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Say What You Mean: Improved Drafting Resources as a Means for Increasing the Consistency of Interpretation of Bilateral Investment Treaties

Kelley Connolly

Say What You Mean: Improved Drafting Resources as a Means for Increasing the Consistency of Interpretation of Bilateral Investment Treaties

ABSTRACT

Following the demise of international recognition of the Hull Rule as the standard governing foreign direct investment, countries throughout the world have turned to bilateral investment treaties (BITs) to govern direct investment relationships. BITs allow countries to bind themselves credibly to commitments by granting substantive rights to investors and offering remedies for violations of those rights, thereby incentivizing new investments and facilitating economic ventures. The recent dramatic increase in disputes arising under BITs has shaken the legitimacy of these agreements. Arbitration panels interpret these documents inconsistently, which disparately impacts developing nations negatively. The inconsistent interpretations rob BITs of clarity and transparency as to the nature and extent of the commitments. Consistency in interpretation can be achieved through reform of the arbitration process or reform of the drafting process. Reform of the arbitration process would fly in the face of the nature and character of the arbitration process, and it cannot alleviate the interpretive difficulties the panel faces. Reform of the drafting process can improve the documents themselves, as well as the interpretive process. BIT drafters must conquer the inherent difficulties of communicating intentions through language, as well as the additional problems created by the existence of multiple authoritative texts in different languages. This Note concludes that improved drafting is the key to providing consistency in interpretation, thereby increasing the credibility of BITs. To that end, this Note proposes a multilingual compilation of key BIT terminology, as provided by each individual country, to serve as a resource to drafters and interpreters.

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I. INTRODUCTION

"Foreign investment is a vital tool for economic development and global prosperity."[1] Developing countries rely on foreign investment to infuse their local industries with capital and to improve their infrastructure, while investors simultaneously receive financial returns and a "foothold in the markets of the future."[2] Historically, direct investment was governed by very loose international customary law, in particular the Hull Rule.[3] Following joint lobbying in the United Nations by developing countries opposed to the Hull Rule, and generally multilateral regulation of direct investment, investors were provided no protection when investing and, therefore, assumed myriad risks.[4] In response to the free market for investment, developing countries turned to contract, in the form of Bilateral Investment Treaties (BITs), as a means to attract investment.[5] These treaties influence "the initial decision to invest in a developing nation, the structure of the investment, and the methods of maximizing commercial benefits if there are difficulties with the investment."[6]

In recent years, foreign direct investment (FDI) has shown dramatic growth. Total FDI grew twenty-nine percent in 2005, following a twenty-seven percent growth in 2004.[7] FDI includes not only investors from developed countries investing in developing countries, but investments in developed countries as well.[8] Although individual countries and regions have regulations that impact direct investment, no general customary international law exists governing

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1. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1524 (2005).

2. *Id.* at 1524–25.

3 *See* discussion *infra* Part II.B. ("Historical Context: The Hull Rule—Its Importance and Its Demise"). The Hull Rule dictated host nations' treatment of investors' property and dictated that any takings would be compensated according to a "prompt and adequate" standard. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 644 (1998).

4. Guzman, *supra* note 3, at 659. The most notable risks are the absence of assurances against expropriation and, moreover, the lack of any clear standard as to compensation if expropriation did occur.

5. *See id.* (discussing the "dynamic inconsistency problem" and foreign direct investment).

6. Franck, *supra* note 1, at 1525.

7. U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], WORLD INVESTMENT REPORT 2006—FDI FROM DEVELOPING AND TRANSITION ECONOMIES: IMPLICATIONS FOR DEVELOPMENT at 1, U.N. Sales No. E.06.II.D.11 (2006), *available at* http://www.unctad.org/en/docs/wir2006overview_en.pdf [hereinafter WORLD INVESTMENT REPORT].

8. *Id.*

these relationships.[9] Therefore, countries and investors continue to rely heavily on BITs to provide reliability and stability for investments.

The goals of reliability and stability have been frustrated through the arbitration process. Dispute arbitrations under BITs have failed to provide consistent interpretations of the treaties.[10] Lack of consistent interpretations, combined with the ability to get out of obligations in the treaties, particularly through manipulating the text of the treaty, "create[] uncertainty in the global marketplace and can serve only to discourage foreign investment."[11] Two approaches for furthering consistent interpretation prevail: (1) reform of the arbitration system to provide increased transparency and develop monitoring through appellate review, and (2) reforms in the drafting process to improve the memorialization of the parties' intentions.[12]

Arbitrators confront several challenges when interpreting treaties. Multiple and sometimes conflicting interpretive methodologies and theories exist.[13] Language often serves as a poor communicator of intent, leaving the text hollow.[14] Additionally, BITs are written in multiple languages, accentuating the interpretive difficulties.[15] In particular, "the lack of precise linguistic equivalents and differences in legal systems throughout the globe make it virtually certain that multiple language versions will include terminological differences that lead to conflicting interpretations of the text."[16]

The difficulties of interpretation, however, serve to influence the drafter and encourage diligence and precision in drafting. The drafting process and final document should not be ignored as critical avenues to increasing the reliability of BITs. Further, multilateral discussion of terminology is critical to providing consistent

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9. *See id.* at 9 (discussing changing trends in the web of international agreements regulating foreign direct investment).

10. Christopher Brummer, Examining the Institutional Design of International Investment Law: Insights from the Symposium 2 (Fall 2006) (unpublished comment, on file with author).

11. Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 173 (2006).

12. *See generally* Brummer, *supra* note 10 (discussing the implications of different theoretical frameworks for addressing issues facing foreign direct investment).

13. *See* discussion *infra* Part V.B ("The Interpretive Process—Background for Drafters").

14. *Id.*

15. *Id.*

16. Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L & COMP. L. REV. 611, 612 (1997).

understanding of parties' intentions. Part I of this Note lays the historical background for the development of BITs. Part II identifies some of the conflicts raised by the lack of consistency in interpretation. Part III examines the traditional common provisions included in BITs. Part IV further analyzes the problem of consistency. It briefly discusses current approaches to reforming the arbitration process and addresses the process of interpretation. Part V offers improvements that can be made through improved drafting and the collection of common terminology across languages to serve as a resource when drafting and interpreting BITs.

II. DEFINITION OF AND HISTORICAL CONTEXT FOR BILATERAL INVESTMENT TREATIES

A. *Definition*

BITs have become a universal tool for documenting foreign investment relationships, "detail[ing] . . . legal rules for allowing and protecting foreign investment."[17] BITs are individually negotiated between sovereign nation-states who agree to encourage, promote, and protect the investments that Country A companies make in Country B.[18] These treaties define the scope and definition of foreign investment, including which investors and investments are covered by the agreement (the scope of application).[19] The main provisions typically "cover four substantive areas: admission, treatment, expropriation and the settlement of disputes."[20] Bilateral investment

17. 2 RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS §§ 25.20, 27.3 (2d ed. 2002).

18 Franck, *supra* note 1, at 1522 n.3; UNCTAD, Investment Instruments Online: What are BITs?, http://www.unctadxi.org/templates/Page____1006.aspx (last visited Oct. 14, 2007).

19. UNCTAD, *Bilateral Investment Treaties 1959–1999*, at 20, U.N. Doc. UNCTAD/ITE/IIA/2 (2000), *available at* http://www.unctad.org/en/docs/poiteiiad2.en.pdf [hereinafter *U.N. Bilateral Investment Treaties*]; Int'l Ctr. for Settlement of Inv. Disputes, World Bank, Bilateral Investment Treaties (1996), *available at* http://www.worldbank.org/icsid/treaties/intro.htm [hereinafter *ICSID Bilateral Investment Treaties*].

