

# When Some Are More Equal than Others: Unconscionability Doctrine in the Treaty Context

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*In recent years, many countries have begun to pull out of bilateral investment treaties signed in previous decades, dismayed by the extent to which the provisions of the treaties serve to protect the interests of investors even as they frustrate the prerogatives of government. The countries seeking to exit these agreements were often less politically sophisticated than their treaty partners at the time of signing. Often, these countries relied on external guidance from IGOs or even indirect advice from the very countries they were negotiating with in deciding whether to sign these treaties. While unconscionability doctrine in contract law allows courts to deem contracts between unequal parties partially or totally unenforceable, international law treats sovereigns as equal parties and offers no such protection to weaker states. Historical discussions show, however, that less powerful states have long been concerned about the ability of more powerful states to coerce or otherwise pressure them into unfavorable treaties, and have sought unsuccessfully to introduce protections against the enforcement of unequal treaties in international law. This Article proposes a method for incorporating the kinds of equitable remedies pursued by courts in contract unconscionability cases into the decision-making framework of arbitral tribunals faced with interpreting bilateral treaties in the context of investment disputes.*

Even after you give a squirrel a certificate which says he is quite as big as any elephant, he is still going to be smaller, and all the squirrels will know it and all the elephants will know it.

--Samuel Grafton<sup>1</sup>

All animals are equal, but some animals are more equal than others.

--George Orwell, *Animal Farm*<sup>2</sup>

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<sup>1</sup> William T. R. Fox, *The Superpowers: Then and Now*, 35 INT'L J. 417, 418 (1980).

<sup>2</sup> GEORGE ORWELL, *ANIMAL FARM* 192 (1945).

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## INTRODUCTION

In autumn of 2001, the Attorney General of Pakistan received a phone call from the Secretary of Law. The Washington, D.C.-based International Center for

the Settlement of Investment Disputes (ICSID) had contacted the Secretary, informing him that a Swiss company, Société Générale de Surveillance (SGS), was claiming \$110 million in compensation based on an alleged violation of a bilateral investment treaty (BIT) concluded between Pakistan and Switzerland.<sup>3</sup> The Attorney General was aware of an ongoing contractual dispute between SGS and his government, but neither he nor the Secretary knew what a BIT was. Neither had heard of ICSID. After a phone conversation in which two of the most expert individuals on public international and commercial law in Pakistan were forced to reveal to one another that neither had the slightest clue what agreements SGS was relying upon, the Attorney General turned on his computer. He had two questions for Google: “What is ICSID?” and “What is a BIT?”<sup>4</sup>

The Attorney General continued doing his homework. He quickly understood how serious SGS’s claim was, and he understood that Pakistan’s reliance on financial assistance from abroad would make ignoring the issue impossible. He began inquiring at different government ministries, trying to ascertain the reasons that Pakistan had decided to sign the BIT six years before. There were no records. There were no records showing the negotiation had occurred in Switzerland. There were no records showing that the treaty had been discussed in Parliament. There was not even a copy of the treaty itself. Later, the Attorney General would learn that this was not only the case with the Switzerland-Pakistan BIT, but with many of Pakistan’s other BITs, as well.

How was it that treaties that were now having such an impact on the country went practically unnoticed in the political, bureaucratic, and legislative spheres? It was not because documenting the negotiating process was considered too sensitive. It was because signing these treaties had been a nonevent for the government.<sup>5</sup> Pakistani officials were eager to sign the treaties because they believed that they could increase foreign investment, but they were ignorant to the liabilities and regulatory restraints that the treaties brought with them.<sup>6</sup>

Pakistan was not alone. An official in South Africa, a country that has begun to exit some of its BITs,<sup>7</sup> also echoed the conclusions of the Pakistani Attorney General: “We had signed on BITs without proper analysis, the more the merrier, part of the global trend of signing BITs without understanding the implications.”<sup>8</sup>

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<sup>3</sup> SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, (Aug. 6, 2003).

<sup>4</sup> This episode is related in some detail in LAUGE POULSEN, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY*, at xiii (2015).

<sup>5</sup> A signatory to a treaty thereby demonstrates his consent to be bound by it. Depending on domestic law, a treaty may need to be ratified by a legislature or other State organ, but once it is confirmed by such an organ, it is binding upon the parties.

<sup>6</sup> See POULSEN, *supra* note 4, at xv.

<sup>7</sup> Adam Green, *South Africa: BITs in pieces*, FINANCIAL TIMES (Oct. 19, 2012), <https://www.ft.com/content/b0eec497-5123-3939-92f7-a5fbc73dd33> (stating that South Africa had terminated a BIT with Belgium and Luxembourg, and had further plans to exit agreements made in the years directly following apartheid).

<sup>8</sup> Mohammed Mossallam, *Process Matters: South Africa’s Experience Exiting its BITs* 9 (Global

Just as BITs proliferated in the 1990s and early 2000s, so has the skepticism toward them grown in recent years. Indonesia has announced its intention to terminate a BIT with the Netherlands, and eventually to terminate all sixty-seven of its agreements.<sup>9</sup> Bolivia, Ecuador, and Venezuela have withdrawn from ICSID.<sup>10</sup>

But it is not only the bare language of the BITs that may be leading countries to withdraw from them. It is the sense that even if they had properly examined the treaties they had hurried to sign, the cards would still have been stacked against them because the dispute settlement mechanisms included in these agreements unfairly privilege investors. While not all investment arbitration claims have to be made public, of the cases that have been made public, most are brought against countries with developing or transition countries.<sup>11</sup> Investors win or settle most of the time.<sup>12</sup> One arbitrator, Johnny Veeder, spoke plainly about how unpopular international arbitration had become around the world:

It's an issue of trust... [and] there isn't a trust that the words of the treaties will be respected by claimants and by arbitration tribunals... However you draft it, [there is the feeling that] these bad guys are going to find a way 'round it and make a decision for the arbitration tribunal to which the state has not consented.... The more [people] find out about what we do... the more appalled they are."<sup>13</sup>

The fact that South Africa, Pakistan, and developing countries around the world can enter into treaties that the international community is bound to honor and enforce is based on the notion that sovereigns are equal. The principal of sovereign equality is fundamental to international law. It is asserted by small states and large states, weak states and strong states, and democratic and nondemocratic states. The United Nations and its Charter are based upon “the principle of the sovereign equality of all its Members.”<sup>14</sup> Under the umbrella of the United Nations, each State is accorded exactly one vote in the general assembly<sup>15</sup>—sovereigns are equals and the mutually-agreed Charter enforces and

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Economic Governance Programme, Working Paper No. 2015/97, 2015).

<sup>9</sup> Philippa Maister, *Breaking BITs: why are countries withdrawing from bilateral investment treaties*, FDI INTELLIGENCE (Feb. 12, 2012), <http://www.fdiintelligence.com/Companies/Breaking-BITs-why-are-countries-withdrawing-from-bilateral-investment-treaties>.

<sup>10</sup> *Id.*

<sup>11</sup> According to a UNCTAD report, from 1987-2015, the most frequent respondent States in the known investor-State disputes were Argentina, the Bolivarian Republic of Venezuela, the Czech Republic, Spain, Egypt, Canada, Mexico, the Russian Federation, Ecuador, Poland, India and Ukraine. UNCTAD, *WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY* 115 (2017).

<sup>12</sup> Fifty-two percent of documented cases have been decided against the host State or settled, usually on unknown terms. *Id.* at 117.

<sup>13</sup> Comments by Johnny Veeder QC at Wilmer Hale seminar on international arbitration, Apr. 23, 2014, recording available at <https://www.youtube.com/watch?v=fQPllmURi24>.

<sup>14</sup> U.N. Charter art. 2(1).

<sup>15</sup> *Id.* art. 18(1).

maintains this equality. A sovereign State, if it is to be recognized as such, must possess internal and external sovereignty.<sup>16</sup> That is, its government must be able to plausibly claim habitual obedience from most of its population and it must be independent of other states.<sup>17</sup> In the traditional consent-based view of international law, sovereignty is not bestowed by international law; international law derives its authority from the power of sovereigns.<sup>18</sup> Sovereigns are equal in their ability to create and maintain international law, and sovereign States are equals under international law.

Of course, sovereign equality is a legal fiction. Pakistan is not an equal of Switzerland, just as the United States is not an equal of Grenada. Economic and military power, size, alliances, and location all converge to create a situation in which all States are equal, but some states are more equal than others.<sup>19</sup> To declare States equal as a matter of international law only means to declare a law that will be implicitly or explicitly violated. Even at the United Nations, which is ostensibly based on the principle of sovereign equality, great powers can assert their domination in myriad ways. While all States may be equal in a legal sense, tradition, financial and economic power, commerce, and raw ability to protect their own interests determine how much practical influence one State enjoys over others. States with a weak influence are keen to assert the fiction of equality because it puts them on a par with powerful, influential States. For powerful States, Professor Percy Corbett wrote that the idea of equality is “a plume which the great Powers allow the weak to wear as a sop to their vanity, calm in the assurance that it adds nothing appreciable to their weight...”<sup>20</sup> It is an appeasing concession in the form of an idea, but it concedes nothing in practice.

Contrary to what some scholars have argued, the concept of sovereign equality is beginning to have practical significance, and this trend should be encouraged and supported. While sovereign equality may now be a fiction, it can also be a reality to aspire to. However, true sovereign equality can only be realized if it is recognized not as an objective legal fact but as a value judgment—one that must itself be defended through law. This essay offers one small way to do that.

The idea of sovereign equality animates international law and international relations, but it was borrowed from political thinkers who were primarily concerned with domestic power.<sup>21</sup> In this Article, I propose borrowing even more from domestic legal thinking. Domestic law, which is constantly being

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<sup>16</sup> R.P. Anand, *Sovereign Equality of States and International Law* 8 INT'L STUDIES 386, 20 (1966).

<sup>17</sup> *Id.* at 21.

<sup>18</sup> For one of the most classic accounts of this view, see EMER DE Vattel, *THE LAW OF NATIONS* 17 (1797) (“There is another kind of law of nations, which . . . proceeds from the will or consent of nations. States, as well as individuals, may acquire rights and contract obligations . . . hence results a conventional law of nations, peculiar to the contracting powers.”).

<sup>19</sup> See ORWELL, *supra* note 2, at 192.

<sup>20</sup> P.E. Corbett, *Social basis of a law of nations*, 85 RECUEIL DES COURS 467, 509 (1954).

<sup>21</sup> See *infra* Section I(A) for a discussion of the idea.

rearticulated and revised by courts, often has doctrines that are more nuanced than those of international law.

How should we think about the BIT concluded between Pakistan and Switzerland? Just as countries are unequal, so too are persons within a State. Stronger, better-resourced, more sophisticated parties can use their power to oppress, constrain, and coerce weaker parties. Most domestic legal systems have implemented legal doctrines that both address and combat this natural trend. While sometimes criticized as paternalistic, these doctrines ultimately constrain action in order to promote equality so that parties may interact on more equal footing. A domestic court, when presented with an unfair contract, can refuse to enforce some or all of it. The court's discretion to do so is based on the court's ability to provide equitable remedies and to promote justice by protecting weaker contracting parties. International legal tribunals, I argue, can and should also promote justice in this manner. If we can admit that sovereign equality constitutes not *lex lata* but *lex feranda*, we can begin to ask ourselves how to place it on more stable ground. Domestic law can begin to show us how. Indeed, Pakistan seems just as worthy of protection and access to equitable remedies as do domestic plaintiffs who mistakenly sign substantively flawed contracts or are duped into an agreement that harms them.

## I.

### SOVEREIGN EQUALITY

#### A. *Sovereign Equality as an Idea in History*

In his historical account of the notion of sovereign equality, Professor Robert A. Klein asserts that the notion of the equality of States within the international community is rooted in the older notion of the equality of persons within the polity.<sup>22</sup> Both are, of course, myths. Any casual observer can see that members of a State do not enjoy perfect political or legal equality, often because they have differing levels of access to resources, education, and privilege. However, the principle of individual equality undergirds democratic society. By the same token, it is overwhelmingly clear that States are not equal in their power, influence, or wealth. Nevertheless, a true international legal order depends on the notion of equality before the law. What role does the principle of sovereign equality play in the international legal order?

In this section, I examine two instances in which weaker States have somewhat paradoxically but understandably used their status as sovereign equals to advocate for themselves as disadvantaged states. In both examples, weaker States rely on the forum provided by United Nations—which was founded on the principle of sovereign equality—to argue for recognition of their own sovereignty, which they see as inherently tenuous. I first examine the disagreement over the

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<sup>22</sup> See ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA, Foreword (1974).

scope of the notion of “coercion” in the Vienna Convention on the Law of Treaties. In this case, a number of States asserted that what seemed to be sovereign decisions to sign treaties may actually have been the result of coercion. By admitting that they were especially vulnerable to coercion, they acknowledged that the notion of sovereign equality is flawed because the power to coerce persists between *unequal* parties, not equal ones. At the same time, in negotiating the Vienna Convention on the Law of Treaties at an international conference, these countries rely on their position as sovereign equals to argue that treaties resulting from coercion should be invalid.

The discussion about the Calvo Doctrine represents an instance in which some States asserted sovereignty over their natural resources even as they were signing away aspects of that sovereignty under BITs. The legitimacy of these treaties is rooted in the notion of sovereign equality—all agents properly acting on behalf of the State have the authority to sign treaties.<sup>23</sup> Here, I argue (as some countries have) that there may be at least some instances in which the negotiation or interpretation of those treaties offends the notion of sovereign equality, and the State parties should therefore be released from performance. In these examples, weaker States act as both idealists and realists—relying on the notion of sovereign equality to ask for justice after their sovereign equality has been trampled on by stronger States.

*B. The Vienna Convention on the Law of Treaties: The Fight Over and the Meaning of ‘Coercion’*

In 1947, the United Nations General Assembly established the International Law Commission (ILC) in order to codify treaty laws.<sup>24</sup> Before the work of the ILC, treaties were often concluded through gunboat diplomacy—foreign policy buttressed by the immediate threat of military force. There were no prohibitions on using force to conclude treaties before the Second World War,<sup>25</sup> and unsurprisingly, many treaties favored countries with the biggest gunboats. China was one of the first countries to officially demand the abolition of some treaties in international forums, arguing that the treaties were unjustly concluded.<sup>26</sup> But explicit reference to inequality generally went nowhere. The draft articles and

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<sup>23</sup> Vienna Convention on the Law of Treaties, art. 7, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT].

<sup>24</sup> Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 22 (1955).

<sup>25</sup> Article 2(4) of the United Nations Charter, signed in June 1945, prohibits the use of force in international relations. U.N. Charter art. 2(4). Although the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes provided that signatories commit “to use their best efforts to ensure the pacific settlement of international differences,” both the U.S. and European signatories to the agreements regularly used threats of force to enforce foreign policy priorities in what were ultimately commercial disputes. See ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 9 (2009).

<sup>26</sup> Anne Peters, *Treaties, Unequal* ¶ 7 (2007), Max Planck Encyclopedia of International Law.

reports written by the ILC did not include the term “unequal” or “unjust treaties,”<sup>27</sup> and neither did the Vienna Convention on the Law of Treaties (VCLT), an agreement that eventually emerged from the draft articles. However, the text of what would eventually become Article 52 of the Vienna Convention offers protection against certain procedural inequalities (such as the one created when one country makes a show of greater force against another). It states:

A treaty is void if its conclusion has been procured by the threat of use of force in violation of the principles of international law embodied in the Charter of the United Nations.

