

Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law

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Introduction.....	815
I. Unequal Standards in International Law	816
II. The Current International Investment Law Scheme.....	821
III. Applying Contextual Standards to International Investment Law.....	822
IV. Why Are Contextual Standards Needed?.....	825
V. Possible Arguments Against Adopting Contextual Standards ..	830
Conclusion	839

INTRODUCTION

The concept of judging developing countries' compliance with the substantive requirements of international law based on more favorable standards is not a new one, and the idea is fairly easy to grasp; developed countries are viewed as more capable—economically, technologi-

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cally, socially, and legally—of complying with the requirements of international agreements. Many international agreements, including treaties on trade, the environment, human rights, intellectual property, and other areas, recognize that developing countries will have more difficulty complying with international obligations and adopt either differential standards, which expressly grant developing countries a more favorable position under the agreement, or contextual standards, which allow the relative development of the country or other similar factors to define the standard to which a country is held.

This Note argues that these more favorable standards for developing countries should also be adopted in international investment law. Contextualizing the standards by which a developing country's compliance with the substantive requirements of international investment law is judged would help to ensure that compliance is not viewed in a vacuum, but is evaluated with careful consideration of the relative development of the country.

Part I of this Note will explore differential and contextual standards in greater detail and present examples from various areas of international law. Part II will describe the current international investment law scheme. Part III suggests how more beneficial standards for developing countries might be adopted and how they might affect the relevant analysis. Part IV explains why new standards are needed. Finally, Part V discusses and rebuts possible arguments against adopting these standards.

I. UNEQUAL STANDARDS IN INTERNATIONAL LAW

Before examining international investment standards in detail, it is necessary to understand the ways in which developing countries are granted lower or more beneficial treatment in other areas of international law.¹ Developing countries can be granted more favorable treatment both in “hard law,” traditional forms of international law such as treaties, and in “soft law,” such as General Assembly Resolutions and Declarations which “do not constitute ‘law,’ properly called, and yet are not without legal content and consequence.”² Developing countries can be granted beneficial treatment both under the substantive obligations of

1. It is also interesting to note that there are agreements, including arms control and disarmament treaties, which grant more favorable treatment to developed countries. For a discussion of this treatment, see LAVANYA RAJAMANI, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* 34–46 (2006).

2. *Id.* at 91.

a treaty and under the implementation timelines and strategies. Developing countries also are frequently given financial and technological assistance in complying with certain requirements of the agreement.³

This beneficial treatment comes in two types of “international norms” that “delimit the treatment that international law can and does provide developing countries.”⁴ The first type is a differential norm that “on its face provides different, presumably more advantageous, standards for one set of States than for another set.”⁵ For example, a treaty granting developing countries ten years to comply with a goal or standard while giving developed countries only five years to comply is a differential norm.

The second type of international norm is a contextual norm “that on its face provides identical treatment to all States affected by the norm but the application of which requires (or at least permits) consideration of characteristics that might vary from country to country.”⁶ A treaty which states that all countries shall comply “to the best of their abilities” is an example of this second type of norm. Contextual norms can either be “general, in which case the terms of the norm do not place a limit on the characteristics that may be considered, or limited, in which case the norm is phrased such that the set of relevant characteristics is defined (more or less precisely).”⁷

Modern international law is “replete” with examples of differential and contextual norms.⁸ These norms are especially prevalent in trade law. The idea of granting developing countries “special and differential treatment” became popular after many developing countries began to join the General Agreement on Tariffs and Trade (GATT) in the 1950s,⁹

3. *Id.* at 93.

4. Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 *COLO. J. INT'L ENVTL. L. & POL'Y* 69, 73 (1990). The third type of international norm is an absolute norm which “provides identical treatment to all countries and does not require or permit consideration of factors that vary between countries.” *Id.* at 76.

5. *Id.* at 73.

6. *Id.* at 74. Although this Note will often refer to adopting contextual standards *for* developing countries, this language is imprecise. In reality, contextual standards apply to all states party to the specific agreement. Contextual standards, however, clearly will have the most significant impact on the behavior and liability of developing countries. Instead of “differential” and “contextual,” these norms are sometimes referred to as “explicit” and “implicit” differential norms, respectively. See RAJAMANI, *supra* note 1, at 90.

7. Magraw, *supra* note 4, at 75.

8. *Id.* at 98.

9. Edwini Kessie, *The Legal Status of Special and Differential Treatment Provisions Under the WTO Agreements*, in *WTO LAW AND DEVELOPING COUNTRIES* 12, 16 (George A. Bermann & Petros C. Mavroidis eds., 2007).

and now this special treatment is “the cornerstone describing developing countries’ participation in the GATT/WTO.”¹⁰ The goal of these measures, as recognized by the Preamble to the World Trade Organization (WTO) Agreement, is a “need for positive efforts designed to ensure that developing countries...secure a share in the growth in international trade commensurate with the needs of their economic development.”¹¹ This treatment takes the form of measures that both allow developing countries to protect their domestic industries and grant them preferential access to the markets of other countries. For example, Article XXXVI of GATT provides that developed country members “do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.”¹²

Under the WTO Agriculture Agreement, developing countries were given ten years to cut their tariffs on agricultural products by an average of twenty-four percent while developed countries were given six years to cut thirty-six percent.¹³ Under the Agreement on Trade-Related Aspects of Intellectual Property Rights, developed countries were given one year to bring their legislation into conformity with the Agreement, developing countries were given five years, and least-developed countries were given eleven years.¹⁴

Contextual and differential norms also provide the foundation for developing countries’ participation in international environmental law. The primary reason for granting developing countries differential treatment in environmental law is the idea that “developing countries have not had the same socio-economic benefits as the developed countries that over-exploited the global environment, yet they are expected to share the burden of controls on economic development that may have a negative impact on the environment.”¹⁵ These lower standards also re-

10. George A. Bermann & Petros C. Mavroidis, *Introduction to WTO LAW AND DEVELOPING COUNTRIES*, *supra* note 9, at 1; *see also* PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 676 (2005) (“Almost all WTO agreements provide for special and differential treatment provisions for developing-country Members to facilitate their integration into the world trading system and to promote their economic development.”).

11. Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154, *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

12. General Agreement on Tariffs and Trade art. XXXVI, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47.pdf.

13. Kessie, *supra* note 9, at 30.

14. *Id.* at 32.

15. ANITA MARGRETHE HALVORSSSEN, *EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES* 28 (1999).

flect the need “[w]hen we consider the contribution that developing countries can make to solving problems of global change,...to give special consideration to their economic and technological capabilities.”¹⁶ This policy in international environmental law, often termed common but differentiated responsibility, is memorialized in Principle 7 of the Rio Declaration on Environment and Development:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.¹⁷

Principle 6 also states that the “special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.”¹⁸

The Kyoto Protocol has been called the “[m]ost [r]igid [a]pplication”¹⁹ of common but differentiated responsibility because developing nations assumed no binding obligations to reduce greenhouse gases while developed countries agreed to, on average, a 5.2% reduction of their 1990 emissions levels from 2008 to 2012.²⁰ This asymmetry in

16. Cheng Zheng-Kang, *Equity, Special Considerations, and the Third World*, 1 COLO. J. INT’L ENVTL. L. & POL’Y 57, 63 (1990) (“The steps we ask developing countries to take must realistically correspond to developing countries’ capabilities.”); *see also id.* (“Special consideration thus means that when considering the solutions to problems of global change, we must consider the economic development of the developing countries and their need to raise their standards of living.”).

17. Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, U.N. Doc. A/CONF.151/26 (Vol. 1), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

18. *Id.*

19. Michael Weisslitz, Note, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 COLO. J. INT’L ENVTL. L. & POL’Y 473, 483 (2002); *see also* Kristen Sheeran, *Beyond Kyoto: North-South Implications of Emissions Trading and Taxes*, 5 SEATTLE J. FOR SOC. JUST. 697, 703 (2007) (“It can be argued that the Kyoto Protocol represents a truly remarkable and unprecedented example of the willingness of the global community to prioritize fairness for developing countries in an international agreement.”).

20. Sheeran, *supra* note 19, at 703.

obligations under the Kyoto Protocol “has become one of the major arguments against ratification in the U.S.”²¹

Contextual and differential standards are also common outside of environmental and trade law. For example, the 1972 World Heritage Convention states that each state, in protecting culture and natural heritage for future generations “will do all it can..., to the utmost of its own resources.”²² Under the International Covenant on Economic, Social and Cultural Rights, each state is required to take steps toward the realization of the rights covered by the Covenant “to the maximum of its available resources.”²³ Moreover, “[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the...Covenant to non-nationals.”²⁴ Under Article 22 of the Universal Declaration of Human Rights, everyone “is entitled to realization, through national effort and international co-operation and in accordance with the organization and *resources of each State*, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”²⁵ The 1971 Paris Revisions to the Berne Convention on international intellectual property law created an appendix specially addressing the needs of developing countries, which became a part of the Convention and which gave developing countries special status in both the implementation and substantive requirements of the Convention.²⁶ The Basel Convention on hazardous waste production states that each party shall take action to reduce such production “taking into account social, technological and economic aspects.”²⁷

Contextual and differential standards play a critical role in international law. These standards take many different forms and have different aspirations, but they all recognize the vast differences that currently

21. VED P. NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY 40 (2003).

22. Convention Concerning the Protection of the World Cultural and Natural Heritage art. 4, Nov. 23, 1972, T.I.A.S. 8226, *available at* <http://whc.unesco.org/archive/convention-en.pdf>.

23. International Covenant on Economic, Social and Cultural Rights art. 2, Jan. 3, 1976, 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

24. *Id.*

25. Universal Declaration of Human Rights art. 22, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948), *available at* <http://www.un.org/Overview/rights.html> (emphasis added).

26. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. TREATY DOC. No. 99-27 (1971), *available at* <http://www.jus.uio.no/lm/wipo.protection.of.literary.and.artistic.works.convention.berne.1886.1979/doc#331>.

27. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 4(2), *opened for signature* Mar. 22, 1989, 28 I.L.M. 657.

exist between countries and the effect that these differences have on countries' priorities and capabilities. As the next Part of this Note will demonstrate, this recognition is absent from international investment law.

II. THE CURRENT INTERNATIONAL INVESTMENT LAW SCHEME

Bilateral investment treaties (BITs), the primary vehicle for protecting foreign investments against detrimental treatment by host governments,²⁸ currently do not provide more beneficial standards for developing countries. Substantive obligations toward foreign investments are being written into BITs without regard to the relative economic, legal, social, or technological development of the countries involved. For example, the U.S.-Congo BIT requires fair and equitable treatment toward investments and forbids arbitrary and discriminatory treatment, but the treaty language is written in absolute terms and does not permit a country's relative development to shape the standard by which it is evaluated:

Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.²⁹

Similarly, international investment law tribunals generally do not consider the context of a country's individual capabilities or needs in judging the country's compliance with investment obligations. Indeed, if one were to read most international investment arbitration decisions with the names of the parties removed, it would be nearly impossible to determine whether the state accused of breaching its obligations is a de-

28. See generally R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 47–119 (2005); M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 204–68 (2d ed. 2004).

29. Treaty with the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Congo, art. II, Feb. 12, 1990, S. TREATY DOC. NO. 102-1 (1991); see also 2004 U.S. Model BIT [hereinafter U.S. Model BIT], available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (setting out the standard U.S. language for investment obligations without any use of contextual or differential standards).

veloped or developing country. For example, the ELSI case brought against Italy and decided by the International Court of Justice (ICJ) in 1989,³⁰ and the AAPL arbitration brought against Sri Lanka and decided by an International Centre for Settlement of Investment Disputes (ICSID) tribunal in 1990³¹ both involved the same claim: that the state had failed to provide “full protection and security” to an investment within its territory. Neither case, however, acknowledges either the fact that Italy is a developed country and Sri Lanka is a significantly underdeveloped country, or that their relative development might affect their capacity to provide the “full protection and security” required by international law. Indeed, one reads the cases with the impression that the countries are in similar circumstances with nearly the same priorities and capabilities.

