Toward a Private Law Theory of International Investment Law

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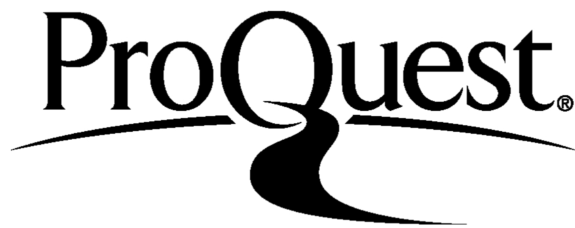

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ABSTRACT

Toward a Private Law Theory of International Investment Law

Julian Arato

This Dissertation lays the groundwork for a private law theory of international investment law (*IIL*). This project intervenes in a polarized debate on the nature of the global investment regime. With few exceptions, the scholarship has tended to divide sharply according to stylized visions of IIL as *either* a system of private, commercial law, *or* a system of public law. The "commercial law school" tends to be associated with a thick, capital-centric vision of IIL – one that emphasizes insulating private interests from foreign state action. Scholars and practitioners in this vein tend to be apologists for the system, or advocates of only minimal structural reforms. By contrast, the "public law school," tends to be associated with a thin vision of IIL, highly deferential to national sovereignty, where private interests take a back seat to bona fide national regulatory policy. Its adherents tend to style themselves as critics and reformers, decrying how the status quo seems to have sacrificed national regulatory autonomy at the altar of global capital. While the commercial lawyers have been far too dismissive of the threat posed by IIL to domestic public values, the public lawyers risk losing sight of the values states seek to achieve through IIL in the first place – the *promotion* of sorely needed foreign direct investment (*FDI*) and the *protection* of FDI providers. The debate thus far has proceeded mostly in caricature, and something important has been lost: the possibility of a nuanced system of international private law, sensitive to both the sovereign state's public values and the private rights and interests of foreign investors whose protection is central to the object and purpose of the regime. These Chapters seek to fill that lacuna.

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TOWARD A PRIVATE LAW THEORY OF INTERNATIONAL INVESTMENT LAW

Introductory Essay

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This Dissertation seeks to lay the groundwork for a private law theory of international investment law (*IIL*). This project intervenes in a polarized debate on the nature of the global investment regime. With few exceptions, the scholarship has tended to divide sharply according to stylized visions of IIL as *either* a system of private, commercial law, *or* a system of public law. The "commercial law school" tends to be associated with a thick, capital-centric vision of IIL – one that emphasizes insulating private interests from foreign state action to whatever extent possible. Scholars and practitioners in this vein tend to be apologists for the system, or advocates of only minimal structural reforms. By contrast, the "public law school," tends to be associated with a thin vision of IIL, highly deferential to national sovereignty, where private interests take a back seat to bona fide national regulatory policy. Its adherents tend to style themselves as critics and reformers, decrying how the status quo seems to have sacrificed national regulatory autonomy at the altar of global capital. While the commercial lawyers have been far too dismissive of the threat posed by IIL to domestic public values, the public lawyers have tended to lose sight of the ultimate value in IIL itself – the promotion of sorely needed foreign direct investment (*FDI*) through the grant of international protections for foreign property, state contracts, IP, and assets of all stripes. This project starts from the position that the debate thus far has proceeded mostly in caricature, and that something important has been lost: the possibility of a nuanced system of international private law, sensitive to both the sovereign state's public values and the private rights and interests of foreign investors whose protection is central to the object and purpose of the regime. These Chapters seek to fill that lacuna.

This introductory essay situates the broader Dissertation within the intellectual history of international investment law. After briefly introducing the regime, I set out the main scholarly debate between the commercial and

public law schools. In so doing, I attempt to explain the absence of any theoretically satisfying study of the private dimensions of IIL, and explain the need for such an endeavor. I then establish the semantics of the broader project. I deploy the concepts of private and public law only as ideal types, rather than truly exclusive categories. These concepts are here used only as analytical devices, whose merit rests on what they can illuminate about IIL. The overarching goal of this project is to demonstrate that a private law hermeneutic can offer significant insights into the regime which have yet to be tapped, both toward diagnosing its pathologies and toward opening up promising avenues for reform. Finally, I introduce the Dissertation's three main chapters: (1) *The Margin of Appreciation in International Investment Law*; (2) *Corporations as Lawmakers*; and (3) *The Logic of Contract in a world of Treaties*.

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The international law of foreign direct investment has become, in recent years, a pillar of international economic law. This ever-expanding regime is now constituted by thousands of bilateral investment treaties (*BITs*) and free trade agreements (*FTAs*), and fleshed out through hundreds of published arbitral awards. The twin goals of these treaties seem narrow at first blush: to *protect* foreign investors from certain forms of state action; and thereby *promote* foreign direct investment. But the regime has generated enormous interest, among governments, scholars, and private litigants – in large part due to its surprising substantive breadth, and its central innovative institutional feature – investor-state dispute settlement (*ISDS*). Institutionally, IIL empowers individual investors to directly sue sovereign states over violation of their treaty rights. As such, the regime has generated a level of activity in practice paralleled only by regional human rights litigation. At the same time, ISDS claims have touched all areas of public policy, from economic regulation to regulatory efforts concerning public health, security, morals, and the environment. This seemingly narrow regime of international law has thus already had a substantial bearing on the state's sovereign policy space.

Over the last decade, initial scholarly excitement about the regime has turned increasingly critical – and frequently alarmist. The global investment regime is increasingly cast as a *bête noire* in international law, for several of the very reasons grounding its success. From the national perspective, IIL has come under increasing fire for undercutting the state's internal sovereign prerogatives, democratic choice and national self-

determination. The regime has empowered private investors to collaterally attack sovereign regulatory measures of all stripes, through compulsory, binding, and highly enforceable international arbitration. From the international point of view, the sheer volume of investment treaties and arbitral awards has also generated significant concerns about the fragmentation of international law. *Ad hoc* arbitral tribunals have created significant interpretive inconsistencies, without any institutional mechanism for appeal, review, or harmonization – not only in the interpretation of common investment treaty terms, but also in the interpretation and application of general international law. Even in its best light, the regime remains troublingly incoherent, and at minimum it poses a real threat to national regulatory autonomy.

IIL is, however, at an inflection point. While few advocate eliminating the regime entirely, there are also very few apologists for the basic status quo. And there is clear movement in the field, with states of all sizes and regions currently pursuing significant projects of reform. In the newest BITs and FTAs, states have tended to scale back treaty protections, or at least more clearly delineate their limits. Further, States are increasingly experimenting with new institutional forms, particularly in the so-called "mega-regional" agreements currently under negotiation: including the twelve-member Trans-Pacific Partnership (*TPP*); the Trans-Atlantic Trade and Investment Partnership between the U.S. and the E.U. (*T-TIP*); the E.U.—Canada Comprehensive Economic and Trade Agreement (*CETA*); and the U.S.–China Bilateral Investment Treaty (*U.S.–China BIT*). The most recent draft of the CETA, for example, would establish a permanent international investment court, with judges selected by the states parties, and mechanisms for appeal and remand.[1] Other recent models have included publicly minded institutional reforms like increased transparency and access for amicus curiae submissions, as well as interpretive mechanisms to ensure that states (as opposed to arbitrators) maintain primary voice in interpretation.[2] For all the negative coverage of the regime,

[1] EU—Canada Comprehensive Economic Economic and Trade Agreement (CETA), Draft, (December 2015) , http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf; This court would be open only to investors bringing suit under the CETA, but the treaty envisions linking the court to other treaty regimes in the future, evincing more global institutional ambitions. *See also* EU—Vietnam FTA, Trade in Services, Draft (January 2016), Investment & E-Commerce, Ch. II, Art. 12, *available at* http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf.

[2] US–Peru Trade Promotion Agreement, Ch. 10, Art. 10.21 (Apr. 12, 2006), *available at* *https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file78_9547.pdf*.

states clearly continue to see value in the use of investment treaties to protect and promote FDI – they have generally opted for reform over exit.

Yet for all this productivity, and all the attendant legal, political, and scholarly interest, IIL remains remarkably poorly understood. Its precise doctrinal workings are, of course, expounded in countless treatises, monographs and articles.[3] And the consequences of the regime (or particular interpretive tendencies) for the state's regulatory autonomy have been more than adequately expounded. We know how the doctrine works, more or less, and we know all about the basic tension between the protection of private rights and public regulatory values. But for all the pages written on BITs and ISDS, there has been very little theoretical attention to the core private dimensions of a regime self-consciously established for the protection of foreign property. For all its very real and significant implications for domestic public law and public values, IIL is at heart about regulating *investments* – which means *property* and *contracts* of all types, and, to an extent, other assets like, *intellectual property* (*IP*), *sovereign debt*, and *business organizations*. The main thing that investment treaties do is establish law and institutions to govern these private rights. It is therefore striking that so few studies of IIL even consider its manifold private dimensions – much less how analogous national regimes of private law are balanced against public values. This Dissertation seeks to fill that gap.

I contend, throughout this study, that investment treaties have subtly brought into being robust (though incomplete) international legal regimes of contract and property, and are expanding into the realms of IP, corporate law, and sovereign debt. Despite the misleadingly sparse and general language of their substantive protections, investment treaties can only be properly understood and reformed if their private law dimensions are kept in view. And it is precisely here that the literature falls short. To fully understand this body of law, it must be understood in light of the widely varied assets it seeks to govern. In particular, it should no longer be assumed that investment treaty norms simply apply to all these different types of assets in the same way. Why should rules protecting a foreign investor's expectations against state action play out the same way in the context of real property as they might with contracts specifically negotiated with the state? Or with IP? Or debt? In domestic law, by contrast, each of these assets are created and defined by discrete legal regimes which tend to be oriented around widely different values (ranging from autonomy and

[3] *See, e.g.,* RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed., 2012); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2005).

efficiency to incentivizing innovation). Absent any specificity in the treaties, there is no reason to assume that IIL converts such distinct legal rights and interests into an undifferentiated class of assets.[4] Likewise, any project of reform should start from an appreciation of the variegated nature of the private rights protected by IIL – bearing in mind the discrete values and tradeoffs at stake in the regulation of such different types of assets. For example, there may be good reason to defer to states' regulatory determinations regarding patent enforcement which simply do not hold in the context of regulatory takings of real property, or regulation which has vitiates the value of an investor's contract with the state.

This Dissertation intervenes *in medias res*, and starts from the position that reform is necessary. I share the critics' concerns that IIL poses a substantial threat to local and global public values. The problem is that the main contemporary projects for reform remain wrongheaded in thrust, incomplete, and ultimately inadequate. Critics and reformers have tended to focus unduly on only one side of the puzzle: the real and perceived pernicious consequences of the regime for the state's regulatory autonomy and public values. But by emphasizing regulatory autonomy over all else, these projects pay insufficient attention to the distinct private rights to which these treaties apply, and thereby risk losing sight of the regime's central object and purpose – the protection and promotion of foreign direct investment. Moreover, they fail to grapple with the possibility that private interest and public values might be reasonably reconciled in different ways, depending on what kind of assets and measures are at issue. I argue that something valuable has been lost within the peculiar ebbs and flows in the literature, which this Dissertation seeks to retrieve: the private dimension of IIL, and, especially, the possibility of recasting IIL as a variegated body of international private law attuned to public regulatory values, democracy, and national self determination.

Together, the articles comprising this Dissertation have two main goals. The first is to reveal the weakness in trying to resolve the complex tensions of international investment law by appeal to one-size-fits-all public law doctrines – a task I take up primarily in Chapter One. The second goal is to begin the hard work of constructing a more satisfying approach to reform, grounded in private law, with due consideration to the widely divergent interests and values implicated by regulating the such diverse assets as property and contract – not to mention IP, sovereign debt, and corporate entities. I begin this project in general in Chapter Two, and hone in specifically on the relationship between treaties and contracts in Chapter Three.

[4] Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229 (2015).

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Why has there been no serious theoretical attempt to expound the private dimensions of international investment law to date? The likeliest explanation lies in the peculiar intellectual history of IIL. The regime has itself only come into existence within the last thirty or so years, but it generated little scholarly attention prior to the explosive public law movement in the early 2000's.

Within IIL scholarship, it is an old hat that the regime's early evolution was led by commercial lawyers – scholars and practitioners steeped in private law, coming from the older field of international commercial arbitration.[5] These lawyers brought with them a private law hermeneutic, which – the story goes – led them to an extremely investor-friendly interpretive ethic.[6] And true enough, the early arbitral interpretations of investment treaties tended to be highly suspicious of any host state regulatory policy that undermined the value of an investor's assets. Indeed, in reading BITs and FTAs as robust protections for private parties, a number of early awards seemed to seriously undermine the state's sovereign capacity to regulate in the public interest.[7]

The backlash against ISDS came in the early 2000's – particularly following a series of arbitral judgments against Argentina, awarding hundreds of millions of dollars in damages to private investors for losses arising out of the state's efforts to manage its financial crisis in 2001–2002. Since then, a steady stream of scholars have excoriated the regime and its participants for failing to appreciate IIL's public dimensions. Adherents of the ever-growing "public law school" have called for dramatic doctrinal and institutional reforms, to better safeguard public values, through, above all, an appreciation of the state's fundamental right to regulate.

