discretion comparable to Article XX of the GATT[126].) The European Court of Human Rights' attempts to balance the competing rights of individuals, sovereigns and, where applicable, the competing rights of other individuals, are most readily seen in that court's application of a so-called "margin of appreciation"[127]. While traces of proportionality balancing may now be emerging in certain arbitral interpretations of some investment treaties, it is not at all clear that the right to property under the ECHR and under investment treaties that have wording comparable to that in the US Model of 1987 will be subject to comparable interpretations[128].

As this suggests, despite their common roots, the rights contained in investment and human rights regimes may diverge over time. While the former are fewer in number, the property rights reflected in investment treaties may receive the most reliable international protection. To put it more forcefully and controversially: investors' rights to legitimate expectations in their property may be the most effectively protected "human" right that there is, at least at the global level[129].

[126] For an exception, see Foreign Affairs and International Trade Canada, "Foreign Investment Promotion and Protection Agreement Model" (2003), available at <http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf> (hereinafter "Canada Model BIT"), Art. 10.

[127] For a classic description of the "margin of appreciation" and its origins, see, e.g., R. St. J. Macdonald, "The Margin of Appreciation", in R. St. J. Macdonald (ed.), *The European System for the Protection of Human Rights* (The Netherlands, Kluwer, 1993), p. 83.

[128] But see A. Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier", 4 *Law & Ethics of Human Rights* 47 (2010) (suggesting such comparisons).

Not surprisingly, the international investment regime has prompted considerable scholarly controversy and growing political backlash[130].

F. Contemporary Critiques of the Investment Regime

Contemporary critiques of the investment regime parallel those faced by other international legal regimes or international organizations. Like other institutionalized processes designed to implement the international rule of law, the investment regime's legitimacy deficits can be characterized as vertical, horizontal, ideological and legal[131].

(1) Vertical critiques

As have those of the WTO and international financial institutions such as the IMF, the investment regime's "democratic" credentials have come under fire[132]. The charge is that this regime, like a number of others, constitutes an illegitimate top-down form of regulation on States; that there is, in short, a vertical

[130] See generally M. Waibel *et al.* (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (The Netherlands, Kluwer Law International, 2010).

[131] See, e.g., J. E. Alvarez, *International Organizations as Law-Makers* (New York, Oxford University Press, 2005), pp. 630-645 (discussing "horizontal", "vertical", and "ideological" critiques of international organizations). See also W. Grieder, *One World, Ready or Not* (New York, Touchstone, 1997); L. Gruber, *Ruling the World* (Princeton, Princeton University Press, 2000); S. Marks, "Big Brother is Bleeping Us — With the Message that Ideology Doesn't

disconnect between the supranational law that it produces and that created by a country's elected representatives or enforced by local court. Alleged "vertical" deficits of the investment regime are also driven by perceptions that in this instance, more than is the case with other forms of international governance, a considerable part of delegated international "law-making" is occurring in the course of deciding investor-State disputes and the establishment of arbitral "case-law" that other investor-State arbitrations attempt to follow. While comparable critiques have been levied against other international adjudicators, especially those in the WTO, the high profile public issues with which many investor-State arbitrators contend as well as the fact that such disputes are brought by private parties, lend this critique considerable salience. Investor-State arbitral decisions are more prone to criticism than most[133]. Critics argue that it is not democratically legitimate to assign cases that "second-guess" politically sensitive actions taken by sovereigns — that contest the Argentine government's decisions to respond to a serious economic or political crisis, for example — to three arbitrators, only one of which is appointed by the host State whose actions are challenged[134]. Others are offended precisely by the fact that unique rights to internationalize a claim and impose supranational

[133] See generally B. Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", 41 *Vanderbilt Journal of Transnational Law* 775 (2008); C. N. Brower, "NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the

scrutiny on State laws are accorded to those who are not even entitled to be considered part of the democratic polity of that State[135]. "Vertical" concerns are exacerbated to the extent particular BITs and FTAs forgo the favoured tool for according local deference, namely the requirement to exhaust local remedies.

The substantive decisions issued by investor-State arbitrations, and not merely their procedures, sometimes draw fire for being insufficiently deferential to legitimate (and vitally necessary) forms of public regulation in a democracy[136] or for intruding on fundamental questions of "sovereignty" or ostensibly sacrosanct matters relating to "domestic jurisdiction"[137]. The perceived democracy deficits are aggravated to the extent many investment treaties are not terminable at will or

[135] See, e.g., Alvarez and Khamsi, *supra* footnote 77 (discussing certain cases against Argentina).

