

THE RETREAT OF NEO-LIBERALISM IN INVESTMENT TREATY ARBITRATION

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An evidence of the success of neo-liberal policies in the last decade of the twentieth century was the rise of investment treaties providing secure standards of treatment and guarantees against expropriation to foreign investors in the hope that there would be greater flows of foreign investment into developing countries as a result of such protection.¹ The standards and rights created by the treaties were provided a strong mechanism for their enforcement through the existing arbitration system that catered specifically to the settlement of investment disputes, the International Centre for the Settlement of Investment Disputes (ICSID). The Centre was created by the Convention on the Settlement of Disputes between States and Nationals of Other States (1966).² The latter Convention also was based on the neo-liberal assumption, stated in its preamble, that the existence of a secure, external system of settlement of disputes would facilitate the flow of investments into developing countries which would otherwise be seen as risky for the reason that their judicial systems do not offer impartial justice to the alien investors. The notion that foreign investment promotes economic development³ and that the investment treaties with the compliance mechanism of ICSID or other arbitration is essential to the promotion of foreign investment took strong hold in the nineteen nineties when neo-liberalism provided the policy objectives that drove an instrumental international law. The tenets of neo-liberalism relevant to the area of foreign investment may be identified to include the following: (a) a belief in the liberalisation of the flows of foreign investment on the assumption that such flows will lead to the creation of assets within the host state and thereby lead to its economic development; (b) the uniform acceptance of the beneficial effects of foreign investment flows to the exclusion of its negative effects, consequently justifying absolute protection of such investment; (c) the need for safeguards of property rights in the host state, particularly property brought in or acquired by the foreign investor;⁴ (d) the securing of judicial safeguards for such property through external arbitration in the absence of a court system in the host state which would provide secure

¹ . The number of investment treaties catapulted from around 800 in 1990 to over 3000 towards the end of the decade. They are the result of bilateral negotiations each treaty containing its own internal balance. The view that they may lead to the creation of customary international law must be resisted for this reason.

² . Other arbitral institutions and ad hoc arbitration are mentioned as alternatives in many treaties. But, the overwhelming majority of treaties refer to ICSID arbitration and the overwhelming number of arbitrations have been before ICSID.

³ . This is a more fundamental question than the question whether investment treaties promote foreign investment. There is a revival of this question too in the modern literature though focus of attention is on the question relating to investment treaties. After the Asian economic crisis, states like Thailand stressed the need for development based on internal resources on the ground that the economy could be subverted by the sudden pull-out of foreign capital, which precipitated the Asian economic crisis.

⁴ . The need for property protection for economic development came to be stressed. See Hernando de Soto, The Mystery of Capital (2000).

protection in the face of executive or political displeasure;⁵ and (e) the redefinition of the rule of law to encapsulate these neo-liberal ideas.⁶ The neo-liberal belief is that ensuring these conditions were vital to the promotion of economic development. Besides in a world caught up in the vortex of globalization, the liberalization of the flows of foreign investment was regarded as a logical consequence.

On the basis that the world was globalising rapidly, the message was driven home that the process of globalisation would be facilitated through the adoption of market oriented policies of liberalization of trade and the unhindered flow of foreign investment and the restructuring of socialist or mixed economies through privatization. The two international financial institutions, the World Bank, of which ICSID forms a part, and the International Monetary Fund, espoused the tenets of neo-liberalism and pressured developing states into accepting the philosophy through changes in their legal framework.⁷ It was in that ethos that the drive for a Multilateral Agreement on Investment, which failed, was made in 1995. Had it succeeded it would have brought about secure, neo-liberal principles of investment protection.⁸ Despite the failure of the MAI, the ethos of neo-liberalisms led to the exponential growth of bilateral and regional economic treaties, with strong provisions recognising the unilateral right of the foreign investor, usually a large multinational corporation, to have recourse to arbitration in the event of a dispute with the host state.⁹ The multinational corporations and its interests constitute an important component of the neo-liberal strategy of liberalisation of flows of assets and means of production and the integration of the world economy. In this context, a package of norms based on neo-liberal tenets were sought to be established on the basis of the available foundations of the investment treaties and the arbitration system. It is the building up of that system during the nineteen nineties that constitutes the study of the success of the neo-liberal project during the period but decline was soon to commence as its flaws began to be exposed.