With the text of Article 52 on the table, the debate became more focused and heated. The heart of the disagreement was the proper scope of the phrase “threat or use of force”—and with it the *kinds* of procedural inequality that could be considered. Government statements recorded in the 1966 Yearbook of the ILC show that a country’s global influence and historical position vis-à-vis other powers was a strong predictor of what its ultimate opinion on the scope of the word “force” would be. The Polish government considered that “‘coercion’ for the purposes of this article should include not only the threat or use of force but also some other forms of pressure, in particular, economic pressure. In its view the latter represents a typical kind of coercion sometimes exercised in the conclusion of treaties.”<sup>28</sup> Czechoslovakia was even more precise, stating that “unequal treaties... constitute a serious obstacle to the attainment of complete independence and sovereignty by a number of developing countries... Article 36<sup>29</sup> should explicitly prescribe the invalidity of treaties imposed by such forms of coercion as, for example, economic pressure.”<sup>30</sup>

The Algerian government was also very specific:

...[E]conomic pressure may sometimes be more effective in reducing the power of self-determination of a country, above all in the case of a country with single-crop farming or whose economy depends on the export of one product only. In [Algeria’s] view, recognition that economic pressure is a cause of nullity of treaties is not a threat to their stability but increases the confidence of newly independent States in international law.<sup>31</sup>

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<sup>27</sup> See Kirsten Schmalenbach, *Treaties conflicting with a peremptory norm of general international law (“jus cogens”)*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, at 897, 903–04 (2013).

<sup>28</sup> Sir Humphrey Waldock (Special Rapporteur of the International Law Commission), Fifth Report on the Law of Treaties, at 15, U.N. Doc. A/CN.4/183 and Add.1-4 (Jan. 18, 1966) [hereinafter Fifth Report on the Law of Treaties].

<sup>29</sup> The text of what would eventually become Article 52 of the finalized VCLT was referred to as Article 36 at the time of these negotiations.

<sup>30</sup> Fifth Report on the Law of Treaties, *supra* note 28, art. 36., at 15–16.

<sup>31</sup> *Id.*

Byelorussia pointed a finger at former colonialist States, saying that it considered “the principle of the nullity of leonine treaties<sup>32</sup> to be of great contemporary importance from the point of view of the eradication of colonialism in all its forms and the protection of new States from unequal treaties.... [C]olonialist Powers are now resorting to more subtle forms of coercion, for example, under the guise of economic assistance.”<sup>33</sup> Iraq, Ghana, Colombia, Ecuador, Morocco, Nigeria, the Philippines, Uruguay, Venezuela, and Yugoslavia all voiced similar concerns.<sup>34</sup> The U.S.S.R.—not a traditional colonial power but a rising political one—condemned leonine treaties, while refraining from mentioning economic or political coercion explicitly.

Unsurprisingly, many of the Great Powers and former imperial States took a different view. The United States argued that Article 2, paragraph 4 of the U.N. Charter mentioned only threat or physical force, so the scope of Article 52 should be limited to actual or threatened violence.<sup>35</sup> The United Kingdom echoed the United States’ concern, adding that widening the notion of coercion “might lessen the effectiveness of the article and give rise to pretexts for the evasion of treaty obligations.”<sup>36</sup> The United Kingdom also stipulated that challenges to treaties on the basis of alleged coercion should be adjudicated independently.<sup>37</sup> Interestingly, China, a country that only decades before had zealously accused many Western powers of concluding leonine treaties in the late nineteenth and early twentieth centuries, did not unequivocally condemn such treaties in the ILC discussions.<sup>38</sup> Instead, it shared the concerns of the United Kingdom: “difficulties may arise in [the application of the Article] unless the Commission solves the question of determining the presence of the threat or use of force at the time of the conclusion of a treaty, and works out safeguards to ensure that ‘coercion’ is not used as a pretext for violating a treaty.”<sup>39</sup> In the few decades between China’s condemnation of unequal treaties and the 1966 ILC meeting, much had changed. Instead of being the victim of unfair trade practices enforced at the tip of a sword, it had gained a permanent seat at the table of the United Nations Security Council.<sup>40</sup> It had become a great power in its own right.

The number of countries in support of expanding the scope of “coercion” to include economic or political pressure was certainly greater than the number of those opposed. However, the compromise articulated by the Commission seems

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<sup>32</sup> Leonine treaties are treaties forced upon a weaker state by a stronger one.

<sup>33</sup> Fifth Report on the Law of Treaties, *supra* note 28, art. 36., at 17.

<sup>34</sup> *Id.* at 15–18.

<sup>35</sup> *Id.* at 18.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 17. For a thorough examination of the so-called “Unequal Treaties,” a set of treaties signed by China between 1842 and 1946, as well as China’s efforts to annul them, see DONG WANG, CHINA’S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005).

<sup>39</sup> Fifth Report on the Law of Treaties, *supra* note 28, art. 36., at 17.

<sup>40</sup> See U.N. Charter art. 23(1).

to best embody the more limited use of the term “coercion,” while still leaving the door of interpretation open to the majority view:

Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a ‘threat or use of force in violation of the principles of the Charter,’ and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.<sup>41</sup>

The Special Rapporteur decided to stay silent on the scope of Article 2(4) of the U.N. Charter, inviting the international community to try to resolve the debate in another context. And try they did. In 1966, Resolution 18 established a “Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.”<sup>42</sup> The Special Committee was tasked with the development and potential codification of “the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>43</sup> In short, the Special Committee was tasked with making the text of what would eventually become Article 52 more robust. However, the deliberations of the Special Committee were inconclusive as to whether the term “force” embraced economic and political pressures.<sup>44</sup> Given the lack of a conclusion, the Special Rapporteur reported that he did not feel justified in elaborating the principle independently.<sup>45</sup> The reluctance of the Special Rapporteur and the intractability of the issue in the Special Committee did not put it to rest. The discussion and disagreement continued for years; it was still ongoing during the thirty-fourth session of the ILC in 1982. Some countries maintained their position even as they signed the treaty. For example, the Syrian Arab Republic stipulated that it read Article 52 broadly in its reservation to the VCLT.<sup>46</sup>

### C. *Hull vs. Calvo: The Fight Over the Meaning of Expropriation*

Just as many newly independent or weaker States were keen to subject treaties that had been politically or economically coerced to greater scrutiny, there was also a desire to increase internal sovereignty through a new articulation of the

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<sup>41</sup> Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May – 19 July 1966, art. 49 ¶ 3.

<sup>42</sup> G.A. Res. 1966 (XVIII), *Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*, at 70 (Dec. 16, 1963).

<sup>43</sup> Fifth Report on the Law of Treaties, *supra* note 28, at 19.

<sup>44</sup> *Id.*, citing U.N. Doc. A/5746, ¶ 47 (Nov. 16, 1964).

<sup>45</sup> *Id.*

<sup>46</sup> VCLT, *supra* note 23, at 506. Syria signed the VCLT on October 2, 1970.

expropriation power. Prior to the rapid decolonization that followed the Second World War, many of the most powerful countries in the world shared the view that international law protected investor property.<sup>47</sup> If investor property was taken by a host country, “prompt and adequate” compensation was due to the investor.<sup>48</sup> This principle came under scrutiny during a long-standing dispute between Mexico and the United States, lasting from 1915 until 1940.<sup>49</sup> During those years, the government of Mexico confiscated private agrarian and oil properties, some of which belonged to Americans. The United States argued that the expropriations were illegal and demanded compensation for the affected U.S. citizens. So began a diplomatic exchange of letters between the American Secretary of State, Cordell Hull, and his Mexican counterpart. Hull penned what has since become the leading formulation of the full compensation standard: “[N]o government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.”<sup>50</sup> It was this requirement of “prompt, adequate, and effective compensation” that has become known as the “Hull Rule.”<sup>51</sup>

Newly independent States in the post-war years were, by and large, not proponents of the Hull Rule. Although Mexico had articulated its disagreement with the Hull Rule during its dispute with the United States, it was not until after the Second World War that expropriation—and the attendant conflict about its scope and meaning—became frequent enough to warrant extra attention. Nationalizations and expropriations increased as more countries became independent for two primary reasons. First, former colonies were interested in flexing their new independence, sometimes in retribution, by seizing assets from foreigners who had been granted property rights under the colonial regime.<sup>52</sup> Second, Communism began gaining ground in Eastern Europe, Cuba and China, and these governments began to nationalize private property, seizing it from citizens and foreigners alike.<sup>53</sup>

In the decades following the Second World War, much of the developing world threw its weight behind efforts to dial back the Hull Rule’s “prompt, adequate, and effective” standard. Developed countries and former colonial powers continued to argue that the Hull Rule was customary international law, and developing countries argued the opposite.<sup>54</sup> Both sides appealed to customary international law, but the persistence of the very ideological tension they were

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<sup>47</sup> Notes exchanged between the United States and Mexico during the 1938 dispute are reprinted in GREEN H. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 653–65 (1942).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 658–59.

<sup>51</sup> *Id.*

<sup>52</sup> For a detailed discussion of this historical trend, see Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1997).

<sup>53</sup> *Id.* at 647.

<sup>54</sup> *Id.* at 647–48.

interested in resolving undermined their appeals. Finally, many less developed countries and recently emancipated colonies channeled their collective energy into an effort to bring a number of resolutions before the newly-created United Nations General Assembly.

Resolution 1803, for example, provided that in cases of expropriation, “appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law” must be granted.<sup>55</sup> This resolution allowed for compensation but also consistently emphasized the necessity of preserving sovereignty and its prerogatives. Paragraph 2 provides a representative example of this balancing act. It reads: “The exploration, development and disposition of such resources, as well as the import of foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable...”<sup>56</sup> In the same vein, Resolution 3171 gave some nuance to the otherwise ambiguous term “appropriate compensation.” Giving a wide margin of discretion to the sovereign power, it stated that:

...[T]he application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which may arise should be settled in accordance with the national legislation of each State carrying out such measures.<sup>57</sup>

One-hundred and eight countries voted in favor of Resolution 3171, sixteen abstained, and one voted against it.<sup>58</sup> While these resolutions did not constitute a codification of international law, their existence certainly frustrated the ability of the developed nations to argue that the Hull Rule was well-established international custom.<sup>59</sup> Further, they are a powerful reminder of how a majority of U.N. Member States remained concerned about the scope of their sovereign power.

## II.

### THE EMERGENCE OF THE BIT REGIME

While weak and newly independent States were trying to buttress their newly acquired sovereignty at the United Nations, bilateral investment treaties (BITs) like the one between Pakistan and Switzerland were being signed around the globe. A BIT is a legal instrument that sets out the legal rules and procedures that

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<sup>55</sup> G.A. Res. 1803 (XVII), *Permanent sovereignty over natural resources*, ¶ 4 (Dec. 14, 1962).

<sup>56</sup> *Id.* ¶ 2.

<sup>57</sup> G.A. Res. 3171 (XXVIII), *Permanent sovereignty over natural resources*, ¶ 4 (Dec. 17, 1973).

<sup>58</sup> The vote on Resolution 3171 (XXVIII) is recorded at A/PV.2203 in U.N. Doc. A/9400 (Dec. 17, 1973), available at [http://www.un.org/depts/dhl/resguide/r28\\_resolutions\\_table\\_eng.htm](http://www.un.org/depts/dhl/resguide/r28_resolutions_table_eng.htm).

<sup>59</sup> *Id.*

will govern investment disputes between countries. The text of these treaties, often rather vague on its face, typically provides extremely potent protections to foreign investors in a given country, sometimes pitting investor interests against the interests of the people.<sup>60</sup> Under a BIT, suits are brought by the investors of one country against the government of another. The first BIT was signed in 1959, and these instruments have only grown in popularity since then.<sup>61</sup> There are currently 2,033 international investment treaties in force in the world.<sup>62</sup> In the latter half of the 20<sup>th</sup> century, foreign direct investment boomed, with a growth rate that outstripped international trade, reaching 1.75 trillion dollars by the year 2016.<sup>63</sup>

BITs have generally codified the Hull Rule, which many countries tried so hard to reject in the context of the treaties negotiated at the United Nations in the post-colonial era. A BIT will also establish minimum standards of treatment of the investor required from the host country. Most BITs require that foreign investors be accorded “fair and equitable treatment and full protection and security” and shall in no case be accorded treatment less than that required by international law.<sup>64</sup> It is often further required that unreasonable or discriminatory measures that impair the management, conduct, operation, and sale or other disposition of investments be prohibited.<sup>65</sup> As will become important later in the Article, BITs also establish a mechanism for resolving investment disputes that does not rely on local law or the law of the investor-state.<sup>66</sup>

Authors Jeswald W. Salacuse and Nicholas P. Sullivan explain the “grand bargain” involved in BITs. Treaties, like contracts, are characterized by a bargaining process from which both parties will benefit. Bilateral investment treaties grant the same rights to both parties, but because citizens of developing countries rarely invest in developed countries, the rights afforded under the treaty typically flow in one direction only. The “bargain” that a BIT promises is not to be found within the document itself, according to Jeswald and Salacuse. It represents the promise a developing country makes to protect capital and potentially relinquish aspects of its own regulatory power in the present in return for the prospect of more capital—and ultimately economic development—in the

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<sup>60</sup> See *infra* Section II(B)(3)(b) for a discussion of arbitration cases that have arguably interfered with the ability of governments to create or enforce laws protecting the environment, public health, or democratic values.

<sup>61</sup> See Jeswald W. Salacuse, *Bit by Bit: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 THE INT'L LAW. 655, 655 (1990).

<sup>62</sup> Investment Policy Hub, *International Investment Agreements Navigator*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> [hereinafter UNCTAD, *International Investment Agreements*]. Of these, 2,008 are bilateral and 25 are treaties with investment provisions.

<sup>63</sup> UNCTAD, *supra* note 11, at iii.

<sup>64</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY 7–8 (2012), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

<sup>65</sup> Only one-third of the investment treaties currently in force lack such a provision. UNCTAD, *International Investment Agreements*, *supra* note 62.

<sup>66</sup> Less than five percent of the investment treaties currently in force lack such a provision. *Id.*

future.<sup>67</sup> In a few cases, this expectation is represented in the preamble of the agreement, but often it is not.<sup>68</sup>

It is worth noting that other lawyers and scholars have taken a slightly more expansive view of what is entailed by “the grand bargain” of BITs. While there are plenty of cynics who would disagree, the general consensus is that BITs exist to promote the free flow of capital across borders. Their protections are designed to provide reliable commitments to foreign investors that their investments will not be subject to unjust government action or indirect interference. In the event that such action or interference does occur, moreover, the arbitration clause typically contained in a BIT provides the investor with the ability to have the resulting dispute arbitrated by a dedicated tribunal. In disputes against a State, a foreign investor may understandably be leery of submitting its investments to adjudication in local courts. A BIT’s arbitration clause can provide credible assurance to a reluctant investor considering investment in a country that may have experienced a recent regime change or be plagued by political or judicial instability. Large scale investment projects, like those associated with extractive industries, may take years to build and require millions of dollars of construction and labor before any resources can be extracted. Not only do proponents of the BIT regime rightfully assert that investors deserve to reap the benefits of their investments, but it is true that—in some cases at least—the political realities of a given country may not inspire the confidence of foreign investors. An enormous amount of institutional integrity is required for a domestic legal system to make a judicial finding that runs contrary to or implicitly criticizes a legislative decision or a Presidential decree. Foreign investors are taking a real risk in undertaking their projects. BITs play a crucial role in safeguarding their legitimate expectations. BITs are unique, however, in that they are signed between countries, but their most concrete protections and benefits flow to *individuals*. Moreover, those individuals are overwhelmingly likely to come from only one of the States party to a given BIT. It is this tension that sets the backdrop for how we should think of the “grand bargain” the BITs entail.