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[5] *See*, classically, Jan Paulsson, *Arbitration Without Privity* 10 ICSID REV.—FILJ 232 (1995); Dolzer & Schreuer, *supra* note 3; *See also* Anthea Roberts, *Clash of the Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013).

[6] Roberts, *supra* note 5; *See also* Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* (2012), 32, http://www.wipol.unibonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12.

[7] *See, e.g., Técnicas Medioambientales Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003), discussed more fully in *Corporations as Lawmakers*, at 264.

The public law critique has taken a range of forms, some more thoroughgoing than others. But the basic pattern is the same. These scholars tend to associate the older commercial law school with private law and the interests of capital, as opposed public law with its greater sensitivity to public values. On that assumption, the critics have leveled a sustained attempt at rebranding IIL as fundamentally a regime of public law, with both descriptive and normative valences. They tend to make two basic moves. First, descriptively, they tend to highlight the public features of the regime. Typically, such arguments emphasize: the *sources* of IIL in treaties and custom (i.e. instruments of public international law); *institutional arrangements*, e.g. the practice in ISDS of issuing published arbitral awards smacking of case-law;[8] the strong bearing of IIL and ISDS on public values like health, morals, and the environment;[9] and even its broader impact on democracy and self-determination writ-large. [10] For these scholars, appreciating what they take to be the public dimensions of IIL reveals its paucity as a public law regime. Second, by apparent corollary, these scholars have sought inspiration and analogy for reform in other public law regimes – both domestic and international. Typically, these include calls for

[8] Canvassed in Roberts, *supra* note 5. Most of these descriptive arguments are not compelling. There is something particularly unsatisfying about pointing to sources as evidence that the regime is really best understood as public law. In domestic legal orders large swaths of property, contract, and tort are established by statute. Does that convert them into public law in any meaningful sense? Surely not. More relevant is what relationships these statutes regulate, between whom, and how they regulate those relationships. The mere fact that IIL is established by sources of public international law, similarly, should not make any difference in whether the regime is best described as public or private. Arguments emphasizing the institutions of IIL are hardly more satisfying – as they apply to most domestic private law regimes as well. Clearly there is something more "public" about ISDS than confidential commercial arbitration between private parties, but whether that hews toward understanding IIL as public law is suspect, given that domestic contract, property, and tort disputes are generally resolved *in court*. The real issue is the interplay between IIL and ISDS, on the one hand, and domestic regulatory autonomy on the other. To the extent that this international regime puts a damper on the state's capacity to regulate, it certainly has an important public dimension. Whether that is enough to describe the entire regime as "public law" is debatable (and, as suggested below, ultimately not too important as a *semantic* matter, so long as such labels are not taken as license to ignore the regime's complex private dimensions.).

[9] Stephan Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 579 (2012); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration*, 35 YALE INT'L L.J. 283 (2010).

[10] Mattias Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, 4 ESIL REFLECTION 3 (2015).

importing various doctrines of deference to domestic policy into ISDS,[11] like the margin of appreciation,[12] proportionality,[13] and subsidiarity.[14] Other scholars have emphasized the need for new institutions more appropriate to stewardship of a public law regime in such a sensitive area – hailing, for example, the current proposals for a permanent international investment court, other mechanisms for appeal and remand, and transparency reforms.[15] For these critics, IIL is best understood as a regime of public law, and that hermeneutic provides the key to identifying appropriate reforms.

Perhaps surprisingly, the public law school's vehement scholarly backlash has been largely left unanswered. There has been little sustained theoretical response by the commercial lawyers – though they have remained highly influential in the *practice* of investment arbitration.[16] Apologists for the regime have rather tended to ignore the public law critique. For example, the latest edition of Dolzer & Schreuer's *Principles of International Investment Law* – still deservedly the key treatise in the field – retains its strong commercial law hermeneutic, as well as an uncritical investor-friendly slant – all without engaging the critics on the larger theoretical questions about the nature of the regime. Where the commercial lawyers have engaged with the public lawyers, it has generally been only on the level of debating particular normative prescriptions – for example, by rejecting calls for deference as illegitimate attempts to rewrite extant treaties.[17]

It bears mentioning that a small handful of scholars have begun attempting to thread the needle, suggesting that IIL represents a kind of hybrid between public and private law.[18] But they too have expended little

[11] Schill, *supra* note 9.

[12] Burke-White & von Staden, *supra* note 9.

[13] Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 76 (2010).

[14] Kumm. *supra* note 10.

[15] *Id.*

[16] *See, e.g.* Dolzer & Schreuer, *supra* note 3.

[17] Thomas W. Walde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-actively, the Equality of Arms*, 26 ARB. INT'L (2010) p. 3.

[18] *See* Roberts, *supra* note 5; José Alvarez, *Is Investor-State Arbitration Really Public?* (manuscript on file with author). The notion of a hybrid regime is, here, ultimately more confusing than not. As discussed further below, all regimes of private law touch on relationships between individuals and the state – in property, contract, etc. And where they

intellectual capital theorizing the private dimensions of IIL – expending far more energy engaging with the public law critiques. There remains no sustained academic counterpoint to the public law critique, nor any fully theorized synthesis.[19]

Thus, as the makeup of the scholarly changed in the early twenty-first century, the early capital-friendly interpretations came to be associated with the commercial lawyers who then dominated the field, and, unfortunately, with private law itself. Today, in IIL circles the idea of private law tends to be strongly associated with an interpretive approach that is *opposed* to public law and non-commercial values. By contrast, public law is usually cast as the savior of the public interest. The former is typically coupled with capital, private interest, and the status quo, while the latter is typically linked to public values, self-determination, and reform.

These linkages have already had pernicious effects for the regime as a whole. First, they appear to have given rise to an assumption that descriptive characterizations of the regime as either public or private authorizes, or even mechanically leads to, specific doctrinal interventions – as if, for example, a public law hermeneutic leads inexorably toward deference to state action while a private law hermeneutic necessarily entails equality of arms between states and foreign investors. Second, relatedly, reformers have tended to assume that the theory and doctrine of private law has little to offer toward effectively rebalancing the regime. In making these assumptions, their efforts for reform risk pushing the needle too far in the opposite direction, protecting the state's discretion to such an extent as to undercut the key goals of the regime – to *protect*, and thereby *promote* foreign direct investment.

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do, special rules frequently apply – typically to the benefit of the governmental party. Christopher Serkin, *Public Entrenchment Through Private Law*, 78 U. Chi. L.R. 879 (2011). One might thus say that takings law or the law of public contracts are thus similarly "hybrids," but that implies unnecessarily reified concepts of public and private law. It would not be especially fruitful to try to precisely determine which aspects of the law of takings or public contracts are "really" public or private. These categories are better viewed as analytical ideal types, which necessarily overlap at the borders, but are nevertheless capable of revealing different facets of the same phenomena. *See further supra*, at p. 11.

[19] The only real exceptions lie in a handful of articles by domestic private lawyers, marveling at how investment law seems to be reshaping their own fields. *See, e.g.*, Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. Rev. 30, 37 (2003) (on the concept of property in NAFTA jurisprudence); and Rochelle Dreyfuss & Susy Frankel, *From Incentive, to Commodity, to Asset: How International Law is Reconceptualizing Intellectual Property*, 36 MICH. J. INT'L L. (2015) (on the relationship between IIL and domestic and international IP law).

The public law movement has generated important insights, in particular through its critique of the too-frequent subordination of public values to private interests in the cases – especially the early, formative ones.[20] But it is not at all clear that public law doctrines offer the best solutions toward rebalancing the private rights and public values. What is missing is an appreciation of the nuances of private law, and its reformist potential – in particular the variegated ways in which discrete regions of private law like property, contract, and IP can be highly sensitive to domestic public values, as in: the domestic laws of takings; the domestic differentiation between public contracts and contracts between merely private parties; or in the way national law balances values of innovation and public health in patent law.[21] This Dissertation seeks to decouple the idea of private law from the early capital-friendly excesses of investor-state jurisprudence, and to reconstruct some of the fundamental concepts of the global investment regime from the perspective of a nuanced theory of private law, sensitive to local and global public values.

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It is worth pausing, at the outset, to emphasize that the categories of public and private law should not be too rigidly segregated. Public law is classically understood as the law regulating interactions between the state (or other public authority) and individuals; private law, on the other hand, is typically understood as regulating relationships between individuals. As has long been clear, however, these categories do not really connote entirely distinct fields of law. Wide areas of so-called private law wind up regulating interactions between individuals and the state, such as takings law, the law of public contracts, and the idea of mandatory contract rules, etc. Indeed, entire fields of law seem to live in the boundary, such as the law of patents. If IIL is a regime of private law, it too lies entirely within the border. Far from undermining the value of the distinction between public and private law, for present purposes it is precisely this porous boundary that makes the distinction most fruitful.

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[20] *See Tecmed*, *supra* note 7; Arato, *Corporations as Lawmakers*, *supra* note 4, at 264.

[21] In other words, I am arguing that private law theory in the international context should take a cue from efforts in domestic private law theory to reconcile private law with regulation and public values. *See, e.g.*, HANOCH DAGAN, PROPERTY: VALUES & INSTITUTIONS, (2011); Michael Heller, *The Boundaries of Private Property*, 108 YALE L.J., 1163, 1217–1219 (1999); Serkin, *supra* note 18.

I deploy the concepts of public and private law here as ideal types – as analytical categories, the purpose of which is not classification in and of itself, but rather achieving a better understanding of the pressures and values implicated by regulating commercial interactions between private individuals and the state. Public law and private law are just labels – useful labels, to be sure, for organizing our thoughts, but labels nonetheless. Each of these concepts may have some elective affinity toward certain legal doctrines or institutions, but merely affixing one label or the other to a borderline case should not lead mechanically to conclusions about how that case should be regulated.[22] Calling the law of state contracts "public law" does not automatically imply that the state should be entitled to deference in case of regulatory breach, any more than would labeling it "private law" logically imply that the state should be construed as a private commercial actor like any other. The labels serve to draw our attention to the different facets involved – e.g., the importance of private expectations and reliance, on the one hand, and the regulatory responsibilities of the government on the other. But determining how to balance these interests and values involves difficult tradeoffs, which need to be addressed head on – not simply papered over.

That said, there is value in the ideal types – particularly, here, insofar as they open us to new and more satisfying possibilities for reform. As a matter of pure semantics, it is not especially important that IIL is described as either public law or private law, or as some kind of hybrid. What matters is the level nuance with which we evaluate the regime. Given its significant impact on domestic public life, it matters how we evaluate IIL's successes and diagnose its pathologies, and it matters how we conceive of solutions. And herein lies the value in keeping sight of IIL's private dimension. The core tension of the regime lies in balancing the state's capacity to regulate against providing a level of protection for investors sufficient to *induce* FDI. But there is no reason to assume that this tension should be resolved in the same way for all types of assets – not when property, contract, IP, and debt implicate such distinct and complicated constellations of interests and values *in any legal order*. The failure of the early capital-centric awards was to assume that IIL should

[22] As Dewey famously noted, in discussing the legal nature of corporations, abstract descriptions of what a legal entity *is* tells us nothing about how it *ought* to be regulated. John Dewey, The Historical Background of Corporate Legal Personality, 35 YALE L.J. 655, 670-673 (1926). Such leaps in logic simply mask the material tradeoffs involved. Attempts to portray such linkages as logical corollaries ultimately amount to normative smuggling. *See also*, Steven Walt & Micah Schwartzman, Morality, Ontology, and Corporate Rights, VA. PUB. L. & LEGAL THEORY RESEARCH PAPER, No. 21, (2016) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730333.

grant all such assets ironclad protection on the model of the most rudimentary Blackstonian property right. But the public law school falls into the same kind of trap by assuming that all such questions can be resolved by appeal to a single one-sized-fits-all doctrine of deference, like proportionality or the margin of appreciation. A more theoretically satisfying private law approach will not yield mechanical answers any more than the public law approach does. But it opens the way to a much more nuanced understanding of the wide range of relationships between individual and state regulated by these treaties, and reveals the hard work and tradeoffs that reform will involve.

While my goal, here, is to lay the groundwork for a private law theory of international investment law, I do not seek to replace a reified public law theory with an equally doctrinaire private one. The project is ultimately synthetic. My goal throughout is to resuscitate the fundamental private law dimensions of the regime, without losing sight of the threat it poses to domestic and global public values.

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The Dissertation is comprised of three discrete articles, each comprising a chapter in the broader project. **Chapter One**, titled *The Margin of Appreciation in International Investment Law*, represents a critique of one instantiation of the public law approach. In view of the substantial tension between international investment law and domestic regulatory capacities, most adherents of the public law school have advocated reading some doctrine of deference into BITs and FTAs – to loosen the burden on states seeking to implement bona fide regulatory measures. Foremost among such efforts, scholars like William Burke-White and Andreas von Staden have advocated importing and repurposing the margin of appreciation doctrine, famously developed by the European Court of Human Rights (ECtHR).[23] And a number of Tribunals have in fact invoked the doctrine, seemingly giving credence to the view that it presents a viable path toward reform.[24]

[23] Burke-White & von Staden, *supra* note 9.

[24] Continental Casualty. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); Frontier Petroleum Services. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008).