When the experiment in the adoption of market economics and liberalization commenced failing due to a succession of economic crises and disenchantment in the increase in the numbers of persons the trickle down economics was leaving behind trapped in increasing poverty, organised resistance to the symbols of neo-liberalism took place within the capitals of the developed world. One of the first efforts at such organized resistance was that against the Multilateral Agreement on Investment. A series of agitations against the Ministerial Meeting of the WTO, the meetings of the agencies of the Washington consensus, the World Bank and the IMF took place evidencing disquiet at their neo-liberal policies. The WTO was forced to consider the effects of its measures

⁵ . The use of judicial techniques to deal with political and economic matters is a feature of the period. Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004). In the present case, it is transferred to the international sphere to ensure depoliticization of foreign investment.

⁶ . This is seen particularly in the literature generated by the World Bank. Alvaros Santos, "The World Bank's Use of the Rule of Law Promise" in David Trubeck and Alvaros Santos, The New Law and Economic Development: A Critical Appraisal (Cambridge University Press, 2006) p.253 at pp. 286-289.

⁷ . Loans were not made available unless a package of neo-liberal reforms were not instituted. The IMF imposed conditions for rescue of states from economic crisis. These techniques probably went beyond the constituent documents of these institutions but those who needed to complain could scarcely do so.

⁸ . For a survey of the MAI, see EC Nieuwenhuys and MMTA Brus (Ed), Multilateral Regulation of Investment (Kluwer, The Hague, 2001). Its failure is attributed to the world-wide organization of opposition through non-governmental organizations bringing pressure on states. The rise of this new force in international relations is observable in this single incident of opposition to the MAI.

⁹ . States were unwilling to participate in a global investment treaty like MAI but were willing to make investment treaties on a bilateral basis as they could be negotiated on the basis of each party's needs and strengths.

on development and the Doha Development Round came about.¹⁰ Some of its measures underwent changes as a result of collective pressure exerted by developing states. The globalization debate which was dominated by popular works in its favour¹¹ saw discontents emerging to show the detrimental effects of globalization.¹² Successive bank bail-outs resulting from sub-prime mortgages in the United States, France and the United Kingdom and a variety of corporate frauds exposed the fact that the absence of state regulation promoted practices that fed the greed of a new class of the superrich and that their speculations affected the rest of the citizenry.¹³

One facet of the march of neo-liberalism in the field of foreign investment was that the investment treaties had a secure compliance mechanism provided through arbitration at the unilateral instance of the foreign investor. This technique of investment protection mushroomed since it was discovered in *AAPL v Sri Lanka* ¹⁴ in 1991. The case load of ICSID, a hitherto dormant institution, suddenly grew exponentially. The innate nature of arbitration enabled pro-business arbitrators to articulate and shape the law under the treaties in a manner that would further entrench and expand neo-liberal principles in international investment law. There was a zealotry for neo-liberalism demonstrated within investment arbitration by arbitrators imbued with the spirit of neo-liberalism which prevailed in the period of the nineties and the first few years of the twenty first century. The nature of the profession of arbitration was such that its members bend with the prevailing winds so as to keep themselves in business.¹⁵ But, arbitrators must also have fidelity to their profession. As a result, it was inevitable that a schism occurred between those arbitrators who showed fidelity to the prevailing doctrines of neo-liberalism and those who showed fidelity to their task as neutral decision-makers. The situation in investment arbitration also involved commercial arbitrators sitting in judgement over disputes involving heavy public law matters with which they had no experience in dealing. They decided the disputes according to commercial principles ignoring the public law features.¹⁶ The quality and background of the arbitrators deciding these disputes differed markedly. One can witness dissensions breaking out within the fold of arbitrators as a result of expansive changes which extended the law under the investment treaties too rapidly to conserve the tenets of neo-liberalism. There were reactions to these expansionist trends evidenced in the mounting displeasure of states and some scholars. States indicated that they may not accept awards¹⁷ and would withdraw from the system of

¹⁰ . For reactions to neo-liberalism in the related area of international trade, see

¹¹ . Eg. Thomas Friedmann, *The Lexus and the Olive Tree*

¹² . Eg. Joseph Stiglitz, *Globalization and its Discontents* (

¹³ . Larry Elliott and Dan Atkinson, *The Gods that Failed : How Blind Faith in the Markets Has Cost Us Our Future* (Bodley Head, London, 2008). Popular books of this type are on the increase indicating a deep-set disenchantment with globalization and neo-liberal economics.