20. *ICSID Bilateral Investment Treaties*, *supra* note 19. More specifically, BITs generally include provisions on the following themes:

> [A]dmission of investments; national and most-favoured-nation treatment; fair and equitable treatment; guarantees and compensation in respect of expropriation and compensation for war and civil disturbances; guarantees of free transfer of funds and repatriation of capital and profits; subrogation on insurance claims; and dispute-settlement provisions, both State-to-State and investor-to-State. In addition, some BITs include provisions regarding transparency of national laws; performance requirements; entry and sojourn of foreign personnel; general exceptions; and extension of national and most-favoured-nation-treatment to the entry and establishment of investments.

treaties developed to fill in the gaps where international law failed to provide a code of conduct for host nations, "promot[ing] national treatment and protect[ing] . . . investors abroad."[21] BITs not only filled the gaps, but also expanded investor protection by allowing "for private parties (investors) to directly initiate arbitration with host states."[22] Such benefits of BITs have reduced the numbers signed between developed nations, particularly because investment relations between those countries operate according to various instruments adopted under the auspices of the Organization for Economic Cooperation and Development (OECD).[23]

The Federal Republic of Germany (West Germany) and Pakistan signed the first bilateral investment treaty, focusing exclusively on the protection of investment, on November 25, 1959.[24] The number of BITs has increased dramatically since that first treaty signing.[25] Between 1959 and 1991 over 400 BITs were signed, which was followed by a flurry of treaty signing in the 1990s.[26] By 2005, 2,495 treaties had been signed, encompassing at least 176 countries.[27] The dramatic increase in BIT agreements reflects their "rise[] to prominence during a period in which the international regulation of foreign investment was the subject of great change, uncertainty, and controversy."[28] During this period, the Hull Rule, which had previously dictated international custom on compensation following expropriation, met its demise.[29] Developed and developing nations then began signing binding international agreements to govern investment relationships, ultimately offering investors more protection than the Hull Rule had.[30]

U.N. Bilateral Investment Treaties, *supra* note 19, at 20. BITs universally address these themes, however, the exact content of the provision varies widely, even between one country's BITs, "reflecting different approaches as well as bargaining positions." *Id.*

21. 2 FOLSOM, *supra* note 17, § 25.26.

22. AARON COSBEY ET AL., INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 3 (2004), *available at* http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf.

23. *U.N. Bilateral Investment Treaties*, *supra* note 19, at 4.

24. RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 1 (1995); Guzman, *supra* note 3, at 653.

25. Guzman, *supra* note 3, at 652.

26. *Id.*; Jayati Ghosh, *Treaties to Protect Foreign Investors*, FRONTLINE (India), Apr. 22-May 5, 2006, *available at* http://www.bilaterals.org/article.php3?id_article=4573.

27. WORLD INVESTMENT REPORT, *supra* note 7, at 9; Guzman, *supra* note 3, at 652; Ghosh, *supra* note 26.

28. Guzman, *supra* note 3, at 641.

29. *Id.* at 642.

30. *Id.*

B. *Historical Context: The Hull Rule—Its Importance and Its Demise*

Traditionally, foreign investors were given limited rights under customary international law.[31] During the early twentieth century, host nations took the view that investors' property would be protected and property takings would be compensated according to a "prompt and adequate" standard.[32] This standard was termed the "Hull Rule" following a dispute between Mexico and the United States.[33] The United States Secretary of State, Cordell Hull, articulated the full compensation standard in diplomatic notes exchanged during the dispute.[34] The Hull Rule required that compensation be "prompt, adequate, and effective."[35] Following decolonization, newly formed independent sovereign states began to voice their objections to the Hull Rule, often stipulating that it was not based on a universally accepted theory of international law.[36]

Following World War II, nationalizations and expropriations increased, bringing disdain surrounding the Hull Rule to the forefront.[37] During this period, developing countries supported "a less stringent compensation requirement for expropriations than the Hull Rule[]."[38] In the 1960s, developing nations took their cause to the United Nations, pointing out that the actual practice of compensating expropriations was not always consistent with the Hull Rule, and furthermore, the Rule lacked the sufficient international support required of customary international law.[39] From 1962 through the mid-1970s, developing nations succeeded in getting the United Nations General Assembly to pass "a series of resolutions intended to emphasize the sovereignty of nations with respect to foreign investment."[40] The UN resolutions supported developing countries who refuted the assertion that the Hull Rule was consistent with customary international law.[41] The 1962 Resolution articulated the standard in terms of "appropriate compensation," thereby prompting further debate over the definition of "appropriate."[42]

Additional resolutions, lobbied for by developing nations, solidified the UN's position that the Hull Rule was no longer

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31. DOLZER & STEVENS, *supra* note 24, at 10.
32. Guzman, *supra* note 3, at 644.
33. *Id.* at 645.
34. *Id.*
35. *Id.*
36. *Id.* at 646.
37. *Id.* at 646–47.
38. *Id.* at 647.
39. *Id.* at 648.
40. *Id.*
41. *Id.*
42. *Id.* at 648–49.

customary law.[43] Further, the UN General Assembly passed a resolution stating that nation-states have "[f]ull permanent sovereignty . . . over [their] natural resources and all economic activities;" in light of that, "[n]o State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."[44] The resolutions indicated that an international obligation of repayment would no longer be recognized.[45]

The UN resolutions indicated that, as a group, developing countries "prefer a regime under which they are able to expropriate property when they feel it is justified and under which they need only pay what they determine to be appropriate compensation."[46] The result for investors was essentially a cartel of developing nations who refused to provide assurance of compensation.[47] The climate was ripe for opportunism.

Following the demise of the Hull Rule, the international rules for "investment were entirely uncertain and individual states were in a position to determine what constituted appropriate compensation."[48] Investors therefore bore the risk that, following an agreement with a sovereign state and subsequent to spending for sunk costs, a state may alter the agreement.[49] Faced with this dilemma, investors generally would accept such alterations because, having spent for the initial costs, pulling out of the investment often was more costly than merely adjusting to changes to the agreement.

This dilemma is the result of the "dynamic inconsistency problem."[50] The problem "exists when a preferred course of action, once undertaken, cannot be adhered to without the establishment of some commitment mechanism."[51] In private transactions parties avoid the dynamic inconsistency problem through contracts, which are enforceable under domestic law.[52] Following the demise of the Hull Rule in the international setting, however, sovereign states could not "credibly bind [themselves] to a particular set of legal rules when [they] negotiate[d] with a potential investor."[53]

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43. *Id.*
44. *Id.* at 649–50.
45. *Id.*
46. *Id.* at 651.
47. *See generally id.* at 646–51 (discussing the "The Decline and Fall of the Hull Rule")
48. *Id.* at 651.
49. *See id.* (discussing the victory won by developing nations as a result of declining to follow the Hull Rule as customary international law).
50. *Id.* at 658.
51. *Id.*
52. *Id.* at 658–59.
53. *Id.* at 659.

BITs resolve the dynamic inconsistency problem. They "provide a way for a host country to make credible and binding commitments to an investor."[54] BITs incentivize new investments, help facilitate ventures in the presence of economic opportunity, and characterize a host country's investment climate.[55] Host states can gain an advantage to encourage investment in their countries due to this credibility. BITs further this confidence through two innovations: (1) by "grant[ing] investors a series of specific substantive rights, which help contribute to the stable investment climate of an investment": and (2) by "offer[ing] investors direct remedies to address violations of those substantive rights."[56] The credibility host states gain from BITs, however, is undermined if that BIT is not upheld at arbitration according to the agreed upon terms.[57] This conflict is particularly illustrated in arbitrations involving investors and states trying to enforce the binding nature of the BIT to resolve investment disputes.

III. BIT DEVELOPMENT AND CURRENT CONFLICTS

When investors are considering a new foreign investment, host countries, as in any business venture, position themselves to offer the best "investment package" to the investor. The dynamic inconsistency problem, however, means that once the deal is done, the host country does not have to abide by any of the promises made during the negotiation period: it does not have to offer benefits; rather, it only has to "treat the investor well enough to *keep* the investment."[58] The legitimacy of the final agreement is as important to the investing decision as the credibility of the host country's promise.[59] Therefore, bilateral investment treaties will offer no credibility if they have no legitimacy, as indicated by arbitration decisions that uphold the intent of the parties to the BIT.

The problem of bilateral investment treaty legitimacy has recently become more apparent.[60] Prior to 1995, few disputes arose; however, from 2000 on, the number of cases has exploded.[61] By 2005, bilateral investment treaties had been involved in over sixty arbitrations.[62] The BITs themselves contain provisions stipulating

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54. *Id.*
55. DOLZER & STEVENS, *supra* note 24, at 12.
56. Franck, *supra* note 1, at 1529.
57. *See* Wong, *supra* note 11, at 139 (highlighting the marketplace uncertainty involved with allowing nations to go back on BIT provisions, particularly umbrella clauses).
58. Guzman, *supra* note 3, at 661.
59. Franck, *supra* note 1, at 1529.
60. *Id.* at 1521.
61. *Id.*
62. *Id.*

arbitration as a means for settling disputes.[63] Two types of disputes may arise: (1) disputes between the contracting parties (nation-states), called inter-governmental disputes, and (2) disputes between the host State and the investor, called investment disputes.[64] Inter-governmental disputes are typically resolved through ad hoc arbitration, which is "non-institutional arbitration governed by rules specially formulated for and inserted into the text of the treaty."[65] Investment disputes, however, usually call for "institutional or other pre-existing arbitration rules which are simply incorporated into the treaty by reference."[66] In either case, the arbitration panel or tribunal ultimately confronts the task of interpretation. Variations in interpretations are the root of inconsistency in the arbitral process.