I argue, however, that the attempt to import the margin of appreciation (and other doctrines like it) into IIL is conceptually misguided. Through comparison to the ECtHR, I suggest that certain key doctrinal and institutional grounds for affording a doctrine like the margin in its original context do not obtain within IIL, calling into question the doctrine's propriety in its new setting – particularly the absence of systematic judicial institutions capable of fleshing out such a doctrine of deference in the long term with any degree of predictability. Indeed, upon close analysis it turns out that every ISDS tribunal that has invoked the doctrine thus far has deployed it uncritically in materially different ways – ultimately taking the margin to imply totally different standards of review, ranging from rational-basis, to reasonableness, to least-restrictive-means analysis. And there is no control for such divergence in a regime lacking any form of appeal or formal precedent.[25]

While this public law doctrine may work within the confines of the ECtHR to grant states some leeway to regulate according to local values and needs, it is a false friend to states in IIL. Under current institutional structures, structurally flexible doctrines of deference like the margin of appreciation and proportionality review leaves both sovereigns and foreign investors in a state of uncertainty about how much regulatory flexibility the state will ultimately have. In a regime oriented toward promoting foreign direct investment, such unpredictability leaves no party better off.

Chapter Two, titled *Corporations as Lawmakers*, begins the work of reappraising IIL from the perspective of private law. I here make the claim that IIL has created rudimentary but broad regimes of international law for the protection of contracts and property, as well as certain aspects of corporate law. However, these ever-expanding fields of law have as yet been poorly thought through, leading to the perverse consequence that private corporations are able to unilaterally impose highly enforceable norms of international law on sovereign states with whom they contract. This consequence flows directly from the confluence of three seemingly discrete tendencies in the interpretive practice of ISDS tribunals, concerning assumptions about property, contract, and corporate law.

I first challenge the peculiarly aggressive vision of property that has become tacitly entrenched in ISDS. Drawing on domestic and comparative property theory, I argue that the maximalist (Blackstonian) conception of transnational property entrenched in international arbitral practice assumes a

[25] *Continental Casualty* (engaging in least restrictive means review); *Frontier Petroleum* (reviewing for reasonableness and good faith); *Electrabel* (reviewing for rational basis); *Micula* (reviewing only for convincing evidence of fraud or material error).

primacy of property rights over other domestic values unimaginable in most modern societies, including both capital-importing and capital-exporting states. Property is here insulated from all kinds of domestic regulatory initiatives, regardless of the state's aims. Investors' assets are protected not only from complete regulatory takings, but even from substantial depreciation in value incidental to regulation (e.g. via a doctrine protecting their legitimate expectations) – along with extensive procedural guarantees.

Second, I demonstrate how this conception is uncritically extended to a surprising range of assets, from the typical categories of real property to contracts and a host of other intangible rights, without any differentiation. I argue that even where a BIT or FTA applies to contracts, it does not follow that contracts and property should be protected in the same way. There are crucial differences between the values at stake in the protection of real property and the disposition of a public contract (not to mention the entitlements associated with a patent right). Solutions, moreover, are not easily universalizable. Domestic private law regimes differ in how they balance private rights and public interests for legitimate reasons – societies differ not only in what they value, but in how much they emphasize particular values. Taken together, I suggest that the application of exceptionally broad international property protections to state contracts paves over all such nuance, ultimately elevating such contracts entirely above the domestic legal order of the host state.

Finally, I demonstrate how Tribunals' assumptions about the corporate form have led them to unduly empower corporations to graft such heightened protections onto their contracts with sovereign states unilaterally – even when such contracts were not initially negotiated under the aegis of an investment treaty. ISDS jurisprudence generally permits corporations to easily augment their nationality to secure arbitral jurisdiction, by structuring their foreign investments through intermediaries in countries party to BITs or FTAs with the target state. Remarkably, the case law recognizes such restructuring even after contracts between the state and investor have gone into force. This effectively allows corporations to elevate contracts negotiated with the state under domestic law to the level of ironclad international legal entitlements, without even notifying the host state. Taking these three trends together, I contend that ill-considered assumptions about the nature of private law in investment treaties and ISDS jurisprudence have had the perverse effect of empowering private corporations to unilaterally erect norms of international law in their own private interest.

If Chapter Two demonstrates the need for reconstructing international investment law anew, in a variegated way, sensitive to the

widely divergent classes of assets IIL covers, **Chapter Three** represents a first pass at one such private law reconstruction – in the area of contracts. Titled *The Logic of Contract in a World of Treaties*, this Chapter probes the core contractual notion of the autonomy of the parties – i.e. the capacity of the parties to structure their relationships and allocate risk as they see fit. In particular, it examines the relationship between the rights enshrined in a BIT or FTA, and the agreement reached in a subsequently negotiated public contract. To what extent can a contract trump (or waive) substantive and procedural treaty rights? This Chapter suggests that the jurisprudence varies wildly on this question, creating significant problems of certainty, efficiency, and fairness – for states and foreign investors alike.

This Chapter reappraises the treaty/contract issue from the *ex ante* perspective of contracting states and foreign investors. I make three main claims: one conceptual, one descriptive, and one normative. First, I argue that investment treaties must be understood as having generated a rudimentary, yet broad, law of contracts – governing agreements between states and foreign investors on pivotal issues, from substantive rights and duties, to damages and forum selection. Second, I argue that this emerging international law of contracts has developed sporadically, irregularly, and inconsistently, due in part to a tendency among tribunals to confuse the logics of contract and property. As a result, it remains undecided whether contracting parties should understand background treaty norms as defaults, sticky defaults, or mandatory terms – leaving the meaning of their contracts under a cloud of doubt. Third, I argue that the best way to resolve this problem for both states and investors, *ex ante*, is generally to privilege their contractual arrangements over background treaty rules. Even when these parties have different interests and values at stake, the treaty/contract problem is not zero-sum. Both sides usually stand to benefit from the freedom to negotiate around treaty rules as mere defaults – though I explore certain cases where treaty norms might justifiably exert a greater pull. In general, prioritizing party choice is not only optimal from the economic standpoint – it also provides states with the tools to secure their future capacities to regulate in the public interest.

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Taken together, these Chapters underscore the pitfalls of scholarly attempts to resolve the tensions of international investment law through quick-fix invocations of public law doctrines, as well as the conceptual losses in the scholarship's failure to appreciate the incoherencies of the regime as a

matter of private law. I seek to shift the focus back toward the private dimensions of IIL, and lay the groundwork for reconstructing the regime with due sensitivity to both public values and the needs of foreign capital. These three Chapters represent only a prelude, laying the groundwork for a broader project probing the private law foundations of IIL. The next stage of the project is to reorganize, expand, and supplement these pieces, with a view toward publishing a systematic monograph – tentatively titled INTERNATIONALIZED PRIVATE LAW: RIGHTS, INTERESTS, AND VALUES THROUGH THE LOOKING GLASS OF INTERNATIONAL INVESTMENT LAW. I envision structuring the book around a series of private law reconstructions, on the model of *The Logic of Contract in a World of Treaties* – examining in turn property, contract, IP, sovereign debt, and issues of corporate law. It will conclude with an examination of the present and future institutions of international investment law, probing the extent to which these private law reconstructions can enrich the debate on institutional reform.

ARTICLE

The Margin of Appreciation in International Investment Law

JULIAN ARATO[*]

Investment treaties tend to say nothing, or only very little, about the appropriate standard of review for arbitrating disputes between sovereign states and foreign investors. Most treaties do not address whether states should be afforded any deference in their own assessment of their treaty obligations. Neither do they specify the converse, that state action must be strictly reviewed. They are simply silent — and their silence has been interpreted in innumerable ways by different tribunals. This interpretive chaos has generated calls for a unified approach — one that would resolve the uncertain and fragmented status quo, while being sufficiently flexible as to admit the application of different standards of review in different contexts. To some, the venerable doctrine of the margin of appreciation appears to fit just this bill — a solution finding growing favor among tribunals and commentators, not to mention advocates for respondent states.

This Article challenges the suitability of the margin of appreciation in the adjudication of investment disputes. This judge-made doctrine is famously a product of Strasbourg, manufactured by the European Court of Human

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Rights. Its halting import into the global investment regime is only a recent phenomenon. Through comparison to the Strasbourg Court, I suggest that certain key grounds for affording the margin in its original context do not obtain within investment law — calling into question the doctrine's propriety in its new setting.

Beyond questioning the suitability of the margin of appreciation within ad hoc investment disputes, this Article challenges the broader premise that the problem of fragmented approaches to the standard of review among investment tribunals can be best resolved through judicial recourse to a unified a priori *doctrine of deference. As evidenced by the adventures of the margin in several recent arbitral awards, such attempts tend to produce only a pernicious illusion of unity. I argue, instead, that the desired certainty can be achieved only gradually, through judicial practice and dialogue over the medium to long term.*

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INTRODUCTION

Investment treaties tend to say nothing, or only very little, about the appropriate standard of review for arbitrating disputes between sovereign states and foreign investors. Most treaties do not address whether or to what extent states should be afforded a degree of deference in their own assessment of their treaty obligations, or their agencies' findings of fact; and neither do they specify the converse, that state action must be strictly reviewed, or state fact-finding subject to de novo scrutiny. They are simply silent, and their silence has been interpreted in innumerable ways by different tribunals. This emergent interpretive chaos has, unsurprisingly, generated calls for a unified approach — one that would resolve the uncertain and fragmented status quo, while being sufficiently flexible as to admit the application of different standards of review in different contexts. To some, the venerable doctrine of the margin of appreciation appears to fit just this bill — a solution finding growing favor among tribunals and commentators, not to mention advocates for respondent states.

This Article questions the propriety of the margin of appreciation in the context of the *ad hoc* resolution of investment disputes. In so doing, it challenges the broader premise that the problem of fragmented approaches to the standard of review can be best resolved through judicial recourse

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to a unified *a priori* doctrine of deference, no matter how flexible. The problem cannot be solved all at once — at least not through judicial action under current institutional arrangements. And as evidenced by the adventures of the margin in investment awards to date, attempts to do so are more likely than not to produce only a pernicious illusion of unity. I suggest, instead, that the desired certainty can be achieved only gradually, through judicial dialogue over the medium to long term — among investor-state tribunals, and extending no less to other international courts and tribunals grappling with similar problems.

The margin of appreciation is a judge-made doctrine of deference — famously a product of Strasbourg, manufactured by the European Court of Human Rights (ECtHR); in broad strokes, it reflects a particular approach to "assigning weight to the respondent state's reasoning" under certain judicially imposed conditions.[1] Though developed within the European Convention on Human Rights (ECHR),[2] the doctrine has gained purchase in other international judicial settings.[3] Some scholars have suggested that the margin ought to become a general feature of all international adjudication.[4] Still, its halting import into the global investment regime is only a relatively recent phenomenon.[5] Without questioning the

1. ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW 3, 17 (2012). While the margin of appreciation is, for all intents and purposes, a creation of the ECtHR, there is some dispute as to whether its ultimate origins lie in national or even international judicial doctrines of deference. Some scholars suggest that the doctrine stems from doctrines of deference applied in European national courts. *See, e.g.*, *id.* at 3 (calling the doctrine a "judicial creation" of the ECtHR, whose "origins have been traced to analogous concepts of judicial deference in the administrative law of a number of European countries," including in particular France and Germany). More recently, Eirik Bjørge has made a strong case that the doctrine is better understood as grounded in historical *international* doctrines of deference to national authorities, specifically the more state-centric international legal doctrine of the early twentieth century. *See* Eirik Bjørge, The Margin of Appreciation: Where Does it Come From and Where Is It Headed? (Feb. 10, 2014) (unpublished manuscript) (on file with author) (noting further that the doctrine's precursors have long been abandoned in general international law). But for present purposes the doctrine's pedigree is not at issue. Wherever the doctrine's deepest roots lie, the key point is that the margin of appreciation has been shaped and developed by the ECtHR for nearly four decades, and has become inextricably associated with the Strasbourg Court's jurisprudence.

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

3. *See, e.g.*, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶¶ 62–63 (Jan. 19, 1984).

4. *See* Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005); *see also* Jean-Pierre Cot, *The Margin of Appreciation*, *in* 6 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1012, 1013 (Rüdiger Wolfrum ed., 2012). *But see* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 354 (Feb. 6, 2007) ("[T]he European Convention on Human Rights permits a margin of appreciation not found in customary international law . . . .").

5. *See* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008); Cont'l Cas. Co. v. Argentine Republic, ICSID

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propriety of the margin in other supranational judicial contexts, I suggest that this form of deference is problematic in the context of *ad hoc* investor-state arbitration. Through comparative analysis of the ECHR and the international investment regime, I hope to show that certain key grounds for affording the margin in its original context do not obtain within investor-state arbitration — calling into question the propriety of the doctrine in its new setting.

In the arbitral context, the margin of appreciation acts as little more than a pseudo-standard. While appearing to connote a coherent doctrine of deference, the invocation of the margin tends to obscure the reasoning behind tribunals' determination of the appropriate degree of deference in particular disputes, and obstruct dialogue among tribunals across cases. Were it to find increased favor, a doctrine of this kind would only hinder the development of a coherent approach to the standard of review in international investment law.