The protection of private property that a capital-importing country offers under a BIT is concrete and immediate. By contrast, the benefits it stands to obtain—increased flows of FDI and economic development—are theoretical and potentially distant, especially as the majority of the profits from such investments flow across the border and back to the investors.<sup>69</sup> Even as early as the 1990s,

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<sup>67</sup> Jeswald W. Salacuse & Nicolas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT’L L. J. 67, 77 (2005).

<sup>68</sup> See Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT’L L. J. 491, 508 (2009); see generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2004 U.S. MODEL BILATERAL INVESTMENT TREATY (2004), <https://www.state.gov/documents/organization/117601.pdf>; Luke Eric Peterson notes that references to development are rare in treaties signed by the United Kingdom, Canada, and Switzerland. LUKE ERIC PETERSON, *BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING 4* (2004), [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf).

<sup>69</sup> See, e.g., Salacuse & Sullivan, *supra* note 67, at 77; see also Kaushal, *supra* note 68, at 508.

however, the benefits assumed to flow to the capital-importing country were called into question.<sup>70</sup> Some critics maintain that the legal and institutional climate of a capital-importing country is what ultimately protects investor rights. On this view, BITs are no substitute for strong domestic institutions; instead, they act as complements to processes characterized by strong institutions and respect for property rights.<sup>71</sup> Several studies performed by multilateral institutions further frustrate the assertion that BITs are firmly correlated to an increase in FDI flows.<sup>72</sup> Data comparing the robustness of investment flows into a given country against the number of BITs it has concluded further supports this notion. Japan, one of the world's top recipients of FDI, has only concluded a handful of BITs.<sup>73</sup> The United States is still working on a BIT with China, but China has long been the primary recipient of US investment outflows.<sup>74</sup>

But the “bargain” as conceived by Salacuse and Sullivan—the one in which a developing country sacrifices some of its regulatory power in exchange for the promise of increased economic development—has gone awry in other ways, as well. Not only has the promise of increased FDI flows been cast into doubt, the trajectory of BIT interpretation by arbitration tribunals has often meant that the regulatory and legislative rights of capital-importing countries have been severely curtailed.

#### A. Procedural Concerns

BITs are treaties signed between countries and as such they provide reciprocal rights between countries. However, capital flows generally only occur

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<sup>70</sup> See UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, U.N. Doc. UNCTAD/ITE/IIT/7 (1998), which is one of the few early economic analyses of the effects of BITs on investment flows. The book looks at the impact of 200 BITs on foreign direct investment and found a weak correlation between BITs and investment flows. Critics have argued that this study failed to control for the strong upward trend in FDI during this time.

<sup>71</sup> Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... And They Could Bite* 2-3 (World Bank, Policy Research Working Paper No. 3132, 2003).

<sup>72</sup> See Kaushal, *supra* note 68, at 508; *see also*

UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, *supra* note 70, at 122; UNCTAD, *TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT: TRENDS AND PROSPECTS*, at 337; WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES*, at xvii (2003).

<sup>73</sup> As of 2016, Japan had concluded 28 BITs (one being inactive). UNCTAD, *International Investment Agreements*, *supra* note 62 (search or click on “Japan”). The same year, Japan received FDI inflows of nearly 35 billion. World Bank Data, Foreign direct investment, net inflows, <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>. By comparison, France, which received a similar amount of FDI inflow that year, had concluded 104 BITs. UNCTAD INVESTMENT POLICY HUB, *supra* note 62 (search or click on “France”).

<sup>74</sup> See James T. Areddy, *U.S.-China Investment Flows Bigger Than Thought*, WALL STREET JOURNAL (Nov. 17, 2016), <https://blogs.wsj.com/chinarealtime/2016/11/17/u-s-china-investment-flows-bigger-than-thought/> (discussing the extent of U.S. investments in China); Ian Talley, U.S. Treasury Secretary Mnuchin: *China Bilateral Investment Treaty ‘On Our Agenda,’* WALL STREET JOURNAL (June 6, 2017), <https://www.wsj.com/articles/u-s-treasury-secretary-mnuchin-china-bilateral-investment-treaty-on-our-agenda-1496774628> (indicating that as of Summer 2017, a U.S.–China BIT was still being discussed).

in one direction, and claims are made in one direction—investors bringing claims against countries. For this reason, then, BITs represent a regime of protection for investors from one country while imposing restrictions on the other country. Furthermore, the countries from which investments are most likely to flow—the developed countries—are almost always the *drafters* of BIT agreements.<sup>75</sup> Developing countries are overwhelming host countries for these investments, and show up to sign treaties that have already been written. Often, there is shockingly little negotiation involved. The wealthier and more influential country, the more success it may have in shaping the outcome of the treaty negotiations.

Researchers interested in discerning broad trends in the thousands of international investment treaties in force have had some success examining treaty text as data.<sup>76</sup> Looking only at treaties drafted in English, they measured the degree to which States sign internally consistent treaties. To do so, they pioneered a text-as-data approach and measured the similarity between the texts—or the Jaccard coefficient—in order to generate a “consistency score” for each of the countries in their dataset. They deemed countries with BIT networks that are almost completely internally coherent as “rule makers.”<sup>77</sup> On the other hand, internal inconsistency in BIT networks suggests that the country has largely signed the model treaties of other countries. Most countries fall somewhere in the middle. When the researchers mapped the Jaccard coefficients against World Bank data indicating each country’s income, they found that low-income countries have BIT networks that are 20% less internally consistent than the networks of OECD member countries.<sup>78</sup> This method allowed the researchers to prove what most observers may have guessed—that a North-South divide distinguishes so-called rule-makers from rule-takers in the sphere of international investment.

Bilateral treaties amplify the negotiating power of countries with more geopolitical influence. The same is not true of multilateral negotiation settings, like in the U.N. This is because asymmetric power relations are emphasized in a bilateral setting. Multilateral negotiations allow developing countries to pool

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<sup>75</sup> Wolfgang Alschner, an empirical legal scholar and a former UNCTAD employee, has used the text of 1,628 BITs and applied sophisticated data processing methods to map similarities and dissimilarities of the language used in them. This has allowed him to measure the so-called “treaty coherence” of a particular country, meaning the similarity between its BITs. I share Alschner’s hypothesis that the higher a given country’s treaty coherence (or the more similar its BITs to each other), the more likely it is that that country was able to exert its bargaining power to advocate for its own interests in drafting the BIT. A country with lower treaty coherence (or mostly dissimilar BITs) likely had, by contrast, less influence over treaty drafting. His research shows that wealthier more developed countries consistently have a higher treaty coherence than less wealthy, less developed ones. Mapping BITs, <http://mappinginvestmenttreaties.com>.

<sup>76</sup> *See id.*

<sup>77</sup> Wolfgang Alschner, *Rule-Takers and Rule-Makers in the BIT Universe: Empirical Evidence of a North-South Divide*, MAPPING BITS BLOG (Jul. 28, 2016), <http://mappinginvestmenttreaties.com/blog/2016/07/rule-takers%20and%20rule-makers>.

<sup>78</sup> *Id.*

resources and gain strength through numbers, while low bureaucratic capacity, insufficient expertise, and economic and political dependencies make a single developing country less able to assert its preferences in a bilateral negotiation.<sup>79</sup>

Curiously, just as many developing countries were beginning to realize they had common interests that could give them strength in multilateral fora,<sup>80</sup> the number of BITs that these countries collectively signed was beginning to increase. In 1974, the year in which Resolution 3201 came before the General Assembly, the International Centre for Settlement of Disputes (ICSID) recorded the signature of eleven BITs.<sup>81</sup> That is one more treaty than the number signed in the year before, and six more than the number signed in 1970.<sup>82</sup> Ten years after Resolution 3201 was proposed, in 1984, ICSID recorded the signature of 19 treaties.<sup>83</sup> Today, more than two thousand are in force around the world.<sup>84</sup> I will argue that developing countries were forced by asymmetric power relationships to sign treaties that went against their national interest and their understanding of international law. I attempt to explain the contours of that asymmetry below.

In many cases, weak bargaining partners were not looking to the text of the BIT itself in deciding to sign. BITs were often part of a much larger constellation of multilateral financial institutional trends. Weaker countries would often be subjected to the fall-out from trends in the larger economic system, or overwhelmed with policy advice from the very governments they were negotiating against. While weak and newly independent states were able to insist upon and begin to defend certain aspects of their sovereignty in the multilateral fora like the General Assembly, this was not the case for multilateral financial institutions. Multilateral financial institutions like the World Bank or the International Monetary Fund (IMF) are not characterized by equality principles—donation determines the amount of influence. The IMF and the World Bank see themselves as agents of the international community, but are actually governed much more like private corporations, with votes distributed to governments according to the amount of money each contributes to the organization. Receiving benefits from these institutions was often made conditional on signing BITs, and weaker countries were often ostensibly supported in negotiating BITs by these institutions. However, because the priorities and agendas of these institutions may be in large part determined by the countries making the largest donations, weaker countries could not rely on them for unbiased advice or aid.

We do not expect individuals contracting with one another to be the most moral, generous versions of themselves. Indeed, the law allows contracting parties

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<sup>79</sup> *Id.*

<sup>80</sup> Such as, for example, the United Nations, an institution in which these countries were beginning to articulate their vision of the scope of State sovereignty.

<sup>81</sup> For year-over-year information about treaty signatures, see UNCTAD, *International Investment Agreements*, *supra* note 62.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

to exploit superior knowledge, a more comfortable bargaining position, or a greater wealth of experience as long as this does not result in deliberate misrepresentation or fraud.<sup>85</sup> Similarly, we do not expect treaty partners to disclose all relevant information to one another. Instead, in elucidating the procedural concerns below, I am attempting to point out is a kind of bug in the international system. Countries are unlike domestic contracting parties, which can form contracts within their legal system. Domestic contracting parties can employ outside experts and lawyers to oversee and advise during the contracting process. Finally, if a dispute occurs, it can be overseen by judges independent of the drafting of the contract or the benefits accruing from it.

Between countries, the situation is much different. After the Second World War, a number of multilateral institutions were established to author and administer international law and to promote world order.<sup>86</sup> As part of their mandate, many of these institutions provide guidance or aid (financial or otherwise), and seek to occupy an impartial advisory position.<sup>87</sup> Often, capital-importing countries concluding BITs with capital-exporting countries rely on input, advice, or encouragement from these multilateral institutions. However, multilateral institutions reflect the priorities and the will of the individual countries that constitute them. As will be demonstrated below, more powerful countries sometimes have the ability to influence the agenda of these multilateral institutions. In this way, the power asymmetries that characterize many BIT negotiations are both reproduced in and sustained by the interaction between developing countries and these institutions.

*i. 1980s Debt Crisis and the Role of the IMF*

The IMF began its operations on March 1, 1947.<sup>88</sup> Two months later, France was the first country to draw upon the fund.<sup>89</sup> However, it was not until the early 1980s, during a global debt crisis mostly impacting least developed countries (“LDCs”), that the IMF truly emerged onto the international scene.<sup>90</sup> It has been hailed as both a savior and a villain.<sup>91</sup> While analyzing the LDC debt crisis in

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<sup>85</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, § 161 cmts. a, d (AM. LAW INST. 1981).

<sup>86</sup> Such institutions included the U.N., the International Court of Justice, the IMF, and the World Bank.

<sup>87</sup> For example, part of the mandate of the IMF is to provide policy advice and technical assistance to its members; the World Bank provides technical assistance to developing countries; the OECD provides policy advice even to non-member countries; and various bodies of the United Nations provide political advisory services to member countries.

<sup>88</sup> *History*, IMF, <https://www.imf.org/external/about/histcoop.htm>.

<sup>89</sup> *IMF Chronology*, IMF, <https://www.imf.org/external/np/exr/chron/chron.asp>.

<sup>90</sup> JAMES M. BOUGHTON, *SILENT REVOLUTION: THE INTERNATIONAL MONETARY FUND, 1979-1989*, at 2 (2001).

<sup>91</sup> See, e.g., David Goldsbrough, *The Nature of the Debate Between the IMF and its Critics* (Working Group on IMF Programs and Health Expenditures, Background Paper, Sept. 2006), <https://pdfs.semanticscholar.org/6c55/7f75f8079a349a5bd84c064df3f4be73c6e0.pdf>; Charlotte Denny, *The Contented Malcontent*, THE GUARDIAN (July 5, 2002), <https://www.theguardian.com/business/2002/jul/06/globalisation>; Thomas D. Willett, *Understanding*

detail is beyond the scope of this piece, I consider some of the factors that led to the crisis, as well as the IMF's involvement in its aftermath, below.

On August 12, 1982, Mexico's Minister of Finance told the Chairman of the Federal Reserve, the U.S. Secretary of the Treasury, and the Managing Director of the IMF that Mexico would be unable to meet an obligation later that year to service an \$80 billion debt.<sup>92</sup> Mexico's inability to pay only signaled the beginning of the crisis. By October of the following year, twenty-seven countries owing \$239 billion had rescheduled or begun to reschedule their debts.<sup>93</sup> Sixteen of those nations were located in Latin America, and each of the largest economies in the region were implicated.<sup>94</sup> A large portion of the debt was owed to the eight largest U.S. banks, and the amount owed exceeded the capital and reserves of Latin America's largest economies at the time by nearly 150%.<sup>95</sup>

Scholars trace the origins of the debt crisis to the international expansion of banking organizations in the United States during the 1950s and 1960s.<sup>96</sup> As LDCs around the world began to develop, growth rates averaged about 6% annually, slowing to 4-5% during the 1970s<sup>97</sup>—still a point or two higher than growth in developed economies. The sustained rapid growth in these markets generated U.S. corporate investment and led to the development of the so-called Eurodollar market, which provided U.S. banks with access to funds with which they could provide loans to developing countries on a large scale.<sup>98</sup> These international investment opportunities proved all the more attractive as U.S. commercial banks had been losing many of their former clients to the commercial paper market, and shares of traditional loan products dwindled.<sup>99</sup> As revenue streams at home dried up, U.S. banks looked overseas for opportunities.

What may have been a mutually beneficial arrangement to both the U.S. and the Latin American economies it was investing in became suddenly complicated in 1973, when crude oil prices rose unexpectedly and stayed high for nearly a decade.<sup>100</sup> Not only did this price hike generate inflation around the globe, it also caused a balance of payments problem for developing countries, which suddenly found themselves less able to grapple with the new high price of oil and other imported goods.<sup>101</sup> This, in turn, made oil-importing developing countries more

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*the IMF Debate*, 5 INDEPENDENT REV. 593 (2001).

<sup>92</sup> BOUGHTON, *supra* note 90, at 290.

<sup>93</sup> GEORGE HANC, FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC), HISTORY OF THE EIGHTIES: LESSONS FOR THE FUTURE 191 (1997).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 192.

<sup>97</sup> David C. Beek, *Commercial Bank Lending to the Developing Countries*, FED. RESERVE BANK OF N.Y. Q. REV. 1 (Summer 1977).

<sup>98</sup> HANC, *supra* note 93, at 192.

<sup>99</sup> *Id.* at 196.

<sup>100</sup> BOUGHTON, *supra* note 90, at 247.