¹⁴ . (1991) 4 ICSID Rpts 250.

¹⁵ . Dezaley and Garth, *Dealing in Virtue* :

¹⁶ . Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford, 2007).

¹⁷ . Argentinian ministers have often expressed the view that they may not accept and enforce the awards against Argentina willingly. See Charity Goodman, "Uncharted Waters: Financial Crisis and the Enforcement of ICSID Awards in Argentina" (2007) 28 U Pa J Int'l Econ. L 449. The distinct possibility has been enhanced by the annulment tribunal in *CMS v Argentina* ruling that there were errors of law in the award but that they did not provide grounds for annulment.

arbitration¹⁸ or from the investment treaty system. Scholars began to criticise the trends within investment arbitration as not taking the public law features of the disputes into account or as not evidencing sufficient legitimacy.¹⁹

The explanation of the schisms that were taking place merely on the basis that arbitrators are likely to differ unless there is a centralized system is too facile. It hides the fact that arbitrators who decided these disputes belonged to a tradition of applying inflexible contractual principles intent on the creation of strong regimes of investment protection mandated by neo-liberal tenets. They were taking this existing tradition into the field of treaty based arbitration so that strong and inflexible norms of investment protection could be built up. The neo-liberal ethos in which they operated condoned the making of extensions they saw as desirable in creating this structure of investment protection. But, not all arbitrators were imbued with the same zeal. They saw the introduction of the neo-liberal prescriptions as involving an instrumental use of the investment treaties to secure objectives which not have been intended by the parties to the treaties. These arbitrators saw the excesses as being built on insecure foundations and blew the whistle so that the extensions could be stopped before the whole system crumbled. The present chaotic state of treaty based investment arbitration is best explained on the basis of a designed change going awry because of the expansive nature of the changes effected which was not supportable by the intention of the parties who made the investment treaties. The discord that resulted was not accidental as it is often portrayed to be. It occurred simply because of the fact that the neo-liberal expansionists were stopped in their tracks by arbitrators who saw that they did not have the mandate to effect the changes that were being made within the system to substantive principles they felt were not supported by the language in the treaties.

This chapter is concerned with the expansive changes made and the reactions to it. What has resulted in the present stage is that the schisms that have been brought about in investment arbitration is leading to great uncertainty as to what the law is and is leading to the questioning of the legitimacy of the whole system of treaty-based investment arbitration. It offers an explanation for the expansionist views and the schisms that have developed as a result of these views. It is necessary to review the present stage and determine whether the system can be salvaged. The chapter outlines the expansionist changes and assesses them in the light of the intentions of states in the making of the treaties. In the course of the examination of these changes it also indicates the nature of the schisms that have opened up as a result of divisions of opinion among the different awards dealing with similar issues. These schisms indicate that some of the arbitrators are unwilling to go along with the neo-liberal notions of another group of arbitrators who effected the expansionist changes, preferring instead to stand by the law revealed through a textual interpretation of the treaties made in the light of existing principles of investment protection. The resulting uncertainties cast doubts not only on the legitimacy of the law but also on the system which created it. It also indicates that resistance to the law has developed as a result of the expansionary changes as they raises the possibility that the system that has been built up impedes the development of the poorer states. The law is posited on an economic theory that has routinely failed and prevents changes being adopted. This leads to a feeling that the only way in which the system could be dismantled is through resistance.²⁰ The last part of the article looks at the measures that could be resorted to in order to bring some order to the chaos that is resulting in investment arbitration.

¹⁸ . Bolivia has announced its withdrawal from the ICSID Convention. Venezuela and Argentina as well as The Czech Republic have hinted that they would follow similar paths.

¹⁹ . Equally, some descriptive works, largely by interested practitioners began to appear conserving the law that has been created.

²⁰ . This theme of resistance is strong in the writings of many developing country scholars. See Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance (Cambridge University Press, Cambridge, 2004); M Sornarajah, "Power and Justice: Third World Resistance in International Law" (2006) 7 Singapore Yearbook of International Law 36.

