Journal of International Dispute Settlement, Vol. 1, No. 2 (2010), pp. 341–352
doi:10.1093/jnlids/idq013

The Power of States to Make Meaningful Promises to Foreigners

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This article examines fundamental principles and objectives of relevance to States that enter into treaties for the protection of foreign investment. Leaving aside matters of idealism and principled governance, the author suggests that the obvious policy objective is access to international capital at the lowest possible cost. Investors are rational: to insist that those who act in the name of governments have an unfettered right to alter the terms of investment in the alleged public interest would lead to tragic disempowerment and dependence. If States were incapable of giving reliable promises—because their misconceived 'sovereignty' renders them powerless to do so—the policy objective of attracting foreign investment would be illusory.

States tend to be annoyed when a foreigner claims that they have violated legal obligations. States are even more irritated when they are required to defend themselves before an international court or tribunal, perceiving it as an affront to their sovereignty.

Let us then explore three broad questions. First, is a voluntary restriction on sovereignty a violation of sovereignty? Secondly, if restrictions on sovereignty are a matter of sovereign choice, what are the reasons for accepting such limitations? Thirdly, what are good state practices in circumstances when a State has made a commitment of this nature?

We need to begin by considering the meaning of the word 'sovereignty', which is not that 'I do what I want.' It certainly does not mean 'all powerful'. Children dream of omnipotence, and long for the day when they no longer have to seek their parents' permission for anything. But adults know that we confront the daily reality of a thousand reasons why we cannot do whatever we want.

A more interesting question is whether sovereignty, even if it does not give us the power to overcome the forces of nature, or even the effects of accidents and

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miscalculations, at least means that no one else can tell us what to do. This merits some reflection. If all men are equal, then in this sense every person would be sovereign. No one could tell anyone else how to behave. But the fact is that individual human beings *do not really want to be sovereign in this extreme sense*. We are willing to give up some of our freedom, indeed we insist on the opportunity of making a bargain:

– we accept that criminal laws apply to us so that we can be protected by those same laws;
– we accept that we have to pay for our reckless behaviour so that we can live in greater tranquillity because that rule has the consequence that our fellow citizens will also tend to behave less recklessly;
– and we accept that we are held to a bad bargain because if our contracts are not binding we will be stuck in the poverty of a primitive economic system where every transaction is instant—cash and carry—and we are thus left incapable of creating wealth by shared enterprise, by investment in reliance upon long-term commitments, or by the use of capital from willing lenders.

States have similar motives for accepting legal limitations on their future conduct. And just as individuals must accept that it would be calamitous if every individual had the 'sovereign' right to decide whether he is guilty of criminal conduct, recklessness or breach of contract, so too a State must accept that it cannot be the judge of a controversy as to whether it has transgressed legal limits. No one, even a State, can be a judge in his own cause.

These concepts are simple, but they demand mature reflection. Dictatorships seek to abuse law, and seek to disguise this abuse by pretentions of sovereignty. This is an immense danger, and needs to be exposed for what it is. But let us first recall some basic principles, illustrated by a famous example.

On 21 March 1921, a British steamship named the *SS Wimbledon*, operating under charter by a French transporter, was informed by the German authorities that it would not be allowed transit through the Kiel Canal which runs through northern Germany, connecting the Atlantic and the Baltic. The French Government espoused the claim of its national, stating that Germany had violated international law and should be ordered to pay reparations. The ship was carrying munitions loaded in Greece and destined for the Polish naval base at Dantzig. As a result of the German refusal of transit, the *Wimbledon* was immobilized for 11 days and then had to seek longer passage north of Denmark. Germany contended that it was in the right, pursuant to its own national Neutrality Orders—concerning Germany's neutrality in the Russo–Polish war—which prohibited the transit of such cargo. France, joined by Britain, Italy and Japan, brought suit before the Permanent Court of International Justice (PCIJ—the predecessor of today's International Court of Justice), asserting that the German refusal breached the Treaty of Versailles, under which the Kiel Canal was to 'be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality'. Germany was entitled under the Treaty to impose charges and regulations, but only as long as they did 'not unnecessarily impede traffic'.

The PCIJ recognized that Germany had 'sovereign rights which no one disputes that she possesses over the Kiel Canal'. But those rights were subject to a limitation, namely that established in the Versailles Treaty. Germany insisted that its right as a neutral power to decide whether munitions destined for a country at war were 'an essential part of its sovereignty' which could not be waived by agreement. The PCIJ disagreed, and ordered Germany to pay compensation to France on account of its national, the transport company.