III. APPLYING CONTEXTUAL STANDARDS TO INTERNATIONAL INVESTMENT LAW

Obligations toward foreign investments are currently being written in treaties and interpreted by tribunals without regard to the relative development of the countries involved. It is unlikely that the language in existing BITs could be interpreted as contextual or differential standards because there is no indication that the parties intended the language to have such a meaning. The Vienna Convention on the Law of Treaties would consider such an interpretive revision of a BIT to be an invalid interpretation.³² In order to adopt new standards, therefore, new BITs must be negotiated.

As granting developing countries special technological help or a longer time frame to implement their investment obligations is not the goal of adopting new standards, differential standards would be inappropriate. Put a different way, differential norms “recognize[] the need for differential treatment *per se*.”³³ There may be situations, however, in which such rigid differences in standards are not warranted. Contextual standards are therefore better suited for international investment law be-

30. *Elettronica Sicula, SpA (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20).

31. *Asian Agric. Prods. Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990.

32. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (“A special meaning shall be given to a term if it is established that the parties so intended.”).

33. Stuart Walters Belt, *Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 NAVAL L. REV. 115, 170 (2000).

cause the flexibility of these norms “allows coverage of and sensitivity to a range of factual situations and of causes and effects.”³⁴

Moreover, general contextual norms, rather than limited contextual norms that expressly limit what factors a tribunal could consider, would be more appropriate for international investment law. Because a wide array of facts may be relevant in a consideration of a country’s relative development, limiting what factors could be considered on the face of a treaty may have the unintended effect of constraining tribunals and producing results which do not reflect the nuances of the specific situation.

The new BITs could use a variety of language to adopt contextual standards. For example, a BIT could state that each party must provide an investment full protection to the maximum of its available resources. Alternatively, a BIT could state that each party agrees not to engage in arbitrary acts to the best of its abilities. Finally, the language of the standards could remain unchanged, with the parties simply memorializing their intention that the language be interpreted as contextual standards. This final option is the most flexible and may be the best option because it would allow for consideration of the widest array of facts and circumstances.

These new contextual standards would reshape the questions asked by tribunals. For example, tribunals currently ask whether a country violated the fair and equitable treatment provision found in BITs based on some universal standard of what is fair and equitable, without regard to the individual characteristics of the country; the inquiry is the same whether the country accused of breaching the obligation is the United States or Somalia. With contextual standards, the inquiry would shift; tribunals would ask, for example, whether a country treated the investor fairly and equitably given its social, legal, technological, and economic development and abilities. The more developed the country, the higher level of protection it must provide.

The inquiry into violations of the “full protection and security” guarantee would also shift. In *American Manufacturing & Trading Inc. v. Zaire*, an American company brought an arbitration proceeding against Zaire for the destruction of its property after nation-wide looting in September 1991 and January 1993. AMT alleged that Zaire had breached its obligation of “protection and security” guaranteed to investments in the U.S.-Zaire BIT. The Tribunal defined this standard as “an obligation of vigilance, in the sense that Zaire as the receiving State of invest-

34. Magraw, *supra* note 4, at 75; see also RAJAMANI, *supra* note 1, at 90 (stating that the use of contextual norms “permits a balancing of multiple interests and characteristics”).

ments...shall take all measures necessary to ensure the full enjoyment of protection and security of its investment.”³⁵ In holding that Zaire was required to pay AMT over \$9 million, the Tribunal found that Zaire failed to show “that it has taken all measure of precaution to protect the investments of AMT in its territory.”³⁶ Zaire was liable simply “for its inability to prevent the disastrous consequences of these events adversely affecting the investments of AMT which Zaire had the obligation to protect.”³⁷ The Tribunal went so far as to use the phrase *res ipsa loquitur*, holding that “what has happened is self-explanatory without requiring extraneous proof.”³⁸

While the Tribunal was quick to find that Zaire was responsible for failing to prevent the looting, missing from the Tribunal’s analysis is any discussion of the capacity of Zaire to take proactive measures to prevent the destruction of AMT’s property. If the Tribunal were applying the protection and security standard as a contextual standard, the analysis would change. First, the Tribunal would need to determine what level of compliance Zaire was capable of achieving based on its relative development. The second inquiry would then focus on whether Zaire met this level of diligence and action. As these questions were never considered, it is difficult to predict whether a contextual analysis would have affected the ultimate outcome. If Zaire took no action,³⁹ but was capable of making some effort at stopping the destruction, it would still be liable. If it attempted to take action, however, and was ineffective because of social, logistical, legal, political, or economic limitations, Zaire might not have been liable for failing to provide full protection and security.

The prohibition against “arbitrary treatment” would also be contextualized. Many BITs prevent countries from acting “arbitrarily,” although the term is not defined in the treaties themselves. The ICJ has defined

35. *Am. Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, ¶ 6.05, Award, Feb. 21, 1997; *see also Asian Agric. Prods. Ltd.*, ICSID Case No. ARB/87/3, ¶ 77 (“According to modern doctrine, the violation of international law entailing the State’s responsibility has to be considered constituted by ‘the mere lack or want of diligence’, without any need to establish malice or negligence.”).

36. *Am. Mfg. & Trading, Inc.*, ICSID Case No. ARB/93/1, ¶ 6.05.

37. *Id.* ¶ 6.08.

38. *Id.* ¶ 6.09; *see also id.* ¶ 6.11 (“The responsibility of the State of Zaire is incontestably engaged by the very fact of an omission by Zaire to take every measure necessary to protect and ensure the security of the investment made by AMT in its territory.”).