This relatively granular question about the propriety of the margin of appreciation falls into a broader discussion about standards of review in international investment arbitration. It is worth pausing at the outset to reflect on why the larger issue comes up at all. In broad strokes, the question typically arises where tribunals are called upon to review state action for compliance with vague and open-ended standards of treatment — like the requirements to provide foreign investors with "fair and equitable treatment" (FET) or to refrain from engaging in an indirect expropriation of their property.[6] Taking FET as an example, it is uncontroversial that

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Case No. ARB/03/9, Award (Sept. 5, 2008). Among scholars the idea has been championed by William Burke-White and Andreas von Staden. *See* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); *see also* Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008). Several scholars have further advocated for applying the doctrine in the investment context as expert witnesses in investor-state arbitrations. *See* El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Witness Statement of Anne-Marie Slaughter & William Burke-White (Mar. 4, 2007) (arguing for a margin of appreciation in circumstances of public order or national security). On the other hand, other tribunals have strongly resisted the import of the margin of appreciation into the investor-state dispute settlement. *Siemens*, ICSID Case No. ARB/02/8, Award, ¶ 354 (finding no support for the margin of appreciation doctrine under the Germany—Argentina BIT at issue, or under customary international law); *see also* Quasar de Valores SICAV S.A. v. Russian Federation, Arbitration Inst. of the Stockholm Chamber of Commerce, Award (July 20, 2012); Chemtura Corp. v. Government of Canada, UNCITRAL, Award, ¶ 123 (Aug. 2, 2010).

6. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 141, 148–49 (2d ed. 2013); Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 579 (2012) (highlighting other kinds of situations in which deferential review may be appropriate in investor-state arbitration, as when faced by the superior scientific expertise of national authorities, or agency fact-finding grounding their regulatory measures); *see also* Rahim Moloo & Justin M. Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2011–2012 539 (Karl P. Sauvant ed. 2013).

state action cannot be considered unfair and inequitable solely because it negatively affects a foreign investor's bottom line. States retain significant authority to regulate in the public interest, even if such authority is curtailed by their treaty obligations, and it will often happen that legitimate regulatory measures will reduce the value of an investment without entailing any violation of the foreign investor's rights.[7] But the question then arises: how should state action be reviewed where a violation of FET is alleged? In the absence of any specific guidance from the underlying investment treaties, tribunals have appealed to a wide variety of standards of review in different contexts, ranging from the very deferential (e.g., good faith review)[8] to the more probing (e.g., proportionality).[9] The question of the appropriate standard of review similarly arises where the tribunal is called upon to review national authorities' interpretation of their own domestic law, or to review the state's factual determinations — ranging from the scientific fact-finding underlying an environmental measure[10] to the determination of the existence (and requirements) of a national emergency.[11]

The margin of appreciation arises in this context as one very particular approach to determining the standard of review in disputes against states. As indicated above, the margin is most famously a doctrine of deference employed by the ECtHR for resolving a state's compliance with its obligations under the ECHR. The basic idea is that the state is entitled to a cer-

7. *See* DOLZER & SCHREUER, *supra* note 6, at 141. Similarly, in the context of indirect expropriation, see Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. 1, 6 (2005) (arguing that "cases of regulatory expropriation involve conflicting policies and interests which are not easily, if at all, reconcilable," and that tribunals and international lawyers should "explore in a more systematic way: (i) the policy rationales for providing compensation for expropriation; and (ii) the contextual factors that weigh in favor of and against compensation."); L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or* Caveat Investor, 19 ICSID REV. 293, 297 (2004); *see also, e.g.*, Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶¶ 261–62 (Mar. 17, 2006) ("[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today." Interpreting the relevant BIT's provisions on expropriation in light of customary international law, the Tribunal held that even under the Treaty the results of regulatory actions falling within the state's police powers non-compensable).

8. *See Micula*, ICSID Case No. ARB/05/20, ¶ 94.

9. *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 312–13 (July 14, 2006); Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003).

10. *See, e.g.*, Methanex Corp. v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits, ¶ 41 (Aug. 3, 2005) (assessing, *inter alia*, the claimant's submission that U.S. regulatory measures "constitute a 'sham environmental protection in order to cater to local political interests or in order to protect a domestic industry.'"); *see also* Julianne J. Marley, Note, *The Environmental Endangerment Finding in International Investment Disputes*, 46 N.Y.U. J. INT'L L. & POL. 1003 (2014).

11. *See, e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 339 (May 12, 2005).

tain "space for maneuver," within which its conduct is exempt from full-fledged review.[12] In other words, so long as the state's action does not violate a certain minimum threshold of protection, the Court will respect the state's determination that its action complies with the Convention — even if the Court might have come to a different conclusion itself, faced with the issue de novo.[13] Crucially, however, the relevant minimum threshold varies from right to right in the ECtHR's case law, and is subject to change over time under certain conditions — conditions defined by the Court.[14]

Parallels between the global investment regime and the ECHR make judicial borrowing tempting: both regimes, after all, empower individuals to bring suit against states directly, before a supranational judicial forum, over alleged violations of their treaty rights.[15] Given this core structural similarity, it may seem natural to import processual doctrines worked out through the ECtHR's robust case law to flesh out the relatively young system of investor-state arbitration.[16] But despite the similarities between the regimes, certain key differences account for both the margin's success in the ECHR and its counter-productivity in international investment law.

Above all, the coherence of the margin in its original setting must be understood in light of the fact that the ECHR entails a standing court, charged with the adjudication of claims against a consistent set of parties to a single overarching treaty. The ECtHR is effectively the steward of the human rights system in Europe. By contrast, the investor-state system is fragmented in all the ways the ECHR is not. Arbitral tribunals are constituted on a *one-off* basis — for the resolution of particular disputes arising out of myriad bilateral and multilateral treaties, covering an infinitely complex constellation of states parties. The legal regime depends, for its consistency and development, upon a rich dialogue among investor-state tribunals, litigants, and scholars. The ideas get worked out through the inter-

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12. Schill, *supra* note 6, at 582; *see also* Eirik Bjørge, A Theory of National Application of The European Convention on Human Rights 164 (2013) (unpublished manuscript) (on file with author) (calling the doctrine "a form of legal discretion which recognizes that the respondent state can be presumed to be best qualified to appreciate the necessities of a particular situation affecting its jurisdiction").

13. LEGG, *supra* note 1, at 3; *see also* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 666 (8th ed. 2012); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 80 (2007); Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843–44 (1999).

14. *See* Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289, 332 (2013) (examining how the ECtHR augments the breadth of the margin over time, in view of the subsequent practice of the parties evidencing what it takes to be a new or emerging European Consensus about the scope of a particular Convention right, or in view of certain kinds of changes in international factual or legal circumstances).

15. It should be stressed that this feature, the grant to individuals and private corporations of the right to bring direct suit against sovereign states, is extremely rare in general international law. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 257 (6th ed. 2008).

16. Burke-White & von Staden, *supra* note 5, at 333.

play of theory and practice over time. As I hope to show, the basic problem with forcing the margin of appreciation into this setting is that it undermines this critical process of dialogue and risks throwing this relatively fragile legal ecosystem into disarray.

The problem can be illustrated by appeal to the five investor-state awards to date in which the tribunal invoked the margin of appreciation: in particular the Award in *Continental Casualty v. Argentina* (2008); the Award in *Frontier Petroleum v. Czech Republic* (2010); and most recently the Decision on Liability in *Electrabel v. Hungary* (2012); as well as the Partial Award in *Saluka v. Czech Republic* (2006) and the Decision on Jurisdiction in *Micula v. Romania* (2008).[17] At a glance, each case seems to have done the same thing, albeit in different contexts. In each instance, the tribunal found that the respondent state was entitled to a margin of appreciation, requiring the arbitrators to treat certain decisions by the national authorities with a degree of deference.[18] However, upon closer scrutiny (and as examined in greater depth below), it appears that despite the consistent invocation of the margin as a rubric, each of the tribunals ultimately subjected the respondent states' actions to very different standards of review.[19] In order of greatest to least scrutiny: *Continental Casualty* engaged in a relatively searching least restrictive means analysis;[20] *Frontier Petroleum* adopted a more lenient review for reasonableness and good faith;[21] and *Electrabel* subjected the state's action to review for mere rational basis and good faith.[22] *Saluka* and *Micula*, the most deferential and also the most similar, looked for only "clear and compelling evidence" of error or other improper regulatory

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17. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); *see also* Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 272 (Mar. 17, 2006) (invoking the respondent's "margin of discretion"); and Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008) (invoking the margin of appreciation in reviewing the validity of a non-disputing party's conferral of nationality on the claimant).

18. *Electrabel*, ICSID Case No. ARB/07/19, ¶¶ 6.92, 8.35; *Frontier Petroleum*, UNCITRAL, ¶ 527; *Micula*, ICSID Case No. ARB/05/20, ¶ 94; *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 181; *Saluka*, UNCITRAL, ¶ 272.

19. *See* discussion *infra* Part I.B.

20. *Cont'l Cas.*, ICSID Case No. ARB/03/9.

21. *Frontier Petroleum*, UNCITRAL.

22. *Electrabel*, ICSID Case No. ARB/07/19. As discussed further below, *Electrabel* is unique among the five investor-state cases in (at least seemingly) suggesting that the margin might apply differently in different instances. The Tribunal there applied the margin at two separate points in its analysis, qualifying it as a "modest" margin of appreciation in one instance, *id.* ¶ 6.92, and a merely "reasonable" margin in the other, *id.* ¶ 8.35. The Tribunal explained that a reasonable margin of appreciation would entail review for rational basis and good faith, but spent no words on what standard of review a modest margin might entail — or to what extent it might differ from the former. *See id.* ¶¶ 6.92, 8.35; *infra* Part I.B.

action and convincing evidence of fraud or material error (respectively).[23] I do not want to suggest that any of these tribunals misapplied the doctrine. The problem is rather that the concept of the margin does no work in any of these awards. It creates only an illusion of consistency, at the heavy cost of masking serious differences in approach. In other words, the doctrine acts as an empty proxy for any real analysis of how to approach the truly sensitive issue: how to determine the appropriate level of deference due to a sovereign, if any, in a particular case.

To be clear at the outset, I do not want to argue against judicial borrowing in all contexts. Especially within investment law, borrowing and analogy represent critical tools for refining and developing the law.[24] Nor do I want to collaterally attack the margin of appreciation as such — indeed the doctrine has played a very important role in the ECtHR, and to a lesser extent within the Inter-American Court of Human Rights.[25] Most importantly, I do not want to argue against any and all judicial deference in the adjudication of investor-state disputes. What I do very much doubt is the propriety of this particular doctrine in the particular context of the *ad hoc* settlement of disputes through investor-state arbitration. Here, this capacious doctrine merely papers over the problem of fragmented approaches to the standard of review, with the effect of producing more uncertainty — not less.

The following Part will first situate the debate on the propriety of the margin of appreciation within the broader issue of deference and standards of review in investor-state arbitration. Part II will then turn to the case law to demonstrate the principal problem missed by the debate thus far — that the margin produces only an illusion of coherence, while obscuring important divergences in these tribunals' approaches to working out the appropriate standard of review in particular cases. Part III will examine the margin of appreciation in its original context, in order to illuminate the source of its poor fit within the international investment regime. Within the ECtHR, I suggest, the margin of appreciation is contentless by design — allowing the Court to adopt a flexible and evolutionary approach to the adjudication of human rights disputes over time in the face of widespread cultural diversity. As I hope to show, the doctrine is only given meaning through this standing court's rich jurisprudence. Returning to the global investment regime in Part IV, I argue that the purposefully vague and variable facets of the doctrine make it uniquely unsuitable in the con-

23. *Saluka*, UNCITRAL, ¶ 272, 273; *Micula*, ICSID Case No. ARB/05/20, ¶ 95.

24. *See* discussion *infra* Part III; Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 50 (2013).

25. *See generally* LEGG, *supra* note 1, at 3. *But see* Benvenisti, *supra* note 13, at 843 (suggesting that the doctrine has had perhaps an overly important role, overly prioritizing moral relativism at the expense of universal principles in the adjudication of human rights disputes).

text of *ad hoc* dispute resolution arising out of a fragmented multitude of diverse investment treaties. The margin's inherent open texture helps explain why it has thus far produced dramatically inconsistent results in every such case in which it has been applied. Perhaps counter-intuitively, I suggest that the broader problem of legal certainty arising out of fragmented approaches to the standard of review in international investment arbitration will not likely be resolved by appeal to a unified *a priori* standard of review, as a one-size-fits-all solution.[26] The right answers will take time to work out and will only coalesce gradually, through well-reasoned arbitral practice, knitted together over time through rich judicial dialogue.

I. THE MARGIN IN INVESTMENT LAW

Over the last few years, the margin of appreciation has found growing favor within investor-state arbitration. Respondent states, in particular, are increasingly invoking the margin in defending claims impugning the accordance of their conduct with applicable bilateral investment treaties (BITs), often by direct reference to the case law of the ECtHR.[27] Similar claims have arisen under more nuanced multilateral investment treaties, including the North American Free Trade Agreement (NAFTA)[28] and the Energy Charter Treaty (ECT).[29] The margin appeals to respondent states because it assumes *a priori* that the state is entitled to a degree of deference — a "space of maneuver" — in complying with its treaty obligations.[30] Because respondents can rarely find explicit authority for deferential review in their treaties, they have increasingly turned to the ECtHR's

26. This argument assumes current institutional arrangements as a given. The picture may of course look very different under a more centralized judicial regime for the resolution of international investment disputes — as, for example, an appellate mechanism within the ICSID system, or an entirely new standing international investment court. *See, e.g.*, UNCTAD, *IIA Issues Note No. 2: Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, at 8–9, UNCTAD/WEB/DIAE/PCB/2013/4 (June 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (exploring both institutional mechanisms as possible avenues of reform). The problem, for present purposes, is to grapple with the contemporary absence of any formal institutional centrality in the global investment regime; the possibility of future centralization lies beyond this Article's scope.