<sup>101</sup> *Id.*

dependent on loans to finance the deficits, but inflation also increased the quantity of funds available for lending.<sup>102</sup> Finally, the rise in oil prices triggered a world recession from 1974-75, which produced a decline in the global commodities market for minerals and agricultural goods, reducing the exports of many developing countries and augmenting their debt burdens.<sup>103</sup>

As borrowing became more necessary for LDCs, lending became more attractive for commercial banks in the United States. In 1977, Arthur Burns, the chairman of the Federal Reserve Board, warned of the danger of this trend in a speech at the Columbia University Graduate School of Business:

Under such circumstances, many countries will be forced to borrow heavily, and lending institutions may well be tempted to extend credit more generously than is prudent. A major risk in all this is that it would render the international credit structure especially vulnerable in the event that the world economy were again to experience recession . . . [C]ommercial and investment bankers need to monitor their foreign lending with great care, and bank examiners need to be alert to excessive concentrations of loans in individual countries.<sup>104</sup>

The Ford Administration did not heed Burn's warning, and neither did the bankers. The second oil shock of the decade occurred in 1979, and further exacerbated existing problems.<sup>105</sup> As LDCs became more mired in debt, it became clear that U.S. banks might find themselves in serious trouble as well. One Federal Reserve Board governor called for regulation to govern banks' exposure to sovereign risk.<sup>106</sup> But these warnings did not constrain the banks. Lending continued, and the debt crisis worsened.

As global development and global lending were reshaping the international economic order, the IMF was reshaping its role in it. In 1974, one year after the first oil crisis, the IMF set up an Extended Fund Facility to provide medium-term assistance to members experiencing balance of payment problems due to structural economic changes.<sup>107</sup> In 1976, the Executive Board of the Fund established a Trust Fund to provide assistance specifically to developing country members with profits from the sale of gold.<sup>108</sup> In 1982, when Mexico announced that it would have to reschedule its \$80 billion debt, the IMF approved a \$3.9

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<sup>102</sup> Between 1972 and 1977, the annual oil revenues of the Organization of Petroleum Exporting Countries jumped from \$14 billion to \$128 billion. Increased revenues also increased the amount of OPEC's bank deposits, which were mostly in the Eurodollar market. BENJAMIN J. COHEN, *BANKS AND THE BALANCE OF PAYMENTS* 7, 32 (1981)

<sup>103</sup> HANC, *supra* note 93, at 192-93.

<sup>104</sup> Arthur F. Burns, *The Need for Order in International Finance*, 63 FRB RICHMOND ECON. REV. 14, 18 (1977).

<sup>105</sup> BOUGHTON, *supra* note 90, at 269.

<sup>106</sup> See generally Henry C. Wallich, *LDC Debt: To Worry or Not to Worry*, 24 CHALLENGE 28 (1981).

<sup>107</sup> BOUGHTON, *supra* note 90, at 705.

<sup>108</sup> *Id.*

billion loan. Attached to that loan, and to the many other loans that the Fund would make to deeply indebted LDCs during the 1980s, came a set of conditionalities.

*ii. Conditionalities, the BIT Regime, and Coercive Power*

Conditionalities are the set of stipulations under which an IMF loan is made. Generally, conditionalities consist of legislative and regulatory demands, including requirements to make investor-friendly changes to national laws, privatize formerly State-run industries, and to allow foreigners to bid competitively on those industries. IMF loans are typically released in tranches, and adherence to a prescription of policy changes is evaluated before the release of each successive tranche.<sup>109</sup> This process is meant to ensure that countries can be held accountable for their policy promises. Meanwhile, the World Bank's International Finance Corporation (IFC) also encourages developing countries to make investor- and market-friendly changes to their laws, including incorporating measures designed to simplify bankruptcy proceedings, protect intellectual and other forms of property, and to enforce contracts and enable access to arbitration.<sup>110</sup> This pressure to liberalize and to ensure friendliness toward investors in an effort to gain access to desperately needed international loans meant that indebted countries often found themselves under pressure to enter into BIT agreements as part of a broader program of IMF-supervised reforms. The real deal being negotiated, then, was not contained in the text of the BIT itself. The BIT, even though it endures as a treaty, was only one small piece of a much broader set of negotiations.

Countries accepting loans with attached conditionalities were trading short-term assurances of help with stabilizing their balance sheets for long-term commitments to sweeping reforms that, in some cases, placed relatively semi-permanent constraints on important aspects of their sovereignty, including regulatory and legislative discretion. Signing BITs was just one way that this trend was memorialized and codified. Daniel Kalderimis, former associate professor at Columbia Law School, argues that conditionalities of the sort imposed by the IMF and the IFC amount to regulation by appropriation — a “soft” form of regulation that has the power to indirectly influence aspects of government that it does not have the ability or desire to control directly.<sup>111</sup> Requiring performance as a conditionality for loan disbursements has a regulatory effect on the government

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<sup>109</sup> BOUGHTON, *supra* note 90, at 46.

<sup>110</sup> The World Bank's Doing Business Reports, which are issued each year for every country, provide metrics indicating the ease of doing business in each place. Metrics include dealing with construction permits, getting credit, enforcing contracts, protecting investors, and many others. See WORLD BANK, *Doing Business: Measuring Business Regulations*, <http://www.doingbusiness.org/documents/DB-2016-overview.pdf>.

<sup>111</sup> Daniel Kalderimis, *IMF Conditionality as Investment Regulation – A Theoretical Analysis*, 13 SOC. & LEGAL STUD. 103, 105 (2004).

accepting the loan, allowing capital-exporting countries to exercise regulatory control over the domestic processes of capital-importing countries.<sup>112</sup>

The relationship of developing countries to the IMF and the IFC is characterized by the same kind of power asymmetry that features in BIT negotiations. Ultimately, both aspects of the international investment regime have the power to exert an enormous amount of pressure on LDCs to pass laws that protect investors and to refrain from regulations that might harm their citizens. The actions of these multilateral institutions reinforces and even encourages the proliferation of BITs, as a demonstrated willingness to enter into BITs could be seen as a demonstrated willingness or intention to comply with conditionality packages.

*iii. Sophistication, Ignorance, and Procedural Unfairness*

The word “negotiate,” from the Latin *negōtiātiōn*, has meant different things at different times. The Merriam-Webster Dictionary tells us that, as a transitive verb, it means “to arrange for or bring about through conference, discussion, and compromise.”<sup>113</sup> The Oxford English Dictionary points to the original Latin word, which meant simply “done in the course of business.”<sup>114</sup> Merriam Websters’ definition is closer to what people think goes on during treaty-making today. The process, one imagines, is long and difficult, both sides listening to the demands of the other, and both eventually conceding something. The process may be characterized by stress, disappointment, and hard bargaining around. This is especially true of treaty negotiations, which are likely to involve a complex weighing of various priorities, the need to account for diverse stakeholders, and the fact that a treaty is likely to govern long into the future, even as the political reality of the signatories changes. Indeed, John Maynard Keynes died after his 1946 involvement in intense talks on how to best design multilateral financial institutions. The cause of death was likely exhaustion. Of course, we don’t expect treaty negotiation to be as taxing as it was for Keynes. Neither do we expect “negotiation” to mean the same thing as its Latin cousin, *negōtiātiōn*. et, numerous examples exist of treaties negotiated between weak states and strong states that were conducted more like simple business transactions than treaty negotiations.

In the 1980s, for example, the U.S. State Department was especially unwilling to sign treaties that deviated only slightly from its Model BIT. One former American negotiator reported that there was no negotiation, only “an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft.”<sup>115</sup> The BIT with Grenada, about which talks began after the U.S. invaded the country, were concluded at the

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<sup>112</sup> *Id.* at 110–11.

<sup>113</sup> *Negotiate*, MERRIAM-WEBSTER DICTIONARY (2018).

<sup>114</sup> *Negotiate*, Oxford Dictionary, available at <https://en.oxforddictionaries.com/definition/negotiate>.

<sup>115</sup> José E. Alvarez, *The Development and Expansion of Bilateral Investment Treaties: Remarks*, 86 AM. SOC’Y INT’L L. PROC. 532, 553 (1992).

hospital bedside of the Grenadian Prime Minister as he was receiving medical treatment in Washington DC.<sup>116</sup>

After the Cold War ended, American lawyers, consultants, and advisers rushed into the former Soviet States to shepherd in a series of preferred economic and legal reforms.<sup>117</sup> The US Agency for International Development played a key role in this process, lending support to the Central and Eastern European Law Initiative (CEELI), an organization affiliated with the American Bar Association.<sup>118</sup> While CEELI represents itself as a neutral actor that provides training and skills development to legal professionals, the organization's faith in the emerging international investment regime certainly played a role in the advice it administered.<sup>119</sup> These lawyers became cheerleaders of BITs in the countries they worked in, encouraging the countries not only to sign the BITs they were presented with, but to model new investment laws on the basic provisions of BITs.<sup>120</sup> These enthusiastic American lawyers also advised many countries over the course of their BIT negotiations with other countries. When it came time for Lithuania to conclude a BIT negotiation with the United States, however, the jig was up. The State Department did not want its negotiating partners to be *too* informed.<sup>121</sup> The American negotiating team understood that, absent expert counsel from sophisticated CEELI lawyers, Lithuania would be in over its head.<sup>122</sup> With that in mind, the U.S. government asked U.S. citizen and CEELI lawyer Kenneth Vandavelde — who was concerned that Lithuania would be unduly exposed to expropriation claims from American investors dating back to the Soviet occupation — to leave the room.<sup>123</sup> CEELI lawyers — whether as cynics or true believers — promoted a narrative in which bilateral investment agreements promoted FDI; it was a persuasive narrative. Governments then moved to take advantage of a climate in which government officials were open to signing these treaties, in no small part due to the enthusiastic, continuous encouragement of foreign counsel. From 1990 to 1998, therefore, the United States managed to complete BITs with all thirteen of the former Communist states.<sup>124</sup> Hungary was the only exception.

It was not only the United States that was indirectly championing BITs favorable to capital-exporting States. Even multilateral institutions were keen to get in on the trend, albeit for very different reasons. The United Nations

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<sup>116</sup> Kenneth J. Vandavelde, *The BIT Program: A Fifteen-Year Appraisal*, 86 AM. SOC'Y INT'L L. PROC. 532, 539 (1992).

<sup>117</sup> POULSEN, *supra* note 4, at 83.

<sup>118</sup> *Id.*

<sup>119</sup> *Mission of the CEELI Institute*, CEELI INSTITUTE, <http://www.ilacnet.org/blog/organisations/ceeli-institute>; POULSEN, *supra* note 4, at 85.

<sup>120</sup> *Id.* at 86.

<sup>121</sup> POULSEN, *supra* note 4, at 85.

<sup>122</sup> *Id.* at 86.

<sup>123</sup> *Id.* at 86–87.

<sup>124</sup> *Id.* at 88.

Conference on Trade and Development (UNCTAD), which had criticized lack of due-diligence in the lending programs of developed countries in the lead-up to the debt crisis of the 1980s and had championed debt relief for developing countries,<sup>125</sup> endured a kind of identity crisis following the Cold War. In 1984, a Washington-friendly Secretary General was appointed, thereby “defanging” the organization, in the words of historian Mark Mazower.<sup>126</sup> The United Nations came under severe financial pressure during the late 1980s and early 1990s, mainly because the United States refused to honor its contributions.<sup>127</sup> Meanwhile, the Reagan administration sought to establish a “reflection group” as part of a wider effort to reform UNCTAD’s leadership and its role.<sup>128</sup> Officials unsympathetic to the West were removed during this period, and 30 senior staff members were replaced.<sup>129</sup> UNCTAD also received a new mandate: to study and provide information on FDI flows and the activities of transnational corporations, all the while emphasizing the benefits that FDI could generate.<sup>130</sup> The potential negative consequences of FDI went largely unexamined.<sup>131</sup>

As UNCTAD began to shift its focus to the benefits of FDI, it also began to facilitate BITs on a massive scale. In the late 1990s and early 2000s, UNCTAD became the only international organization to focus directly on BITs, and to grease the wheels of negotiation with overwhelming financial and logistical support. UNCTAD bore travel costs, full board, and lodging costs for developing country officials, and provided facilities for meetings and negotiations.<sup>132</sup> UNCTAD hosted ten events in Geneva between 2000 and 2005, which resulted in more than 160 BITs signed between sixty developed and developing countries.<sup>133</sup> Reflecting on the five agreements his country had signed over a two-week period with the help of UNCTAD, the head of the Philippine delegation said that they were able to conclude “far more [agreements] than we could have otherwise done in two years.”<sup>134</sup> Maybe that is because these sessions lacked the kind of lengthy bargaining process that one might expect in treaty negotiations. As one South African official put it, “The OECD model was actively promoted during this session, and no real negotiations actually took place. Treaties were just signed off in a rush in two or three hours.”<sup>135</sup> More significantly than the logistical and financial support, however, UNCTAD was trading on its past reputation among

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<sup>125</sup> JOHN TOYE, UNCTAD AT 50: A SHORT HISTORY 64, U.N. Doc. UNCTAD/OSG/2014/1 (2014).

<sup>126</sup> *Id.* at 74.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 75.

<sup>130</sup> *Id.* at 84.

<sup>131</sup> *Id.* at 84.

<sup>132</sup> POULSEN, *supra* note 4, at 92–94.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 94; *see also* Press Release, UNCTAD, 22 Bilateral Investment Treaties Signed at Sapporo (Japan), U.N. Press Release TAD/INF/PR/048 (June 28, 2000).

<sup>135</sup> POULSEN, *supra* note 4, at 96.

developing countries to promote a completely new agenda. The hypocrisy was complex. BITs were being encouraged even as UNCTAD's own studies were showing that they did not produce any discernible investment impact.<sup>136</sup>

### B. Substantive Unconscionability

In domestic law, the criteria for determining the presence of substantive unconscionability are looser than those of its procedural cousin. The Washington State Supreme court wrote that a substantively unconscionable term is “one-sided or overly harsh, shocking to the conscience, monstrously harsh, or exceedingly calloused.”<sup>137</sup> The Mississippi Supreme Court held that substantively unconscionable agreements are “one-sided [and] one party is deprived of all the benefits of the agreement or left without a remedy for [the other] party’s nonperformance or breach, a large disparity between cost and price or a price far in excess of that prevailing in the market [exists], or [the] terms bear no reasonable relationship to business risks assumed by the parties.”<sup>138</sup> In short — courts know it when they see it.

BITs are often characterized by several profound inequalities and a one-sided allocation of risk. However, these inequalities are largely absent from the language of the treaties themselves. They lie primarily in their interpretation and enforcement. First, BITs often require that foreign investors be treated more favorably than citizen-investors. While this may be a legitimate bargain in some cases, it also creates a situation in which international investors are subject to a substantially different legal regime, and gives foreign investors the ability to influence government actions in ways that citizens may be unable to. Second, the trajectory of interpretation of BIT language often means that sovereigns relinquish significant portions of their regulatory and legislative power. Finally, the arbitration provisions of BITs restrict sovereign authority, pushing disputes out of the diplomatic realm and constraining the discretion of the State.

It is not difficult to see how restrictions on certain kinds of legislative activity could be important to preventing unjust expropriation. A State might, for instance, pass an environmental law in bad faith and choose to enforce it selectively in order to halt the operations and profitability of a mining project in the hopes of appropriating the equipment or infrastructure associated with it. Alternatively, corruption could incentivize a State to pass a law favoring domestic over foreign investors and interfering with general principles of fairness. These kinds of behaviors are worth protecting against and are properly prohibited in a BIT regime. However, there are examples of instances in which legislation that legitimately protects citizens or the environment, or safeguards the economy in

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<sup>136</sup> HALLWARD-DRIEMEIER, *supra* note 71, at 11 (arguing that UNCTAD’s bilateral investment in the mid-1990s shows only a weak correlation between FDI and BITs, and did not control for the general upward trend of FDI at the time).