39. It appears that Zaire may have taken no action. *See id.* ¶ 6.08 (“The Tribunal deems it sufficient to ascertain, as it has done, that Zaire has breached its obligation by taking no measure whatever that would serve to ensure the protection and security of the investment in question.”).

arbitrariness, in a Friendship, Commerce and Navigation Treaty, the precursors to BITs,⁴⁰ to mean a “willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”⁴¹ Under a contextual standard, when judging whether state conduct was arbitrary, a tribunal would consider the development of the state. This is fairly intuitive; what shocks the conscience of judicial propriety is different in a country that has a sophisticated, accessible, and fair judicial system rather than one that has a virtually nonexistent judicial or political system.

Under contextual standards, the realities of an individual country will determine the expectations of full protection and security, fair and equitable treatment, and other substantive obligations. The requirements of international investment law will thus be based on a sliding scale. More developed countries with greater capacity to protect investments will be held to a higher standard. Conversely, a developing country less capable of providing protection will have its behavior judged against a standard based on its own development.

IV. WHY ARE CONTEXTUAL STANDARDS NEEDED?

The most obvious hurdle that the adoption of contextual standards faces is the common perception that the international investment law system is functioning as intended. In other words, if the system is not broken, why fix it? By 2005, over 140 countries had signed approximately 2,000 BITs defining the rights of investors against host governments.⁴² “[D]eveloping countries have willingly and, indeed, enthusiastically, signed BITs with developed countries.”⁴³ They have bound themselves to the current, strict standards—not differential or contextual standards. The arbitration awards are hardly universally against developing countries and most awards are successfully collected.⁴⁴ The current system, according to this view, seems to be functioning smoothly and is gaining in popularity.

40. See SORNARAJAH, *supra* note 28, at 209.

41. Elettronica Sicula, SpA (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 76 (July 20).

42. Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, N.Y. INT’L L. REV., Winter 2005, at 1, 2.

43. Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 666 (1998).

44. See MOSHE HIRSCH, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES 24 (1993) (“The overwhelming majority of arbitral awards rendered by [ICSID] up to the present have in fact been honoured by states.”).

This argument is less convincing when one acknowledges that the goal of adopting contextual standards is to improve the current regime rather than to replace the regime entirely. The international investment law scheme is not broken *per se*, but cracks are beginning to show. Recently, the current system has faced criticism and growing pressure to reform because BITs are “largely drafted to benefit the developed countries’ investors in the developing nation.”⁴⁵

Moreover, the vague terms in BITs have resulted in more litigation than developing countries anticipated,⁴⁶ and this litigation “can be quite expensive and detrimental for a developing country’s government and economic soundness.”⁴⁷ One example of such damaging arbitration is when Big Food Group (BFG), a supermarket chain based in the United Kingdom, sought to collect on a debt of £12 million allegedly owed to it by Guyana. The chain “pursued the arbitration despite the fact that BFG makes a yearly profit that is more than double the gross national product of Guyana.”⁴⁸

The current BIT scheme also faces significant criticism because developing countries are being forced to compete with one another in the negotiating process to “bid down the conditions on which they allow investment in an attempt to attract as much investment as possible.”⁴⁹ Because the host government is forced to give up concessions in order to attract investment, the investment actually creates little, if any, benefit for the host country.⁵⁰

This criticism is not limited to academia; there is evidence of an increasing backlash by developing countries against the current international investment law scheme. Sixteen years ago, José Alvarez, a former participant in U.S. BIT negotiations, warned that “[c]ountries are now turning to BITs in hope of economic benefits; if the benefits fail to materialize, there is the danger of a potent backlash.”⁵¹ This backlash is

45. Hamilton & Rochwerger, *supra* note 42, at 20–21 (arguing that BITs are creating “a situation where the developed country is reaping the largest benefit from the agreement”).

46. Olivia Chung, Note, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT’L L. 953, 961 (2007).

47. Hamilton & Rochwerger, *supra* note 42, at 22.

48. *Id.*

49. Guzman, *supra* note 43, at 672.

50. *Id.*; see also Hamilton & Rochwerger, *supra* note 42, at 26 (“The pressure to gain the financial investment of the more developed nation will often lead a host country to give up concessions that in the long run may not be in the best interests of the country’s environment, resources, or population. In addition, offering individual companies further concessions under the BIT program may completely negate the actual benefits that are sought to be gained by the investment.”).

51. Panel, *The Development and Expansion of Bilateral Investment Treaties*, 86 AM. SOC’Y INT’L L. PROC. 532, 553 (1992) (remarks by José E. Alvarez).

beginning to take shape. Jamaica has withdrawn from ICSID proceedings; Argentina increasingly has taken an anti-ICSID stance in the face of more than 30 arbitrations resulting from its 2001 economic crisis;⁵² and other countries such as Russia, Ukraine, the Republic of Congo, Indonesia, and Pakistan are gradually becoming more hostile to the enforcement of investment arbitration awards.⁵³ One primary explanation for this hostility is that most ICSID decisions do not reflect the realities of developing countries.⁵⁴

There are problems with the current system, and these problems can be significantly reduced by the adoption of contextual standards. There are four main benefits of contextual standards. First, these standards would create a more equitable system and prevent investors from getting an unfair windfall. Outside of international investment law, contextual and differential standards are used to create greater equity in international agreements. This need for equitable treatment is justified by two realities. First, in addition to any international obligations, developing countries face an extremely pressing issue: severe poverty and a dire need to raise their standard of living. Second, developing countries have less capacity to comply with strict substantive obligations under international law. This inability stems from various factors: a lack of capital and other resources; a lack of technological experience to develop, implement, and monitor new projects; legislative drafting inexperience; a lack of regulatory or administrative expertise to implement laws; and a population that is primarily concerned with its standard of living.⁵⁵ International agreements with contextual or differential standards thus reflect the principle that “states with varied resources and capabilities should be subject to equally varied and equitable requirements and obligations.”⁵⁶

These two realities are equally applicable to international investment law. Adopting contextual standards in investment law would acknowledge that while developing countries need foreign investment, they also have critical priorities outside of a specific BIT that may affect their

52. Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT'L L.J. 345, 372–73 (2007).