[136] Recent investor-State cases have involved claims arising from States' actions in the field of public health and have involved challenges to waste management, land regulation, urban sprawl, air pollution, transboundary movement of hazardous waste, and hazardous waste sites. See, e.g., Orellana, *supra* footnote 100, p. 672.

[137] Indeed, it is probable that some state judges in the United States, who have expressed surprise that their rulings can now be questioned in the course of NAFTA investor-State dispute settlement, would sympathize with the positions taken by the Argentine Government in these cases, and especially its contention that only Argentine courts ought to consider such critical questions of public policy. See, e.g., H. P. Monaghan, "Article III and Supranational Judicial Review", 107 *Columbia Law Review* 833 (2007), p. 833 (citing the "surprise" of the Chief Justice of the Massachusetts Supreme Court that its judgments were

upon 12 months' notice but instead provide, as does the US Model addressed here, that States parties cannot terminate their treaty for 10 years and that even if this is done, existing investors remain protected for an additional period of 10 years thereafter[138].

For some the "democratic" problem originates not with the arbitrators but with the treaties themselves. There is a widespread perception that some of the guarantees contained in BITs and FTAs — from the right to fair and equitable treatment to umbrella clauses — operate as a new kind of stabilization clause at the international level that, like those controversial provisions endemic to imbalanced investment contracts, disempower Governments from modifying their laws, even in reaction to new threats to the public welfare[139]. Of course, the investment regime has always anticipated the potential for conflict between BITs and national law. But the perception of a "vertical" disconnect between the requirements of investment treaties and those imposed by national law is heightened when investment rules challenge the highest ranking national rules, namely those in a national constitution. Such clashes elevate the "public" nature of investor-State disputes. Thus, NGOs from the United States to the Philippines have brought constitutional challenges in national courts challenging some of the rights accorded to foreign investors in BITs or at least demanding disclosure of relevant negotiating documents[140]. Even

[138] See, e.g., 1987 US Model BIT, *supra* footnote 48, Art. XIII.

[139] See, e.g., H. Mann, *International Investment*

more controversial is the proposition, advanced by both defenders and critics of the investment regime, that its rules are intended to be a competing source of "constitutional" or higher level norms. Thus, David Schneiderman, a Canadian scholar, contends that the investment regime

> "freezes existing distributions of wealth and privileges 'status quo neutrality'. It does not merely commit citizens to predetermined institutions and rules through which political objectives are realized but also institutionalizes a legal incapacity to act in a variety of economic matters. It is not an enabling precommitment strategy; rather, it is largely a disenabling one. At bottom, the investment rules regime represents a form of constitutional precommitment binding across generations that unreasonably constrains the capacity for self-government."[141]

Beyond perceived "vertical" disconnects between what States are required to do for foreign investors under BITs and FTAs and what democratic polities expect by way of regulation from their legislatures, administrative agencies, and national courts, lie tensions between the different kinds of international obligations owed by States. Some arbitral disputes suggest the potential for conflicts between the rights accorded to foreign investors under investment treaties and those given to all of a nation's citizens under instruments

Investment Treaty News (June 2009); Schneiderman, *supra* footnote 30, pp. 135-157 (describing conflicts between the rights protected by BITs and property rights and the black

such as the Covenant on Economic, Social and Cultural Rights. Host States facing claims by privatized public utilities, for example, have tried to justify their actions by arguing that they intended to protect their citizens' right to water[142]. Human rights and environmental NGOs and some academics argue that investment treaty obligations raise serious public policy questions that were not addressed or scarcely mentioned during the ratification processes for those treaties, perhaps because the actual constraints imposed by investment treaties have only become clear over time, as investors have filed their claims. Some suggest that what these treaties are coming to require of Governments may even prove destabilizing for fragile democracies insofar as they further empower already powerful multinational corporations while undermining these Governments' underfunded efforts to respond to the legitimate demands of their polities.

The backlash in some quarters against investment treaties or investor-State arbitration is such that there is now considerable sympathy, including among many members of the US Congress, for the Calvo-inspired notion that foreign investors should get no more favourable treatment than that accorded to national enterprises or that if "special rights" are accorded to foreign TNCs, comparable international remedies should also be available to others who may be injured by the TNCs' operations[143]. The range of concerns,

[142] See, e.g., U. Kriebaum, "Privatizing Human Rights — The Interface between International Investment Protection and Human Rights", 3 *Transnational Dispute Management* 165 (2006).

even within the context of a developed country that has a relatively small portion of its economy controlled by foreign investors, is suggested by the testimony of a prominent academic testifying before the US Congress in May of 2009. According to Robert Stumberg, US policy-makers ought to be worried about:

1. Forum shopping by foreign investors. Stumberg points out the United States has a BIT with Panama and that Panama is seeking to become the legal domicile of companies because it is a tax haven. He suggests that companies may use their Panamanian operations to challenge domestic regulations in the United States[144].