1. THE EXPANSIONIST CHANGES.

The expansionist changes were triggered by the adoption of neo-liberal policies which advocated market solutions to economic problems. The assumed success of Thatcherism and Reaganomics propelled them further. The so called "Washington consensus" added a degree of compulsion in that loans and other benefits were not forthcoming if neo-liberal policies, usually dressed up as conditionalities or as a part of the rule of law were not accepted by developing countries. It is important to remember this context in which the expansionist changes were made. There were alternative ideas such as the rule of law or the standards of governance that were articulated. There was an unstated assumption²¹ that the task of the arbitrator was to create prescriptions that would promote these ends. The ideas relating to the rule of law tie in with the prescriptions of neo-liberalism.²² There is much arrogance in the certitude with which these views are expressed despite the fact that they have led to widespread failure around the world.²³

On the economic front, the neo-liberalism and its influence on the shaping of issues of foreign investment law are being subjected to scepticism. The trickle down economics has been contested, sceptics likening it to the feeding of fine oats to a stallion in the hope that sparrows may be able to feed off the undigested oats in the stallion's droppings. But, more pointedly, the view that investment treaties promote foreign investment is hotly debated. The impact that such treaties have depends to a large extent on a hunch. There are several factors that attract foreign investment to a state. The absence or presence of investment treaties is but one factor. Several states without investment treaties, like Ireland and Brazil, have done quite well in attracting foreign investment. Those who have had such treaties may have undergone uneven development as the experience of Mexico seems to suggest. In any event, there is tension on the front. What has shaped that tension in the area of investment treaty arbitration is what attention needs to be turned to. The suggestion that the tension has been generated by expansionary trends and the reaction against such trends is looked at under two headings of jurisdiction and substantive law.

I. Expansionary Trends in Jurisdiction

All arbitration depends on the consent of the parties. In the case of investment treaty arbitration there is unilateral consent given to such arbitration in investment treaties which is subsequently converted to an agreement when the unilateral offer of arbitration is accepted by the foreign investor through the institution of the arbitration.²⁴ But, the extent of the limits of this unilateral

²¹ . Arbitrators seldom stated these objectives. It is often an unstated assumption that underlies the prescription that is made or a policy justification given for a particular proposition. But, for an instance of such a statement, see the Separate Opinion in Thunderbird v Mexico :

"Investors need to rely on the stability, clarity and predictability of the government's regulatory and administrative messages as they appear to the investor when conveyed – and without escape from such commitments by ambiguity and obfuscation inserted into the commitment identified subsequently and with hindsight. This applies not less, but more with respect to smaller, entrepreneurial investors who tend to be inexperienced but provide the entrepreneurial impetus for increased trade in services and investment which NAFTA aims to encourage. Taking into account the nature of the investor is not formulation of a different standard, but of adjusting the application of the standard to the particular facts of a specific situation."

²² . John Ohnesorge, "On Rule of Law Rhetoric, Economic Development and Northeast Asia" (2007) 25 Wisconsin J IL 301.

²³ . Thus, Argentina and Indonesia were hailed as success stories of neo-liberalism in the early nineties but when the economic crises occurred in the two countries, they were quickly disassociated from neo-liberalism and cronyism and other factors were hunted up as the reasons for the failure.

²⁴ . The term "arbitration without privity" is a term without substance. There cannot be arbitration without privity. An agreement is central to all types of arbitration.

offer has not been stated in the treaties. It is capable of extension to categories that the parties to the treaty may never have contemplated. Some arbitral tribunals have so extended jurisdiction to parties who could never have been the addressees of the unilateral offer.