The most famous passage from the Court's judgment, rendered in 1923, reads as follows:

> The court declines to see in the conclusion of any Treaty, by which a State undertakes to perform, or refrain from performing, a particular act, an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

'*But the right of entering into international engagements is an attribute of State sovereignty.*' This is a simple sentence, but it has great weight. The ability to make a binding commitment is part of what makes a state a state. We are talking about the power to make a meaningful promise. If States did not have that power, they would be handicapped. The act of limiting possible conduct tomorrow is an exercise of authority today. And if that act is to be internationally meaningful, it must first of all create binding obligations—and secondly be evaluated by an impartial court or tribunal. It is really no different than what we see in relations among ordinary individuals—a man whose promises mean nothing will have great difficulties in life. He will have to work alone, and he will always have to pay cash.

So let us move to our second theme. Now that we know that the capacity to agree to binding limitations on sovereignty is an *attribute* of that same sovereignty, why should any State do so?

There are many possible reasons. Some have to do with a wish to exercise leadership. A State is unlikely to project international influence, and to convince other States to cooperate in certain ways, unless it shows that it abides by its own commitments. The impulse to make international commitments may also be an expression of popular will, as political candidates identify a public desire for the expansion of certain values (such as human rights or environmental protection), are elected on such a platform, and once in office are prepared to join leaders of other countries to pursue a common goal to secure those values.

But perhaps it is easiest for the purposes of analysis to focus on a type of limitation on future government conduct which is accepted predominantly *as a matter of self-interest*—through the mechanism of treaties for the promotion and protection of foreign investment. There are over 2,000 bilateral treaties of this kind. They are commonly referred to as bilateral investment treaties (BITs). Although not identical in every detail, they almost invariably contain four commitments. First, each State promises that it will not nationalize the investments made by nationals of the other State, or take steps equivalent to nationalization, without requisite compensation. Second, each State promises that it will not discriminate against the nationals of the other State. Third, each State promises that it will treat investors from the other State in accordance with international law, and therefore notably in accordance with the concept of fair and equitable treatment. Finally, these three broad substantive commitments are given force by a fourth promise, which is that each State accepts that any claim of breach of the substantive promises may be brought by the complaining investor to international arbitration.

There have over the past 20 years been many arbitrations under these BITs. In all of those arbitrations, a State has been the defendant. Sometimes the State has prevailed, sometimes it has lost and sometimes the result was not wholly favourable to either side.

But States never enjoy having to defend themselves before an external body. Some of these cases have been politically controversial. It has been pointed out that the arbitrators are private persons, and the question has been asked whether their decisions violate sovereignty. We have already seen that this is a bad question. It is not a violation of sovereignty for a State to be held to its own commitments. The good question is rather whether it is in a State's interest to give the promises contained in these BITs in the first place. Some wonder if it is not against a State's interest to agree to BITs. So let us examine possible objections.

Are BITs inherently unfair? Some critics have suggested that BITs may be the handiwork of powerful investors, who convince their home States to put pressure on capital-importing States to sign them, or—rather insultingly to the negotiators—that they are signed in ignorance of their consequences.

This is not a valid objection. It is easy to test it, by examining the contents of the many BITs which have been entered into by developing States *among themselves*. We might call them 'South-South BITs'. These are obviously not the handicraft of capital-exporters. So it is interesting to consider what they contain: precisely the same four promises found in other BITs. Indeed, the first of the modern state-investor arbitrations, 25 years ago, in the case *SPP v Egypt* brought under the ICSID Convention,[1] arose out of the famous Egyptian Law

[1] International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Convention).

No 43 of 1974—not from a BIT at all.[2] This Law No 43, which initiated a successful Open Door Policy for foreign investment, was conceived by the Egyptian Parliament, not by Western countries or corporations. And yet Law No 43 contained the same protections. More recently, in February 2008, in another ICSID case brought under the Oman–Yemen BIT, a treaty whose only official version is in Arabic, an Omani investor's claim was resolved, and the outcome accepted by both sides.[3] The treaty contained the usual undertakings. We must conclude that these protections are ones which developing countries themselves consider fair and appropriate.