A. *Introduction to the Conflict of Inconsistent Interpretations in Arbitration*

Bilateral investment treaties articulate "some public international law rights . . . for the first time."[67] These rights include "the right to 'fair and equitable treatment' and a Sovereign's obligation to 'observe its commitments.'"[68] International agreements are arbitrated in a closed forum, in front of international tribunals that apply "these standards differently and [make] divergent findings on liability."[69] Further, no single forum exists for arbitrating BITs.[70] Tribunals serving as potential venues for arbitration include those organized under the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), and the United Nations Commission on International Trade Law (UNICTRAL).[71]

Arbitration agreements in BITs are premised on the commercial arbitration model, and therefore, connote a strong presumption of confidentiality.[72] Pursuant to this presumption, access to pleadings and evidence is minimal for non-parties, amici curiae participation is nominal, and decisions often remain confidential and are never released to the public.[73] In UNICTRAL proceedings, disclosure of the

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63. DOLZER & STEVENS, *supra* note 24, at 119.
64. *Id.*
65. *Id.*
66. *Id.*
67. Franck, *supra* note 1, at 1523.
68. *Id.*
69. *Id.*
70. *Id.* at 1541.
71. *Id.*
72. *Id.* at 1544.
73. *Id.* at 1544–45.

existence of a dispute and information and documentation related to the dispute is at the parties' discretion.[74]

When drafting a BIT, countries must consider potential future questions of interpretation.[75] General rules of treaty interpretation apply, including those embodied in the Vienna Convention on the Law of Treaties.[76] For example, Article 31 of the Convention states as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[77]

Even though this general guideline for interpretation exists, many of the terms used in these treaties "require evaluation and judgment of the kind that could in turn lead to disputes about degree rather than terminology."[78] This is of particular concern as arbitration claims have ranged from disputes arising out of clear-cut expropriation to more recent claims "target[ing] a wide range of regulatory and administrative treatment which may have allegedly diminished the value of an investment."[79] Language in itself serves poorly to communicate intent and thus increases the difficulties encountered when passing judgment on degree of terminology.[80] Patrick Juillard notes that "standards-laden language of 'just' and 'fair' treatment may involve applications by tribunals that are very different from the expectations arising from the legal culture of the host."[81] Further, the problem of interpretation is compounded by the fact that BITs are usually written in two or three different languages.[82] This results in inconsistent interpretations that undermine the credibility and legitimacy of the agreement.

B. *The Conflict of Inconsistency as Particularly Problematic for Developing Countries*

Inconsistent interpretations disparately impact developing nations. Developing countries are disadvantaged from the start, in that they have "presumably . . . less bargaining power in negotiating

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74. Luke Eric Peterson, Analysis: *Will UNCITRAL Arbitrations become even more secretive?*, INV. TREATY NEWS, Sept. 3, 2005, *available at* http://www.bilaterals.org/article.php3?id_article=5730.

75. The issue of interpretation will be explored in more depth *infra* Part IV.

76. DOLZER & STEVENS, *supra* note 24, at 15.

77. *Id.*

78. *Id.* at 16. This includes terms such as "fair and equitable treatment" and "reasonable installments." *Id.*

79. COSBEY ET AL., *supra* note 22, at 16.

80. *See infra* Part IV.B.ii.

81. Brummer, *supra* note 10, at 2.

82. *Id.*

a BIT."[83] Additionally, "the general normative effect of bilateral investment treaties in the final analysis [(e.g., arbitration)] depends on the extent to which they are viewed as 'fair and balanced regimes for foreign investment outside the immediate context of the bilateral relationships.'"[84] Disparate bargaining power will impede the developing countries' abilities to produce a fair and balanced regime. For example, developing countries "are heavily dependent on the United States for aid," and, thus, they willingly adopt the U.S. Model Treaty, ending negotiation.[85] Generally, BIT negotiations start with the model agreements of the capital-exporting countries.[86]

Developing countries, therefore, are precluded from memorializing their intentions in the document. For example, the United States Model BIT, as originally drafted, was problematic because it included a dispute settlement provision that ran "counter to the principles of the Calvo doctrine."[87] The dispute settlement provision stated:

> For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by its foreign investment authority to such national or company; or (c) an alleged breach of an right conferred or created by this Treaty with respect to an investment.[88]

Many Latin-American countries adhere to the Calvo doctrine, which "insists on the strict abstention from interference by other nations in areas within the host country's exclusive control."[89] These countries are particularly concerned with "the adjudication of disputes involving resources or conduct within their borders and the control over compensation for acts of nationalization or expropriation."[90] Both of these concerns seem common to the developing nations that want to encourage investment in their own countries, particularly

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83. Wong, *supra* note 11, at 138. This does not contend that the bargain is completely one-sided, because the host State will benefit from the adoption of the BIT since it will "foster a more hospitable, and therefore, more attractive, environment for foreign investment." *Id.* at 139. Developing countries, however, are particularly disadvantaged when attempting to enter a BIT with a wealthy developed country that has a formal model BIT in use. The developing country, who seeks investment, is in a weaker position because it is seeking the investment and is inherently disadvantaged as a developing country bargaining with a developed power.

84. DOLZER & STEVENS, *supra* note 24, at 18.

85. Valerie H. Ruttenberg, Comment, *The United States Bilateral Investment Treaty Program: Variations on the Model*, 9 U. PA. J. INT'L BUS. L. 121, 125 (1987).

86. DOLZER & STEVENS, *supra* note 24, at 13.

87. Ruttenberg, *supra* note 85, at 130.

88. Kathleen Kunzer, *Recent Development: Developing a Model Bilateral Investment Treaty*, 15 LAW & POL'Y INT'L BUS. 273, A-8 (1983) (quoting language of Article VII, paragraph 1).

89. Ruttenberg, *supra* note 85, at 130.

90. *Id.*

because they are clearly not in the economic position to make certain assurances. The People's Republic of China also objected to the U.S. dispute resolution provision because of differing concepts of sovereignty and the existence of "an independent body having authority over disputes."[91]

Differing ideas of sovereignty also become issues when adopting a standard of treatment under the agreement.[92] Tension exists between host countries preferring to grant most favored nation status and investors desiring national treatment.[93] For example, "Latin-American countries [traditionally] believe[d] that the national treatment standard is the most advantageous standard for the foreign investor, but not for the host country, because it guarantees that those investors will not be discriminated against solely because they are foreigners."[94] Instead, Latin-American countries seem to have preferred the most-favored nation standard.[95] Developing countries also "fear that unrestricted private foreign investment may not be beneficial to their interests," so seek inclusion of performance requirement provisions.[96] Developing countries view performance requirements as a means of protecting national policies in "employment, pricing, regional development, market competition, and foreign trade" and "promot[ing] their balance of trade and [fostering] growth in local industries."[97] These ideological considerations must be written into the document. Disparate bargaining power is the first hurdle encountered, quickly followed by the difficulties encountered in the failures of language and translation.

This disproportionate bargaining power necessitates an international consensus on the key terminology used in these treaties. Since developing countries are not even given the full opportunity to advocate for their cause during treaty drafting, these countries must again come together as they did to defeat the Hull Rule. Once united in their cause, they may pressure the international community into a consensus on various nomenclatures to be incorporated into model treaties worldwide so as to provide assurance that the documents memorialize the negotiations and

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91. *Id.*
92. *Id.* at 132.
93. Most favored nation status requires host countries to afford investor countries the same privileges, particularly trade terms, afforded to other countries. BLACK'S LAW DICTIONARY 1035 (8th ed. 2004); Michael Doyle et al., Asia and Pacific Law, 41 INT'L LAW 711, 725 n.84 (2007). The national treatment standard requires host countries to afford investor countries "the same regulatory treatment that they would ordinarily bestow on their domestic producers and service providers." *Id.*
94. Ruttenberg, *supra* note 85, at 132.
95. *Id.* at 133.
96. *Id.*
97. *Id.*

agreements. This would provide some security and reliability by enabling more predictable interpretations of the included provisions.