<sup>137</sup> *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197 (Wash. 2013).

<sup>138</sup> *Bank of Indiana, Nat’l Ass’n v. Holyfield*, 479 F. Supp. 104, 110 (S.D. Miss. 1979); *MS Credit Center v. Catherine Horton*, 926 So.2d 167, 177 (2006).

times of crisis has been prohibited or chilled. In those cases, the State is prevented from fulfilling what is perhaps its primary role: protecting its citizens and respecting the institutional frameworks that allow for self-determination. When this primary duty is bargained away (maybe even for a very cheap price), it is done in a manner out of keeping with notions of sovereignty contemplated by Lauterpacht.<sup>139</sup> Such bargains are or have the potential to become “shocking to the conscience” and may constitute the kind of substantive inequality that would be likely to be recognized by domestic courts.

*i. Interference with Domestic Authority: Creation of a Two-Tiered System*

Under many BITs, foreign investors are afforded more expansive property rights than domestic investors. Domestic investors are constrained by domestic law, which may, depending upon the values of the State and the polity, limit the extent of property rights or subordinate them to the public good. A foreign investor with the same enterprise and cause of action as a domestic investor may, therefore, prevail in an action against the State where his domestic counterpart fails. This creates a situation in which governments may be held liable for actions that are wholly within the scope of their domestic laws, which may promote the interests of the country or protect its citizens, and are implemented in a non-discriminatory manner. BITs effectively set up two legal regimes within a single territory, creating a situation in which members of the sovereign political community are more constrained than foreigners. Furthermore, foreign investors can legally contest regulatory and legislative measures taken through democratic processes, allowing them greater influence over the political reality of the States than—in some cases—citizens themselves.

*ii. Constraints on Legislative Power*

Various provisions of BITs have been interpreted in a manner that effectively undermines the legislative and executive power of States. It is difficult to say whether the “rule-makers” anticipated and desired this result, or whether it has been a natural and perhaps welcome outcome for capital-exporting countries. The fact is that the substantive language in treaties has been used to curtail the sovereign authority of States in ways that may have a chilling effect on state regulatory action or legislation. Technically, States retain their prerogative to interfere with foreign investments, but the price of doing so might be extremely high. Investment awards may be so large that they equal or exceed broad areas of public spending. This may end up pitting the public interest against the interests of foreign investors. Indeed, the increasing influence of arbitral tribunals on the regulatory power of States has left some scholars to characterize investment arbitration as part of the evolving notion of administrative law.<sup>140</sup>

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<sup>139</sup> See *infra* Section IV.

<sup>140</sup> Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the*

iii. *Fair and Equitable Treatment Clauses*

Most investment treaties and some trade agreements require governments to provide “fair and equitable treatment” to foreign investors.<sup>141</sup> There has been plenty of discussion about how to interpret this phrase, but efforts to provide a normative analysis of it have occurred only relatively recently. Some argue that the vagueness of the concept is a feature rather than a bug—that it provides arbitrators with the ability to use their discretion and to incorporate their own notions of “fairness” and “equity.”<sup>142</sup> This argument is only compelling, of course, if one also holds that *arbitrators’* notions of fairness and equity are the appropriate standard on which to base this analysis. For critics of international investment arbitration, of course, this is not the case. There is a perceived bias on the part of arbitrators.

While the institutions overseeing arbitration proceedings have guarded against the potential personal or national biases of arbitrators fairly effectively,<sup>143</sup> a number of observers and scholars have criticized BIT arbitration panels for what they see as a bias toward investors and capital-exporting countries.<sup>144</sup> Empirical studies have not shed much light on the issue. Even when they go some distance toward exploring the existence of bias, their results have to be taken with a grain of salt: they are likely to reflect the political bent of the organization that commissioned them.<sup>145</sup> At the time of writing, the most recent information available from the United Nations Conference on Trade and Development reports that of the 855 investment cases that have made their decisions publically available, 37% have been decided in favor of the State, while only 28% have been decided in favor of investors.<sup>146</sup> However, another study uses this same data to

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*Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT’L L. 775 (2008).

<sup>141</sup> See Investment Policy Hub, IIA Mapping Project, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> (showing that 2441 of the 2572 mapped BITs contain a fair and equitable treatment clause).

<sup>142</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW 3 (2004) (available at [https://www.oecd.org/daf/inv/investment-policy/WP-2004\\_3.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf)).

<sup>143</sup> See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1587 n.329 (2005) (Susan Franck’s criticism of scholars asserting that arbitrators may be subject to personal and national bias or other kinds of undue influence).

<sup>144</sup> See, e.g., Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VIRGINIA J. INT’L L. 953 (2007); Ibronke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT’L L. J. 345 (2007).

<sup>145</sup> The studies published by the International Institute for Sustainable Development or highlighted on their website tend to demonstrate that arbitration panels are likely to be biased. Language used in the study mentioned in *infra* note 83 even suggests that the study sees itself as explicitly contradicting supposed proponents of the international arbitration system. The study published by UNCTAD, which has historically underwritten efforts to encourage countries to sign BITs, does not suggest any kind of bias. In fact, the way that UNCTAD displays its data would seem to undercut an argument that arbitrators are biased.

<sup>146</sup> United Nations Investment Policy Hub, *Investment Dispute Settlement Navigator Tool*, UNCTAD

show that even though arbitration tribunals are more likely to resolve claims in favor of States, most of these decisions are made because of jurisdictional problems.<sup>147</sup> These jurisdictional questions often terminate the arbitration. Of the cases that proceeded to the merits, however, investors have won 60%.<sup>148</sup> Of cases that involved more complex jurisdictional determinations, investors won 72%.<sup>149</sup> A slightly older empirical study focused specifically on how arbitration tribunals were likely to interpret issues on which treaties are ambiguous or silent.<sup>150</sup> In that study, Professor Gus Van Harten found that arbitrators were more likely to take an expansive, claimant-friendly approach to such provisions, which favors investors over States. While it shows the existence of a trend, this study is not completely satisfying for our purposes because it does not track interpretations of the fair and equitable treatment clause specifically.

All of this to say that while it is difficult to demonstrate the existence of a bias toward claimants, arbitrators have an enormous amount of discretion over how they choose to read the “fair and equitable treatment” standard. There are many examples of arbitrators choosing to read the standard in an expansive way. These expansive readings arguably extend investor rights under the provision beyond what might have been reasonably expected based on the language of the treaty, at least for treaties signed before the last few years, during which the reading of this standard has been expanding. I provide a few examples of such cases below.

*a. Background and Scope*

The notion of legitimate expectations, which is sometimes referred to as basic, reasonable or justifiable expectations,<sup>151</sup> is a key element of the fair and equitable treatment standard. It has been invoked by arbitral tribunals in decisions that effectively widen the scope of protection granted to foreign investors. The tribunal in *Tecmed v. Mexico* has provided what is perhaps one of the most far-reaching definitions of this concept:

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(2018), <http://investmentpolicyhub.unctad.org/ISDS>.

<sup>147</sup> See Howard Mann, ISDS: WHO WINS MORE, INVESTORS OR STATES? INT’L INST. FOR SUSTAINABLE DEV. (Jun. 2015), <https://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf>.

<sup>148</sup> See *id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Saluka Investments B.V. v. Czech Republic*, 302 (Perm. Ct. Arb. 1991).

...this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>152</sup>

While a couple of arbitral decisions have asserted a narrower view of the standard,<sup>153</sup> it has been echoed and endorsed in many other arbitral decisions.<sup>154</sup> Despite disagreement on the scope of the principle, some consensus seems to be emerging around the notion of legitimate expectations. First, arbitral tribunals seem to be reading into “fair and equitable treatment” an obligation to ensure a stable business environment, meaning that host countries must provide a transparent and predictable framework for investors’ business planning and investment.<sup>155</sup> It follows, then, that inconsistency of the actions of the host State may indicate a breach of the treaty.

In *MTD v. Chile*, for example, one government agency encouraged and approved an investors’ construction project while another denied the required zoning permits.<sup>156</sup> Chile was held to be in breach of the standard. Similarly, a lack

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<sup>152</sup> FIONA MARSHALL, INT’L INST. FOR SUSTAINABLE DEV., FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT AGREEMENTS 10 (2007), [https://www.iisd.org/pdf/2007/inv\\_fair\\_treatment.pdf](https://www.iisd.org/pdf/2007/inv_fair_treatment.pdf).

<sup>153</sup> See, e.g., *Saluka Investments B.V. v. Czech Republic*, 304 (Perm. Ct. Arb. 1991); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 335 (Sept. 11, 2007).

<sup>154</sup> See *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, ¶ 112 (May 25, 2004) (citing *Tecmed v. Mexico*); *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 185 (Oct. 5, 2012); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, ¶ 371 (July 14 2006); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, ¶ 297 (Jan. 17, 2007); *Gami Investments, Inc. v. Mexico*, UNCITRAL, ¶ 88 (Nov. 15, 2004); *Eureko v. Poland*, ¶ 235 (Aug. 19, 2005).

<sup>155</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000); see also *Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, ¶ 154 (May 29, 2003); *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004); *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, ¶ 183 (Oct. 5, 2012); *Azurix v. Argentina*, ICSID Case No. ARB/01/12, ¶ 371 (July 14 2006); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, ¶ 297 (Jan. 17, 2007); *GAMI Investments, Inc. v. Mexico*, UNCITRAL, ¶ 88 (Nov. 15, 2004).

<sup>156</sup> *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

of transparency may also indicate a breach. In *Metalclad v. Mexico*, the tribunal stated that it understood the principle of transparency “to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments... should be capable of being readily known to affected investors.”<sup>157</sup> In *Tecmed v. Mexico*, the standard is even higher—requiring that the investor be able to “know beforehand and all rules and regulations that will govern its instruments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”<sup>158</sup>

Most surprisingly, however, new regulations or disagreement between government agencies may be sufficient to constitute a breach even if these actions were not taken in bad faith and do not constitute “outrageous behavior.”<sup>159</sup> Given the very real worry about transparency in many capital-importing countries, a strict interpretation of a breach may not be unwarranted, but it seems curious that an arbitral tribunal would explicitly state that even a regulation passed in good faith can constitute a breach. This establishes a restrictive regime—while it may be reasonable to expect that a given agency or government may be able to fully inform an investor about how domestic law is likely to affect investments, requiring this over any length of time would seem to preclude reform, regulatory response to environmental or labor activism, and other legitimate exercises of sovereign authority. Finally, even a bureaucracy that zealously enforces existing laws may be found to be pursuing a campaign of harassment against a foreign investor.<sup>160</sup> In these examples, good faith, robust enforcement of regulation is enough to trigger hefty liabilities for host States.

*b. The Chilling Effects of an Expanded Fair and Equitable Treatment Standard*

*i. Enforcement of Existing Laws*

In 2012, an arbitral tribunal issued one of the largest awards in history to Occidental Petroleum Corporation (Oxy) after it launched a successful claim against Ecuador under the U.S.-Ecuador BIT.<sup>161</sup> The claim was brought when the

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<sup>157</sup> *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, NAFTA, ¶ 76 (Oct. 30, 2000)

<sup>158</sup> *Tecmed, S.A. v. Mexico*, ICSID Case. No. ARB (AF)/00/2, ¶ 154 (May 29, 2003).

<sup>159</sup> See Marshall, *supra* note 152, at 13 (citing *Mondev v. United States*, ¶ 116; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) (NAFTA) Award 9 January 2003, ¶ 180; *Tecmed v. Mexico*, ¶ 153; *Waste Management No. 2 v. Mexico*, ¶ 93; *Azurix v. Argentina*, ¶368; *Siemens v. Argentina*, para 297; *Eureko v. Poland*, para 234; *Occidental v. Ecuador*, para 186; *Enron v. Argentina*, ¶ 263; *CMS v. Argentina*, ¶ 280; *LG&E v. Argentina* ¶ 129; *Lowen v. United States*, ¶132).

<sup>160</sup> See *id.*; see also CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 243 (2007).

<sup>161</sup> Tai-Heng Cheng & Lucas Bento, *ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v. the Republic of Ecuador*, KLUWER ARBITRATION BLOG (Dec. 19, 2012), <http://arbitrationblog.kluwerarbitration.com/2012/12/19/icsids-largest-award-in-history-an->

government terminated an oil concession after Oxy sold 40 percent of its production rights to another firm without government approval, in violation of both the contract it had concluded with the Ecuadorian government and Ecuadorian law.<sup>162</sup> The contract between the investor and the country enforced Ecuador's hydrocarbons law, which protects the government's prerogative to exercise discretion over which companies are permitted to produce oil in its territory.<sup>163</sup> This was of particular importance in the area in which Oxy was operating—an environmentally sensitive part of the Amazon region. While the tribunal acknowledged that Oxy had broken Ecuadorian law and that the response of the government was foreseeable, it held that the government had not responded proportionally and had therefore violated the “fair and equitable treatment” requirement under the BIT.<sup>164</sup> In doing so, it read into “fair and equitable treatment” a proportionality requirement that, in its view, determined the proper scope of government action, apparently absent in established domestic law and even the contract concluded between the investor and the state. The tribunal held that “any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences.”<sup>165</sup> It read the same proportionality requirement into Ecuadorian law—to a remarkable result.<sup>166</sup> On this logic, the tribunal found that Ecuador was liable to the investors for the amount of future profits that Oxy would have received from the full exploitation of the oil reserves that it had forfeited through its breach of the contract and its violation of the law.<sup>167</sup> The \$2.3 billion award included the profits from reserves that had yet to be discovered, and was one of the largest awards in history.<sup>168</sup> The amount of the award represented more than 2% of the country's GDP that year.<sup>169</sup>

#### ii. Delegation of Power to Local Authorities

In *Metalclad v. Mexico*, a U.S. waste management firm brought a claim against Mexico under NAFTA's investor-state dispute resolution mechanism.<sup>170</sup> The firm complained that a Mexican municipality had refused to grant it a

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overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador.

<sup>162</sup> See *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

<sup>163</sup> *Id.* ¶ 2.

<sup>164</sup> *Id.* ¶ 404.

<sup>165</sup> *Id.* ¶ 416.

<sup>166</sup> *Id.* ¶ 422.

<sup>167</sup> *Occidental v. Ecuador*, *supra* note 162, ¶ 739–43, 824–25 (discussing the methods employed in calculating the award).

<sup>168</sup> *Id.* ¶ 748; Luke Eric Peterson, *Ecuador Must Pay \$1.76 Billion to US Occidental Corporation for Expropriation of Oil Investment: Largest Ever Award Ever in Bilateral Investment Treaty Case at ICSID*, INVESTMENT ARBITRATION REPORTER (Oct. 5, 2012), <http://www.iareporter.com/articles/20121005>.

<sup>169</sup> Ecuador GDP, TRADING ECONOMICS (2016), <http://www.tradingeconomics.com/ecuador/gdp>.