27. *See, e.g.*, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶¶ 434–36 (July 24, 2008) (recounting the respondent's argument that, as a sovereign state, Tanzania was acting well within its margin of appreciation under international law). The respondent relied exclusively on ECtHR cases in supporting this position. *Id.* ¶ 434 (citing Ireland v. United Kingdom, 18 Jan. 1978, §§ 214, 229, Ser. A no. 25; Rasmussen v. Denmark, 28 Nov. 1984, § 40, Ser. A no. 87; Lithgow & Others v. United Kingdom, 8 July 1986, Ser. A no. 102; and Smith & Grady v. United Kingdom, nos. 33985/96, 33986/96, § 77, ECHR 1999-VI).

28. *See* Chemtura Corp. v. Government of Canada, UNCITRAL, Award, ¶ 123 (Aug. 2, 2010).

29. *See* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

30. *See* Schill, *supra* note 6, at 584.

well-established jurisprudence for support in the hopes of establishing that they are at least entitled to some degree of deference *in principle*.

Invocations of the margin have thus far yielded only a mixed track record for respondents. Some tribunals have expressly rejected the doctrine. For example, the Tribunal in *Siemens v. Argentina* held that as regards the right to property, "the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the [Germany-Argentina BIT]."[31] And other tribunals have simply ignored the respondent's invocation of the doctrine.[32] But a handful of arbitral tribunals have expressly employed the margin in reviewing states' conduct under investment treaties — both at the respondent's urging, as in *Continental Casualty v. Argentina*, and apparently *sua sponte* as in *Frontier Petroleum v. Czech Republic* and *Electrabel v. Hungary*.[33] Suffice it to say that from a high-altitude review of the cases, the long-term acceptance of the doctrine in the context of investor-state arbitration remains to be seen.

Still, the mere notion that the margin of appreciation has a role to play within investor-state arbitration has sparked a polarized scholarly debate. As I hope to show, recourse to the doctrine thus far has also already produced significant jurisprudential problems. By way of background, this Part will first situate the debate about the margin in the broader discussion of the appropriate role and contours of judicial deference in investor-state arbitration. I will then turn to the cases where the doctrine has found favor, in hopes of illustrating its poor fit within the investment regime.

A. Deference and the Standard of Review

The problem of standards of review in investment law starts with silence. As noted above, investment treaties tend to say nothing about the standards of review applicable to disputes between sovereign states and foreign investors over the meaning or application of their provisions. However the fact of their silence on this issue should not be surprising,

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31. Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 354 (Feb. 6, 2007); *see also Chemtura*, UNCITRAL, ¶ 123 (holding that "the assessment of the facts is an integral part of its review under Article 1105 of NAFTA. In assessing whether the treatment afforded to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations. This is not an abstract assessment circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be conducted *in concreto*. The Tribunal will proceed to such assessment *in concreto* when reviewing the specific measures challenged by the Claimant.").

32. *See, e.g.*, *Biwater Gauff*, ICSID Case No. ARB/05/22, ¶¶ 434–36 (recounting Tanzania's invocation of the margin of appreciation at length in summarizing the respondent's position, but completely ignoring the argument in its own analysis of the case).

33. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181 & n.270 (Sept. 5, 2008); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 527 (Nov. 12, 2010); *Electrabel*, ICSID Case No. ARB/07/19, ¶ 6.92.

and would not be necessarily problematic by itself. It is indeed *unusual* to find express guidance on appropriate standards of review in the constituent instruments of international courts and tribunals, or even in national constitutions.[34] The silence of investment treaties becomes problematic only in view of the fragmented nature of the investment regime.

As a preliminary matter, it should be understood that the very idea that *any* deference should be afforded to host states is controversial, though increasingly less so. Investment arbitration was, for a long time, considered merely a sub-species of international commercial arbitration or, in other words, a purely private dispute between the investor and the State-*qua*-private party. As Stephan Schill explains, any notion of deference in that setting was considered "anathema" as a violation of a fundamental principle of international arbitration: the parties' equality of arms.[35] However, as Burke-White and von Staden have amply shown, it is increasingly clear that the investment arbitration regime has moved from its purely private origins into a form of thoroughgoing public law litigation, in which foreign investors regularly challenge host states' fundamental regulatory policy.[36]

Tribunals have increasingly come to appreciate this evolution, and have turned to the idea of deferential standards of review as a tool for balanc-

34. In the United States, the idea of differentiating among various standards of review appropriate to different cases (i.e., strict scrutiny, intermediate scrutiny, and rational basis review) is completely judge-made. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Similarly, the famous German doctrine of proportionality review is found nowhere in the Basic Law; it too is judge-made. *See, e.g.*, Apotheken-Urteil [Pharmacy Case], Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377, 1958 (Ger.); *see also* Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT'L L. 291 (2012). Similarly, in the ECtHR, the margin of appreciation is a wholly judge-made doctrine, and has remained un-codified for sixty years, although it will likely be incorporated into the preamble to the ECHR soon. *See* Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* June 24, 2013, art. 1, C.E.T.S. No. 213, https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2012)166&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 (appending the following recital to the end of the preamble: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention[.]"). Article 1 of Protocol 15 will only come into force upon ratification by all the parties; although universal ratification appears likely, at the time of writing, Protocol 15 has been signed by only twenty-one out of forty-seven, and ratified by just one (Ireland). Up-to-date figures on signatures and ratifications are available at *Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR. TREATY OFFICE (June 27, 2013), http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=27/06/2013&CL=ENG.

35. Schill, *supra* note 6, at 587.

36. *See* Burke-White & von Staden, *supra* note 5, at 287; *see also* 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, 316 (2008); Roberts, *supra* note 24, at 46–49; Schill, *supra* note 6, at 579.

ing the regulatory authority of the state against foreign investors' rights and legitimate expectations under investment treaties.[37] Different arbitral panels have identified and relied on a dizzying set of standards of review in different cases, drawn from international and national orders, and both civil and common law jurisdictions. These standards generally involve some particular linguistic formulation connoting a test. They range from the simple to the nuanced, and from the extremely deferential to the relatively strict.

Some standards entail only minimal review, limited, for example, to the assessment of good faith, rational basis, or reasonableness (in order of greatest to least deference). Other standards involve more sophisticated tests, and will tend to involve a more searching (i.e., less deferential) analysis of impugned governmental action. For example, in applying the least restrictive means (LRM) analysis favored in WTO jurisprudence, a court will uphold a measure so long as it was (1) necessary to a legitimate state aim, and (2) the least restrictive means reasonably available toward achieving that end.[38] Proportionality review is even more strict (if more subjective), adding to the LRM analysis a third prong whereby even if a measure satisfies LRM the court will balance the value of achieving that legitimate aim against its interference with the claimant's right.[39] Finally, U.S.-style "strict scrutiny" represents a maximally searching (or minimally deferential) standard of review, requiring that to survive scrutiny a measure must be both "narrowly tailored to serve a compelling state interest" and also the least restrictive means toward achieving its aim.[40]

Arbitral tribunals have turned to each of these widely varied approaches in grappling with the silence of their underlying treaties. The effect is a state of general uncertainty as to what the standard of review might be from one case to the next — whether the state will be entitled to significant deference in comporting with its treaty obligations, or whether it will be subject to more exacting review. The tribunal's choice of standard thus has serious consequences, and can easily prove decisive in a particular arbi-

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37. *See, e.g.*, Methanex Corp. v. United States, UNCITRAL, Final Award on Jurisdiction and Merits (Aug. 3, 2005); *see also* DOLZER & SCHREUER, *supra* note 6, at 141.

38. *See, e.g.*, Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 308, WT/DS285/AB/R (Apr. 7, 2005). Within investment law, see *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 196; Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L.J. 371, 378 (2007).

39. HCJ 2056/04 Beit Sourik Vill. Council v. Government of Israel [2004] (Isr.); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012). In the context of investor-state arbitration, see Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003). Among scholars, Alec Stone Sweet has been a forceful advocate for reliance on proportionality review in the context of investor-state arbitration. *See* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 76 (2010).

40. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990).

tration. As the significance of these choices becomes increasingly apparent, the problem of uncertainty is moving rapidly to the forefront.[41] Faced with this state of confusion, a growing number of scholars have sought out a more unified approach to the standard of review, applicable across a wide variety of cases.[42]

The debate about the margin of appreciation in international investment law arises out of this broader problem of identifying an appropriate standard of review in the context of *ad hoc* arbitrations based on thousands of disparate legal instruments.[43] On the one side, advocates have been spurred by a perceived need to expand judicial deference in investor-state arbitration where tribunals are faced with disputes that implicate public law, including, for example, disputes over the effects of fundamental state regulatory policy in areas like the environment, health, or public morals, as well as state action in the context of emergencies.[44] Supporters of the margin in the investor-state context question whether non-national arbitrators ought to pass judgment on the state's domestic regulatory policy. At least in the context of some such "public law" disputes, they argue that a degree of deference is necessary, and that the margin of appreciation represents an appropriate mechanism for achieving the correct balance.[45] Most importantly, they emphasize that the margin approach is suitable *across all kinds of cases*.[46] Burke-White and von Staden stress that the doctrine envisions different degrees of deference in different contexts.[47] According to them, where an investment dispute has a public character, the margin of appreciation allows the arbitrator the flexibility to determine whether a wide or limited degree of deference would be appropriate; and where an arbitration between a state and a foreign investor entails a purely private dispute, no margin should be afforded to the respondent state at all (i.e., the latter is entitled to no deference).[48] On this view, the margin fits better than other standards within investment law because of its characteristic elasticity.

On the other side, several critics reject the margin as inappropriate in the investor-state context — but they have tended to focus on what they

41. In Anthea Roberts's phrase, the issue of the standard of review is likely to prove the next battleground in the theory and practice of international investment arbitration. Anthea Roberts, *The Next Battleground: Standards of Review in Investment Treaty Arbitration*, 16 INT'L COUNCIL FOR COM. ARB. CONGRESS SERIES 170, 172 (2011).

42. *See, e.g.*, Burke-White & von Staden, *supra* note 5, at 286, 333.

43. These instruments include thousands of bilateral and multilateral treaties, as well as contracts and national investment laws.

44. *See* Burke-White & von Staden, *supra* note 5, at 292; Choudhury, *supra* note 5, at 827.

45. *See* Andreas von Staden, *Deference or No Deference, That is the Question: Legitimacy and Standards of Review in Investor-State Arbitration*, INVESTMENT TREATY NEWS, July 19, 2012, at 3, 3–4.

46. Burke-White & von Staden, *supra* note 5, at 286, 323, 333.

47. *Id.* at 305–06.

48. *Id.* at 288.

take to be problems with the notion of deference *as such*.[49] They reject the margin as affording too much deference to respondent states, emphasizing that the purpose of the investor-state arbitral regime is to protect foreign investors from undue interference by host states. These critics portray the margin as a means of giving respondent states a free pass to accomplish indirectly what they cannot do directly.[50] In other words, it enables states to cheat — to take advantage of deference by dressing up mere interference in the clothes of public law (e.g., by engaging in indirect expropriation through dubious environmental measures).[51] Indeed they tend to go further and reject all deference in the investor-state context, advocating instead U.S.-style "strict scrutiny."[52] The criticisms are generally quantitative; the arguments tend to reduce into either the old contention that *any* deference is inappropriate in the context of investor-state arbitration, or that, at any rate, this particular doctrine affords the state *too much* leeway.

In my view, the debate has missed the conceptual core of the problem with importing a doctrine like the margin of appreciation into the *ad hoc* adjudicatory setting. The problem is not that the doctrine affords deference to respondent states *as such*, or that it necessarily entails too much deference. Advocates for the margin raise compelling arguments about the need for deferential standards of review in investment law, at least in some contexts. The deeper problem with the margin is that it entails no particular standard of review. As regards the scope and degree of deference due to national decision-makers, the margin of appreciation is essentially *contentless*. And indeed, as constructed by the ECtHR, the doctrine is contentless by design.

By contrast to the varied standards of review considered above, the margin of appreciation does not entail any concrete linguistic standard or specific test. Unlike review for good faith, reasonableness, LRM, and proportionality, the margin does not inherently imply any particular level of deference to the decisions of national authorities. While it recognizes in principle that some deference is due to respondent states, the doctrine is contentless as to the scope and degree of that deference in the abstract.[53]

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49. *See* Kassi D. Tallent, *The Tractor in the Jungle: Why Investment Arbitration Tribunals Should Reject a Margin of Appreciation Doctrine*, *in* 3 INVESTMENT TREATY ARBITRATION & INTERNATIONAL LAW 111 (Ian A. Laird & Todd J. Weiler eds., 2010); Sarah Vasani, *Bowing to the Queen: Rejecting the Margin of Appreciation Doctrine in International Investment Arbitration*, *in* 3 INVESTMENT TREATY ARBITRATION & INTERNATIONAL LAW 137, 162–63 (Ian A. Laird & Todd J. Weiler eds., 2010).