IV. DRAFTING A BILATERAL INVESTMENT TREATY: TRADITIONAL PROVISIONS

Several countries do have model agreements and negotiate modifications to these model or "template" treaties to appease some interests of capital-importing countries or recipients of capital.[98] The U.S. Model BIT includes the following primary targets: "performance requirements, standard of treatment, expropriation and nationalization, monetary transfers, and the settlement of investment disputes."[99] Subsequently, or in spite of this fact, BITs appear to be remarkably similar in their organization and content.[100] The basic structure of a BIT includes articles containing provisions describing definitions, promotion of investment, protection of investment, expropriation and compensation, repatriation, and dispute settlement.[101]

Some scholars believe that individually negotiated BITs have "not led to important divergences," and that most elements are "consistently . . . expressed in standard terms."[102] The compensation provisions of various model treaties contain slight variations that can lead to interpretive difficulties. Descriptions of compensation range from unmodified "compensation" to modifiers including prompt, adequate, effective, or various combinations of the three.[103] The

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98. DOLZER & STEVENS, *supra* note 24, at 13.

99. Ruttenberg, *supra* note 85, at 126.

100. Wong, *supra* note 11, at 141.

101. *See generally* DOLZER & STEVENS, *supra* note 24, Annex I: Model Agreements (providing model agreements from Austria, Denmark, Germany, Hong Kong, Netherlands, Swiss Confederation, Great Britain, and the United States). The list of articles by no means is conclusive but merely delineates several of the predominant sections contained in a representative sample of model BITs from developed countries.

102. *Id.* at 14.

103. *Id.* The Austrian model provision on compensation for expropriated territory states that

> Investments . . . shall not be expropriated . . . except for a public purpose by due process of law and against *compensation*. . . . [C]ompensation shall amount to the value of the investment immediately preceding the time in which the actual or impending measure became public knowledge. . . .

Id. at 169–70 (emphasis added) (quoting the English translation of Austrian Model Treaty drafted February 1994).

Denmark's model provision states:

> Investments . . . shall not be expropriated or subjected to measures having effect equivalent to nationalization or expropriation . . . except for a public purpose related to the internal needs of the expropriating Party, on a basis of

standard by which compensation is measured also varies from no standard to value, market value, real value, genuine value, or fair market value.[104]

Sample provisions illustrate the variety of specificity and terminology that nation-states use to express the concepts

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non-discrimination and against *prompt, adequate and effective compensation*. . . . Such compensation shall amount to the *market value* of the investment immediately before the expropriation or impending expropriation become public knowledge. . .

Id. at 180 (emphasis added) (quoting the English translation of Denmark Model Treaty drafted November 1991).

Hong Kong's model provision states:

> Investors . . . shall not be deprived of their investments nor subjected to measures having effect equivalent to such deprivation . . . except lawfully, for a public purpose related to the internal needs of that Party, and against *compensation*. Such compensation shall amount to the real value of the investment immediately before the deprivation . . . .

Id. at 204 (emphasis added) (quoting the English translation of Hong Kong Model Treaty).

The Netherlands' model states:

> Neither Contracting party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party or their investments unless . . . the measures are taken against *just compensation*. Such compensation shall represent the *genuine value* of the investments affected . . . .

Id. at 213 (emphasis added) (quoting the English translation of Netherlands Model Treaty, drafted May 1993).

The Swiss Confederation model states:

> Neither . . . shall take, either directly or indirectly, measures of expropriation . . . or any other measure having the same nature or the same effect . . . unless the measures are taken in the public interest, on a nondiscriminatory basis, and under the process of law, and provided that provisions be made for *effective and adequate compensation* . . . .

Id. at 222 (emphasis added) (quoting the English translation of Swiss Confederation Model Treaty, drafted June 1986). The provision contains no reference to what basis should be used for determining the value of the expropriated property beyond stating that the compensation be effective and adequate.

Finally, the United States model agreement states:

> Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization [. . .] except: for a public purpose; in a nondiscriminatory manner; upon payment of *prompt, adequate and effective compensation* . . . Compensation shall be equivalent to the fair market value of the expropriate investment immediate before the expropriatory action was taken or became known . . . .

Id. at 245 (emphasis added) (quoting the English translation of United States of America Model Treaty, drafted February 1992). This language has remained virtually unchanged in the model treaty. *See* Practising Law Institute, *United States Model Bilateral Investment Treaty*, in INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 2006 (PLI Litig. & Admin. Practice, Course Handbook Series No. 8710, 2006).

104. *Id.*

memorialized in the agreement.[105] Further, the language used demonstrates how much BIT drafters depend on ambiguous and value-laden language. Although each provision speaks to compensation, its modifiers connote varying intentions. The provisions range from mere "compensation" to "just compensation," "effective and adequate" compensation, or "prompt, adequate, and effective" compensation.[106] The variations in the legal cultures of the negotiating parties, as well as the legal cultures of eventual interpreting bodies, however, lead to the result that "countries may not at the time of treaty formation fully understand the extent of their agreements, and thus fail to adequately negotiate their provisions."[107] One illustration of this issue "concerns measures which do not formally deprive the owner of his title to property, but that on the whole have the same effect as expropriation."[108] In this case, the tribunal may be called to determine whether a BIT's provision on expropriation extends to the specified "indirect" expropriation.[109] Thus, although there are model treaties, there remains a discrepancy in interpretation. It stands to reason that a model treaty is insufficient since the model only represents the model-creating nation-state's interests. Additionally, even though BITs may be similar in form and content, the model would not resolve issues of translation and intention captured by language.[110] Therefore, although a universal template—as opposed to individual state models—may be helpful, it will not ultimately resolve the issues of interpretative inconsistencies and failures to protect developing countries' intentions.

Other factors might also prevent a general model treaty from being a success. The model U.S. BIT, for example, lacks flexibility and "espous[es] provisions that are directly opposed to the interests of many developing nations."[111] Developing nations, therefore, face several obstacles when negotiating a treaty that will attempt to yield consistent interpretation. Further, BITs are considered beneficial "because they focus on [narrow] objectives and enumerate specific ways of regulating the establishment and control of foreign investments."[112] A universal model treaty is unlikely to capture the diverse array of potential objectives and regulatory schemes. Success in terms of increased reliability is not likely to be accomplished since

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105. *Id.*
106. *See supra* text accompanying notes 103–08.
107. Brummer, *supra* note 10, at 2.
108. DOLZER & STEVENS, *supra* note 23, at 14.
109. *Id.*
110. *See* discussion *infra* Part V.B.
111. Ruttenberg, *supra* note 85, at 123.
112. *Id.* at 124.

the specificity of the treaty is only useful if it is enforced, and it can only be enforced when interpreted as the parties intended.

V. PROBLEMS OF CONSISTENCY: ARBITRATION REFORM AND INTERPRETATIVE DIFFICULTIES

Ultimately the current issue is that

> [substantive] obligations agreed to under the myriad treaties are too varied and inconsistently interpreted by ad hoc tribunals to provide clarity and transparency for host states as to the nature and extent of their commitments; and procedurally, ICSID tribunal judges are either too ideological or ethically conflicted to act as proper deciders.[113]

This is a problem because "widespread retreat from commitments and commitment-making would leave foreign investors with diminished comfort for their investments, disrupting systems of international economic governance."[114] Further, "[o]nce disputes arise, the substantive commitments memorialized in agreements are then interpreted in a heavy-handed manner during the arbitration process[,] a phenomenon made possible due to the absence of adequate control mechanisms."[115]

Current scholars have addressed the concern over inconsistent interpretations by calling for a review of the arbitration process.[116] Their work suggests (1) increasing the transparency of the arbitration process and (2) creating appellate review of arbitration.[117] These suggestions, however, essentially fly in the face of the character and nature of arbitration.[118] Countries are willing to submit to arbitration because the process is opaque; it is a closed system, illustrating the desire to prevent information revealed in the proceedings from being disclosed.[119] Similarly, an appellate review process is objectionable since it impedes the arbitration goal of efficiency.[120]

Even if these reforms came into being, they would function only as a patch on a greater problem of interpretation. The United States judicial system has both transparency and an appellate review

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113. Brummer, *supra* note 10, at 1.

114. *Id.*

115. *Id.* at 2.

116. *See generally id.* (discussing the position of various scholars).