<sup>170</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

construction permit for the expansion of a toxic waste facility.<sup>171</sup> The municipality was concerned about water contamination and other environmental and health hazards.<sup>172</sup> The local government was acting consistently with its past decisions to deny permits to the Mexican firm from which Metalclad had acquired its facility.<sup>173</sup> Metalclad claimed that Mexico was essentially expropriating its property through a regulatory taking.<sup>174</sup> The tribunal agreed, and further found that Mexico had failed to provide a “transparent and predictable” regulatory environment to its investors.<sup>175</sup> Critics of the decision describe it as reading into NAFTA the duty for signatories to walk foreign investors through the complexities of municipal, state and federal law and to ensure that officials at different levels of governments never give inconsistent advice.<sup>176</sup> Such a standard would seem to undermine the powers delegated to local governments while simultaneously relieving the investor of the obligation to conduct basic due diligence in the jurisdiction in which it seeks to operate.

### *iii. Maintaining Peace and Public Order*

In 2001, many factors converged to push Argentina toward one of the most serious economic crises in recent history. As the situation worsened, Argentinians rushed to the banks, believing that their pesos would be devalued.<sup>177</sup> President Cavallo responded by limiting bank withdrawals in an effort to prevent the banks from becoming overdrawn.<sup>178</sup> His response triggered a wave of uncertainty and anger throughout the country. People began rioting, looting, and gathering in the thousands outside Cavallo’s apartment, which caused him to resign.<sup>179</sup> The unrest continued, however, and protests became increasingly violent. More than twenty people were killed in the clashes.<sup>180</sup> The government changed hands several times as leaders struggled to stave off chaos.<sup>181</sup>

Invoking the Economic Emergency Law, the government took a number of steps to try to limit inflation. One such effort involved limiting gas utility rate

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<sup>171</sup> *Id.* ¶ 50.

<sup>172</sup> *Id.* ¶¶ 44, 46.

<sup>173</sup> *Id.* ¶ 53.

<sup>174</sup> *Metalclad Corp. v. Mexico*, *supra* note 170, ¶ 59.

<sup>175</sup> *Id.* ¶ 99.

<sup>176</sup> See Stephen L. Kass and Jean M. McCarroll, *The Metalclad Decision Under NAFTA’s Chapter 11*, N.Y. L. J. (2000).

<sup>177</sup> Jorge Schvarzer, *The Costs of the Convertibility Plan: The Economic and Social Effects of Financial Hegemony*, in *BROKEN PROMISES? THE ARGENTINE CRISIS AND ARGENTINE DEMOCRACY* 73, 87 (Edward Epstein & David Pion-Berlin eds. 2006).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; see also Clifford Kraus, *Reeling from Riots, Argentina Declares a State of Siege*, N.Y. TIMES (Dec. 20, 2001), <http://www.nytimes.com/2001/12/20/world/reeling-from-riots-argentina-declares-a-state-of-siege.html> (describing riots and looting in Argentina in late 2001).

<sup>180</sup> Uki Goni, *Argentina collapses into chaos*, THE GUARDIAN (Dec. 20, 2001), <https://www.theguardian.com/world/2001/dec/21/argentina.ukigoni>.

<sup>181</sup> Schvarzer, *supra* note 177, at 87.

increases.<sup>182</sup> This decision caused the value of the Argentine peso to fall in global markets. As the peso fell, CMS Gas Transmission Company, a U.S. firm, lost revenue. CMS subsequently brought an action against the (new) Argentinian government, claiming that the freezing of gas rates violated the “fair and equitable treatment” provision of the BIT, among others.<sup>183</sup> Argentina argued that not only was its treatment of CMS non-discriminatory, but that the actions of the government were necessary in the face of the national emergency it was grappling with.<sup>184</sup> In order to justify its decision, it was even able to point to a provision of the U.S.-Argentine BIT under which CMS was bringing its claim: “This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”<sup>185</sup>

The tribunal decided against Argentina, finding that the economic crisis its citizens suffered was not sufficiently severe for it to be able to rely on this defense.<sup>186</sup> Argentina was found liable for \$133 million, to be paid out of public coffers in the wake of a crisis that had left over 75% of the population poor or indigent.<sup>187</sup> A separate tribunal hearing a similar claim under the same BIT came to the opposite conclusion.<sup>188</sup> Reflecting on the pair of cases, Argentina’s Minister of Justice Horacio Rosatti said that it was obvious to the people of Argentina that a foreign tribunal should not be deciding the consumer rates for public utility services.<sup>189</sup> Adding insult to injury, eventually CMS sold its claim, and the subsequent owner pursued the award in U.S. courts.<sup>190</sup>

#### *iv. The Dispute Resolution Mechanism Contained in BITs Restricts Sovereign Authority*

While BITs technically grant reciprocal rights to investors of both signatory States, they are instruments of public international law that effectively restrict the power of States while granting rights to private investors. Arbitration tribunals, which are convened by the parties to a dispute outside of the public State

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<sup>182</sup> Sarah Anderson & Sara Grusky, *How the World Bank’s Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It*, FOOD AND WATER WATCH (2007) [https://www.foodandwaterwatch.org/images/water/world-water/bank-policy/ICSID\\_print.pdf](https://www.foodandwaterwatch.org/images/water/world-water/bank-policy/ICSID_print.pdf).

<sup>183</sup> CMS Gas Transmission Company v. Argentina, ICSID Case No. Arb/01/8, Award, ¶¶ 84–88 (May 12, 2005).

<sup>184</sup> *Id.* ¶ 99.

<sup>185</sup> *Id.* ¶ 332.

<sup>186</sup> *Id.* ¶¶ 354–56.

<sup>187</sup> Alan B. Cibils, Mark Weisbrot & Debayani Kar, *Argentina Since Default: The IMF and the Depression*, CTR. FOR ECON. AND POLICY RESEARCH (Sept. 3, 2002).

<sup>188</sup> LG&E Energy Corp. v. Argentina, ICSID Case No. ARB/02/1, Award, ¶ 257 (Oct. 3 2006).

<sup>189</sup> *Rosetti respaldo el Proyecto anti-CIADI*, PARLAMENTARIO (2018), [www.parlamentario.com/noticia-4068.html](http://www.parlamentario.com/noticia-4068.html).

<sup>190</sup> *Come and get me*, THE ECONOMIST, Feb. 18, 2012.

apparatus, are endowed with the power to effectively review acts of State. A State party to an arbitration dispute does not participate as a public entity. Structurally and legally, arbitration places the investor and the State on equal footing. The State does not receive special rights or recourse to its public policy initiatives. While the legal doctrine of *rex non potest peccare*—the king can do no wrong—is recognized by countries around the world to grant sovereign immunity, arbitration strips a state of its sovereignty. The tribunal—privately convened, unaccountable to citizens—has the jurisdiction to review public State actions while investors are effectively shielded from similar scrutiny because their conduct is governed by the treaty. Finally, in this system, only investors may initiate claims, and only States must pay damages.<sup>191</sup> By signing a BIT, the State binds itself to a legal regime in which findings of liability only ever run in one direction. In one way, of course, this is what the State has bargained for. While the scope of the “fair and equitable treatment” standard as interpreted by the tribunals would be difficult or impossible to predict, arbitration clauses are clearly stated in BITs. However, given the fact that investors have brought claims that touch such critical aspects citizens’ lives and have the potential to chill the legislative processes, it is especially troubling that arbitration panels are so insulated against wider accountability and that proceedings are so one-sided.

### III.

#### UNCONSCIONABILITY DOCTRINE IN DOMESTIC CASES

Domestic courts can use equitable remedies to promote justice and fair dealing between unequal parties that conclude agreements together. While the doctrine has often been described as paternalistic because it constrains contracting freedoms, it enhances the overall equality of bargain-makers by preventing desperate parties from making their situations even more desperate. By the same token, the doctrine provides a disincentive for stronger parties to attempt to coerce or deceive a weaker party into signing a one-sided agreement. The unconscionability doctrine has existed at least since Roman law, under which, a contracting party who received the raw end of a deal was allowed to rescind the contract “if the disproportion between the values exchanged was greater than two to one.”<sup>192</sup> In the early nineteenth century, an American court also found that in cases in which a “contract ought not, in conscience, to bind one of the parties, as if he had acted under a mistake, or was imposed upon by the other party... a court of equity will interpose and afford a relief... by setting aside the contract.”<sup>193</sup> Later that century, courts characterized unconscionable contracts as contracts written

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<sup>191</sup> For a more in-depth discussion of these tensions, see Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT’L L. J. 491, 518 (2009).

<sup>192</sup> CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 599 (7th ed. 2012).

<sup>193</sup> *Hepburn v. Dunlop & Co.*, 5 U.S. (1 Cranch) 179, 197 (1816).

“such as no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>194</sup>

Perhaps the clearest and most frequently cited articulation of the doctrine emerged during the 1950s after Section 2-302 of the Uniform Commercial Code was drafted.<sup>195</sup> The U.C.C. stipulated that “if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract” or it may limit the effect of the offending portion so as “to avoid any unconscionable result.”<sup>196</sup> The U.C.C. also lays out a contextual test for determining unconscionability: “The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>197</sup> The principle underlying this contextual test “is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.”<sup>198</sup> It wasn't until nearly a decade later that courts began looking to the U.C.C. to give substance to their invocation of unconscionability.<sup>199</sup> At present, the U.C.C. has been adopted by nearly all states.<sup>200</sup> While the U.C.C. traditionally only regulated merchant-to-merchant transactions, the doctrine as articulated by the Code has been expanded to other kinds of agreements as well. However, unconscionability doctrine has enjoyed a broader life as an equitable remedy in U.S. courts, and analogues of the doctrine can be found in legal systems around the globe.<sup>201</sup>

#### A. U.S. Courts

Unconscionability doctrine has been applied idiosyncratically throughout the U.S. While some states have created tests for unconscionability, these tests are largely unclear for the in the same way that unconscionability doctrine itself

<sup>194</sup> *Hume v. United States*, 132 U.S. 406, 411 (1889).

<sup>195</sup> See Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275 (1998), describing the drafting process during the 1940s, for a discussion of the history of the U.C.C.

<sup>196</sup> U.C.C. § 2-302 (amended 2003).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> The reference to the U.C.C. occurred in a New York State Supreme Court case in 1958. See *Donato v. Blatusaitis*, 56 Misc. 2d 935, 942 (1958). There, while the Court did not find it necessary to decide on whether a particular contract provision was unconscionable, the opinion seems to point to the U.C.C. as offering a framework for making such a decision.

<sup>200</sup> After the first publication of § 2-302 of the U.C.C., the ambiguity of the term “unconscionability” induced the State of California to initially drop § 2-302 from their adoption of the Code. See Simon Reznikoff, *The Unconscionable Controversy*, 17 AM. BUS. L.J. 61 (1979); see also CAL. COM. CODE § 2302 (West 2012) for an in-depth explanation as to why the provision was not enacted in California. Also, until 1971, the state of North Carolina also omitted this section from the Code. See N.C. GEN. STAT. ANN. § 25-2-302 (1966) for a discussion of why North Carolina did not initially adopt the provision.

<sup>201</sup> See discussion *supra* Section III(B).

is unclear.<sup>202</sup> Courts, therefore, apply the doctrine on a case-by-case basis, considering a totality of the circumstances under which the contract was made and acted upon.<sup>203</sup> Generally, courts require the presence of both procedural and substantive unconscionability in order to invalidate a contract.<sup>204</sup> Even in cases where factors suggesting unconscionability might be present, some judges insist on formalism, refusing to apply the doctrine, instead appealing to laissez-faire arguments, or warning against paternalism.<sup>205</sup>

*i. Procedural Unconscionability in U.S. Courts*

Mandatory rules may also provide protection to parties that lack the information or the capacity to protect themselves from the negative outcomes of agreements. In a departure from the precedent established in *Lochner*,<sup>206</sup> the United States Supreme Court upheld a statute restricting the working hours of women in *Muller v. Oregon*.<sup>207</sup> In an argument that has since become obsolescent in this context, the court argued that even if legislation removes a woman's personal and contractual rights, "there is that in her disposition and habits of life which will operate against a full assertion of those rights."<sup>208</sup> This is both a social and historical fact, according to the court.

[W]oman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control... has continued to the present... She will still be where some legislation to protect her seems necessary to secure a real equality of right... Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained....<sup>209</sup>

The argument that women require special labor protections because of their physical inferiority to men is, thankfully, superannuated. However, the underlying

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<sup>202</sup> M. Neil Browne & Lauren Bicksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, n. 252 (2014) (the authors describe the test set forth in *Am.Gen. Fin., Inc. v. Branch*, 793 So. 2d 738, 748 (Ala. 2000) in which an Alabama court determined that a contract was unconscionable if: (1) its terms are grossly favorable (2) to a party with overwhelming bargaining power).

<sup>203</sup> See Arthur Allen Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 354–55 (1970).

<sup>204</sup> RICHARD A. LORD, WILLISTON ON CONTRACTS §18:10 (4th ed. 2011) (collecting cases); JOHN EDWARD MURRAY, MURRAY ON CONTRACTS § 96 (4th ed. 2001), § 96(B)(2)(b) (collecting cases); LINDA J. RUSCH, HAWKLAND UCC SERIES § 2:302:5 (2010) (collecting cases).

<sup>205</sup> Browne & Bicksacky, *supra* note 202, at 250.

<sup>206</sup> In *Lochner v. New York*, 198 U.S. 45 (1905), the Court invalidated a New York statute forbidding bakers from working more than 60 hours per week or 10 hours per day on the grounds that the statute interfered with the freedom of contract.

<sup>207</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>208</sup> *Id.* at 422.

<sup>209</sup> *Id.* at 421–22.

principle still applies: lawmakers and administrative elites may have better access to information than contracting parties. As Robert Clark explains it,

when technical information is highly relevant to the choice of a welfare-enhancing rule, there are specialists or experts in the technical information, and the judgments made by the experts cannot be rationally second-guessed by non-experts unless they take on enormous costs to become experts themselves... Similarly, an important asymmetry may exist when the factual beliefs most relevant to choice of a rule are of a general and judgmental sort that depend on experience, and more and wider experience does tend to produce better judgments.<sup>210</sup>

When contracting parties find themselves in a weak position and open to exploitation, it is legitimate for lawmakers to step in and apply mandatory rules that limit the ability of parties to contract in a way that affords greater protection.

Rules may also be designed to protect weaker parties from being forced into a weak bargaining position. Regulations that fill this role include prohibitions on disclaiming the warranty of habitability, and not allowing employees to contract away their rights under labor regulations.<sup>211</sup> While unfair contracts are generally voidable by the affected party, a weak party is unlikely to be in a position to access the information or bear the costs of engaging in adjudication. Mandatory rules, then, are a kind of protective measure that anticipate the ways in which inequality will affect agreement-making and seek to mitigate against its worst effects. Unconscionability doctrine is merely a *specific kind* of mandatory rule.

Procedural unconscionability can be determined by closely examining the bargaining process itself. In a contract dispute between a company and a consumer, for example, courts might look to evidence of specific and objective indications demonstrating that the consumer was unable to read and understand the terms of the agreement.<sup>212</sup> The inquiry would be a fact-intensive one, and a court would likely carefully consider the age, literacy, business sophistication, education, and socioeconomic status of the party making an unconscionability claim.<sup>213</sup> The court would also examine the company's tactics for evidence of bad behavior, pressure tactics, the use of unnecessarily complex language, or the desire to hasten the consumer's signature.<sup>214</sup> Finally, courts also consider whether

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<sup>210</sup> Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1718 (1989).

<sup>211</sup> Omar M. Dajani, *Contractualism in the Law of Treaties*, 34 MICH. J. INT'L L. 1, 23 (2012); *see, e.g.,* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–94 (1937).

