I Introduction

The field of investment law is something of a Rorschach test: how one perceives the equities often reflects one’s predispositions. To many of its proponents, investor-State dispute settlement (ISDS) is the most revolutionary development in transnational dispute resolution since the Jay Treaty arbitrations between the United States and Great Britain.² It accords investors the unilateral right to bring claims directly against States—famously called “arbitration without privity”³—in a neutral and impartial forum. Without such rights, aggrieved investors would be left to press their claims in the courts of the host State, which often cannot be trusted to rule impartially on the legality of their own government’s actions; or investors could seek diplomatic assistance from the foreign ministry of their own governments, which often have other political priorities vis-à-vis the host State.⁴ Any imposition on States in having to defend claims or pay awards, argue many proponents, is a fair price to pay for the economic benefits they reap from these investment treaties in terms of increased foreign direct investment (FDI).

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A second group, populated largely by academics, government officials and NGOs, sees a dangerously unbalanced mechanism that States have too readily adopted for short-term political reasons without fully appreciating their longer-term risks. The economic benefits of investment treaties, say some detractors, are ambiguous.\(^5\) And their asymmetrical claims structure and lack of safeguards of judicial independence create incentives for arbitrators—whose livelihoods and reputations depend on reappointments—to consciously or unconsciously favor the positions of claimants.\(^6\) Moreover, it is said that investment arbitration invites intrusive scrutiny into sensitive regulations regarding public health, safety, human rights, and the environment, issues which ordinarily would be subject to judicial review under constitutional or administrative law, or indeed may not be justiciable at all. It is one thing to promise to refrain from regulating into oblivion an investor’s manufacturing plant, but what sort of perverse social institution have we created that allows Philip Morris to dictate to Australia how best to regulate harmful smoking?\(^7\) Who could blame Australia, South Africa, Indonesia and other States for heading for the exit?

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\(^5\) The vast and expanding literature on the economic effects of investment treaties includes some of the following: J. Salacuse and N. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT (eds. K. Sauvant & L. Sachs 2009 Oxford U. Press) at 109, 155 (concluding that “there is strong evidence to show that [BITs] both protect and promote FDI in developing countries and the United States BITs have a particularly strong effect on encouraging FDI in developing countries.”); T. Büth & H. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT (eds. K. Sauvant & L. Sachs 2009 Oxford U. Press), at 171 et seq. (concluding that BITs are positively and statistically significantly correlated with subsequent inward FDI into developing countries); E. Neumayer & L Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment?*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT (eds. K. Sauvant & L. Sachs 2009 Oxford U. Press), at 225, 248 (concluding that “Developing countries that sign more BITs with developed countries receive more FDI flows,” and that “succumbing to the obligations of BITs does have the desired payoff of higher FDI inflows.”).