117. *See generally id.* (summarizing discussion regarding transparency in the arbitration process and the possibility of appellate review of arbitration).

118. *See infra* text accompanying notes 123–31.

119. Naveen Gurudevan, *An Evaluation of Current Legitimacy-Based Objections to NAFTA's Chapter 11 Investment Dispute Resolution Process*, 6 SAN DIEGO INT'L L.J. 399, 426 (2005).

120. Gary W. Jackson, *Prosecuting Class Actions in Arbitration*, *in* 1 ALTA ANNUAL CONVENTION REFERENCE MATERIALS (2006).

system, yet inconsistent interpretations abound. Even if consistency in interpretation can be reached, the greater goal of consistent and correct interpretation is not necessarily achieved by an after-the-fact review, and arguably not achieved at all.

The drafting process, therefore, is equally critical to the interpretation problem. The goal is to create treaties that accurately capture the intent of the contracting nation-states and then articulate those intentions in a form that can be appropriately interpreted in future relations. Improving the drafting process involves working backwards, identifying the flaws in arbitral interpretations, and hypothesizing ways to avoid them when constructing the document itself. Only through awareness of how treaties—and in particular multilingual treaties—are interpreted can the drafting process be amended.

A. *Arbitration Restructuring as a Means to Improving Consistency of Interpretation*

Scholarly commentary on the problem of consistency and BITs focuses on restructuring the present arbitration system in the hopes of producing more consistent BIT interpretations.[121] Developing countries are particularly injured by the current system since international tribunals have little accountability, are often beholden to multinational corporations, and are not bound by precedent or review by the contracting states.[122] As stated above, two prongs exist within arguments for arbitration restructuring: (1) increased transparency and (2) appellate review.[123] Both these suggestions run contradictory to the goals of arbitration: efficiency, privacy, and cost-savings.[124]

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121. *See generally* Brummer, *supra* note 10 (discussing the scholarly debate regarding reform to the arbitration process).

122. *Id.* at 2 (describing the opening presentation of M. Sornarajh). The open system within which these tribunals function allows the tribunals to "impose an 'injustice of rules' [that] extend[s] key terms substantive commitments . . . [that] extend far beyond the reasonable expectations of host state governments." *Id.*; *see also* discussion *supra* Part II.B.

123. *See generally id.* (including remarks made by Patrick Juillard describing the "lack of transparency to the substantive commitments provided for under investment agreements" as problematic because "[t]hough treaties may employ similarly phrased commitments, their standards-laden language of 'just' and 'fair' treatment may involve applications by tribunals that are very different from the expectations arising from the legal culture of the host state.").

124. Jackson, *supra* note 120; *see also* Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 444 (2006) (noting that "resolving disputes efficiently and reducing litigation" are two goals of arbitration). Arbitration has unique benefits within the international sphere in that it provides a neutral forum. Susan D. Franck, *International Arbitrators: Civil Servants? Sub Rosa*

Arguing that transparency of arbitration proceedings is inherently an improvement of the process ignores the fundamental character of arbitration. Transparency in international investment arbitration has only recently become more widely accepted.[125] Proponents of increased transparency note that modern legal systems view it as "a central fairness value."[126] This is, however, a stark departure from the previously accepted notion that disputes between States and foreign investors are private.[127] Additionally, commercial arbitration holds confidentiality as "the paramount value and often a precondition for parties agreeing to submit to arbitration."[128] Thus, increased transparency may encroach upon parties' willingness to submit to arbitration, thereby eroding much of the purpose for which bilateral investment treaties were created and further crippling the goals of credible and binding commitments.[129]

Appellate review of arbitration decisions also contradicts basic notions of the nature of arbitration. Arbitration, which is required by BITs, provides awards that are meant to be final; that is, the decision by the arbitration panel is intended to be conclusive.[130] This promotes efficiency, a prominent advantage of arbitration.[131] Additionally, arbitration is structured so that the parties select the arbitrators who are "required to render decisions in an 'independent' or 'impartial' manner."[132]

Reviewing arbitration decisions would thwart its goals—efficiency and finality—by extending the resolution process to include review and potential re-trials. Additionally, review would remove the assurances that parties are provided through selecting the arbitration panel. Further, arbitration "is a creature of contract," within which parties can contract for their desires and expectations.[133] Imposing a monitoring system or review system on arbitration impinges upon the

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Advocates? Men of Affairs?: The Role of International Arbitrators, 12 ILSA J. INT'L & COMP. L. 499, 501 (2006).

125. Jorge E. Vinuales, *Amicus Intervention in Investor-State Arbitration*, 61 JAN DISP. RESOL. J. 72, 73 (2007) (noting in particular an increased acceptance in investor-state arbitrations). Proponents of increased transparency find the "public character of trade and foreign investment disputes" to be influential. *Id.*

126. Gurudevan, *supra* note 119, at 426.

127. Vinuales, *supra* note 125, at 73.

128. Gurudevan, *supra* note 119, at 426. Particularly, "the aspect of confidentiality is the chief attraction of arbitration." *Id.* at n.182 (citing MOSHE HIRSH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES 10 (1993)).

129. *See* discussion *supra* Part I.B.

130. *See* Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 JAN DISP. RESOL. J. 16, 17 (2007).

131. *Id.* at 18. Arbitration is considered a speedy and less costly resolution to disputes. *Id.*

132. Franck, *supra* note 124, at 501.

133. *Id.* at 502.

parties' freedom to contract.[134] If appellate review of international arbitrations is provided through domestic courts, host states become vulnerable to an infringement of their sovereignty not agreed to in bilateral investment treaties.[135] Submission to arbitration itself runs counter to the concept of sovereignty, and therefore, the legal community should be careful when asking nation-states to submit to further judicial scrutiny.[136]

Increased transparency alone, or combined with the development of a review system to monitor arbitration decisions, may provide improvements in the arbitration system, but would by no means guarantee accurate interpretations of treaties. Nor would changes fully ameliorate the problem of inconsistent or inaccurate treaty interpretation. Additionally, arbitration itself involves significant transaction costs.[137] Therefore, scholarly commentary stops in error at merely suggesting that current dispute settlement procedures be revamped. Altering the dispute resolution process is insufficient to assure host states that their intentions will be articulated in their BITs. As one author notes, "legal certainty, predictability, and conflict avoidance require the greatest clarity and precision in the drafting of legal texts."[138] Examining and implementing improvements to the drafting of BITs is equally—if not more—helpful in the process of achieving consistent and reliable investment treaty relations.[139]

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134. Much of this criticism of arbitration review is premised on the fact that the review is imposed on the parties and has not been explicitly negotiated for or agreed to in the treaty where the parties agree to the arbitration forum.

135. Gurudevan, *supra* note 119, at 419.

136. This article does not argue that arbitration should not be used. Conversely, the nation-state parties to BITs agree to arbitration proceedings in the bilateral investment treaty and have thereby agreed to submit to arbitration. Further, the author acknowledges that arbitration has evolved "from the lack of existing feasible alternatives" and therefore should continue to serve as the primary dispute resolution mechanism, at least until a "more neutral alternative to arbitration whereby private investors' rights against expropriation [or other contract disputes] may be vindicated." *Id.* at 421. Arbitration serves an important purpose in investment relations; however, its encroachment on sovereignty should not be forgotten. This, combined with the flaws of arbitration, suggests that an alternative approach to improving the consistent interpretation of treaties is necessary; reliance on the arbitration process alone is insufficient.

137. Brummer, *supra* note 10, at 3 (summarizing Susan Frank's commentary on the effectiveness of arbitral enforcement mechanisms).

138. Shelton, *supra* note 16, at 611.

139. Similarly, Bart Legum posits that parties can be protected through explicit drafting of expectations and provisions, which is less costly than an overhaul of the current dispute resolution system. Brummer, *supra* note 10, at 4. Additionally, Legum argues that the case for change in the system has not been made, particularly since litigation of BITs remains relatively infrequent. *Id.*

B. *The Interpretative Process—Background for Drafters*

To properly draft a bilateral investment treaty, the drafters must have some notion of how the treaty will be interpreted. Therefore, an examination of the current issues and problems in treaty interpretation is helpful in shaping the recommendations on how to improve drafting. Bilateral investment treaties compound universal contract and statutory interpretative issues.[140] When interpreting a BIT, the panel or tribunal confronts the interpretive difficulties inherent in determining the parties' intent and the textual meaning of the treaty's provisions. The tribunal must also confront interpretive issues of multilingualism.[141] The interpretative difficulties reflect "long-standing and continuing conflict between the investment interests of developing countries and developed countries."[142] Further, drafting occurs within an interpretive background, which provides some guidance to drafters and arbitrators as to the intended meaning of terminology.[143] For this reason, in particular, a refined approach to drafting is critical. Although "BIT[s] [impose] reciprocal obligations on both Contracting States, [their] effects are asymetrical."[144] Since developing countries are disparately negatively impacted in the interpretative process, it is imperative that these countries effectively communicate their expectations and intentions in the body of their BITs to achieve the greatest likelihood of interpretation consistent with their intentions.