2. Being sued by foreign investors. Stumberg points out that the United States is now a prominent capital

"Foreword: The Ripples of NAFTA", in T. Weiler (ed.), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley Park, Transnational Publishers, 2004), p. xxi. For a recent example of such concerns, see "Statement of Thea M. Lee, Policy Director and Chief International Economist, AFL-CIO", in US House of Representatives, Committee on Ways and Means, Subcommittee on Trade, "Hearing on Investment Protections in US Trade and Investment Agreements", Serial No. 111-20 (14 May 2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg11153473/pdf/CHRG-111hhrg11153473.pdf> (hereinafter "Investment Protections Hearing"), p. 7 (noting that investment agreements are "imbalanced" insofar as they (1) "significantly enhance the rights of investors vis-à-vis governments, but they fail to establish commensurate responsibilities for investors . . ." and (2) because the substantive rights and procedural advantages given to foreign investors "raises the possibility that investment tribunals can be used to circumvent the demo-

importer and needs to worry about its defensive posture in investor-State disputes. Specifically, Stumberg notes that China's current ownership of US investments grew by 62 per cent over the five years preceding the current recession and that it could be looking for a stake in companies like Wal-Mart, Target or Sears. He asks "is it wise to provide investor arbitration to Chinese-owned firms that are significant actors in the U.S. economy"?[145]

3. Threats by foreign investors to local autonomy, including efforts by States to protect the rights of indigenous peoples. Stumberg highlights the example of a current NAFTA case, *Glamis Gold*, involving a challenge by a Canadian company to California legislation blocking Glamis's plans to engage in open-pit mining next to areas where the Quechen Indians practise their religion and venerate their ancestors[146].

4. Threats that the investment regime poses to the US Government's effort to deal with the current global economic crisis. Stumberg suggests that the US commitments to foreign investors may threaten its purchases of troubled assets and the bailouts of some troubled industries, since such US Government efforts tend to be restricted to US banks and firms and may therefore be contested as violations of FET or national treatment.[147]

[145] Stumberg, *supra* footnote 144, p. 37.

[146] *Ibid.*, pp. 37-38. But note that the United States won the *Glamis* claim. *Glamis Gold Ltd.* v. *United States*, Award, UNCITRAL Arbitration Rules (8 June 2009), available at <http://www.state.gov/documents/organization/125798.pdf>. For related concerns regarding potential conflicts between South Africa's BITs and its Black Eco-

Stumberg's specific concerns appear to be driven by a more general one: namely that investor-State arbitration constitutes an undemocratic delegation of authority to "unaccountable" bodies and trumps the freedom of action of national law-making authorities[148]. For such critics, BITs and FTAs essentially "outsource" the application and interpretation of State constitutional law[149]. Certain investor-State arbitral outcomes are perceived as "affronts to sovereignty" that may even threaten the right of States to self-preservation[150]. For the regime's critics, investment treaties threaten Governments' continuing ability to protect their own citizens' rights to equality, life, liberty and security of the person[151]; they undermine, and do not promote, the rule of

[147] Stumberg, *supra* footnote 144, p. 39 (citing *Saluka Investment BV* v. *Czech Republic*, Partial Award, UNCITRAL Arbitration Rules (17 March 2006)). See also A. van Aaken and J. Kurtz, "The Global Financial Crisis: Will State Emergency Measures Trigger International Investment Disputes?", *Columbia FDI Perspectives*, No. 3 (2009), available at <http://www.vcc.columbia.edu/content/global-financial-crisis-will-state-emergency-measures-trigger-international-investment-dispu>.

[148] See, e.g., M. Bottari and L. Wallach, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005* (Public Citizen, 2005), available at <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf>; see also J. Atik, "Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques", 3 *Asper Review of International Business and Trade Law* 215 (2003), pp. 218-220.

[149] See, e.g., Stumberg, *supra* footnote 144, p. 37.

[150] G. Bottini, "Protection of Essential Interests in the

law and democratic governance because they create legal enclaves that *discourage* generalized rule of law reforms in developing countries and "retard the development of certain regulatory initiatives" that are the hallmarks of the democratic social welfare state[152].