53. Chung, *supra* note 46, at 969–74.

54. Odumosu, *supra* note 52, at 373.

55. Magraw, *supra* note 4, at 69–70; *see also* Belt, *supra* note 33, at 171 (“[N]ations are willing to address obligations through the prism of capabilities and responsibilities.”).

56. *See* Karl Ohlsen, *Equality Among Unequals in International Environmental Law: Differential Treatment for Developing Countries*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 129, 129 (2000) (book review).

ability to undertake extensive investment obligations. Contextual standards would also recognize that when developing countries do take on investment obligations, they will have greater difficulty in complying because of a lack of development in various areas.

Although developing countries would still be required to pay damages for the breach of standards within their reach, it is fundamentally unfair to force a developing country, already coping with crushing poverty, to pay awards based on violations of unattainable standards. An award to an investor under such circumstances is simply inequitable.

The second main benefit of contextual standards is that although they would help to create more equity in the system, the change is not drastic enough to discourage most investors from coming to developing countries. Contextual standards would apply only to certain substantive standards. BIT provisions such as Most Favored Nation clauses or Non-Precluded Measures provisions would not be affected. One of the primary advantages of the BIT—the availability of a direct remedy against the state⁵⁷—also would not be affected. Moreover, the current jurisdictional, consent, procedure, and enforcement methods would remain intact.

The change is also not likely to discourage investors from coming to developing countries because the availability of international investment arbitration is only one of a multitude of factors influencing a company's decision to invest in a particular country, and it is far from the most important factor. Some companies are even unaware of the existence of investment treaties as an option for protecting their investments.⁵⁸ There is a growing amount of evidence that even when companies are aware of the existence of BITs, the fact that a particular country has signed a BIT plays, at best, a marginal role in influencing an investor's decision to invest in that country. For example, a 1998 United Nations Commission on Trade and Development study found that BITs have a "minor and secondary role in influencing [foreign direct investment] flows."⁵⁹

57. Gabriel Egli, *Don't Get BIT: Addressing ICSID's Inconsistent Application of Most-Favored Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1054 (2007).

58. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 347–48 (2007).

59. U.N. COMM'N ON TRADE & DEV., *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, at 122, UNCTAD/ITE/IIT/7, Sales No. E.98.II.D.8 (1998); see also Jennifer Tobin & Susan Rose-Ackerman, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* 21–22 (Ctr. for Law, Econ. & Pub. Policy Research Paper No. 293, May 2005) (concluding that for most countries, the relationship between the presence of a BIT and foreign direct investment (FDI) is weak and that "BITS by themselves do not determine the flows" of investment partly because "as a tool for attracting FDI, BITs do

Other factors such as the country's gross domestic product, population, levels of domestic investment, level of political risk, stability, availability of human capital, and degree of market liberalization as well as a company's predictions for immediate profit also play critical roles in affecting an investor's decision to choose a particular country.⁶⁰

Indeed, even the United States appears to recognize that BITs and other investment treaties may not have instant or significant effects on the level of foreign investment in a country. When BITs go to the U.S. Senate for approval, the State Department includes a letter of submittal which states, in part, "It is U.S. policy to advise potential treaty partners that conclusion of a BIT with the United States is an important and favorable factor in the investment relationship, but does not in and of itself result in immediate increases in U.S. investment flows."⁶¹ If the fact that a developing country has signed a BIT is not the primary reason that investors would choose to invest there, it is highly unlikely that moderate changes in some of the standards of those BITs will shift significant amounts of investment away from developing countries.

Third, contextual standards are advantageous because when developing countries are held to standards which they are capable of achieving, they will improve their overall compliance with international obligations. Increased compliance can have beneficial secondary effects for the developing country. One of the primary reasons developing countries sign BITs is to improve governance and rule of law within their own country, vis-à-vis their own nationals. The idea is that "over time...[domestic] authorities and institutions will experience improved governance and a heightened respect for the rule of law."⁶² It is also recognized that "[p]sychologically, [foreign investment] can provide economic role models, generate financial incentives and create hope. In short, it can be a motivational force."⁶³ Because contextual standards are based on the relative development of an individual country, adopting

not work in isolation"). *But see* Eric Neumayer & Laura Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment in Developing Countries? 28 (May 2005) (unpublished manuscript, on file with author) (finding that countries that have signed BITs are more likely to attract foreign investment).

60. *See* Franck, *supra* note 58, at 339, 349.

61. *See* Letter of Submittal from Lawrence Eagleburger to President Bush, Mar. 11, 1991, annexed to Treaty with the People's Republic of the Congo Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Congo, art. II, Feb. 12, 1990, S. TREATY DOC. NO. 102-1 (1991).

62. Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 161 (2007).

63. BISHOP, CRAWFORD & REISMAN, *supra* note 28, at 7.

these standards will make it more realistic for developing countries to satisfy their obligations toward investors and therefore attain these beneficial secondary effects.

Finally, adopting contextual standards may help reverse the current backlash by developing countries against the present international investment law regime. One commentator has suggested that in order to remedy the backlash, “ICSID should situate itself in a space where it can take matters of international concern and public interest into account—including the concerns of Third World peoples, economic development, environmental protection and human rights.”⁶⁴ Contextual standards will achieve this goal by acknowledging the differing needs and abilities of countries and the effect that these differences have on compliance with international obligations.

It is increasingly clear that ICSID decisions are not reflective of the conditions within developing countries and that there is an imbalance between protections for investors and benefits for developing countries. The benefits promised to developing countries simply have not materialized. By requiring developing countries to provide sufficient protection to investments without also requiring them to attain impossible standards, contextual standards can shift this balance in international investment law without radically altering the current system.