Is it possible that arbitrators who decide BIT cases render unfair decisions? Many losing parties will say so, and in some they may even be right in the eyes of impartial observers. Justice is not perfect in every case. Still, advocates who represent States as often as they represent investors are unlikely to say that there is a general bias against respondent States. There are certainly numerous examples of successful defences against investor claims—and examples of furious protests by investors who considered the rejection of their claims to be miscarriages of justice.[4] Better, from the States' point of view, unsuccessful investors have on occasion been ordered to pay significant costs. (Hungary, Ukraine, Mexico, Pakistan and Turkey, eg have been beneficiaries of such orders.)

Investment tribunals have, moreover, shown that corruption and other illegality is not tolerated. Kenya, El Salvador and the Philippines have, for example, obtained the dismissal of claims without even considering whether they may have been well founded in principle due to the fact that the original investment involved bribery, misrepresentations or other breaches of national law.

And where the investor has prevailed, international tribunals have often reduced lost-profit claims by considerable margins, leaving many investors with the feeling that their recovery was undeservedly reduced.

It is understandable that in notorious cases the public perception tends to be simplistic: any international tribunal is good if we win, bad if we lose. But we are not discussing sporting competitions like the World Cup. Resolving disputes properly is essential to the successful management of relations with investors. A State may be happy to win, but what counts for its long term

[2] 14 April 1988, 3 ICSID Rep 131 (1995).

[3] *Desert Line Projects v Yemen*, ICSID Case No ARB/05/17, 6 February 2008.

[4] When an affiliate of the US corporation Thunderbird Resorts lost its claim under NAFTA against Mexico following closure of its gaming facilities there (and was moreover ordered to pay Mexico $1,250,000 in legal costs), *International Thunderbird Gaming Corporation v The United Mexican States*, 26 January 2006, its Board of Directors issued a press release in which the General Counsel was quoted as saying that 'the Company believed that NAFTA would level the playing field in Mexico... clearly it did not as this same government... has given permits for hundreds of new locations'. The President and CEO, for his part, was quoted as speculating: 'It is not coincidental that the 'permits' were issued to the most powerful interests in the country while [the relevant Minister] was seeking to become the next President of Mexico.' Press release dated 27 January 2006, published the same day on the OGEMID mailing list <http://www.transnational-dispute-management.com/ogemid> accessed 30 June 2010, or ogemid@jiscmail.ac.uk.

reputation is that it confronts the inevitable occasions of disagreements in a loyal, businesslike and efficient way—and that it respects the outcome of international legal proceedings. Mexico is an outstanding example. When it became a party to the North American Free Trade Agreement (NAFTA), Mexico opened the door to international claims against it by US and Canadian investors. There have been a number of such claims. Mexico has won some of them, and lost others. What the international community has observed is (i) that Mexico defended itself competently, (ii) that its losses have been moderate and (iii) that it has paid the amounts ordered. Its reputation has been enhanced. And compared to the vast benefits of NAFTA, in the magnitude of billions,[5] former Mexican observers have pointed out that incidental payments to wrongfully treated investors, in the magnitude of millions, is a small price to pay.[6]

In highly controversial cases it may indeed be very attractive for States to have the problem resolved once and for all on the international level rather than to fester on the local scene, creating tensions, disruption and adverse reputational consequences for a very long time. A case like *World Duty Free v Kenya* might have led to disaster if it had not been solved internationally. The claim was for US$500 million, the investor had shown himself willing and able to corrupt national officials at the very highest level, and an official inquiry at the time showed that the Kenyan judiciary itself was severely compromised.[7]

Should we not consider, one might ask, whether acceptance of BITs in fact leads to more foreign investment? This might—just possibly—be an interesting question in particular circumstances. As a general proposition, however, the premise is dubious; seems to be wrong; it seems most unlikely that the signature of BITs lead directly to an increase in foreign investment. Foreign investments would flow massively into Switzerland even if Switzerland had never signed any BITs. Anyone can understand why. A solvent State with stable good governance attracts investments without BITs. On the other hand, a State with a record of financial crises, repudiation of debts and arbitrary policy changes will not suddenly look attractive just by signing BITs. For a State to demonstrate enduring reliability is a matter of much greater complexity. It requires mature institutions: a tradition of efficient and reliable governance. The rule of law is a part of such an environment, and the network of BITs contributes to the rule of law.

[5] For instance, NAFTA trade in goods in 2009 totalled $735 billion and regional trade in services during 2008 was $69.8 billion <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> accessed 24 June 2010.