(2) Horizontal critiques

Investment treaties are seen by some critics, particularly those based in developing countries, as asymmetrical bargains struck along sadly familiar and predictable North/South lines[153]. The investment regime,

ability", 14 *Michigan State Journal of International Law* 315 (2006), pp. 321-322 (citing applicants in *Council of Canadians* v. *Canada*, Ontario Superior Court of Justice, Court File No. 01-CV-208141 (8 July 2005), para. 1); see also Office of the High Commissioner of Human Rights, *Human Rights, Trade and Investment*, UN doc. E/CN.4/Sub.2/2003/9 (2003), p. 17 (making statements to the same effect).

[152] A. Newcombe, "Sustainable Development and Investment Treaty Law", 8 *Journal of World Investment & Trade* 357 (2007), p. 394; see also T. Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", 25 *International Review of Law and Economics* 107 (2005) (arguing that the spread of investment agreements permitting powerful players to bypass national courts may help to explain the intractability of LDCs' efforts to improve such courts); S. Krislov, "Do Free Markets Create Free Societies?", 33 *Syracuse Journal of International Law and Comparative Politics* 155 (2005) (expressing scepticism about the alleged connection between markets and freedom). For a response, see S. D. Franck, "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law", 19

on this view, violates the principle of sovereign equality. Although the regime was premised on putting all States on a "level playing field" — at least as compared to the bad old days of gunboat diplomacy — it falls well short of that goal.

The critique along "horizontal" lines borrows a page from old UN debates over the New International Economic Order ("NIEO"). It is no accident, on this view, that BITs originated with capital exporters such as Germany. For some, investment agreements have not overcome their biased origins and they continue to reward principally the capital exporting States whose investors are the beneficiaries. Capital importing States, typically in the Global South, on the other hand, are promised untenable economic rewards in the future and effectively have had no choice but to yield to the power and wealth disparities that such treaties reflect and perpetuate. According to a leading account of how BITs proliferated, developing countries concluded BITs because they were caught in a prisoner's dilemma from which they could not individually defect; they concluded treaties that "hurt them" because they were individually pressured to do so, in some cases because they were effectively under the barrel of an IMF gun to

tries needful of foreign capital had been forced, *individually*, to consent to treaties that harm or impoverish them as a group or that make it more difficult for them to fulfil other international commitments (as under the International Covenant on Economic, Social and Cultural Rights). See, e.g., Guzman, *supra* footnote 91. More radical critics have suggested that these agreements are merely a more diplomatic version of colonial-era capitulation treaties in which the metropole forced non-Western countries to "civi-

demonstrate their commitment to the free market principles that such institutions demanded in exchange for their financial assistance. The most provocative critiques assert that investment treaties are merely contemporary versions of the capitulation agreements once imposed by colonial rulers against the periphery. Like those products of imperialism BITs also seek to impose rules of "civilization" on the ostensibly "uncivilized". Like capitulation agreements they displace host States' "uncivilized" courts. Instead of relying on adjudication of aliens' rights by imperial consular officers, modern investment treaties rely on the modern equivalent: commercial arbitrators doing the bidding of empire under the auspices of the World Bank's ICSID[154]. On this view, investor-State arbitration has merely replaced gunboat diplomacy with "gunboat-arbitration"[155]. Accordingly, some deride investor-State arbitral tribunals as "businessmen's' courts"[156] that apply "privilege law for foreigners"[157]. Only slightly less provocative are those

[154] See, e.g., H. Mann, "International Investment Agreements: Building the New Colonialism?", 97 *Proceedings of the Annual Meeting of the American Society of International Law* 247 (2003). For a description of colonial era capitulations, see W. E. Grigsby, "The Mixed Courts of Egypt", 12 *Law Quarterly Review* 252 (1896); A. M. Latter, "The Government of the Foreigners in China", 19 *Law Quarterly Review* 316 (1903).

[155] See, e.g., S. Montt, "What International Investment Law and Latin America Can and Should Demand from Each Other: Updating the Bello/Calvo Doctrine in the BIT Generation", 3 *Res Publica Argentina* 75 (2007), available at <http://www.iilj.org/GAL/documents/SantiagoMontt.GAL.pdf>, p. 80.

[156] Van Harten, *supra* footnote 134, p. 153 (title of his

who imply that BITs are essentially contracts of adhesion that ought to be interpreted, where possible, against the interests of their rich country drafters[158].