1. Interpretive Issues Inherent in the Difficulty of Communicating Intentions through Language

Any time an affected party, judge, tribunal, or other person reads a contract, statute, or treaty, the reader engages in some level of interpretation. The reader must find meaning in the words included in the writing. Treaty interpretation is an inherent aspect of the arbitration process and the source of the subsequent inconsistencies in arbitration decisions. Extensive writings delve into the subject of treaty interpretation specifically, and this Note does not purport to

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140. Alex Glashausser, *What We Must Never Forget When It is a Treaty We are Expounding*, 73 U. CIN. L. REV. 1243, 1245 (2005) (stating that treaties have contractual elements and elements of legislation).

141. *See supra* text accompanying note 82.

142. Wong, *supra* note 11, at 138.

143. Glashausser, *supra* note 140, at 1273. However, since consistency has not been shown in BIT interpretation this mechanism is not fully available. Further, with no transparency in the process even consistent interpretations would fail to provide precedent in subsequent proceedings. Consequently, drafters are critical to providing the tribunals with the necessary information to produce consistent interpretations through careful drafting.

144. Wong, *supra* note 11, at 138.

provide a complete summary or analysis of all theories of treaty interpretation. A basic understanding of treaty interpretation, however, provides a foundation for recommending improvements to treaty drafting. Further, theories of treaty interpretation highlight several of the issues that exist when writing a treaty.

To start, the physical treaty is a written document that memorializes a "discussion of terms, conference, [and] negotiation."[145] It uses language to express the intentions and expectations of the negotiating parties.[146] Immediately, conflict abounds since "language as a means of communication is fraught with ambiguities, mistakes, and deception."[147] The Vienna Convention on the Law of Treaties includes several treaties that champion textualism over intentionalism as the appropriate method of interpretation.[148] The textualist approach presumes that the text is "the authentic expression of the intentions of the parties."[149] The Vienna Convention additionally requires that interpretation be "in good faith," thereby ensuring that the interpretation not lead to an absurd result.[150]

Scholars suggest using (and some interpretive bodies do in fact use) extratextual sources when interpreting treaties.[151] Extratextual sources, including drafting history, arguably reveal the parties' underlying legislative intent or purpose, thereby "illuminat[ing] the meaning of . . . the text of a statute."[152] In fact, the European Court of Justice "gives weight to legislative policy rather than language" when interpreting different textual versions of European Community Law.[153]

Interpretative methodologies embrace other factors as well. The purpose of the document is influential to determining its meaning.[154]

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145. Glashausser, *supra* note 140, at 1248.

146. *Id.* at 1258. Glashausser further notes that modern conceptions of treaties by judges and scholars "have tended to reduce treaties to part statute, part contract." *Id.* at 1248. By likening treaties to contracts or legislation, scholars and judges have implicitly selected the starting point for interpretative theory. *Id.* at 1249.

147. Shelton, *supra* note 16, at 611–12.

148. Glashausser, *supra* note 140, at 1260.

149. *Id.*

150. *Id.* at 1261.

151. *Id.* at 1268. The International Court of Justice is a tribunal willing to use extratextual sources when interpreting treaties, although the Court has formally announced a rule of strong textualism. *Id.* at 1264–66.

152. Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 743 (1998).

153. Ana M. Lopez-Rodriguez, *Towards a European Civil Code without a Common European Legal Culture? The Link Between Law, Language and Culture*, 29 BROOK. J. INT'L L. 1195, 1212 (2004).

154. *See* Glashausser, *supra* note 140, at 1270–71 (discussing the importance of purpose).

Purpose in the ambit of treaties inevitably includes diplomacy.[155] The cooperation expressed by the countries is embodied in the treaty, which symbolizes the bond between the nation-states, and is offered as a unique characteristic of treaties relevant to their interpretation.[156] Additionally, the subject being interpreted in any treaty is "presumed to be the definition by sovereign actors of their own formal obligations."[157]

Others suggest that arbitrators guide their interpretation by "inductive principles" induced from the value judgments reflected in the provisions of the treaty to identify broad policies and purposes.[158] Through this process, one scholar suggests that arbitrators can fill in the gaps in meaning or application in the treaty.[159] Additionally, arbitrators may consider the relative bargaining position of the parties.[160] Consideration of bargaining power can justify the arbitrator resolving "any ambiguity in the text against the . . . party with more bargaining power."[161] In the case of BITs, developing countries are those with less bargaining power and generally prefer that "any BIT provision that accords rights to the investor and imposes obligations on the host State" be interpreted restrictively, while "developed countries will read the same provision expansively."[162]

The maze of methodologies leaves the reader with only traditional interpretive methods that do not provide concrete solutions for treaty interpretation. The methods serve as guides for determining meaning from the text; however, rarely does one governing text exist. The multilingual aspect of treaties fuels conflicts of interpretation. For this reason, all of the authoritative texts should be considered; by consulting multiple texts, the expectations of the parties are more likely to be met.[163] The multilingual complexities of interpretation require exploration as well.

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155. *Id.* at 1270. Glashausser posits that the diplomatic purpose of most treaties is inconsistent with strict textualism. *Id.* at 1300.

156. *Id.* at 1271.

157. Van Alstine, *supra* note 152, at 707.

158. *Id.* at 751.

159. *Id.*

160. Glashausser, *supra* note 140, at 1272.

161. *Id.*

162. Wong, *supra* note 11, at 138.

163. *See* Glashausser, *supra* note 140, at 1316 (stating that "multiple authoritative texts should be considered in all instances").

2. Multiple Authoritative Texts in Different Languages as the Impetus for Additional Problems

All interpretative methods require that the arbitrator address the language of the treaty and its various ambiguities, mistakes, and deceptions.[164] Law and language "are products of the same social, economic and cultural influences" and, therefore, "legal thinking cannot be easily separated from the language in which it is formed."[165] The dependency on language, whose foundation garners meaning from the social and cultural influences that create it, leaves already conflicted tribunal judges further handicapped in the search for consistent interpretation. The problems inherent in divining meaning from language "may be alleviated or exacerbated by drafting texts in multiple languages."[166] In particular, treaties appear "in not only one, but typically several, authoritative languages."[167] BITs are written in at least the native languages of both contracting nation-states (as well as in additional languages)—and both treaties are considered authoritative.[168] Subsequently, several "plain meanings" potentially exist for each term used in the treaty.[169] Most interpretative methods, including the "ordinary meaning" method stipulated in the Vienna Convention of the Law of the Treaties, do not resolve this dilemma.[170] By embracing a distinctly textualist approach, interpretive methods such as the Vienna Convention compel drafters to construct the treaty with exacting particularity.[171] This is particularly difficult when multiple translations are equally authoritative.

The issue of multilingual text comes up prior to the arbitrator confronting the existence of multiple ordinary meanings gleaned from several authoritative texts. The authoritative texts most likely do not capture the same idea; even if the parties shared a thought at negotiation, the consensus is probably lost "when that thought is translated into two slightly different sets of words."[172] The connotations of words that refer to the same basic concepts or that have the same dictionary meaning vary in different languages; thus, intended nuances may be missed.[173] Subsequently, the text doubtfully captures the parties' shared intent, particularly because it

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164. *See supra* text accompanying note 147.
165. Lopez-Rodriguez, *supra* note 153, at 1211.
166. Shelton, *supra* note 16, at 612.
167. Van Alstine, *supra* note 152, at 742.
168. Shelton, *supra* note 16, at 615.
169. Van Alstine, *supra* note 152, at 742.
170. Wong, *supra* note 11, at 163; see also *supra* text accompanying notes 76–77.
171. *See* Van Alstine, *supra* note 152, at 744 (noting that extrinsic evidence should only be used in "exceptional circumstances") (citation omitted).
172. Glashausser, *supra* note 140, at 1277–78.
173. *Id.* at 1278, 1315.

is unlikely that there was a true "meeting of the minds."[174] Consequently, disputes are ripe in this context.[175] Often ambiguity may be used deliberately in drafting "due to lack of agreement over the substance of the text."[176] In fact, when drafting a BIT, "the most difficult problem is probably striking the balance between details and generalities."[177] Although an appropriate balance between flexibility and clarity must be found, too often the scale is tipped in favor of flexibility over clarity, as is evidenced by the lack of consistency in interpretations.[178] This practice erodes the reliability that countries seek when entering a BIT, forcing drafters back to interpretive dilemmas since they should carefully articulate with specificity the terms that best reflect the agreement.