These instances may now be detailed. It is well known that a company incorporated in a state becomes a corporate national of that state. Such a view has been consistently taken in international law.²⁵ Most treaties adopt the principle of incorporation as the test of nationality. But, corporate nationality can be abused. Arbitral tribunals have not heeded the possibility of such abuse but rather have aided the abuse by utilizing corporate nationality to found arbitration in situations that could never have been intended by the parties. Thus in *Tokio Mokuoka v Ukraine*, Ukrainian nationals who incorporated a company in _____, a state with which Ukraine had an investment treaty, were held entitled to claim the protection of the treaty. Investment treaties are intended by the parties to promote foreign investment. In this case, there was no foreign investment as nationals were taking assets from their home state, vesting them in a company incorporated in a treaty state and bringing them back as protected foreign investment. The protection of such "round tripping" of the investment could never have been the intention of any state and cannot be supported on the basis of any policy ground, the only policy ground supporting an investment treaty being that it promoted foreign investment flows. Clearly, there could have been no intention on the part of Ukraine to protect such investment. But, the tribunal held that such "round-tripping" of assets would be protected if funds had been vested in a company incorporated in a treaty partner state. This reading may satisfy the words of the statute but not its intended meaning. The strong dissent of the President of the tribunal indicated the extent of the departure from principle the jurisdictional award in *Tokio Mokuoka* was making. In *Aguas del Tunari v Bolivia*, a case that is watched with great interest around the world because of its involvement with water privatization, there was an even more startling proposition involving corporate nationality. It was there suggested that as in the case of ordinary persons, corporations could also migrate to more salubrious places so as to enjoy benefits of treaty protection of the new state in which they locate. This could be done in order to benefit from better investment protection available in a state which has greater investment protection in its treaty with the state with which the corporation anticipates a dispute. This view makes a mockery of investment arbitration.²⁶ Again, the idea could never have been anticipated by the states which made the treaties. Neither would the objects of the treaty from the point of view of the host state have in any way been furthered by the notion of corporate migration that is formulated in the award. The idea will lead to widespread treaty shopping and bring about the downfall of the treaty system as the uncertainties that are involved will lead states to rethink the wisdom of entering such treaties which are capable of infinite extensions and create liability to an unlimited number of corporations.

It is difficult to explain these awards on any rational basis. The only hypothesis that could have been advanced is that some arbitrators are quite happy to make such extensions despite the effect which they would have on the system of investment arbitration. The expansive notions that are articulated would be counterproductive as states would simply withdraw from the system and

What purports to happen in treaty arbitration is that a unilateral offer of arbitration that is held out by the state is converted into an agreement by its later acceptance by the foreign investor who has a dispute with the state. It is a term which sacrifices accuracy for flamboyance. The policy justification that was given for it sounds hollow in the light of later events showing the punditry with which such ideas were formulated at the height of the fervour for globalization with an arrogance that does not recognize that human affairs do not stand constant. The policy justification given reads as follows:

²⁵ . *Barcelona Traction Case*

²⁶ . This view was foreshadowed in *Fedax v Venezuela* where it was held that jurisdiction could be obtained in a dispute concerning bonds held by nationals by transferring the bonds to foreigners who had treaty protection. The startling proposition passed without much comment.

bring an end to it. The Bolivian withdrawal from the ICSID Convention, hopefully, is a timely warning of the dangers that such zealous thinking of arbitrators could engender.²⁷

Expansive jurisdiction furthers neo-liberalism as it sets the stage for giving protection to a wider range of foreign investment than the parties had intended to protect. It also enables the tribunals greater opportunity to express their neo-liberal vision in the awards on merits. So far, there is nothing to show that the vision has been pressed home in the final award. Yet, the fact that expansionist views are adopted in finding jurisdiction itself is disturbing in that states become exposed to costly arbitration and a potential threat of heavy damages hangs over them.

Another technique of expansion of jurisdiction was attempted on the basis of the most favoured nation clause in investment treaties. In *Maffezini v Kingdom of Spain*, it was held that once there is a most favoured nation clause in the treaty between the host state and the home state, it would be possible for the foreign investor to utilize the better dispute settlement provisions in a treaty made by the host state with a third state. There is little to show that such a technique of obtaining jurisdiction was intended by the parties. The *Maffezini Award* has been followed in subsequent cases but not accepted in others, thus bringing about a schism between awards on this issue.²⁸ There is a build up of such schisms in investment arbitration. The discordant views do not bode well for investment arbitration.

In order to meet these expansionary trends, several strategies have been adopted by states. Again, what one finds here is really a gladiatorial contest between lawyers advising foreign investors and those advising states, the outcome of the contest depending on the constitution of the tribunal. This explanation, if true, adds to the uncertain nature of investment arbitration. The strategy that states or their advisors have adopted is to confine the scope of the protection of the treaties to narrow circumstances, either by the manipulation of key concepts in the treaty or by the use of words in the treaty identifying restrictions.

The example of the first technique is to be found in awards which have examined the issue as to whether a transaction falls under the definition of an investment to qualify for protection under the treaty. The expansionists would be inclined to construe the meaning of an investment widely. Thus in the two *SGS Cases*, a contract for the pre-inspection of goods customs clearance, performed entirely out of the territory of a state was silently passed off as a protected investment. How and why the issue was not taken up remains unknown. But, in other cases, the qualification of the transaction as an investment has been seen as important. Thus, a salvage operation to recover historical artefacts, the hiring of earth-moving equipment were not considered investments. But, in other awards, similar transactions have been held to be investments.