[6] Guillermo Aguilar-Alvarez, *NAFTA @ 15: Lessons Learned, Moving Forward*, lecture delivered at the University of Miami School of Law on 23 March 2010 (to be published). Mr Aguilar-Alvarez, a senior member of Mexico's NAFTA negotiating team, also pointed out that NAFTA has become a remarkable instrument of self-discipline and dispute avoidance.

[7] ICSID Case No ARB/00/7, 4 October 2004.

The insight is not complicated: a country governed in accordance with the rule of law has little to fear from BITs, or from international tribunals. (Switzerland, although it hardly needs to prove its institutional bona fides, has signed a range of BITs; they are unlikely to be of concern to the Swiss government as a potential source of international liability.)

Equally, a failure to accept the concept of investor protection will certainly discourage investors, including *present* investors who should be the first target of capital-importing States: to persuade them to expand their investments in magnitude and duration.

Let us then consider the fundamental purpose of investor protection. It is certainly not to protect multinational corporations. It is nonsense to speak of the interests or rights of corporations in the abstract. We have no *a priori* stake in the survival of corporations as a way of doing business. If they did not serve society, they could be abolished without regret. But of course they have proved unsurpassed as levers for the mobilization of capital and the use of technology. So when we protect the 'rights' of corporations, which of course means the rights of the people behind them, we do so because that is the price of sustaining a valuable system, explicitly embraced by both capitalist and social-democratic theory—and implicitly by the central planners of State capitalism.

When we look at the world in this light, we discover that *the objective of investment protection is to convince investors to invest for the longest time possible and for the lowest possible return.*[8] That is how the capital-importing country maximizes its benefits. In a lawless country, someone will always be prepared to speculate, but only if there is a spectacular rate of return—after which both the investment and the profits vanish. This is not desirable investment.

So let us conclude with respect to this second theme.

The idea that States may be held accountable under international law by arbitral tribunals created by treaty is neither new nor radical. There were hundreds of such cases in the 19th century. The defendant States were of all types: rich and powerful, European or ex-colonial. International tribunals held the United States responsible for actions which its Supreme Court had declared not to be breaches of international law. Those awards were nevertheless respected by the United States.[9] When one of the most illustrious of all awards was handed down against Great Britain in the *Alabama Claims* (1872), the British arbitrator issued a harsh dissent, calling the award of some US$15 million gold 'unjust', but his government—far more powerful at the time than the United States—nevertheless paid the awarded amount.[10]

[8] I am indebted to important insights found in an early contribution to this field, Jürgen Voss, 'The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies' (1982) 31 ICLQ 686.

[9] Jan Paulsson, *Denial of Justice under International Law* (2005) 257.

[10] Ibid 261.

This tradition of respect for international law as applied by international tribunals should be kept in mind by critics of investment protection. Such critics sometimes imagine that international tribunals can be paralysed by declarations of municipal courts that the treaties creating international jurisdiction are contrary to national constitutions. But to suggest that the alleged requirements of a nation's own constitution may neutralize the international undertakings of its government flies in the face of international law itself. It may happen that such undertakings are an excess of power under national law, or may run afoul of national law in other ways. But they do not (provided of course that the appearance of authority is sufficient for the purposes of international law) prevent anyone from relying on those undertakings internationally. Whatever their force as a matter of national law is, such arguments evaporate on the international plane.

Judge Keba Mbaye (once the Vice-President of the International Court of Justice, and before that the First President of the Supreme Court of Senegal) put it as follows: 'A state must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted.'[11] Lord Mustill suggested that: 'Perhaps it should be classed as a principle of international *ordre public*.'[12] This concept was firmly endorsed in a landmark arbitration brought by a German private party against Belgium, in a case called *Benteler v Belgium* (1984).[13] It has even been incorporated into the *municipal* law of Switzerland, which provides that a state party to an arbitration agreement 'cannot rely on its own law to contest the arbitrability of a dispute or its own capacity to be a party to an arbitration'.[14]

Criticism of international tribunals on the grounds that they impede democratic policies—whether protection of the environment or the labour market—is misdirected. International tribunals do not establish policy. They give effect to international agreements. To deny the authority of international tribunals is to deprive States of the power to make meaningful promises. The French Professor Pierre Mayer wrote a comprehensive and fundamental article some 20 years ago on 'The neutralisation of the normative power of the State with respect to State contracts,' in which he queried: 'Is it not paradoxical that the exaltation of sovereignty over natural resources implied preventing the sovereign State from entrusting their temporary exploitation by a foreign corporation possessed of the necessary capital and technology, on the grounds that the State cannot validly accord the guarantees required by the

[11] *60 Years On: A Look at the Future* (ICC Publications No 412, a collection of papers from the 60th Anniversary of the International Chamber of Commerce) 296 (1984).