Others worry not only that investor-State arbitrations are skewed in favour of claimants but that they may be skewed in favour of more powerful Governments. Such suspicions fuel speculations about why the United States, the third leading investor-State defendant in investor-State disputes, has, to date, managed not to lose a single claim against it[159]. Debates about

ing, 2008), p. 203 (arguing that investor-State arbitrations enable arbitrators to "outdo each other in their ability to recognize new expansionary doctrines favouring neoliberal trends"); *ibid.*, pp. 205, 219 (arguing that some arbitrations are motivated to rule in favour of investors to sustain the business of investor-State arbitration); *ibid.*, p. 208 (suggesting that investor-State arbitrations have a "hidden agenda" to advance the cause of one of the parties); *ibid.*, p. 214 (contending that investor-State tribunals "clearly evinced a desire to ensure that the regulatory space for the host state was curtailed as much as possible"). For responses to many of these critiques, see generally T. W. Wälde, "The Specific Nature of Investment Arbitration", in *New Aspects of International Investment Law*, *supra* footnote 100.

[158] For one response to this suggestion, see Alvarez and Khamsi, *supra* footnote 77, pp. 83-86.

[159] The most prominent source of speculation is the *Loewen* case. In that instance, the US Government's appointed arbitrator, Abner Mikva, reported that some US officials noted that if the United States were to lose that case, "we could lose the NAFTA". Mikva remarked that if that had been intended to put pressure on him, "then that does it". Stumberg, *supra* footnote 144, p. 40 (quoting remarks of Judge Mikva at a Pace University School of

whether win/loss records in investor-State arbitrations fall along North/South lines underlie concerns over whether investor-State arbitration has truly managed to "level the playing field" between States or instead subtly violates the "equality of arms" principle that is foundational to any legitimate scheme of international adjudication. Those who express such concerns may support reforms that are further addressed in Chapter V, including establishment of an advisory facility that would assist poorer respondent States in defending investor-State claims[160].

Other allegations of alleged "horizontal" inequities among States are far more finely grained. Thus, some

tion on municipal law". T. W. Wälde, "Denial of Justice: A Review Comment on Jan Paulsson, Denial of Justice in International Law", 21 *ICSID Review* 449 (2006), p. 460. While this may be an innocuous comment, consider the implications of such a deferential burden of proof when, as is sometimes the case, the result in an investor-State dispute turns precisely on whether the investor has been treated in accord with preexisting local law.

[160] See, e.g., UNCTAD Work Programme on International Investment Agreements, Policies and Capacity-building Branch, Division on Investment and Enterprise, "Consultations Report on the Feasibility of an Advisory Facility on International Investment Law and Investor-State Disputes for Latin American Countries", non-paper (2009) (copy on file with author). Susan Franck's empirical work analysing the results of known investor-State cases casts doubt on the idea that LDCs are systematically disadvantaged. S. D. Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration", 86 *North Carolina Law Review* 1 (2008), pp. 26-44. However, her own work also provides some examples of the types of

complain that the application of substantive investor protections such as national treatment may subtly disadvantage developing countries, as where a requirement demanding that host States justify an arguably discriminatory measure anticipates a level of scientific documentation and expertise that can only be fairly expected of richer States having a concentration of scientific centres and sufficient funding[161].

(3) Ideological

Closely allied with the above critiques but conceptually distinct are ideological critiques of the investment regime that resemble those directed at other international institutions, and especially at the WTO or the IMF. On this view, the investment regime — both its substance and its procedures for interpretation and enforcement — are structurally biased in favour of the ideology of the free market and privatization, namely many of the elements associated with the "Washington Consensus". Like other adherents to that Consensus, the investment regime empowers private non-State actors to pursue an ideologically driven agenda that is blind to other views of what is in the public interest[162]. As another manifestation of the flawed "Washington Consensus model" of governance[163], BITs and FTAs appear to some as legalized manifestations of the "Golden Straitjacket" that Thomas Friedman, apparently without irony, has endorsed[164]. Although many

[161] See, e.g., Orellana, *supra* footnote 100, p. 684 (citing GATT cases for the concern).

associate ideological concerns with traditional North/South divides, the CIEL Letter noted above — from a northern based NGO — suggests that such ideological concerns also extend to elements of civil society located within developed countries. Thus, CIEL has complained, for example, that the United States-Morocco FTA protects investors at the expense of environmental concerns, without imposing "minimum standards of corporate conduct on investors acting abroad" [165].