<sup>212</sup> *See, e.g.,* Weaver v. Am. Oil Co., 276 N.E.2d 144, 145 (Ind. 1971) (finding procedural unconscionability where plaintiff, a gas station operator, “had left high school after one and a half years and spent his time ... working at various skilled and unskilled labor oriented jobs.”).

<sup>213</sup> *Id.*

<sup>214</sup> E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28; Browne & Bicksacky, *supra* note 202, at 297–98; *see, e.g.,* John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1574 (D. Kan. 1986) (finding procedural unconscionability where the contract provisions contained complex “legalese” written in fine print).

the contract in question is one of adhesion, although the mere existence of an adhesionsary contract will generally be insufficient to show unconscionability.<sup>215</sup>

ii. *Substantive Unconscionability in U.S. Courts*

When determining substantive unconscionability, the court will look to the text of the contract itself and determine whether the provisions of the document are unfair. In its analysis, it may examine the allocation of risks to determine whether they are unreasonable or one-sided.<sup>216</sup> Remedy limitations, penalty clauses, and price terms that impose a significant cost-price disparity are generally recognized by scholars to factor heavily into a determination that risks fall unfairly on the consumer.<sup>217</sup> The standard echoed in many courts is that an unconscionable provision is one that “no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>218</sup> This turn of phrase was taken from the Webster’s dictionary in the eighteenth century, and has been used by courts ever since.<sup>219</sup> In the conventional view of most courts, then, if it is to be found unconscionable, the provision in question must be more than “unreasonable.” It must also be “harsh” or “oppressive,” or the terms must be so one-sided as to “shock the conscious.”<sup>220</sup>

iii. *The Sliding Scale Approach*

The conventional approach to unconscionability requires that procedural and substantive unconscionability both be present in order for a court to find

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<sup>215</sup> MURRAY ON CONTRACTS, *supra* note 204, § 96, at 547–49.

<sup>216</sup> *See, e.g., Dalton v. Santander USA, Inc.*, 2016-NMSC-035, 385 P.3d 619 (N.M. 2016) (noting that a determination of substantive unconscionability requires the court to consider whether the contract terms are commercially reasonable and fair and to take into account the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns to determine the legality and fairness of the contract terms themselves); *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 358 (2013) (noting that substantive unconscionability involves the unfairness of the contract itself, and whether the contract terms are one-sided and will have an overly harsh effect on the disadvantaged party, and that courts may consider the commercial reasonableness of the terms, the purpose and effect of the terms, public policy concerns and the allocation of risks between the parties in making a determination).

<sup>217</sup> *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 4-4; Browne & Bicksacky, *supra* note 202, at 298-99; Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1079–80 (2006).

<sup>218</sup> Decisions using this very language, attributable to *Hume v. United States*, 10 S.Ct. 134, 136 (1889), include: *United States v. Lennox Metal Mfg.*, 225 F.2d 302, 310 (1955); *Hojnowski v. Buffalo Bills, Inc.*, 995 F. Supp. 2d 232, 238 (2014); *Smith v. Harrison*, 325 N.W.2d 92, 94 (Iowa 1982); and *Layne v. Garner*, 612 So.2d 404, 408 (Ala. 1992), among many others.

<sup>219</sup> *Earl of Chesterfield v. Janssen* [1750], 28 Eng. Rep. 82, 100 (Ch.); *see* Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 743 & n.2 (1981) (noting that since the eighteenth century, most courts have parroted Webster’s Dictionary definition – “not guided or controlled by conscience”).

<sup>220</sup> LINDA J. RUSCH, HAWKLAND UCC SERIES § 2:302:4 (2010).

sufficient grounds to invalidate a contract or a particular provision of it.<sup>221</sup> The “sliding scale” approach to unconscionability doctrine, the first example of which emerged in 2000, has since been adopted or reaffirmed by at least a dozen state supreme courts.<sup>222</sup> Rather than requiring that strong evidence of both procedural and substantive unconscionability be present, and reviewing evidence of each separately, courts have recently shown themselves amenable to taking a more holistic approach. Under this new approach, the overwhelming presence of either procedural or substantive unconscionability may be enough to offset a lesser amount of its complement, or may even itself be sufficient to find the entire contract unconscionable.<sup>223</sup>

Under this more relaxed approach, some courts have shown themselves willing to find the mere existence of a consumer contract of adhesion sufficient to satisfy procedural unconscionability—without looking further to evidence of deficient assent.<sup>224</sup> A contract of adhesion that is *also* found to be significantly substantively unconscionable might fulfill the criteria of a sliding scale. This reduced standard of analysis can then allow the court to proceed more easily to matters of substantive unconscionability. The court is not required to engage in tortured speculation over a long and complicated set of facts that may or may not be sufficient to establish whether or not the consumer was appropriately educated, had sufficient time to review the contract, and could have understood the contractual provisions. However, the appeal to the sliding scale approach, and its contours even in jurisdictions where it has been adopted, is far from settled law.<sup>225</sup>

### B. Foreign Courts

As I argue that unconscionability doctrine should have some role in treaty interpretation and therefore in international law, it is worth noting that the doctrine

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<sup>221</sup> Lord, *supra* note 204, § 18:10 (collecting cases); 1-6 MURRAY ON CONTRACTS § 96 (4th ed. 2001), § 96(B)(2)(b) (collecting cases); Rusch, *supra* note 220, § 2-302:5 (collecting cases).

<sup>222</sup> Melissa T. Lonegrass, *Finding Room for Fairness in Formalism — The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 5 (2012).

<sup>223</sup> For an extensive discussion of the evolution of the sliding scale approach, see *id.* For a list of cases in which courts have found that either substantive or procedural unconscionability was sufficient to find that unconscionability was present, see Lauterpacht, *supra* note 24.

<sup>224</sup> For example, in California, where the sliding scale approach has been utilized for some time, courts are generally willing to find procedural unconscionability established by the existence of a typical standard form contract. See, e.g., *Gentry v. Superior Court*, 165 P.3d 556, 572 (Cal. 2007) (“The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, ‘which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’” (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005), overruled on other grounds by *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011))).

<sup>225</sup> See *Sitogum*, 800 A.2d at 921-22 (noting disagreement among jurisdictions); *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995) (same). See also Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RES. 757, 795 (2004) (noting that some cases require both forms of unconscionability while others only require one).

does not exist only in American law. Other nations' courts have also incorporated unconscionability doctrine into their legal systems, some taking a broader view of the doctrine than those in the United States. In Australia, for example, a court tasked with determining whether a particular contract was unconscionable is required by law to consider: (1) the relative strength and the bargaining positions of the corporation and the consumer; (2) whether the consumer was able to understand any documents related to the supply of the goods or services in question; and (3) whether any undue influence or pressure was exerted on the consumer.<sup>226</sup> In fact, the doctrine is more expansive in Australia than it is in the United States<sup>227</sup> because unconscionability doctrine does not exist only as a treaty defense, but can provide the basis for suits brought by the Australian Competition and Consumer Commission—a government regulatory body—for injunctions and declarations.<sup>228</sup> In Australia, then, unconscionability doctrine is more than just an equitable remedy, it is a method for the government to actively deter unfair agreements.

Unconscionability doctrine has also been articulated by the German Civil Code; specifically in Articles 138, 242 and 826 of the Code.<sup>229</sup> While Article 138 mainly governs unconscionable contract terms, Article 242 combats the unconscionable or bad faith enforcement of contractual rights, even if the contractual text is not itself unconscionable.<sup>230</sup> While American courts have focused on the text of the contract itself and the bargaining power of the parties to the contract, they have not considered unconscionable *enforcement* of contract terms.<sup>231</sup> Article 242 of the German Civil Code allows Courts to address the unfair use of contractual rights, even where when a provision conferring those rights is fair on its face.<sup>232</sup> This is a compelling approach and is in line with the remedies I suggest for substantive unconscionability in Section V(B). Finally, Article 826 provides that “one who intentionally injures another by conduct offending good morals must make repatriation.”<sup>233</sup> This Article, like the German statute, advocates for an approach that would regulate the actions of groups with “overriding, economic power.”<sup>234</sup>

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<sup>226</sup> M. Neil Browne and Lauren Biksacky, *supra* note 202, at 241 (2014).

<sup>227</sup> *Id.* at 241.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 243–46.

<sup>230</sup> *Id.*

<sup>231</sup> Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 LOY. L.A. INT'L & COMP. L.J. 455, 505–06.

<sup>232</sup> *Id.*

<sup>233</sup> John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1044–45 (1976).

<sup>234</sup> *Id.* at 245.

IV.  
TREATIES AS CONTRACTS

Treaties have long been seen and treated as close cousins of contracts. In his article on the overlap between the law of contracts and international treaty law, Professor Dajani emphasizes that just as unconstrained contractualism has been prohibited by the State, natural or supranational limits were long thought to limit the extent to which States could affect international law through unconstrained treaty-making.<sup>235</sup> Medieval France and England, for instance, both had rules prohibiting monarchs from ceding sovereignty or authority in ways that would prove injurious to the subjects they were responsible for.<sup>236</sup> The Italian jurist Alberico Gentili saw monarchs as bound not by their domestic law, but by natural law.<sup>237</sup> Natural law, in his view, was also the bedrock of the law of nations.<sup>238</sup> The alienation of sovereignty “seems to be forbidden by the general law of all kingdoms, which comes into being with the kingdoms themselves and as it were by the law of nations.”<sup>239</sup> These rules and their articulation by legal scholars, Dajani points out, reveals that even early legal theorists were aware of, and concerned about, problems of agency and representation during treaty making, and were also aware that the will of the sovereign leader was not the only factor upon which the value or relevance of treaties should be judged.<sup>240</sup>

While this understanding of the interaction of international law with treaty law was briefly interrupted by legal positivist thinking, nineteenth century scholars involved in efforts to codify the law of treaties were also amenable to it. Johann Kaspar Bluntschli, the Swiss founder of the Institut de Droit International, wrote that treaties infringing on general human rights or the necessary principles of international law should not be respected, but should be found to be null and void.<sup>241</sup> Bluntschli also wrote that treaties which seek to “establish the domination of one Power over the whole World” or violently eliminate States that are not threatening peace should also be void.<sup>242</sup> The Italian legal scholar Pasquale Fiore—living and writing in the same period as Bluntschli—came to similar conclusions. The code he authored also established a mandatory rule prohibiting coercion, which he said included “true physical violence or when the person who

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<sup>235</sup> *See id.*

<sup>236</sup> *Id.* at 26.

<sup>237</sup> Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 AM. J. INT’L L. 1, 14 (1995).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Dajani, *supra* note 211, at 27.

<sup>241</sup> *Id.* at 28.

<sup>242</sup> Special Rapporteur on the Law of Treaties, *Law of Treaties*, U.N. Doc. A/CN.4/23 (Apr. 14, 1950) (by J.L. Brierly), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 245, app. D, art. 410, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (entitled “Bluntschli’s Draft Code,” and listing “[r]elevant articles” translated into English from Johann Caspar Bluntschli, *Le droit international codifié* (C. Lardy trans., Librairie de Guillaumin et Cie ed. 1870) (1868)).

signed the treaty was compelled to do so through external constraint which deprived him of all deliberation and freedom of judgment.”<sup>243</sup> The exception, for Fiore, was treaties made under occupation. Ensuring stability and ending conflicts were worth the risk of concluding unequal treaties.<sup>244</sup>

It was not until the early twentieth century that Professor Alfred von Verdross of the University of Vienna became the first scholar to thoroughly explore the question of whether there might be mandatory rules of international law. His article on the subject appeared in 1937 in the *American Journal of International Law*.<sup>245</sup> In Verdross’s view, mandatory rules were necessary in the treaty context in two instances. First, they were necessary to protect third parties whose legal interests might be adversely affected by treaties between other States.<sup>246</sup> Second, mandatory rules also limited the conclusion of treaties that ran contrary to the morals or ethics of the international community.<sup>247</sup> He based the second idea in domestic law, which prohibits contracts *contra bonos mores*. In order to extrapolate on the scope of his proposed rules, Verdross provided some examples of treaties that would be forbidden under the mandatory rules of international law. In his view, an immoral treaty is one that prevents States from exercising their primary moral tasks which include the “maintenance of law and order within the states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, and protection of citizens abroad.”<sup>248</sup> These duties constituted the “universally recognized tasks of a state” and could not be abrogated because doing so would leave a situation in which a community of people would go uncared for.<sup>249</sup> While Verdross and others focused on the appropriate substantive content of treaties, it was not until after the Second World War that legal scholars began to seriously concern themselves with *procedural* issues.

Despite Verdross and many legal scholars before him drawing parallels between domestic law and treaty law, most international law scholars continued to hold that the private defense of duress simply could not be applied to the law of treaties.<sup>250</sup> Voiding agreements concluded by force, the argument went, would upend peace treaties and might have the result of prolonging hostilities.<sup>251</sup> It was not until 1953 that Sir Hersch Lauterpacht, second Special Rapporteur on the law of treaties, stopped that trend. He argued that treaty law should be made to conform to “the general principle of law which postulates freedom of consent as

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<sup>243</sup> Dajani, *supra* note 211, at 29.

<sup>244</sup> *Id.*

<sup>245</sup> Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937).

<sup>246</sup> *Id.* at 571–73.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 577.

<sup>249</sup> *Id.* at 571 (1937).

<sup>250</sup> IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 177 (1984).

<sup>251</sup> *Id.*

an essential condition of the validity of consensual undertakings.”<sup>252</sup> Lauterpacht observed that the existence of the U.N. Charter and its prohibition on the use of force had made this possible for the first time in history.<sup>253</sup>

Lauterpacht’s assertions were based on his idea of consent. Consent, Lauterpacht argued, is a necessary component if a treaty is to be valid.<sup>254</sup> Treaties concluded in the absence of real consent are, in his view, fundamentally defect. In fact, a treaty concluded without real consent is no treaty at all. Lauterpacht also drew in the idea of equitable estoppel, arguing that because force or threats of force constitute a violation of international law, a treaty based on such acts cannot produce legal rights for the benefit of the state that has perpetrated them.<sup>255</sup> Lauterpacht did not have much of an audience on these issues. In the 10 years that followed his assertions, the International Law Commission “was not able to do much more than give occasional glances at these reports.”<sup>256</sup> With an overflowing plate of international legal challenges, ILC first began devoting time to the issue in 1963, when it began the codification of the law of treaties.<sup>257</sup> By then, Lauterpacht had passed away. While Article 52 of the Vienna Convention demonstrates that Lauterpacht’s ideas on coercion enjoyed a lasting legacy, the jury is still out on what constitutes coercion in the international legal context. Nevertheless, Lauterpacht and his predecessors make it clear that the creation and enforcement of treaties is not absolute, but can and should be limited by some of the same principles evoked for constraining the power of individuals in a domestic law setting.

## V.

### UNCONSCIONABILITY DOCTRINE AT THE ARBITRATION TRIBUNAL

In the domestic context, unconscionability is an equitable doctrine. Its primary aim is not to punish, but to promote fairness. As such, courts invoking the doctrine have relatively wide latitude in deciding how their invocation will affect the contract. A court that decides a contract governing the sale of goods is unconscionable under §U.C.C. 2-302 has three options available to it: it can refuse to enforce the agreement in its entirety; it can remove the unconscionable clause

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<sup>252</sup> Special Rapporteur on the Law of Treaties, *Law of Treaties*, Int’l Law Comm’n, U.N. Doc. A/CN.4/63 (Mar. 24, 1953) (by Hersch Lauterpacht), *reprinted in* [1953] 2 Y.B. Int’l L. Comm’n 90, art. 12, cmt. A.3, U.N. Doc. A/CN.4/8ER.A/1953/Add.1 [hereinafter Lauterpacht Report].