50. *See* Tallent, *supra* note 49, at 113; Vasani, *supra* note 49, at 149.

51. See, for an oft-cited example, Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) (wherein Mexican authorities declared the region around the claimant's waste disposal facility a protected area for a rare form of cactus on apparently dubious grounds, thereby precluding Metalclad from operating its facilities).

52. *See* Tallent, *supra* note 49, at 113, 134; *see also* Vasani, *supra* note 49, at 149, 162–65 (acknowledging that at least emergency situations "warrant increased scrutiny").

53. At most the Court has pointed to certain factors that it considers relevant to the scope of the

B. Recourse to the Margin of Appreciation

The best way to draw out the indeterminacy inherent in the margin as applied in the context of *ad hoc* arbitration is by comparing the cases — specifically the five awards where the tribunal relied on the doctrine to date: *Continental Casualty v. Argentina*, *Frontier Petroleum v. Czech Republic*, *Electrabel v. Hungary*, *Saluka v. Czech Republic*, and *Micula v. Romania*.[54]

Continental Casualty was one of several arbitrations arising out of the Argentine financial crisis of 2001.[55] Continental, an American company, claimed that Argentina's emergency fiscal measures had interfered with its investment in Argentina (an insurance company named CNA Aseguradora), thereby substantially diminishing its value in violation of several provisions of the U.S.—Argentina BIT (to the tune of roughly $70 million). Argentina argued that its measures were not wrongful because they constituted lawful derogations from the BIT under the "non-precluded measures" clause at Article XI, exempting, *inter alia*, measures "necessary for the maintenance of public order," or the protection of the state's own "essential security interests" from constituting violations of the treaty. For present purposes, the relevant question of the appropriate standard of review arose out of the question of who gets to decide whether or not Article XI applied in the present circumstance — the Tribunal or the respondent state itself (meaning that the clause would be "self-judging" on the question of applicability)? And if the Tribunal, then how much, if any, deference should be afforded to the respondent state?

The Tribunal held that the clause was not self-judging, and that it thus had to determine whether the financial crisis triggered Article XI. In determining the applicability of this derogation clause, however, the Tribunal held that the respondent state should be entitled to a margin of appreciation, citing to the jurisprudence of the ECtHR.[56] In the words of the Tri-

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margin in particular cases. In Buckley v. United Kingdom, 25 Sept. 1996, § 74, *Reports of Judgments and Decisions*, 1996-IV, the Court held that "[t]he scope of this margin of appreciation is not identical in each case but will vary according to the context . . . . Relevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned." *See also* Schalk & Kopf v. Austria, no. 30141/04, § 98, ECHR 2010 (observing that "[t]he scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background."). However, it provides no doctrinal explanation for how it weighs these factors in particular cases.

54. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012); Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008).

55. *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 53.

56. *Id.* ¶ 181 (citing Jahn & Others v. Germany, nos. 46720/99, 72203/01, 72552/01, ECHR 2005-VI) (further citing Shany, *supra* note 4). The Tribunal notes, in the footnote, that "A certain

bunal, "this objective assessment must contain a significant margin of appreciation for the State applying the particular measure: a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight."[57]

Rather than impose a strict review, the Tribunal determined that, given the state's margin of appreciation, it would only be appropriate to engage in a relatively deferential LRM analysis, asking only (1) whether the impugned measures were necessary to a legitimate end, and (2) whether these means were the least restrictive measures reasonably available to achieving that purpose.[58] With respect to all but one relatively minor claim, the Tribunal found that Argentina's measures satisfied the LRM test and thus constituted non-precluded measures under Article XI — thereby immunizing the respondent state from liability under the BIT.[59]

Frontier Petroleum involved a much less dramatic kind of dispute. It belongs to a line of cases interrogating the liability of a respondent state for the actions of its judiciary in refusing to enforce a commercial arbitral award between two private parties.[60] Frontier, a Canadian company, claimed that it had made a significant investment in the Czech Republic through a joint venture to manufacture aircrafts with a private Czech company (Moravan).[61] After disputes arose between the two companies, the claimant commenced and won a private commercial arbitration in Stockholm, and sought to enforce the award in the Czech Republic under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[62] The Czech courts refused

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deference to such a discretion [of the respondent state] when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary, fair and equitable, may well be by now a general feature of international law also in respect of the protection of foreign investors under BITs." *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 181 n.270.

57. *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 181.

58. *Id.* ¶¶ 193–95; *see also* Sweet, *supra* note 39, at 73–74.

59. *Cont'l Cas.*, ICSID Case No. ARB/03/9, ¶ 320 (the one exception entailed a comparatively small sum of U.S. $2.8 million, relative to the U.S. $70 million originally claimed).

60. *See, e.g.*, Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award (June 30, 2009); ATA Constr., Indus. & Trading Co. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2000); White Indus. Austl. Ltd. v. Republic of India, UNCITRAL, Final Award (Nov. 30, 2011). *But see* GEA Grp. Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award (Mar. 31, 2011) (finding that a commercial arbitral award does not constitute an investment, and thus that State authority's refusal to enforce any such award is not, on its own, actionable before an ICSID tribunal). *See generally* D. Brian King & Rahim Moloo, *Enforcement After the Arbitration: From National Courts to Public International Law Fora*, *in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 393, 412–26 (Franco Ferrari ed., 2013).

61. Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 26 (Nov. 12, 2010).

62. The New York Convention provides only very limited grounds for a State to refuse to enforce an arbitral award, one of which is a relatively narrow category of public policy. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 ("Recognition and enforcement of an arbitral award may also be

enforcement as a matter of public policy (one of the few permissible grounds for refusing enforcement under the New York Convention (Article V(2)(b))), citing Moravan's intervening bankruptcy, the need to maintain the equality of creditors in bankruptcy proceedings, and the equitable and orderly distribution of assets.[63] As a measure of last resort, Frontier brought a direct claim against the Czech Republic as an investor under the Canada—Czech BIT, alleging that the Czech authorities' refusal to enforce its commercial award constituted, *inter alia*, a breach of the BIT obligation to afford foreign investors fair and equitable treatment.

The crucial issue implicating the standard of review was how to determine whether the respondent state had actually breached its obligation under the New York Convention, given that it claimed to have refused enforcement pursuant to the valid public policy exception under Article V(2)(b). In the Tribunal's view, this task amounted to determining whether the Czech courts' interpretation of the public policy exception in Article V(2)(b) was "made in an arbitrary or discriminatory manner," or otherwise amounted to a breach of FET.[64] According to the Tribunal in *Frontier Petroleum*, it would not be necessary to determine for itself whether the findings of the Czech courts met the standard of public policy under Article V(2)(b), nor would it be appropriate for it to determine the precise contents of that standard.[65] Instead, it held that "States enjoy a certain margin of appreciation in determining what their own conception of international public policy is."[66] The Tribunal thus limited itself to a highly deferential form of review, asking only whether the Czech courts' interpretation of public policy under the New York Convention was "*reasonably tenable* and made in *good faith*."[67] The Tribunal found no reason to doubt the Czech courts' good faith, and was satisfied with the reasonableness of the courts' interpretation of public policy by evidence that this view was corroborated in French and German national jurisprudence, as well as in academic commentary.[68] The Tribunal thus found no violation of the BIT.

The third case, *Electrabel v. Hungary*, concerned a dispute arising out of Hungary's accession to the European Union (EU), and its subsequent efforts to harmonize its laws with binding EU regulations.[69] In 1995, Hun-

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refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.").

63. *Frontier Petroleum*, UNCITRAL, ¶ 29.

64. *Id.* ¶ 525.

65. *Id.* ¶ 527.

66. *Id.*

67. *Id.* (emphasis in original).

68. *Id.* ¶¶ 528–30.

69. Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

gary caused a then-state-owned power plant operator (Dunamenti) to enter into a power-purchase agreement (PPA) with a separate state-owned energy supply company, guaranteeing the latter's purchase of a large, fixed quantity of electricity from the former. The goal was to make Dunamenti attractive to private, and especially foreign, investment; the PPA would act, in effect, as a lucrative government subsidy. Between 1995 and 2001, the claimant, a Belgian corporation, invested heavily into Dunamenti, presumably to take advantage of the attractive PPA. The most significant dispute arose in connection with Hungary's accession to the EU, in 2004, due to a perceived inconsistency between Dunamenti's preferential PPA and EU regulations prohibiting such subsidies. Hungary ultimately terminated the PPA in 2008 in compliance with a binding order to do so by the European Commission in the form of a "Final Decision."[70] Notably, Hungary declined to challenge the Commission's decision before the EU courts.[71] Electrabel thus brought an ICSID claim against Hungary under the Energy Charter Treaty, contending that the state's termination of the PPA constituted an indirect expropriation and a violation of FET. Though less significant to the overall arbitration, Electrabel further complained of Hungary's reintroduction of regulated electricity pricing in 2006, which the claimant contended violated its legitimate expectations and forced Dunamenti to lower its prices by 40 percent.[72]

The *Electrabel* Tribunal invoked the margin of appreciation at two different points in its analysis. It resolved the bulk of the dispute by determining that Hungary was under an obligation to comply with EU regulations and could not bear international responsibility for complying with any binding orders by the Union under the terms of the ECT.[73] However, the issue of deference arose in relation to two remaining issues: whether Hungary should have challenged the European Commission's Final Decision before the EU courts; and, separately, whether Hungary's reintroduction of regulated pricing in 2006 violated Electrabel's legitimate expectations (and thus FET). First, in resolving whether Hungary should have challenged the European Commission's Final Decision, the Tribunal held that "Hungary was entitled to a *modest* margin of appreciation in arriving at its own discretionary decision in regard to such proceedings, without thereby committing a breach of the ECT's FET standard."[74] The Tribunal went no further in explaining what level of review any such "modest" margin would entail, simply finding Hungary not liable for failing to challenge the Commission's decision.

70. *Id.* ¶ 2.24.
71. *Id.* ¶ 6.92.
72. *Id.* ¶ 2.12.
73. *Id.* ¶ 4.40 (finding that ECT itself envisions compliance with EU regulations).
74. *Id.* ¶ 6.92 (emphasis added).

The Tribunal was somewhat more specific in invoking the margin a second time, later in the case. In assessing Hungary's regulation of electricity prices, the Tribunal held that, at least as regards that particular sector of the economy, "[r]egulatory pricing (by operation of law) was and remains an important measure available to State regulators."[75] As a result, the Tribunal determined that the state enjoyed a "*reasonable* margin of appreciation in taking such measures before being held to account under the ECT's standards of protection."[76] The Tribunal added that its "task is not here to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith towards Dunamenti at the relevant time."[77] Notably, the Tribunal's language gives pause as to whether it applied the doctrine in the same way in each instance — whether, in other words, a "reasonable" margin of appreciation is the same as a "modest" one. At least in the former case, it seems as though the Tribunal considered the doctrine to call for a review for rational basis and good faith; as for the "modest" version of the doctrine, the reader is simply left wondering.

Two further cases merit brief mention. The first is *Saluka v. Czech Republic*, wherein the Tribunal afforded the respondent state a "margin of discretion" in assessing the compliance of its regulatory action with the Czech—Netherlands BIT provision on expropriation.[78] In relevant part, the claimant complained that the respondent had expropriated its investment in a Czech bank by placing the ailing institution under state administration. Despite the slightly different linguistic formulation, the Tribunal engaged in a similar kind of analysis to the above cases. The Tribunal held that, in view of the bank's financial state, the Czech State "had the responsibility to take a decision," and that it "enjoyed a margin of discretion in the exercise of that responsibility."[79] Given that margin, the Tribunal reviewed only for "clear and compelling evidence that the [Czech banking regulator] erred or acted otherwise improperly in reaching its decision" to put the bank under forced administration.[80] In the absence of any such evidence, the Tribunal considered itself bound to accept the justification given by the Czech authorities.[81]

Finally, in *Micula v. Romania*, the Tribunal invoked the margin of appreciation in assessing the validity of the claimant's acquisition of Swedish nationality. Though born a Romanian national, Micula claimed the right to

75. *Id.* ¶ 8.35.
76. *Id.* (emphasis added).
77. *Id.*
78. Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 272 (Mar. 17, 2006).
79. *Id.*
80. *Id.* ¶ 273.
81. *Id.*

sue Romania under the Sweden—Romania BIT on the grounds that he had both renounced his Romanian nationality and acquired Swedish nationality. Romania challenged his claim to foreign nationality, alleging that the claimant had acquired Swedish nationality through fraud or material mistake of fact.[82] Noting that Sweden was not a party to the dispute, the Tribunal invoked the margin to ground an extremely deferential standard of review. It considered that the "State conferring nationality must be given a 'margin of appreciation' in deciding upon the factors that it considers necessary for the granting of nationality,"[83] and determined under that rubric that it could only disregard the Swedish authorities' decision if there was "convincing and decisive evidence" that the "acquisition of Swedish nationality was fraudulent or at least resulted from a material error."[84]

Taking stock, none of these cases, on their own, seem glaringly problematic. In each instance the Tribunal determined that the state was due a margin of appreciation in a particular context, and accordingly scrutinized its impugned measures under a more or less lenient standard. But viewing the awards side by side, it appears that each of these tribunals adopted very different standards of review under the seemingly consistent rubric of the margin: a somewhat deferential LRM analysis in *Continental Casualty*;[85] a more deferential review for reasonableness and good faith in *Frontier Petroleum*;[86] still lighter review for a mere rational basis and good faith in *Electrabel*;[87] and even more deferential approaches in *Saluka* and *Micula*, with the former reviewing for clear and compelling evidence of regulatory error or other impropriety,[88] and the latter reviewing only for clear and convincing evidence of fraud or material error.[89] The problem is not that any of these tribunals *misapplied* the margin — but rather that the doctrine

82. Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 94 (Sept. 24, 2008). (Sweden was not a party to the dispute).