Multiculturalism also affects treaty drafting because "peoples across the globe use and understand language in different ways."[179] When "communicators do not share background knowledge and assumptions[,] . . . 'the best parsing in the world will fail to deliver the full meaning of a sentence.'"[180] Cultural norms complicate this since different "legal cultures vary in terms of how precisely people write."[181] This "cultural untranslatability" stems from the fact that many terms are "rooted in the political and legal history of a particular country."[182] Legal terminology is particularly specific to each national legal system; "[h]ence, a literal translation of a given legal term in another language may not exactly express the same concept."[183] In many respects, "legalese" is a separate language itself.[184]

Beyond basic definitional issues, the multilingual nature of bilateral investment treaties is problematic because "when the negotiating parties' linguistic and cultural backgrounds differ, [treaty] norms may . . . often be misunderstood."[185] Thus, drafters encounter a conundrum; faced with the necessity of resolving inconsistency by avoiding ambiguity, drafters must turn to the very tool that is the crux of confusion: language. Further, not only do drafters need to use specific language, but they need to translate that

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174. *Id.*

175. *See* Shelton, *supra* note 16, at 619 n.40 (quoting Michel de Montaigne [translation] "Most of the instances of the world's troubles are grammatical. Our trials would not arise but for the debate over laws' interpretation.").

176. *Id.* at 620.

177. DOLZER & STEVENS, *supra* note 24, at 14.

178. *Id.*

179. Glashausser, *supra* note 140, at 1280.

180. *Id.*

181. *Id.* at 1281.

182. Shelton, *supra* note 16, at 619.

183. Lopez-Rodriguez, *supra* note 153, at 1200.

184 Rose Kennedy, *Much Ado About Nothing: Problems in the Legal Translation Industry*, 14 TEMP. INT'L & COMP. L.J. 423, 426 (2000).

185. Glashausser, *supra* note 140, at 1276.

language as well. So the problem stems from the combination of linguistic failures to capture intention universally and issues of translation. Simply throwing one's hands up at this juncture does nothing to alleviate the problem of inconsistency. Leaving all solutions to *ex post* interpretation clearly does little once the magnitude of the difficulties encountered during interpretation is illuminated. Thus, some *ex ante* improvements must be explored.

VI. PROPOSAL FOR A COMPILATION OF KEY TERMINOLOGY TO SERVE AS A MULTILINGUAL "THESAURUS" FOR THE PURPOSE OF DRAFTING IMPROVEMENTS

A. *Why Multilateral Investment Treaties Are Not the Solution*

Attempts at multilateral investment treaties were made following the extinction of the Hull Rule and general abatement of international custom on direct investment.[186] These attempts failed, however, "because they had to address wide-ranging interests of multiple countries that were ultimately too striated to reconcile."[187] The diverse interests represented in the investment sphere and variety of domestic practices, combined with the history of a lack of multilateral agreement on these issues, suggest that a multilateral investment treaty would not be feasible or preferable.[188] Therefore, improvements will more easily be accomplished through agreement on nomenclature, denotation, and connotation than attempts to garner universal agreement in a multilateral treaty. Further, a multilateral treaty will not solve the problems of interpretation that are encountered in the multilingual sphere. A multilateral treaty would not resolve the interpretive problems that exist when trying to extract a single meaning from multiple texts in various languages.[189] For a multilateral agreement process to succeed, a common legal discourse would be required, which would have to be multilingual.[190]

B. *Characteristics of an Improved Draft*

The meaning of the specific terms used is all the more critical since the text of treaties is often deliberately ambiguous.[191]

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186. Wong, *supra* note 11, at 140; see *supra* text accompanying notes 29–30.

187. Wong, *supra* note 11, at 140.

188. COSBEY ET AL., *supra* note 22, at 21.

189. *See supra* note 82.

190. Lopez-Rodriguez, *supra* note 153, at 1218. The author also notes that "[t]his multilingual discourse would, of course, presuppose the existence of polyglot lawyers and academics in command of many languages." *Id.*

191. Glashausser, *supra* note 140, at 1275.

Deliberate ambiguity often promotes international cooperation and provides leaders political flexibility when seeking ratification of a treaty.[192] This ambiguity, however, proves fatal when seeking reliability and consistent interpretations in arbitration. Ambiguity is fodder for arbitration, and thus, the antithesis of good drafting.[193] Although it may serve a diplomatic purpose, it ultimately is a source of great dispute.[194] Semantic ambiguity arises out of the words themselves.[195] The drafter must clarify its meaning when colorable arguments exist for multiple meanings.[196] Issues of multilingualism and translation compound this problem and could be improved by creating pre-draft consensus on terminology.

C. *A Compilation of Key Terminology as a Resource for Improved Drafting and Interpretation*

Although resources already exist for the treaty writer, no single source exists providing a compilation of terminology, and therefore, there is no across-the-board agreement on definitions for commonly used terminology.[197] To effectuate change, this Note suggests that a non-governmental or international organization compile a "thesaurus" of terminology spanning multiple languages that would serve as the guide to treaty drafters. The broad scheme entails each country submitting a "dictionary" or "definitions article" listing words or terms that the country would use if constructing its own model BIT. Along with the list, the country would include a definition and short explanation of the connotations of that word and the scope of the meaning. This thesaurus would serve as a tool for drafters and arbitrators. Once compiled, the thesaurus would provide drafters with the bank of basic terms necessary for constructing provisions that capture the expectations of the nation-states party to the treaty. Further, arbitrators could use the resource as evidence of the *ex ante* intentions of the contracting parties. Variations from these norms would provide further guidance as indications of alternative intentions of the contracting parties.

BITs are relatively similar across the board, encompassing similar obligations and addressing limited and specific issues.[198] The

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192. *Id.* at 1275–76.

193. THOMAS R. HAGGARD, CONTRACT LAW FROM A DRAFTING PERSPECTIVE—AN INTRODUCTION TO CONTRACT DRAFTING FOR LAW STUDENTS 39 (2003).

194. *See supra* text accompanying note 176.

195. HAGGARD, *supra* note 193, at 39.

196. *Id.*

197. *See generally* Katherine Guerin, *International Contracts and Terminology: An Annotated Research Guide for the U.S. Practitioner*, 29 INT'L J. LEGAL INFO. 575 (2001) (providing a broad range of useful interpretive sources but recognizing that the "sources are by no means comprehensive").

198. *See supra* Part III.

intentions and expectations of the parties, however, vary within these issues. The proliferation of treaties further suggests a formulaic approach by many countries. These particular treaties require a limited bank of key terminology. Subsequently, creating a universal consensus on terminology is achievable, so long as consensus only requires *individual countries stating their chosen terminology,* rather than universal agreement. Individual countries' submissions would then be compiled to map the terminology across languages.

The goal is to improve the drafting of the treaties and the ability of developing countries with less bargaining power to ensure that their conception of the negotiation and agreement is captured in the treaty. By using a bank of terms that has previously been given meaning and compiled to create a consensus across languages on the chosen word to fill a specific role, both parties can be clearer on what is being agreed to and memorialized in the formal document. Developing countries will be able to rely more on the documents, knowing that their conception of the investment treaty has been memorialized.

This will not resolve all interpretive issues. The compilation could not possibly contain all the possible terms or general words that could be used in any BIT. Further, it would not address the grammatical issues that can plague language and change meaning across translations. The universal agreement on key terms across languages, however, puts more of the chips on the table. Both parties are better informed as to what tools they are working with in constructing the treaty. Therefore, a meeting of the minds is more likely to exist. The benefit of the thesaurus existing as a bank of all languages is that it empowers otherwise disenfranchised countries; the thesaurus ensures that their language will be on the same playing field as the already dominant languages.