<sup>253</sup> *Id.* at art. 12, cmt. A.3.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Special Rapporteur on the Law of Treaties, *Law of Treaties: First Report*, Int’l Law Comm’n, intro. A.1, U.N. Doc. A/CN.4/144 (Mar. 26, 1962) (by Humphrey Waldock), *reprinted in* [1962] 2 Y.B. Int’l L. Comm’n 27, U.N. Doc. A/CN.4/SER.A/1962/Add.11.

<sup>257</sup> Provisional Agenda for Fifteenth Session of the Internal Law Commission, A/CN.4/153, (May 6–June 12, 1963), [http://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_153.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_153.pdf&lang=EF).

and enforce the remainder of the agreement; or, it can limit the application of the unconscionable clause so that an unconscionable result can be avoided.<sup>258</sup>

Because unconscionability doctrine is an equitable remedy, it is also a flexible one. U.C.C. § 2-302 does not authorize a court that has determined that a contract for the sale of goods is unconscionable to award damages to the victim of the unconscionability. This rule that has been extended to unconscionability analysis generally<sup>259</sup>. Rather, the court has the power to refuse enforcement of the agreement in its entirety, to remove the unconscionable clause and enforce the remainder of the contract, or to limit the unconscionable clause's application so that an unconscionable result will be avoided.<sup>260</sup>

These three kinds of remedies are equally plausible in the treaty context. However, because BITs are broader in scope than most commercial contracts, and are intended to govern a numerous and diverse range of investments, it is important to think carefully about the context in which each of these remedies might be invoked. In her article on unequal treaties, Jianfeng Li expands upon the framework suggested by other scholars to propose a framework of remedies for unequal treaties that distinguishes between procedural and substantive inequality.<sup>261</sup> Although I have argued that both procedural and substantive unconscionability are present in the negotiation, drafting, and adjudication of investment disputes, I think adopting the distinction Jianfeng Li proposes is helpful for thinking about how remedies might be implemented. Li identifies three kinds of treaties: procedurally unequal treaties, treaties that were substantively unequal at the time of their drafting, and treaties through which substantive inequality is introduced due to unforeseen circumstances.<sup>262</sup> While Li's

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<sup>258</sup> Lord, *supra* note 204, §§ 18F:1 to 18F:4.

<sup>259</sup> *Id.* § 18:17 (citing *Cowin Equipment Co., Inc. v. General Motors Corp.*, 734 F.2d 1581 (11th Cir. 1984) (quoting both the text and several other authorities):

"The language of § 2-302 and the Official Comment which follows it make no mention of damages as an available remedy for an unconscionable contract. This is consistent with traditional common law unconscionability theory. When the equity courts found contracts to be unconscionable, they refused specific enforcement .... No case has been cited in which a damage award was based on an unconscionable contract. Although apparently not decided in either Alabama or Ohio courts, the cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision, citing the language of § 2-302 and its common law precursor to demonstrate that § 2-302 was not intended to provide a basis for damage recovery."

<sup>260</sup> *See Jones v. Star Credit Corp.*, 59 Misc. 2d 189 (Sup. Ct. 1969) (holding "Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions. It authorizes the court to find, as a matter of law, that a contract or a clause of a contract was 'unconscionable at the time it was made,' and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or limit the application of the clause to avoid an unconscionable result. 'The principle,' states the Official Comment to this section, 'is one of the prevention of oppression and unfair surprise.' It permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy.")

<sup>261</sup> Jianfeng Li, *Equal or Unequal: Seeking a New Paradigm for the Misused Theory of "Unequal Treaties"* in *Contemporary International Law*, 38 HOUS. J. INT'L L. 465 (2016).

<sup>262</sup> *Id.* at 469–78.

framework purports to deal with a broader problem, and does not seek to borrow from contract law, it can be used as a jumping-off point. For that reason, I use the same distinctions below to think about how to overlay the three equitable remedies pursued by courts responding to unconscionability cases in contract law.

While these kinds of remedies may have a useful role to play in thinking about how and even whether certain BITs should be enforced, a word of caution is in order. To put the doctrine of unconscionability on the table as a treaty defense is to tempt its abuse. Making it easier for parties to wiggle out of contractual obligations that have become irksome is destabilizing to contract-making. By the same token (although far more serious), making it easier for countries to wiggle out of irksome treaty obligations is destabilizing to the international legal order. I am arguing that unconscionability doctrine may ultimately increase the stability of BITs because it would encourage arbitral tribunals to view them in a broader context and find interpretative methods that may ultimately prevent capital-exporting countries from pulling out of BITs they see as unjust. However, it is important to state that finding that unconscionability provides a defense to enforcement should be a rare occurrence, reserved for the most egregious cases. The framework that I propose below, I believe, makes it very unlikely that unconscionability doctrine will be invoked in the majority of cases, but not impossible. If arbitral tribunals were to find BITs unconscionable only in extremely rare cases—that would be precisely the appropriate frequency.

#### A. Remedies for Procedural Unconscionability

A demonstration of procedural unconscionability is most damning to the treaty because it implies that the consent upon which the treaty is based was never granted. A State that is coerced into a treaty or failed to comprehend the content of the treaty has not truly consented to that treaty. In the example evoked at the beginning of this Article, it seems very likely that the Pakistani official signing the BIT with Switzerland did not understand what he was committing Pakistan to, and neither did his colleagues at home who might have been responsible for ratifying or approving the treaty. Like many capital-exporting countries at the time, Pakistan may have seen the BIT as a mere photo-opportunity with insignificant costs attached.<sup>263</sup> Just as domestic contract law might fail to find that a contract had been made due to a failure to find a “meeting of the minds,”<sup>264</sup> treaties are based on consent expressed through the will of the sovereign. If the sovereign has failed to understand the treaty, or its consent has been coerced, no

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<sup>263</sup> In the words of some South African officials reflecting upon the circumstances under which certain BITs were signed: “the BITs really have the regional desk officers something to do. Do ten agreements and you have been very successful that year.” Another official said: “we used to call them apple-pie agreements intended to give comfort to politicians.” A third official reflected that embassies requesting BITs “like photo-sessions and smiles, so they love to have a minister to come and sign an agreement, no matter how small the country.” POULSEN, *supra* note 4, at 184.

<sup>264</sup> Restatement (Second) of Contracts § 17 (1981).

true consent exists. If no consent was truly given, no treaty was actually made.<sup>265</sup> On this logic, if an arbitration tribunal determines that substantial procedural unconscionability exists in the treaty-making process, it should refuse to enforce the treaty in its entirety. The treaty would be invalid, and the investor would bear the risk of having relied on it.

At the risk of following a tangent, it is worth mentioning another lens that could just as easily be invoked to examine the behavior of the Pakistani official mentioned above. One might assert that such an official is not—because of his ignorance—a proper agent of the State. However, Article 7 of the Vienna Convention on the Law of Treaties recognizes any person endowed with “full powers” of the State to be a legitimate representative of that State, able to adopt or authenticate treaties on its behalf.<sup>266</sup> Alternatively, a Head of State, Head of Government or Minister of Foreign affairs possesses this legitimacy without further proof of possessing “full powers.” If even the highest officials of a State are truly ignorant about the implications of signing a BIT, or if the government of that State succumbs to external pressures to sign, it matters very little *who* does the actual signing. It is possible, then, to assert that even if a given official is very ignorant about what it ultimately means to sign a BIT, he can be reasonably seen as possessing the proper authority to sign it. The problem is not whether he can be considered an agent of the State—the problem is the idea—fundamental to the Vienna Convention—that States are equals at the negotiating table. To argue that unconscionability doctrine has a role in treaty interpretation is to begin to dismantle that idea.

However, this proposition is concerning because it has broad implications for the status of hundreds of treaties around the world, and the potential to influence the behavior of thousands or hundreds of thousands of investors. Numerous international law scholars have warned against inquiring too far into the validity of treaties, arguing that widespread inquiry would upset the stability of treaties, interfere with the status quo in international relations, and imply that future treaties might be less reliable.<sup>267</sup> Insofar as the international community is invested in the status quo, this is a serious concern.

However, I want to argue that in the cases we are concerned with here—namely, BITs—these concerns are overblown. I predict that even if procedural unconscionability is a rather widespread phenomenon in the conclusion of BITs, many countries are unlikely to rely on it as a defense. Even when they do so, it would be difficult to prove. In the rare cases in which countries are both keen to invoke it and able to prove it, then we might think it is right and proper for the claim to succeed.

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<sup>265</sup> See Dajani, *supra* note 211, at 36 (discussing Lauterpacht’s writing on this issue).

<sup>266</sup> VCLT, *supra* note 23.

<sup>267</sup> See, e.g., THE OXFORD GUIDE TO TREATIES 569 (Duncan B. Hollis ed., 2012); Statements by Eduardo Jiménez de Aréchanga of Uruguay concerning the dangers of recognizing unconscionability doctrine or the French doctrine of lésion, Summary Records of the 684th Meeting of the ILC, [1963] 1 Y.B. Int’l L. Comm’n 67, P31, U.N. Doc. A/CN.4/156/SER.A/1963, P45.

Countries may have natural incentives to not bring a procedural unconscionability defense before an arbitration tribunal. First, if Country A brings a successful defense of procedural unconscionability in a dispute against Investor X, it is foreseeable that Investors Y, Z and W, whose investments are protected by the same BIT, would also take notice. This might affect the decision to invest in Country A in the first place, or lead them to shift existing investments elsewhere. This kind of negative investor response would mean that the “grand bargain” promised by BITs is meaningful, that the BIT is actively encouraging FDI, and therefore that a country is less likely to bring an unconscionability defense in the first place. If investors fail to react to the invocation of the defense, this could be a signal either that they have sufficient faith in Country A’s domestic judicial system or that their investments are so profitable that they are willing to take on the additional risk of continuing operations even if they may not be protected by the BIT. In this case, it may be argued that the BIT was not doing much work in the first place, and its removal will not have much effect on the status quo. In any case, countries considering whether to bring such a defense are likely to make this assessment, and are therefore unlikely to bring such a defense in cases where BITs represent significant incentives to investors to stay and operate in the country.

Second, the arbitration tribunal could require a country invoking this defense to present evidence of procedural unconscionability. Procedural unconscionability takes two forms in this context: oppression and surprise.<sup>268</sup> Oppression results from the unequal bargaining power between the parties, and the fact that one party’s diplomatic and economic influence over the other can lead to a lack of meaningful choice. Surprise results from the unequal level of sophistication between the parties. While we would not expect terms of the agreement to be physically obscured or to consist of unreadable jargon, as we might see in the domestic context, we have seen that countries that are less sophisticated have simply failed to grasp the gravity and implications of the treaties they are encouraged to sign.<sup>269</sup> We have also seen countries relying on external experts that may misconstrue the treaties.<sup>270</sup> These situations also result in surprise. The presence of oppression and surprise are both difficult to prove. Oppression enacted through attenuated diplomatic channels has to be shown to be sufficiently connected to the decision to sign the treaty. Surprise is also difficult to show. Countries that failed to grasp the implications of the treaties they sign are less likely to have detailed records of negotiations, they are less likely to produce extensive intragovernmental communiqués or memos about the treaty (because such communication is unlikely to have taken place), and given that the countries bringing such a defense are largely “rule-takers,” they are unlikely to be

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<sup>268</sup> *Motsinger v. Lithia Rose-Ft, Inc.*, 211 Ore. App. 610, 614 (Or. Ct. App. 2007).

<sup>269</sup> *See supra* Section I (discussing the Pakistan–Switzerland BIT).

<sup>270</sup> As discussed in Section II(A)(3), the experts affiliated with the American Bar Organization were involved in advising countries that were negotiating BITs, but were subject to the sometimes countervailing priorities of the U.S. State Department.

able to produce evidence of their understanding of the terms treaty. Therefore, even when surprise does exist, it is difficult to imagine that most countries are able to prove it. If, somehow, a country overcomes this burden, we might conclude that the defense should be especially justified in succeeding.

The idea of “competence-competence” allows tribunals to make determinations about their own jurisdiction. In cases in which procedural unconscionability is determined to be present, the arbitration tribunal’s authority to hear the case would end there. Unlike a domestic court, which derives its power from the State, an arbitral tribunal derives its power from the parties who have consented to the arbitration. The arbitration agreement, concluded between the parties, establishes the scope of that power. This leads to a certain paradox, wherein an arbitration tribunal must find that it does not have the authority to decide on the case because the treaty does not establish jurisdiction over the case. If a tribunal finds that a treaty is procedurally unconscionable, further considerations, or the narrower question of substantive unconscionability, would not be touched. This is, of course, unlike a domestic court, which is likely to look at the coexistence and interaction of both procedural and substantive unconscionability. This may mean that unconscionability doctrine may take more time to gain footing in the arbitration context.

#### *B. Remedies for Substantive Unconscionability*

A showing of substantive unconscionability is unlikely to be damning to the entire treaty because it may be focused on a single provision. However, given that BITs are concluded between *countries* and are reciprocal on their face, it is unlikely that a tribunal will be able to identify a single unconscionable provision. This is because a stronger party is unlikely to advocate for treaty language that could—even in a distant eventuality—be potentially harmful to it. The unconscionability inherent in many BITs only comes into play when the BIT is relied upon in a dispute between an investor and a sovereign State, and when arbitration tribunals read fairly innocuous phrases such as “fair and equitable treatment” to include inherent limitations on legislative and regulatory power. When dealing with substantive unconscionability, a court may choose to strike the offending provision from the contract, or to interpret it in a way that avoids an unconscionable effect. Because most BITs are unlikely to be unconscionable on their face, the second option is more plausible for arbitration tribunals adopting this approach. Tribunals can simply refrain from reading the host country obligations under a BIT too expansively. Indeed, some tribunals have taken issue with the broad readings of “fair and equitable treatment” employed in the cases discussed in Section II(B).<sup>271</sup> If tribunals were amenable to the invocation of unconscionability doctrine, host countries could invoke the doctrine to push tribunals toward a narrower reading of the treaties.

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<sup>271</sup> While a number of tribunals endorsed the expansive reading of “fair and equitable treatment” championed in *Tecmed v. Mexico*, for example, the tribunal in *Saluka v. Czech Republic* distanced itself from the tribunal’s reading in *Tecmed*.

## CONCLUSION

After two devastating world wars, the international community realized that it needed to change the rules of the game. The United Nations, flawed as it is, was perhaps the first forum in history in which small, weak States could exercise their voices and advocate for their positions on the international stage. The architects of the United Nations project saw this as a way to preserve stability and prevent conflict. These priorities are still important today.

Skepticism toward globalization, the vehemence of anti-colonial sentiment, and the rise of neoliberal attitudes in multilateral financial institutions posed a threat to this fragile project. Now, developing countries around the world are pulling out of BITs, and developed countries are wary of including arbitration provisions in multilateral treaties. Similar criticisms to those discussed in this Article are being made of international tax and trade agreements, and their legitimacy is being questioned. Doubtless, these agreements are flawed. Doubtless, enforcement can be unjust. However, I make a conservative argument: by finding ways to promote more just outcomes and honoring the ideals upon which the international legal system is built, these agreements can continue to be meaningful and perhaps helpful into the future. Incorporating unconscionability doctrine in bilateral investment arbitration is just one small way to do that.