, online: http://www.equator-principles.com/documents/Equator_Principles.pdf.

risk, the borrower must conduct a social and environmental assessment to address the relevant social and environmental impacts.²¹⁹

While requirements for EIAs and SIAs do not guarantee investments will be sustainable, they are likely to make for better investment decisions. Marie-Claire Cordonier Segger and Ashfaq Khalfan have noted that: “Although international law may not currently require development to be sustainable, international law can require development decisions to be the outcome of a process which promotes sustainable development.”²²⁰ This approach, for example, has been advocated by the International Institute of Sustainable Development (IISD) in its *Model International Agreement on Investment for Sustainable Development* (IISD Model Agreement).²²¹

Another potential innovation would be to require state parties to IIAs to impose more onerous reporting requirements on investments that are likely to have significant sustainable development impacts. For example, the Global Reporting Initiative (GRI) has developed Sustainability Reporting Guidelines, which require triple bottom line reporting—reporting on economic, environmental, and social performance.²²² Currently almost 1000 organizations in over 60 countries use the GRI Framework as the basis for their reporting,²²³ and an updated set of the guidelines was adopted in late 2006.

Militating against the adoption of EIA and SIA requirements in IIAs are a number of institutional and practical concerns. First, given the large number of financial institutions that already require an assessment process for international projects, are additional requirements in IIAs necessary? Second, it is not clear that IIAs are the appropriate international mechanism for creating wide ranging international EIA/SIA obligations. For example, it might be better to develop a stand-alone convention, based on experience with the *Espoo Convention*, to address EIAs/SIAs more broadly. Third, since most developed states already have EIA processes, the compliance cost of EIA implementation will be borne disproportionately by developing states. In addition, since IIAs

²¹⁹ *Ibid.*, Principles 2 and 3.

²²⁰ Cordonier Segger & Khalfan, *supra* note 179 at 175.

²²¹ *IISD Model Agreement*, *supra* note 138.

²²² Online: <<http://www.globalreporting.org/>>.

²²³ Online: <<http://www.globalreporting.org/about/06whatWeDo.asp>>.

have national treatment requirements, developing states will be required to apply similar EIA requirements to their own nationals. Any agreement on EIA requirements will therefore likely require institutional mechanisms for capacity building and funding between developed and developing countries.

Another second area of innovation in IIAs would be to impose requirements regarding investor conduct in IIAs.²²⁴ It is beyond the scope of this paper to review and assess the long-standing issue of regulation of multinational corporations. Since the early seventies there has been a proliferation of initiatives—codes, guidelines or norms for transnational corporations,²²⁵ including the failed Draft United Nations Code of Conduct on Transnational Corporations, the International Labour Organization’s Tripartite Declaration of Principles of Multinational Enterprises, the OECD Guidelines for Multinational Enterprises,²²⁶ the *UN Norms on the Responsibilities of Transnational Enterprises and Other Business Enterprises with regard to Human Rights*²²⁷ and most recently the Global Compact.²²⁸ It is important that the IIA regime reinforces

²²⁴ See generally UNCTAD, *Social Responsibility*, Series on issues in international investment agreements (New York and Geneva: United Nations, 2001) and P. Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell, 1995).

²²⁵ Muchlinski, *ibid.* at 592.

²²⁶ OECD, *Guidelines for Multinational Enterprises* (Paris: OECD, 2000), online: <www.oecd.org/daf/investment/guidelines/mnetext.htm>.

²²⁷ ECOSOC, *Sub-Commission on Promotion and Protection of Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003). For a detailed account of the provenance of the norms see D. Weissbrodt & M. Kruger, “UN Norms on the Responsibilities of Transnational Corporation and Other Business Entities with Regard to Human Rights” (2003) 97 Am. J. Int’l L. 901. The norms have been controversial and the ECOSOC has not accepted them. A special representative, John Ruggie, has been appointed to study the matter. His interim report was issued in February 2006 (*Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Entities*, 2006, UN Doc. E/CN.4/2006/97).

²²⁸ The UN Secretary General launched the Global Compact in 2000, online: <<http://www.unglobalcompact.org>>, a set of 10 universal principles relating to human rights, labour, the environment and anti-corruption. Businesses can publicly endorse the compact and are expected to explain in their corporate documents how they support the compact and the principles. The principles are:

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

expectations with respect to the conduct of investors. This could be done by expressly incorporating specific guidelines in the treaty text, such as the OECD Guidelines for Multinational Enterprises, or through more general reference to international standards and practices, so as not to freeze the standards. A variation on this theme would be to provide, as does the IISD Model Agreement, that where an investor has persistently failed to comply with its obligations, the host state may institute proceedings to have the investor's rights abrogated.²²⁹

There are many questions to be addressed, however, in whether to incorporate investor obligations into IIAs, how to do so, and most importantly, which specific obligations. There has been much controversy about the human rights responsibilities of transnational corporations. This matter is currently under study by John Ruggie, the UN Special Representative.²³⁰ In my view, it is desirable that IIAs, which to date have been so focused on promotion and protection of investment, address the responsibilities of investors. At a minimum, references in IIAs to the expectation that investors comply with International Labour Organization's Tripartite Declaration of Principles of Multinational

Principle 2: make sure that they are not complicit in human rights abuses.