V. POSSIBLE ARGUMENTS AGAINST ADOPTING CONTEXTUAL STANDARDS

The primary concern about the adoption of contextual standards is that their alleged benefit—flexibility—could become a hindrance in reality. Investors are likely to be concerned that contextual standards will become a “get-out-of-jail-free card” by which developing countries will be able to avoid responsibility for damage to investments when brought to arbitration. It is certainly true that contextual norms offer developing countries greater latitude to defend the lawfulness of their actions and thereby create a risk that such standards will “interfere with public order.”⁶⁵ Taken to an extreme, a contextual standard which permits con-

64. Odumoso, *supra* note 52, at 378; *see also id.* at 373 (“The argument is not that ICSID tribunals should decide cases where states clearly breach their obligations in favor of those [Third World] states. Rather, it is that ICSID tribunals should recognize...within the parameters of the applicable law, that there may be explanations for a state’s actions, and factor this into their decisions...”).

65. Magraw, *supra* note 4, at 74.

sideration of a country's development could encourage a developing country to completely ignore its investment obligations.

This concern, however, is not likely to be borne out for three reasons. First, as already described above in Part IV, the adoption of contextual standards would not have a drastic effect on the current system because it only modifies certain standards. Second, certain actions could not be justified even under a contextual standard. Egregious actions or actions based on bad faith or failure to disclose likely could not be justified. Similarly, the mere fact of poverty would remain an insufficient justification for treaty violations. It would still be necessary for a developing country to prove that its lack of development in a specific area—technological, legal, social, or economic—should be considered when evaluating its compliance. Tribunals would carefully scrutinize evidence of development and whether a lack of development actually affected a country's ability to comply. Indeed, “the indeterminacy of contextual norms is not infinite: A contextual norm specifies the terms for discourse about the issue to which it applies and provides some bounds of acceptable behavior—bounds which, although not exact, usually are sufficiently precise that some conduct commonly will be seen as exceeding them.”⁶⁶

Third, it is unlikely that contextual standards will result in rampant investment violations because developing countries have interests in full compliance with their international obligations that go beyond the threat of arbitration or monetary costs from potential arbitral awards. States have a strong reputational interest in complying with international obligations.⁶⁷ When governments sign international agreements, “[t]he acceptance of treaty obligations raises expectations about behavior that, once made, are reputationally costly for governments to violate.”⁶⁸

66. *Id.* Moreover, if developed countries are worried that developing countries will be able to hide behind a lack of development in perpetuity, developed countries have the power to ensure that although development is to be considered by tribunals, developed countries expect continual progress in development, and thus continual progress in investment protection. For example, the exemption from trade reciprocity in Article XXXVI of GATT mentioned in Part I was further clarified in the Enabling Clause resulting from the 1979 Tokyo Round, which states that developing country members “expect that their capacity to make contributions or negotiated concessions... would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.” Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, ¶ 7, L/4903 (Nov. 28, 1979), available at http://www.wto.org/english/docs_e/legal_e/tokyo_enabling_e.pdf.

67. See, e.g., Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000).

68. *Id.* at 819.

Governments comply with international obligations “to preserve their reputation for predictable behavior in the protection of property rights.”⁶⁹ When a country has a strong record of compliance, investors are more likely to invest there.⁷⁰ Therefore, it would be costly for a developing country to try to push contextual standards to the extreme and provide no protections for foreign investments.

A further argument against the flexibility of contextual norms is that they may prove problematic for tribunals attempting to apply them. Contextual standards “provide little, if any, certainty in predicting the outcome of...international disputes settled by third parties such as courts and arbitral tribunals,”⁷¹ and they can lead to “manipulated, unprincipled third-party decisionmaking.”⁷² Tribunals would face a number of evidentiary issues regarding what evidence is relevant to the standard and problems with clearly determining and articulating the standard in each individual case. This problem is especially serious given the fact that most arbitral decisions are not subject to any appeal process. Inconsistency in arbitral decisions is already a significant problem in the current system,⁷³ and the adoption of contextual standards may serve to exacerbate the problem.

The difficulty in applying the standards may lead to a secondary problem. If investors have increased difficulty in predicting the outcomes of arbitrations, they also may have increased difficulty in calculating investment risks and benefits. This problem is aggravated because tribunal awards and reasoning are not binding precedent on subsequent arbitrations, even arbitrations against the same country and arising out of the same government action.

It is undeniable that contextual standards initially will be difficult for tribunals to interpret and therefore difficult for investors to predict. Contextual standards, however, do give tribunals some help in applying BIT standards because these standards give tribunals a baseline—the country’s relative development—from which to start their analysis. This baseline provides a point of departure for courts to analyze whether a country’s behavior met their obligations.

69. *Id.* at 820.

70. *Id.* at 828 (“Investors and suppliers should prefer to do business in countries whose legal framework protects international contracts.”).

71. Magraw, *supra* note 4, at 74.

72. *Id.* at 76.

73. *See, e.g.*, Egli, *supra* note 57, at 1064 (describing inconsistencies in the interpretation of Most-Favored-Nation clauses by ICSID tribunals).

It will also be feasible for courts to apply contextual standards because international tribunals do have some experience with taking into account the context of a case. Although international investment arbitration tribunals currently do not judge a country's compliance based on differential or contextual standards or with regard to its economic, technological, social, and legal development, some past decisions by other international tribunals have acknowledged that their decisions must incorporate the circumstances of the case. Such cases recognize that decisions cannot be made in a vacuum, but must take account of relevant factors such as equity or the surrounding circumstances. These past decisions leave open the door for a legal analysis that recognizes that development may affect a developing country's ability to comply with investment obligations.

In the North Sea Continental Shelf case, for example, the ICJ was asked to decide “[w]hat principles and rules of international law are applicable to the delimitation...of the areas of the continental shelf in the North Sea.”⁷⁴ The Netherlands and Denmark argued that a mandatory rule of equidistance should be applied. In rejecting the exclusive use of this rule, the Court stated that applying the rule would create an inequity.⁷⁵ Rather than create such an inequity, the Court instead held that “the parties are under an obligation to act in such a way that, in the particular case, and taking all circumstances into account, equitable principles are applied.”⁷⁶ Equity would require, *inter alia*, consideration of the geographical configuration of the parties' coastlines, the location of any natural resource deposits, and length of the parties' coastlines.⁷⁷

In the Tunisia-Libya Continental Shelf case, Judge E.I. Jiménez de Aréchaga similarly argued that equity and other factors must be taken into account in international decisions:

To resort to equity means, in effect, to appreciate and balance the relevant circumstances of the case, so as to render justice, not

74. North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 6 (Feb. 20).

75. *Id.* at 50. (“Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.”).