83. *Id.*, *citing* Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶¶ 62–63 (Jan. 19, 1984).

84. *Micula*, ICSID Case No. ARB/05/20, ¶ 95.

85. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 181 (Sept. 5, 2008).

86. Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 527 (Nov. 12, 2010).

87. *See* Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 8.35 (Nov. 30, 2012) (finding the State entitled to a "reasonable" margin of appreciation, which seemed to require only that the state's determination was "not made irrationally and not exercised in bad faith" — i.e., rational basis review). The *Electrabel* Tribunal indicated in a separate instance that the State was entitled to a differently qualified "modest" margin of appreciation, but left unsaid whether this entailed a weaker standard of review, and if so, what kind of analysis it might have entailed. *Id.* ¶ 6.92.

88. Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 272 (Mar. 17, 2006).

89. *Micula*, ICSID Case No. ARB/05/20, ¶ 94.

itself provides no guidance one way or another as to the appropriate standard of review. While indicating merely that *some* deference is appropriate, these invocations of the margin obscure the deeper issue of *how much*.

Of course these cases did not necessarily all call for the same standard of review. Cases like *Electrabel* and *Saluka* seem to call for the same kind of standard insofar as each tribunal weighed the respondent's justification of its regulatory action as coming under its police power — and it stands out that the one engaged in rational basis review, while the other reviewed only for clear and compelling evidence of error or impropriety. But on the other hand, it seems fairly reasonable that the determination of an absent third state as to nationality would be entitled to substantially more deference than the assessment of a respondent state's invocation of a public policy exception to its treaty obligation to enforce foreign arbitral awards. To be sure, different standards of review may be appropriate in different circumstances. The point is rather that the doctrine of the margin does no work in actually determining what the right standard should be. At least in the context of *ad hoc* investment arbitration, the problem is that the doctrine *appears* to be doing work, but in reality amounts to a mere pseudo-standard — a substitute for real reasoning. In other words, the invocation of the margin of appreciation as a rubric creates a false impression of consistency across cases like *Continental Casualty, Frontier Petroleum*, *Electrabel*, *Saluka*, and *Micula*, while obscuring significant differences in the type and degree of deference afforded therein.

The problem comes down to institutions. As indicated above, the margin of appreciation is by no means a useless doctrine in all judicial contexts, even in light of its apparent hollowness. Indeed, in the practice of the ECtHR the doctrine appears to be contentless *by design*; its flexibility is a feature there, not a flaw. The following Part will thus turn to an examination of the margin in Strasbourg, in hopes that a comparison to the operation of the doctrine in its original setting will be instructive as to its poor fit in the context of international investment law.

II. STRASBOURGEOIS DEFERENCE

In comparison to the fragmented international investment regime, the ECHR represents the exemplar of a systematized supranational judicial order. At its pinnacle sits the ECtHR, a standing court charged with the adjudication of human rights disputes between individuals and the 47 parties to the Convention. The ECHR permits individuals to bring direct claims against the states parties — and they do so frequently. Today the

Court's backlog is well over 100,000 cases, and ever growing.[90] All this means that the Strasbourg Court enjoys ample opportunities to interpret (and reinterpret) the rights of the Convention — and it has developed a formidable case law over its sixty-plus years in operation.[91]

While the margin of appreciation is, today, a fixture of the ECtHR's jurisprudence, the Court developed the doctrine only gradually, over the last forty years.[92] The ECtHR first deployed the concept in the 1976 case *Handyside v. United Kingdom* — a case implicating the freedom of expression at Article 10 of the Convention, which expressly admits limitations by the state for purposes of regulating public morals.[93] The question, then, was how much weight to give to the state's own determination that it was acting within the scope of that exception. The case involved the state's seizure, on grounds of obscenity, of several thousand copies of *The Little Red School Book* — a book which encouraged young people to experiment with sex and drugs and otherwise challenge the authority of adult "paper tigers."[94] The Court famously refused to scrutinize the United Kingdom's decision to confiscate the books, declaring the state entitled to a "margin of appreciation" in determining the appropriate contours of the public morals exception in Article 10(2).[95] The Court pointed out that:

> [T]he machinery of protection established by the Convention is *subsidiary* to the national systems safeguarding human rights . . . . The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines . . . . By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle *in a better position* than the international judge to give an opinion on the exact content of [the]

90. As a snapshot, in 2009 alone the Court received 57,200 applications, and the Court's backlog reached 119,300. Council of Europe Press Division, Fact Sheet: Protocol 14, The Reform of the European Court of Human Rights (May 25, 2010), *available at* https://wcd.coe.int/com.instranet.IstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1566940&SecMode=1&DocId=1583116&Usage=2.

91. *See* Arato, *supra* note 14, at 333.

92. Only in the last few years have the parties begun the process of formally codifying the judge-made doctrine, culminated in Protocol 15, opened for signature on April 29, 2013, which provides, *inter alia*, for incorporating a reference to the margin of appreciation in the preamble to the Convention. *See* Protocol No. 15, *supra* note 34.

93. Handyside v. United Kingdom, 7 Dec. 1976, Ser. A no. 24. The exception clause at art. 10(2) states that: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society," including, *inter alia*, "for the prevention of disorder or crime, for the protection of health or morals." ECHR, *supra* note 2, art. 10(2).

94. *Handyside*, §§ 20, 32.

95. *Id.* § 48.

> requirements [of public morals] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[96]

The key justification for affording deference to the state was thus, at this stage, based on the doctrine of subsidiarity. The idea was that, in those cases where the state was in a better position to determine the line between a qualified right and its exception in light of the "vital forces" of its own country, the Court would defer to the state's interpretation of its obligations under the Convention.

Shortly after *Handyside*, the Court extended the doctrine to states' derogations in the context of national emergencies in the case of *Ireland v. United Kingdom*.[97] The issue here was to assess the state's judgment that it was acting within the meaning of the Convention's general provisions on derogation, permitting states to derogate from the ECHR "in time of war or other public emergency threatening the life of the nation."[98] And here too the Court grounded its answer in the principle of subsidiarity, holding that:

> [b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and the scope of derogations necessary to avert it.[99]

Such deference would not be limitless, but the Court would afford the state a wide berth.[100]

Over the years the Court has dramatically extended and fleshed out the doctrine to encompass its review of state compliance with a wide array of substantive rights of the Convention — not only as a matter of subsidiarity, but increasingly as a means of fostering the rich cultural, political, and legal diversity across the parties to the Convention. In other words, as Benvenisti notes, the doctrine is today largely "based on the notion that each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions."[101] As the modern doctrine stands, the Court will afford states a margin of appreciation as regards their compliance with (most) of

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96. *Id.* §§ 48–49 (emphasis added).

97. Ireland v. United Kingdom, 18 January 1978, § 48, Ser. A no. 25.

98. ECHR, *supra* note 2, art. 15. It is worth bearing in mind the parallel between this situation and Argentina's invocation of the non-precluded measure clause in the Argentina—United States BIT in Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).

99. *Ireland v. United Kingdom*, § 207.

100. *Id.* ("Article 15 § 1 leaves [national] authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect.").

101. Benvenisti, *supra* note 13, at 843–44. No supporter of the doctrine, Benvenisti goes on to state that the "Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights" and that its use should be curtailed within the ECtHR. *Id.* at 844.

the Convention rights,[102] reviewing their laws, regulations, and measures for conformity to a certain minimum threshold, beyond which the Court will respect the decisions of each state to determine how best to effectuate the right within its borders.

As noted above, the core idea is that the Court will respect the state's determination of its obligations under the Convention — based on subsidiarity or cultural diversity — even if the Court would have itself come to a different decision if presented with the matter de novo. However, it is easier to frame the margin as an abstract principle than to pin down its full doctrinal contours. In practice, the margin represents something of a moving target: unlike typical standards of review, within the ECHR the margin affords national authorities a *variable* level of deference, shifting from right to right, and over time.

In the first place, the Court gives states a wider or narrower space of deference depending on the Convention provision in question — taking into consideration the context and importance of the interests at issue. Speaking in general terms, in *Buckley v. United Kingdom* the Court offered the vague explanation that "[r]elevant factors include the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned."[103] While such a broad factor-based test tells us relatively little, a closer look at the cases reveals some clear trends. For example, in the context of assessing state measures regarding public emergencies,[104] national security,[105] the protection of public morals,[106] and interference with private property,[107] the Court tends to afford states a

102. The exception being a handful of "absolute rights," for example the prohibition of torture and inhuman and degrading treatment at Article 3 or the prohibition of slavery at Article 4, which entails no qualification and affords no derogation under Article 15. *See* ECHR, *supra* note 2, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), art. 15(2) ("No derogation . . . from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.").

103. Buckley v. United Kingdom, 25 Sept. 1996, § 74, *Reports of Judgments and Decisions*, 1996-IV; *see also* Schalk & Kopf v. Austria, no. 30141/04, § 98, ECHR 2010 (observing that "[t]he scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background."). However, it provides no doctrinal explanation for how it weighs these factors in particular cases.

104. *Ireland v. United Kingdom*, § 48; Brannigan & McBride v. United Kingdom, 26 May 1993, § 40, §§ 41–43, Ser. A no. 258-B (both cases affording a wide margin to the State's decision to derogate from the Convention "[i]n time of war or other public emergency threatening the life of the nation.").

105. Klass & Others v. Germany, 6 Sept. 1978, Ser. A no. 28 (1978) (concerning a secret surveillance system aimed at combating terrorism).

106. Handyside v. United Kingdom, §§ 48–49, 7 Dec. 1976, Ser. A no. 24.

107. Perhaps of greatest relevance to international investment law, the Court takes a highly deferential approach to the right to property, affording a "wide" margin in cases alleging either a deprivation of, or interference with, private property by the State in violation of ECHR Article 1, Protocol 1 (A1-P1). *See* James & Others v. United Kingdom, 21 Feb. 1986, § 46, Ser. A no. 98 (holding that States enjoy a "wide margin of appreciation" in determining the "public interest" in relation to ex-

"wide" (more deferential) margin. By contrast, the Court has afforded only a "narrow" margin in cases implicating an intimate aspect of an individual's private life.[108]

Moreover, the margin varies over time. The Court augments the size of the member states' margin of appreciation under certain conditions. Most famously, the Court will readjust the breadth of the margin as regards a particular right in view of a new consensus among the member states as to the meaning or scope of the right in question.[109] The Court takes a very broad view of the term "consensus" — meaning really "almost-consensus," or even "emerging consensus," which need not actually include the respondent state in the case at hand.[110]

Similarly, the Court has proven willing to revisit the scope of the margin in view of the convalescence of external rules of international law relating to the particular issue — a respect the Court has extended not only to other rules of international law binding on the parties to the Convention, but also to norms binding on only some of them, unratified treaties, treaties signed by only some of the parties, and even intrinsically nonbinding "soft law" instruments like declarations issued by the International Labor Or-

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propriation under A1-P1).

108. Dudgeon v. United Kingdom, 22 Oct. 1981, § 52, Ser. A no. 45 (noting in the context of Northern Ireland's criminalization of forms of sexual conduct between consenting adult males, the State is indeed entitled to some margin of appreciation as regards public morals, but that "[t]he present case concerns a most intimate aspect of private life" and that "[a]ccordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate . . . .").

109. *See* Rasmussen v. Denmark, 28 Nov. 1984, § 40, Ser. A no. 87 ("The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States . . . .").

110. In *Christine Goodwin*, for example, the Court recognized that Article 8 (respect for a private life) may generally entail a wide margin of appreciation, but found that margin defeated in this case on the basis of changing international trends, despite the manifest lack of any clear consensus within Europe. Christine Goodwin v. United Kingdom [GC], no. 28957/95, § 85, ECHR 2002-VI ("The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."); *see* Arato, *supra* note 14, at 336–37 (examining the Court's expansive approach to the doctrine of European consensus); *see also* Georg Nolte, *Jurisprudence Under Special Regimes Relating to Subsequent Agreements and Subsequent Practice: Second Report for the ILC Study Group on Treaties over Time*, *in* TREATIES AND SUBSEQUENT PRACTICE 210, 255–59 (Georg Nolte ed., 2013). *But see* A, B, & C v. Ireland [GC], no. 25579/05, §§ 233–37, ECHR 2010 (affording Ireland a wide margin of appreciation in its decision to prohibit abortion in the vast majority of cases despite acknowledging the existence of a clear European consensus to the effect that the right to a private life (Article 8) requires less interference with the right to terminate a pregnancy. The Court emphasized, in particular, "the acute sensitivity of the moral and ethical issues raised by the question of abortion," and the lack of consensus as to the specific question of when life begins). Evidently, the application of the margin is not just variable but largely discretionary, and entails, as Benvenisti notes, no small measure of "judicial politics." *See* Benvenisti, *supra* note 13, at 846.

ganization.[111] As with identifying consensus, the Court leaves itself significant leeway.