Although the intention of the thesaurus would be to improve the drafting process and thereby produce more clearly worded documents that accurately represent the parties' intentions, it would also prove helpful when disputes arise. Since the predominant method of interpretation is a textualist approach, a single compiled resource containing the expected application of specific terminology should aid in the interpretive process. By providing the arbitrators with a resource that demonstrates the prior intentions of the party, the arbitration will likely lead to results more in line with the parties' expectations. This will ultimately further the goal of improved consistency in application and interpretation of BITs.

As the consistency of interpretation improves, all parties involved—developing countries in particular—will be able to rely on BITs more faithfully. Increased reliability is inherently beneficial. Further, reliable interpretations will lead to continued improvement in the drafting process, as consistent interpretations will create a precedential jurisprudence for the parties to the treaties. Such

precedent could then be used to guide their drafting of future BITs. Developing countries are more likely, then, to reap the benefits they attempt to sow when entering a BIT. Subsequently, the use of BITs will continue, if not increase.[199]

To effectuate this goal, two prominent routes seem apparent: (1) forming a new non-governmental organization or (2) mobilizing an existing international organization. The first option of forming a new non-governmental organization appears most daunting as it would require not only the consensus of numerous countries but also financial support for its formulation. To be credible, each individual government of the participating nation-state must agree to the proposed terminology for its country, otherwise the entries would merely be scholarly recommendations (which, although helpful, would not have as substantial an impact on reliability and predictability). Thus the formation of an independent organization that would serve as a depository of terms provides political as well as financial hurdles. Organizing and mobilizing only the least developed or developing nations of the world poses a substantial task due to opportunism, mistrust, and collective action problems.

Further, if those countries do organize as a unit to support the creation of an independent organization, they will still be plagued with political hurdles and the task of funding that organization. To be complete, the compilation would require submissions not only from the developing nations, but also from developed nations. An independent organization created solely by developing nations would probably struggle to garner sufficient respect in the international community to get reliable submissions from developed nations. Further, any document produced by the independent organization would only have the backing of the nations that created the organization and therefore would probably lack clout in future proceedings. Finally, the financial responsibility of funding the organization would fall on the countries that have the least resources with which to do so.

The benefit of an independent organization, or one created by unifying developing countries (as was done to defeat the Hull Rule), is that this organization would be less likely to fall prey to the desires of developed nations. By creating the organization through the combined efforts of developing nations, those nations would, in effect, re-orient the disparate bargaining power that infuses the negotiation process. For this reason, developing countries may find this route most attractive. By forming their own organization, these countries

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199. This is premised on the assumption that BITs are beneficial to developing countries. Although one may debate the normative value of BITs, in the absence of an international body of law or multilateral agreement on foreign direct investment, BITs seem to provide developing countries the greatest access to the advantages of investment by protecting investor rights.

would be taking full control over the process of compiling the thesaurus. The disadvantages of this route (e.g. lack of support from developed nations and lack of funding) suggest, however, that the most appropriate forum for such a compilation is an existing international organization. This does not preclude an independent organization from playing a pivotal role in the formulation of the compilation; it merely suggests that the organization would be most successful by working through an existing international caucus.

The United Nations Conference on Trade and Development (UNCTAD) may be the appropriate existing forum for such an endeavor. UNCTAD is a subsidiary organ of the United Nations General Assembly.[200] At UNCTAD conferences member nations assess "current trade and development issues, discuss policy options and formulate global policy responses."[201] UNCTAD facilitates "intergovernmental consensus building regarding the state of the world economy and development policies."[202] UNCTAD also helps identify the UN's role in addressing economic development issues.[203] It serves as "an authoritative knowledge-based institution whose work aims to help shape current policy debates and thinking on development."[204] One of UNCTAD's three key functions is undertaking "research, policy analysis and data collection for the debates of government representatives and experts."[205] Therefore, UNCTAD generally provides the appropriate forum for such an exercise to occur. It would provide organization and resources for the process of compilation, international support for the final product, and legitimacy through the participation of developed states.

The Trade and Development Board serves as the overseer of all activities of UNCTAD.[206] Further justification for this avenue is that Board membership is open to all State members of UNCTAD, and intergovernmental as well as non-governmental organizations may observe meetings.[207] Therefore, all developing nations that are members of the UN and UNCTAD could be represented on the board. Additionally, any organized, independent non-governmental or

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200. UNCTAD Conferences, http://www.unctad.org/Templates/Page.asp?intItemID=3375&lang=1 (last visited Oct. 15, 2007).

201. *Id.*

202. *Id.*

203. *Id.*

204. About UNCTAD, http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1 (last visitedOct. 15, 2007).

205. *Id.* The other two functions include serving as a forum for intergovernmental deliberations aimed at consensus building and providing technical assistance.

206. UNCTAD, Trade and Development Board, http://www.unctad.org/Templates/Page.asp?intItemID=1906&lang=1 (last visited Oct. 15, 2007).

207 UNCTAD, The Intergovernmental Process, http://www.unctad.org/Templates/Page.asp?intItemID=3360&lang=1 (last visited Oct. 15, 2007).

intergovernmental organization created to champion this task could apply for observer status and be present at the meetings.

UNCTAD's most recent conference in São Paulo, Brazil, included an agreement to better integrate NGOs, the private sector, and academia into the work of UNCTAD.[208] This demonstrates UNCTAD's recognition of the important role that "civil society" plays in advocating for development and adding value. This agreement additionally demonstrates a willingness to work with these organizations in joint meetings and discussion forums in order to foster concrete development outcomes.[209] Thanks to this recognition, it would be possible for a non-governmental organization to facilitate the compilation of terminology and then introduce it to UNCTAD through this civil society outreach focus. Thus, the work could maintain independence, in terms of protection from undue influence by developed countries, while simultaneously garnering the support and subsequent legitimacy from acceptance by such a large and influential international organization as the UN.

The credibility—and therefore binding quality—of BITs can be increased by promoting improvements in the drafting process. By providing a compilation of terminology across multiple languages, drafters as well as interpreters can focus on a single resource as the primary resource demonstrating the basic expectations of the contracting parties. To produce such a compilation will require international mobilization. This process can be spear-headed by either a non-governmental organization or an existing international governmental organization. A non-governmental organization would provide the benefit of independence from the influence of powerful developed countries. However, it potentially lacks sufficient credibility to (1) prompt countries to submit to the compilation and (2) ensure its future use of the resource in drafting as well as interpretation. Turning to existing international organizations, the UN provides sufficient clout to support any international compilation. Within the UN, UNCTAD serves as the appropriate forum for raising the specific concerns presented, as well as for implementing the campaign for change.

VII. CONCLUSION

Foreign direct investment is a crucial part of a globalized economy. Since the universal rejection of the Hull Rule and other international customary laws regarding protection of foreign

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208. UNCTAD, UNCTAD and Civil Society, http://www.unctad.org/Templates/Page.asp?intItemID=3455&lang=1 (last visited Oct. 15, 2007).

209. *Id.*

investments, BITs have served as the primary mechanism for regulating investment relations. BITs memorialize the negotiations between two independent nation-states regarding obligations, regulations, and expectations in investment. Both the nation-state parties to the BITs, as well as private investors who operate under the auspices of BITs, depend on these treaties for reliability and stability through credible and binding commitments.

The reliability, and therefore stability, provided by BITs, however, expires when tribunals resolve disputes through inconsistent interpretations of treaties. Where no consistent interpretation exists, there is no reliable source of commitment. Arbitration reform is one means of improving the situation. Through increased transparency and appellate review, scholars argue, more consistent interpretations will result. These changes in the arbitral system, however, run contrary to the attractive characteristics of arbitration: privacy and efficiency. Furthermore, neither fully resolves the interpretive conflicts.

Interpretation of BITs, and treaties generally, is a complex exercise. Multiple methods of interpretation exist, including focus on the intent or spirit of the treaty and use of extratextual resources. All methods, however, ultimately rest on the text of the document, and therefore on language. Language generally poorly communicates a party's intentions and fails to fully captures the party's meaning, and multilingual translations only compound the problem. These dilemmas, however, should not prevent drafters from focusing on improved contracting to encourage consistent application and interpretation. Compiling key terminology used in BITs as submitted by individual nation-states in their native language would aid in this process.

*Kelley Connolly**

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* J.D. Candidate, May 2008, Vanderbilt University Law School; B.A., Dartmouth College, 2005. Special thanks to my parents for their love and support, particularly to my father for instilling in me an early love of the law. Thanks also to Prof. Christopher Brummer for his guidance with this Note.