(4) Rule of law critiques

As might be expected, lawyers emphasize the alleged flaws of the investment regime from a rule of law perspective. For academics like Gus Van Harten, international arbitration, long used to resolve purely private commercial disputes (that is breaches of contract between two private parties), is a fundamentally inapposite mechanism for deciding weighty issues of public policy [166]. Contested and political loaded issues, such as whether an environmental regulation constitutes a compensable taking of property, need to be resolved, in his view, before constitutionally accountable national courts and cannot be settled legitimately through unpredictable, haphazard and potentially inconsistent decisions issued by transnational and *ad hoc* arbitrators drawn only from limited specialties within international law. Moreover, as Van Harten points out, such adjudicators are given the limited jurisdiction of examining such claims only on the basis of whether these violate treaties designed to protect

alien investors' property interests. Such questions ought to be decided, he argues, by national judges capable of examining a wider spectrum of concerns, or at least a permanent body of international judges whose tenure in office, as well as independence from the litigants is more likely to produce a politically acceptable result [167].

Another rule of law concern focuses on the potential for forum-shopping by foreign investors, whose options may include shopping around for the best available investment treaty (as is possible by incorporating elsewhere) or for the best available treatment (as is possible by resorting to MFN guarantees in investment treaties). In addition, the proliferation of specialized international dispute settlers, as well as national courts, may enable foreign investors to have multiple bites at the apple, to the detriment of harassed and overworked government lawyers. For critics, the potential for forum and BIT shopping encourages strategic behaviour by TNCs without producing any of the anticipated benefits to host States [168]. Instead, investor-State dispute settlement might be (mis)used to address trade issues that States assumed would be handled by the WTO's inter-state dispute settlement mechanism,

[167] See, e.g., Van Harten, *supra* footnote 134, pp. 175-184.

[168] See, e.g., A. J. Bjorklund, *supra* footnote 107. Bjorklund addresses, for example, the *Lauder* cases arising from the same set of facts but brought by different claimants against the Czech Republic and other respondents in three different arbitral tribunals (under two different BITs and in the International Chamber of Commerce), along with proceedings in municipal

for example[169]. There is also concern that some arbitrators are giving unanticipated scope to MFN clauses of investment treaties and have, for instance, permitted investors to insist on better procedural protections found in other BITs. Such interpretations are seen as undermining particular States' attempts to insist on the exhaustion of local remedies or other preconditions to international arbitration[170].

As the CIEL Letter suggests, worries about recourse to investor-State arbitration are not limited to scholarly circles. In the United States and Canada in particular there has been tremendous concern expressed by some NGOs over the prospect that policy issues are now being relegated, under the NAFTA's investor-State mechanism, to "unaccountable" supranational tribunals operating in secret and closed to other stakeholders[171]. Although, as is addressed in a later chapter, such concerns have led to changes to the NAFTA to enhance its transparency, not all forms of investor-State dispute resolution are similarly open to public scrutiny or to the participation of *amicus* briefs by, for example, interested NGOs. Nor is all criticism silenced by the turn to greater transparency that has occurred within ICSID and especially within the NAFTA. The CIEL

[169] See generally Bjorklund, *supra* footnote 107.

[170] *Emilio Agustin Maffezini* v. *Kingdom of Spain*, Decision on Jurisdiction, ICSID Case No. ARB/97/7 (25 January 2000), para. 63.

[171] See "Bill Moyers Reports: Trading Democracy", *NOW* (1 February 2002), available at <http://www.pbs.org/now/transcript/transcript_tdfull.html>; J. J. Coe, "Transparency in the Resolution of Investor-State Disputes

Letter indicates, for instance, that in the absence of any specific concerns about how US investors have been treated in Morocco, the FTA's provision for investor-State arbitration is unnecessary since US investors should be content with taking their disputes to Morocco's courts[172].

A final rule of law concern, addressed in a later chapter, relates to a perceived threat to public international law more generally: namely that investor-State arbitrators are failing to produce decisions that are either *consistent* with other investment treaties or with other international law regimes, including those dealing with human rights. The concern is that the investment regime is failing on its own terms to the extent it fails to produce the stable and predictable rules of the road to which investors are entitled and is, in addition, contributing to the overall fragmentation of international law that will ultimately undermine its efficacy[173].

G. The Regime and Public International Law

This introduction to the investment regime highlights why this author has chosen to address this topic as part of the Hague Academy's courses on "public international law". There was some resistance to this idea within the Academy. Some maintain that the investment regime should continue to be framed in terms of private international law. To be sure, if one focuses only on certain features of the investment regime, particularly the procedural rules that it shares