[12] Michael Mustill, 'The New *Lex Mercatoria*: The First Twenty-Five Years' in M Bos and I Brownlie (eds), *Liber Amicorum for Lord Wilberforce* (1987) 149, at 177, n 91.

[13] Jan Paulsson, 'May a State Invoke its Internal Law to Repudiate Consent to International Arbitration?' (1986) 2 Arb Int'l 90.

[14] Federal Act on Private International Law art 177(2).

corporation?'[15] He added: 'to allow States to undo their commitments means in practice to forbid them from making undertakings in the future'.[16]

When France wanted to ensure that the Walt Disney Corporation would build Eurodisneyland outside Paris and not in Spain, the Parliament passed a special law to authorize the government to accept the jurisdiction of international arbitration (ICSID) in agreements 'with foreign corporations for the implementation of operations having a national interest'.[17] The US corporation was adamant about a neutral jurisdiction in the event of a dispute with the French government.

Criticism of international tribunals on the grounds that they should operate more efficiently, transparently, coherently and fairly are entirely legitimate. But no human institutions are perfect. International arbitral tribunals have existed for many generations; complaints by those disappointed in their awards have existed for precisely as long. One must be careful to recognize criticism which is only a cover for the disinclination to obey international norms and institutions.

It thus seems that many of those who challenge the legitimacy of international adjudication aim at the wrong target. They criticize the principle of the supremacy of international law when their real complaint has to do with the political choices of their own government in making the bargains reflected in international treaties. The mistake is a dangerous one. For what will happen if they destroy the authority of international law? What then does it matter if they are right about the policy? What will they do once they have prevailed—once they have achieved agreement as to important rules for the protection of the environment, the elimination of child labour, the proper treatment of persons accused of crime, an adjustment of the terms of trade in favour of impoverished producers denied access to markets? What a hollow victory indeed, to stand there empty-handed, deprived of a shattered tool.

To sum up: in the field of international investments, arbitral tribunals are instruments of the rule of law. Their purpose is not to favour the rich, but to enable States to make reliable promises. To undermine that reliability is to deprive the State of a valuable tool, to generate international transactions as favourable terms. Arbitral tribunals are not to be blamed for the contents of treaties. International tribunals tend to irritate respondent States—whether they are rich or poor—in individual cases; yet their decisions should be respected in order to achieve the long-term benefits of the rule of law. Respect for settled and legitimate expectations is a precondition for healthy international relations.

[15] Pierre Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat' (1986) J Droit Int'l 5.

[16] '*[P]ermettre aux Etats de se délier, c'est en pratique leur interdire de se lier dans le futur*.' Ibid.

[17] Article 9, Law No 86972 of 19 August 1986, *Journal officiel*, 22 August 1986, 10190.

And finally, our third and final theme. It will be the shortest. What should a State do once it has accepted certain limitation of its sovereignty by making these promises to foreigners? In very broad terms, what are best practices once a State has signed BITs?

In some countries, international arbitration is viewed in a defeatist and defensive way. There is a failure to perceive that effective use of the arbitral process is an important task in managing international economic relations—indeed, in managing the national debt. Wherever such defeatist views prevail, the attachment of foreign investors to the arbitral process will continue to be viewed as part of a strategy of the rich to take unfair advantage of the poor.

Here are some premises of defensiveness or defeatism that explain negative views of international arbitration:

- States are reluctant to subject themselves to the jurisdiction of tribunals that are not part of their own apparatus. This is generally an especially important consideration with respect to newly independent nations, where the weaknesses of the local private sector are such that foreign investors and international banks demand direct contractual commitments by the State itself. As national economies develop, it becomes increasingly rare that ministries act directly as signatories to private law contracts.
- When developing countries find themselves in international arbitration with foreign investors, they often participate with misgivings or even bitterness. Such feelings tend to intensify over time as new officials—or indeed new regimes—look back critically on the work of their predecessors.
- Many parties from developing countries misunderstand the international arbitral process in a number of ways. They assume that it is a mechanism designed for the protection of the investor, when in fact it is a two-way street with significant advantages to the State as compared even to its domestic courts. It should be obvious that the failure of foreign investors to fulfil contractual undertakings may give rise to important and justified claims or defences. International arbitral awards tend to be vastly more enforceable, as a practical matter, than domestic court judgments, which benefit from very limited recognition abroad.