The most interesting development is the view stated by the annulment committee in *Robert Mitchell v The Republic of Congo* that, to qualify for protection, the investment must be one that is capable of promoting the economic development of the receiving state. The idea sets a ferocious cat among the coop of the neo-liberal pigeons. Certainly, it is consistent with the neo-liberal theory that foreign investment treaties promote economic development and it must, therefore, logically follow that an investment which lacks this capacity should not be protected. But, the possibilities such a view holds out for defences that a state may make against liability are immense as the capacity for investments to promote economic development are often tenuous in many sectors.

²⁷ . Another award which also involves expansionism is *Fedax v Venezuela* where citizens of the state could obtain protection for their bonds by transferring them to foreigners who had treaty protection.

²⁸ . The recent award in *RossInvest v Russia* contains a statement of the two line of awards. There are several articles on the issue, most of them seeking to conserve the integrity of the system by explaining the difference on the basis of the difference in words employed in the different treaties. The more honest way of explaining the conflict of the awards is on the basis of the preferences of the arbitrators who constituted the tribunals. The explanation on the basis of the different wording used sounds implausible on examination. For a selection of the many articles on the issue, see

There is also an increasing tendency to create defences to jurisdiction based on basic contract principles or the use of restrictive language in the treaty qualifying the type of investment that is protected.

Extension of Substantive Principles. To the first category of awards belong instances where the state has pleaded circumstances that nullify the making of the foreign investment contract which is the vehicle of entry for most foreign investment. These vitiating conditions which render the contract a nullity will affect the jurisdiction of the tribunal, presumably both where jurisdiction is claimed on the basis of the contract²⁹ as well as where it is claimed on the basis of treaty.³⁰ Such vitiating conditions include bribery and fraud.³¹

It would also include entry which does not satisfy the conditions of the entry laws of the host state. Thus, in *Fraport v Philippines*, the tribunal held that entry of a foreign investment through a structure devised to circumvent the provisions of a mandatory statute in the host state would move the investment outside the protection of the treaty. This result was achieved without reliance on any limiting language in the treaty. Presumably, then, it would be possible to rely on the internal laws of the host state in identifying manner and form limitations on foreign investment entry and argue that non-conformity with these prescriptions will move the investment outside jurisdictional limits.

The argument will be more clearly made where the treaty itself limits its protection to investments qualified as requiring an approval process³² or requiring that they should be made in accordance with the laws and regulations of the host state. Though in perfectly liberalizing investment treaties,³³ such language is absent, the restrictions regarding entry continue to be maintained by many states. Many states still retain screening mechanisms and such states will be reluctant to nullify the effect of such mechanisms by making treaties which discount the existence of such mechanisms.

It is evident that in the area of jurisdictional conflicts, there is a back-lash against neo-liberal expansionism. The conflicts that has been brought about are better explicable on the basis of ideological clashes rather than on the basis of analytical niceties that are artificially construct so as to preserve a veneer of neutrality in arbitration. It is evident that the latter types of explanations are preferred by the internal elites that run the system as such explanations attempt to preserve the corroding integrity of the system. There are many vested interests which support the system as the system produces golden eggs for its practitioners, largely big law firms and arbitrators. So, much labour is put into publications that are devoted to bolstering up this image of integrity when in fact the system has developed internal faults. It is best to recognise this fact and seek solutions than paper over the ever-broadening cracks.

The next part of the paper deals with expansionary trends in Substantive principles. It is yet to be written. It deals with the manner in which arbitral awards sought to expand the meanings of treatment standards and expropriation and the reaction to these expansions.

²⁹ . v Kenya

³⁰ . Azinian v Mexico

³¹ . v Kenya; Azinian v Mexico

³² . Grueslin v Malaysia, Young Chi Oo Ltd v Myanmar

³³ . Such treaties are made by the United States, Canada and Japan. South Korea is a recent entrant. They insist on pre-entry national treatment which excludes the application of investment screening laws. But, it is possible to exempt sectors from the scope of these treaties. As a result, even such treaties lack uniformity to be regarded as contributing to customary international law.