Labour Standards

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies

Anti-Corruption

Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.

Online <<http://www.unglobalcompact.org/>>.

²²⁹ *IISD Model Agreement*, *supra* note 138, Art. 18.

²³⁰ *Supra* note 227.

Enterprises and the OECD Guidelines for Multinational Enterprises would be desirable.²³¹ This would provide tribunals with contextual references for interpreting obligations such as fair and equitable treatment. For example, the legitimate expectations of the investors must be viewed not only in light of investors' rights but also their responsibilities. With respect to reporting requirements, we are in a time of development and experimentation. States until now have not imposed triple bottom line accounting requirements on domestic enterprises. However desirable these may be, it is unlikely that they will be integrated into international treaties until there is domestic acceptance of the need, importance and efficacy for this type of reporting. Further, in this area, it may be desirable to see how voluntary initiatives evolve and are adopted as a result of market forces.

Finally, I would highlight that the IISD Model Agreement makes a number of proposals for an investment agreement that promotes sustainable development.²³² While it is beyond the scope of this paper to assess the merits of each proposal, it is interesting to note that the model emphasizes the need for home states to take more responsibility for the actions of their investors abroad and the importance of creating institutional mechanisms within IIAs so that the investment regime between states can evolve over time.

Conclusion

It is a truism that a balance is required between the interests of foreign investors and those of states. The 2003 World Investment Report put it this way:

²³¹ I am not suggesting here that the texts should be imposed as directly enforceable legal obligations. If IIAs were to impose specific legal obligation on investors the obligations would need to be drafted with clarity and specificity and mechanisms for enforcement, either domestic or international, would have to be created.

²³² These include a more limited definition of investment; a requirement for investors to notify the host state of its home state (based on an effective control test); limitations on the scope of national, most-favoured-nation and minimum standards of treatment; making investors subject to civil actions in their home state for acts or decisions made with respect to the investment; abrogation of investor rights where there have been consistent failures to comply with obligations; a standing panel of arbitrators to decide disputes with an appellate division; information sharing between home and host states and institutional mechanisms to promote information sharing and cooperation. *IISD Model Agreement, supra* note 138.

For developing countries, the most important challenge in future IIAs is to strike a balance between the potential contribution of such agreements to increasing FDI flows and the preservation of the ability to pursue development oriented FDI policies that allow them to benefit more from them—that is, the right to regulate in the public interest. This requires maintaining sufficient policy space to give governments the flexibility to use such policies within the framework of the obligations established by the IIAs to which they are parties. The tension this creates is obvious. Too much policy space impairs the value of international obligations. Too stringent obligations overly constrain national policy space. Finding a development-oriented balance is the challenge—for the objectives, structure, implementation and content of IIAs.²³³

In this paper, I have argued that IIAs are not an impediment to sustainable development. Indeed, aspects of the IIA regime actively promote sustainable development. In the language of the World Investment Report, there is sufficient policy space and flexibility under IIAs for regulation in the public interest. The real impediment to sustainable development is the intensely difficult task of integrating economic, environmental and social consideration in local, national and global communities that have conflicting interests and values.

It may be that, in a perfect world, the entire IIA regime would be replaced by a multilateral investment treaty regime that provides high standards of protection to foreign investment while at the same time integrating sustainable development principles into its structure, addressing issues such as sustainability impact assessments, triple bottom line accounting, and corporate social responsibility and providing an institutional forum for cooperation, capacity building and future development of the international investment law. The reality is that given the longstanding inability of states to agree on a multilateral framework for investment, the prospect of a new regime replacing the IIA ‘spaghetti bowl’ in the immediate to mid-term future is wishful thinking.

In the short to medium term, the focus should be on promoting to a greater degree the integration of sustainable development principles into bilateral and regional agreements. The new generation of IIAs has started on this path by drafting preambles that reflect sustainable development

²³³ *WIR 2003*, *supra* note 9 at xvii.

concerns, by delineating the scope of investment obligations, by providing for exceptions and reservations, and by focusing on good governance, transparency and public participation. Future treaty drafters and treaty interpreters should be mindful of integrating evolving international standards in order to create an international investment regime that promotes sustainable development.