Many States still believe that international arbitration intrinsically favours the foreign party, when experience over the past two generations has shown that serious governments even in poor countries are able to use the process successfully. Moreover, the leading international arbitral institutions have responded to the vast changes in the identity of their users by making corresponding changes in their governing structure. For example, a majority of the members of the Court of International Arbitration of the International Chamber of Commerce are today neither European nor North American.

> It is also a mistake to suspect investors of trying to lure inexperienced States before courts which are biased against them, because serious foreign investors understand that it is in their own interest that host States have enduring confidence in international arbitration.

It serves little purpose to tell host States that they should respect the international arbitral process because it is the right and decent thing to do, and that in the long run foreign investors will think better of them for it. To get anywhere, one must rather understand that the arbitral mechanism is something they can use effectively to their concrete benefit.

It is a serious mistake to focus on the *opposition* between investor and host State. The true dividing line goes *within* the community of investors; there are good investors and bad investors. Good investors are there for the long haul, and want to make a decent return, as is understood by everyone from the beginning. In order to merit that reward, they expect that they will be held to making a real contribution, which they are happy for anyone to evaluate. Their enemy is not the host State, because they have shared interests, but the bad investor, a dubious operator who wants to make a quick buck, getting vast profits for shoddy goods, procuring signatures on all sorts of opaque documents, contracts, amendments and certificates designed as a legal cover for poor performance—or worse. The bad investor creates a climate of suspicion and despair which also harms good investors.

Those who operate transparently, professionally and rigorously, and create an atmosphere of seriousness and reliability, are on the same side, whether they represent investors or governments. They are united in their desire for an environment in which long-term legitimate expectations may be relied upon. If such an environment is brought about, and if bad investors are discouraged or flushed out, many dubious debts will evaporate and Ministers of Finance will sleep better.

How may such a good environment be created and maintained? It seems clear that good practices include rigour and professionalism in monitoring foreign investment—as it enters the country, as it is implemented, and as returns on investments flow back to the investor. It seems equally clear that it is bad practice to sign a BIT and then forget about it. Unfortunately, as my father often said, 'Good examples are admired; bad ones followed.' But this cycle of negligence can surely be broken. There are many capital-importing countries which develop serious and enduring structures to channel investments in positive ways. This does not happen automatically. If the benefits of foreign investment are to be maximized, the hard work for the capital-importing State begins after the BIT has been signed. It is imperative that officials with adequate knowledge and experience review the regulatory framework critically. Is it clear? Is it effective? Are relevant systems of approvals and licences comprehensible to foreigners? Is the decision-making process transparent?

In one Latin-American country which has been exceptionally successful in attracting foreign investment, an important inter-Ministerial Commission ensures oversight, coordination and implementation. It has set up a comprehensive website which contains complete and comprehensible information not only in Spanish and English, but also French, German and Italian—that is to say languages chosen to facilitate relations with major economic partners.

Reducing the obscurity of governance is of benefit not only to the foreign investor, but also to the host State; opaque bureaucratic procedures are breeding grounds for corruption, and corruption obviously leads to pathological decision-making.

BITs should be adjusted to suit the policy desiderata relevant to the particular bilateral relationship. When two countries share a common border, they may wish to achieve substantial integration of their economies, and on that basis provide full investor protection to whatever investment finds its way across the border, even if it has not been specifically approved. Even when the two countries are situated far apart, the attitude may be the same on the reasoning that medium-volume investments should be encouraged as well, and are less likely to be initiated if formal approvals are required from the central government. But some BITs follow the example of Malaysia and Belgium/Luxemburg, who limited the applicability of their BIT to approved projects. In a case called *Gruslin v Malaysia*,[18] where the claimant was a Belgian national who had done nothing more than to invest in a fund which had made portfolio investments on the Kuala Lumpur Stock Exchange, an ICSID tribunal refused even to consider the complaint on the basis that it was not covered by the treaty because the investment had not been approved as required under that BIT.

In sum, although the purpose of agreeing to limitations on sovereignty is to gain the power of making meaningful promises, these promises go as far as they go—and no further. This too is an essential element of international law.

[18] ICSID Case No ARB/99/3, 27 November 2000.