76. *Id.* at 47.

77. *Id.* at 50–51.

through the rigid application of general rules and principles and of formal legal concepts, but through an adaptation and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case.... Equity is here nothing other than the taking into account of a complex of historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it.⁷⁸

This consideration of equity and other outside factors is also evident in the decisions of previous international arbitrations regarding breaches of investors' rights. For example, in the Franco-German Mixed Arbitral Tribunal, the Tribunal recognized that an investor's expected profits had to be measured based on the surrounding events—World War I. In one arbitration, the property of a glass company was sequestered by the German authorities. Experts appointed to the case agreed that the company's claimed lost profits were reasonable. The Tribunal, however, rejected the experts' report for lost profits because "the experts, in giving their opinion, obviously did not take account of the fact that during the war the operation of glass plants in Germany was limited because of restrictive measures decreed in connection with the distribution of coal."⁷⁹ The experts had ignored the context of the case and therefore had wrongly estimated the lost profits.

This recognition of the context of a case is certainly not universal in international decisions,⁸⁰ but these past decisions have given tribunals

78. *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18, 106 (Feb. 24) (separate opinion of Judge Jiménez de Aréchaga). Many contextual or differential standards reference the concept of equity. For example, the preamble to the Charter of Economic Rights and Duties of States recognizes that the goal of the Charter is "to develop a system of international economic relations on the basis of sovereign equality, mutual and equitable benefit." Charter of Economic Rights and Duties of States pmbl., G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., U.N. Doc. A/RES/39/163 (Dec. 17, 1984). "It is evident from many opinions of the International Court of Justice" that the concept of equity "require[s] consideration of the facts and circumstances of the particular situation under examination." Magraw, *supra* note 4, at 78. In the situation of developing countries, "[t]he concepts of 'equity' and 'equitable' thus mandate that the individual characteristics of developing countries be taken into account." *Id.*

79. *Saint Gobain, Chauny & Cirey Glass & Chem. Prods. Mfg. Co. c. Etat allemand*, VI RECUEIL DES DÉCISIONS DES TRIBUNAUX ARBITRAUX MIXTES 297 (1927), excerpted in 3 MAJORIE M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1836 (1943).

80. In *Robert May v. Guatemala*, for example, the arbitrator refused to weigh investor expectations in light of the contextual circumstances. Guatemala was unable to comply with its obligation to an American investor under a railroad operation contract because of widespread revolutionary movements. The arbitrator, however, refused to acknowledge the possible effects of the riots either on Guatemala's ability to comply with its contractual obligations or on the investor's expectations and damages. *See* Award of the arbitrator elected by the Governments of Guatemala and the United States to consider the claim of Robert H. May against Guatemala, and the claim of

experience in contextually applying rules or standards, rather than inflexibly and unrealistically ignoring the surrounding circumstances. Contextual standards will require the courts to undertake similar analyses, thinking about the equity of the case, the surrounding circumstances, and the actual facts of the accused country.

A third argument against adopting contextual standards is that they are unnecessary because Non-Precluded Measures (NPM) clauses in BITs already adequately address the concerns of developing countries. In BITs with NPM clauses, “the state must compensate investors for harms that breach the treaty in ordinary circumstances, but in exceptional circumstances...NPM clauses transfer those risks to the investor, and the state will not be liable for actions that would ordinarily breach the BIT.”⁸¹ For example, a NPM clause may provide that “[n]othing in this Treaty shall be construed:...to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”⁸²

NPM clauses and contextual standards, however, serve different purposes and would be applied in different situations. Contextual standards recognize that not all countries are equally capable of complying with substantive obligations and that investment protection standards should be based on relative development. By contrast, NPM clauses recognize that, at times, all countries are faced with emergency situations which require immediate action and which take precedence over investment obligations.

Moreover, contextual standards would apply in every case while NPM clauses would apply only in the direst of nationwide emergencies. For example, in 2001, Argentina experienced a disastrous financial crisis. The result was widespread unemployment, a drastic decrease in wage levels, and political turmoil. In response, “Argentina adopted a number of measures to stabilize the economy and restore political confidence.”⁸³ These measures included the pesification of all financial obligations and ceasing to peg the peso to the U.S. dollar.⁸⁴ In several

Guatemala against said May, in the matter of the Northern Railroad of Guatemala, 1900 Papers Relating to Foreign Relations of the United States 659, 674.

81. William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 314 (2008).

82. See U.S. Model BIT, *supra* note 29, art. 18.

83. Burke-White & von Staden, *supra* note 81, at 309.

84. *Id.*

cases, Argentina defended its actions as justified under the NPM clause of the U.S.-Argentina BIT, insisting that the measures taken were “necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.”⁸⁵

Three tribunals, however, have rejected this argument,⁸⁶ holding that even with the severity of the economic crisis,⁸⁷ the NPM clause did not apply. Contextual standards are still needed, therefore, to address the day to day realities of developing countries that fall short of severe emergencies.

As a practical matter, it might also be argued that contextual standards would be so politically unpopular that developed countries would never agree to their adoption. Differential treatment is used as an incentive in environmental law to get developing countries to participate in reductions in emissions and other obligations at all.⁸⁸ Unlike the environmental context, however, investment is not necessarily a worldwide crisis the remedy of which requires the participation of developing countries;⁸⁹ developed countries could simply choose not to deal with developing countries.

This argument overlooks the fact that investors will still need new areas to expand and invest. Investors will be forced to weigh the cost of investing in a country under a BIT using contextual standards against the cost of simply foregoing investment in developing countries. As contextual standards are not intended to have a drastic effect on investment protections, it is likely that investors (and therefore their governments responding to their demands) will still find it more costly to forego the opportunity of new and developing markets.

85. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993).

86. See *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007; *Enron Corp. Ponderosa Asset, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005.

87. See *Burke-White & von Staden*, *supra* note 81, at 309 (comparing the Argentine crisis to the Great Depression).

88. HALVORSSSEN, *supra* note 15, at 4.

89. Belt, *supra* note 33, at 171 (arguing that the concept of common but differentiated responsibility in international environmental law “recognizes that the goals established under the treaties are based on capabilities and that compliance is necessary for survival; that everyone loses if the standard is simply established at the lowest common denominator”).

In the past, one argument against the adoption of contextual or differential standards is that they create an unfair double standard. This concern about inequality was raised during negotiations for the United Nations Convention on the Law of the Sea (UNCLOS). The treaty requires states to protect the marine environment by taking steps to prevent, control, and reduce pollution “in accordance with their capabilities.”⁹⁰ It uses this phrase twice more throughout the Convention and five times requires states to take action “as far as practicable.” This language “allows for varying standards to be used in assessing whether states have met their obligations.”⁹¹ Although some developed countries objected to these provisions of UNCLOS as setting up a double standard, the delegate from Mexico argued that the standards “‘must not be construed as recognizing double standards but merely as emphasizing the obvious limitations of developing countries and the special duties of those who have the technology and the economic means to protect the oceans.’”⁹²

By allowing countries leniency under substantive obligations based on their relative development, it is certainly true that contextual standards would violate the principle that all countries are treated equally in the eyes of international law.⁹³ Equality as an abstract ideal, however, is of limited practical value when dealing with countries that are obviously unequal to begin with:

As one moves from the level of the ideal to practical social policy, equality is in itself too general a concept to support concrete policy choices. Choices must be made among the different kinds of equality: equality of rights, of opportunities, of conditions, and of outcome. And, these different kinds of equality may be incompatible in practice: indeed, this is likely to be the case when there are disparities in resources and capabilities. That is why, since the time of Plato it has been suggested that “equality among unequals” may be inequitable and that *differential treat-*

90. United Nations Convention on the Law of the Sea art. 194(1), *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 22 I.L.M. 1261, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

91. NANDA & PRING, *supra* note 21, at 315.

92. *Id.* at 316 (quoting Jose Luis Vallarta, *Protection and Preservation of the Marine Environment and Marine Scientific Research at the Third United Nations Conference on the Law of the Sea*, 46 LAW & CONTEMP. PROBS. 147, 148 (1983)).

93. See HALVORSSSEN, *supra* note 15, at 27 (“Referring to the principle of equality of states, one could argue that developing countries should have the same obligations in environmental treaties as the industrialized nations have—from the outset—with no leeway built into the system.”).

ment may be essential for real equality.⁹⁴

Thus, although contextual standards appear to create a double standard, they are based on the reality that developed and developing countries are in dissimilar situations. As a result of this initial inequality, these sets of countries must be treated differently in order to achieve an equitable result in individual cases and long-term equality in international investment law.

Finally, it is argued that contextual and differential standards have failed to achieve their desired results in other areas of international law. This criticism is most prevalent in the context of environmental and trade law. “[D]oubts have been expressed as to the effectiveness of special and differential treatment in assisting developing countries to participate actively and derive significant benefits from the multilateral trading system,”⁹⁵ and it has been claimed that common but differentiated responsibility is “marred by a near-sighted bias” and “absolute and universal norms of compliance can be achieved without unduly burdening the economies of developing states.”⁹⁶

One of the primary reasons for the lack of success of differential and contextual norms in the environmental arena, however, is that environmental treaties in general lack effective enforcement mechanisms to ensure compliance. A lack of monitoring and effective enforcement undermines the ultimate goal of the agreements.⁹⁷ In international investment law, private investors would be responsible for monitoring. One of the reasons that the special treatment has been unsuccessful in trade law is that the treatment is based on an extremely complicated set of preferences, origins, quotas, and other rules that developing countries have not always taken advantage of. In international investment law, developing countries would not need to avail themselves of a complicated set of rules to gain the benefit of contextual standards.

94. *Id.* at 28 (quoting OSCAR SCHACHTER, *SHARING THE WORLD'S RESOURCES* 7 (1977) (emphasis added)).

95. George A. Bermann & Petros C. Mavroidis, *Introduction to WTO LAW AND DEVELOPING COUNTRIES*, *supra* note 9, at 1.

96. Weisslitz, *supra* note 19, at 477–78.

97. *See, e.g.*, Tanya D. Sobol, Note, *An NGO's Fight To Save Ukraine's Danube Delta: The Case for Granting Nongovernmental Organizations Formal Powers of Enforcement*, 17 *COLO. J. INT'L ENVTL. L. & POL'Y* 123, 128 (2006) (“Most international environmental treaties either completely lack enforcement mechanisms or only provide weak enforcement measures, which undermines the instruments' ability to protect the environment.”).

CONCLUSION

The adoption of contextual standards raises many more issues to be resolved. This Note has attempted to demonstrate some of the justifications for and benefits of adopting contextual standards in international investment law. Now is an ideal time to adopt contextual standards because “with the recent rise in investment treaty claims...tribunals [have] begun to further define the meaning of key BIT standards,”⁹⁸ and contextual standards can help to shape these requirements in an equitable and realistic manner.

While at first glance it may appear that contextual standards grant developing countries an unfair or undeserved benefit, it is helpful to think of the situation in reverse. When one invests in the United States, one relies upon the availability of an above-average social, financial, technological, political, and legal apparatus that will ensure stability, protection, due process, and equitable treatment.

Decisions cannot be made without regard to the realities of our world. Among these realities is that the desperate need of developing countries for foreign investment cannot be separated from their limited capacity to meet strict investment obligations with far fewer resources at their disposal.

98. See Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 259 (2007); see also Odumosu, *supra* note 52, at 380 (“The international law on foreign investment is still largely a contested site and one amenable to construction by dominant voices....”).