Thus the margin of appreciation cannot be properly understood in the abstract. It is not a static doctrine, but an inherently dynamic device that twists and turns through the case law over time. It allows the Court to ensure that the Convention remains responsive to material changes in the legal, political, and social circumstances of greater Europe and beyond. The margin of appreciation must thus be understood in light of the central fact that the ECtHR views itself as the steward of human rights in Europe — charged with overseeing 47 countries, widely diverse in social, economic, legal, and political character.

In sum, as a doctrine of deference, the margin reflects a commitment to subsidiarity. That is, an understanding that the states are the primary guarantors of human rights in Europe, and that the Court should defer to national authorities in areas where they will be more competent (e.g., as regards societal mores or the determination of appropriate responses to a public emergency). The doctrine further reflects a respect for cultural diversity, acknowledging that such different societies as comprise the ECHR membership may legitimately structure and balance their rights protection in different ways;[112] it represents an acknowledgement that there are not always right answers, though of course some answers will always be wrong. But at the same time, the doctrine is dynamic and responsive — reflecting the idea that things change over time, and the minimum threshold of rights protection (or, conversely, the appropriate width of the margin) may adapt and evolve in response.

Viewed on a case-by-case basis, the margin may seem just as arbitrary in the ECtHR as it does in the investment regime.[113] But the doctrine's success lies precisely in the fact that the Court is charged with the adjudication of complaints under the Convention on a *standing* basis. Although the

111. Demir & Baykara v. Turkey, no. 34503/97, ECHR 2008 (narrowing the margin with respect to labor rights under Article 11 on the basis of changing external norms of international law under the auspices of the ILO); *see* Julian Arato, *Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 BROOK. J. INT'L L. 349, 371 (2012) (examining the Court's willingness to expand rights protection in light of a broad array of external norms, ranging from international law norms binding on the parties to the ECHR to explicitly non-binding soft law).

112. As Benvenisti notes, this doctrine thus entails a principled moral relativism that is difficult to square with the universalism inherent in the very idea of human rights. *See* Benvenisti, *supra* note 13, at 844. Benvenisti rightly suggests that it is difficult to explain the Court's recourse to the margin without at least in part recognizing the driving force of "judicial politics." *Id.* at 846. This Article takes no position as to whether the margin is ultimately desirable in the context of international human rights adjudication. The point here is only to demonstrate why it *works* in the context of the ECHR — i.e., why it produces (relatively) coherent and sensible jurisprudence, whatever we may think of the outcomes, by contrast to the present (and likely future) arising out of its import into international investment arbitration.

113. *See* Tallent, *supra* note 49; Vasani, *supra* note 49.

margin contains no particular degree of deference in the abstract, the degree of deference entailed gets fleshed out over the long term, through the case law of the Court. And while the degree can change, it tends to shift through coordinated and relatively well-known ways. Even at home, the margin of appreciation certainly has its critics;[114] but at least there these three words reflect a coherent doctrine.

III. DEFERENCE AND DIALOGUE

Variable deference may be appropriate in the context of the ECtHR, where the rationales of subsidiarity, inter-cultural sensitivity, and inter-temporal flexibility make sense and can actually be vindicated. But all this works because the regime entails a single court, charged with the adjudication of disputes against a stable set of parties under a single treaty. Certainty and coherence arise out of case law, and the case law is explicitly responsive to changes of view among the parties. This kind of doctrine works less well in the context of *ad hoc* dispute resolution.

International investment law lacks any centralized system for ensuring jurisprudential consistency, any notion of formal precedent, or even consistent adjudicators. The system — such as it is — is even fragmented at its roots, arising out of myriad discrete treaties, with an infinite diversity of parties. Interpretation of these treaties occurs *ad hoc*, each time on a one-off basis. In this setting, the idea of a flexible margin of appreciation connotes little more than a pseudo-standard. It does no analytical work beyond merely acknowledging that some degree of deference is due. The structure of the regime makes it difficult, if not impossible, for a purposefully variable standard to develop a rich and dynamic structure through case law.

The comparison between these regimes helps to illuminate the deep structural problem with importing the margin of appreciation into investment arbitration. A review of the investment cases already gives rise to an intuition that something is wrong. It seems strange and potentially misleading that applications of the supposedly same doctrine can give rise to such varied standards of review in different, but not altogether dissimilar cases: requiring an LRM analysis here, a reasonableness review there, or a mere rational basis test in a third case.[115] But the problem is not just the fact of

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114. *See, e.g.*, Benvenisti, *supra* note 13.

115. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) (engaging in LRM review); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010) (reviewing for reasonableness and good faith); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012) (reviewing the relevant measure for a rational basis (and good faith)); *see also* Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008) (reviewing only for convincing evidence of fraud or material error); Saluka Investments BV (The

difference. As we have seen, even within the ECtHR, the margin leads to the application of widely varied standards of review in different cases. Indeed such flexibility is a central feature of the doctrine, and the characteristic most strongly emphasized by those advocating its import into the investment regime. The real problem is that the fragmented investment regime lacks the institutional capacity to coordinate the application of this elastic doctrine over time; here the margin of appreciation tends to produce difference *without reason*.

The problem of interpretive cacophony on the question of the standard of review is significant. There is no doubt that the growing uncertainty in this important area, and the increased awareness of such uncertainty, undermines the credibility of the system. But the invocation of the margin by scholars and tribunals reflects the wrong approach to resolving this perennial problem in the diffuse investment regime. The attempt to solve the problem *a priori*, through judicial recourse to an open-textured doctrine sufficiently flexible as to accommodate all kinds of different situations, is set up to fail in a system lacking any unified judicial body capable of streamlining its meaning and contours over time. Absent such *institutional* unity, the margin of appreciation and other doctrines like it will create more uncertainty than they resolve.

In this decentralized regime, the better path to interpretive coherence is the slow road of judicial dialogue across tribunals over the long term. Dialogue among *ad hoc* tribunals is central to the coherence, certainty, and development of international investment law over time — and this centrality is due precisely to the structural fragmentation of the regime belabored above. Absent a unified, hierarchical judicial system, and absent any generally accepted notion of formal precedent (in the sense of *stare decisis*), the vague and varied standards of treatment in investment treaties get worked out only gradually, as tribunals rely on or distinguish one another's interpretations. This path is equally open to attaining greater coherence in approaches to the standard of review, even if the process promises only gradual results.

Most standards are indeterminate in international investment law. Investment treaties contain myriad formulations of broad standards of treatment like FET, or the obligation to refrain from indirect expropriation. Despite marked differences in their phrasings, and even in view of widely varied interpretations by different tribunals, few believe that these standards are today impossibly uncertain.[116] At least at their cores, these

Netherlands) v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006).

116. *See* DOLZER & SCHREUER, *supra* note 6, at 134–39 (recounting the long debate among tribunals as to the scope of FET provisions, broadly over whether they merely incorporate the supposedly restrictive international minimum standard of treatment under customary international law, or whether FET clauses entailed a more robust standard autonomous from customary international

standards are relatively stable. But they were not built in a day; rather, these standards have convalesced over time through arbitral practice informed by prior case law. To be sure, there are conflicting lines of jurisprudence, often — but not always — relating to the outer boundaries of these concepts.[117] But conflict and disagreement are essential motors in the process, so long as they are well reasoned rather than papered over. Distinguishing past cases is as valuable a mechanism of judicial dialogue as relying on them. And where the law appears truly in flux, as with standards of review, the best answer is often to wait and see — to wait for tribunals to come to conclusions, test approaches, and compare their views with whatever disparate authorities are available.[118]

Thus the fact that tribunals employ different standards of review in different cases is not necessarily a problem at all. There may have been perfectly good reasons to apply a more searching LRM test in reviewing the state's emergency measures in *Continental Casualty* and a mere rational basis test in determining whether the state was within its rights to reintroduce administrative pricing in *Electrabel*. But even in more similar cases the fact of differences in result is not necessarily a bad thing. It is not necessarily problematic that the tribunals in *Electrabel* and *Saluka* resorted to different standards of review in assessing whether their respective respondents' regulatory actions were non-compensable exercises of the states' police powers; if adequately explained, the fact that one engaged in rational basis review while the other considered a more deferential approach appropriate could help illuminate methodological possibilities as well as the relevant stakes for future disputes, and thereby prompt greater critical reflection going forward. But everything turns on reasoning. Difference can only be

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law). Dolzer and Schreuer note that over time extreme divergence among tribunals on this issue has given way to "growing doubts about the relevance of the whole debate." *Id.* at 138. Most scholars now tend to acknowledge that FET provisions must at least be interpreted in light of customary international law, but at the same time, that the law on the protection of aliens under customary international law has evolved into something more robust than the international minimum standard of the early twentieth century. *See* MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013).

117. For example, tribunals have come to opposite conclusions in interpreting whether the most favored nation clause of the same treaty, the Germany—Argentina BIT, applies only to substantive protections or also allows importation of more favorable procedural protections found in other BITs. *Compare* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶¶ 102–03, 120–21 (Aug. 3, 2004) (allowing importation of the more favorable procedural structure of the Argentina—Chile BIT, to avoid having to comply with a requirement under the Germany—Argentina BIT to litigate in domestic court for eighteen months before going to arbitration) *with* Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (Aug. 22, 2012) (holding, on exactly the same issue, that the most favored nation provision of the treaty does not allow recourse to more favorable procedural provisions in external treaties, and thus disclaiming jurisdiction).

118. Admittedly this answer may not satisfy litigants in particular cases, but it will likely not surprise anyone either — at least not those with experience within the investor-state arbitral system.

productive where reasons are given. As things stand, the tribunals in *Electrabel* and *Saluka* grounded their choices about the standard of review in only abstract invocations of the margin of appreciation in lieu of any real reasoning — as a consequence, their differences in result appear more or less random.

This concept of dialogue should thus not be equated with the separate idea of de facto precedent in international investment law. Some have emphasized the fact that tribunals do (and should) rely on one another's opinions, not just as a matter of practical reasoning but on the further theory that such opinions should be entitled to some presumptive weight. This view is especially associated with the prolific arbitrator and publicist Gabrielle Kaufmann-Kohler; as arbitrator, she has ensured the inclusion of a paragraph formalizing the idea in several awards. As framed in *Saipem v. Bangladesh*:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[119]

By contrast, I do not mean to suggest that prior awards need necessarily be afforded any precedential *weight*. The point is rather that tribunals ought to draw from previous awards in working out their answers where doing so is helpful. Whether or not tribunals grant authoritative weight to past decisions *because* they are past decisions is distinct from, and arguably less important than, the idea that they should rely on prior awards on the basis of strength of reasoning.

My negative claim is thus that we should avoid turning to broad all-encompassing approaches in seeking to attain greater coherence as regards

119. Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 90 (June 30, 2009). This paragraph has become a hallmark of Gabrielle Kaufmann-Kohler and appears often among the many disputes chaired or decided by this prolific arbitrator. *See, e.g.*, Quiborax S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 46 (Sept. 27, 2012) (repeating practically verbatim the above paragraph from *Saipem S.p.A.*); *see also* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 357, 378 (2007); J. P. Commission, *Precedent in Investment Treaty Arbitration: The Empirical Backing*, TRANSNAT'L DISP. MGMT., Sept. 2007, at 6, http://www.transnational-dispute-management.com/article.asp?key=1064. *But see* Brigitte Stern's separate statement in *Quiborax*, indicating that she "does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend." *Quiborax*, ICSID Case No. ARB/06/2, ¶ 46.

the standard of review. Recourse to malleable *a priori* doctrines not found in the treaties runs the risk of undermining dialogue over time, by substituting abstract recitations for real reasoning, and thereby obscuring difference and disagreement. My positive claim is that we can and should count on the process of dialogue to work out the answers in the long term. This means that tribunals ought to simply do their best to determine the right standards in particular cases, in light of (but not necessarily in reliance on) other cases. Of course they need not shy away from deviating from past cases or case lines, even on similar issues, where there appears good reason to do so. But they should above all be very clear in explaining their choices. The system privileges, and indeed necessitates, clarity. In international investment law, an award should be only as persuasive as its reasoning.

A final point bears noting. None of this is to say that the jurisprudence of other international courts and tribunals like the ECtHR bears no relevance to judicial reasoning in international investment arbitration. Dialogue need not be confined among investor-state tribunals. As Schill forcefully argues, the judgments of other international courts and tribunals provide a valuable repertoire of practice from which arbitrators can draw insight and inspiration — including the rich case law of the ECtHR.[120] The same arguably applies to drawing from the reasoning of national courts as they grapple with similar questions in various contexts.[121] Although, as I have argued above, it may be imprudent to try to resolve the problem of standards of review in investment law by lifting a complex, overarching doctrine from a very different standing court, there may be good reason to rely on more precise elements of such a court's reasoning in particular cases.[122]

Even as regards the specific issue of determining the appropriate standard of review, several investor-state tribunals have drawn important insights from the jurisprudence of the ECtHR without having recourse to

120. Stephan W. Schill, *International Investment Law and Comparative Public Law — An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3 (Stephan W. Schill ed., 2010).

121. *Id.*; *see also* Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 392 (2012). *But see* PAPARINSKIS, *supra* note 116, at 19–20, 172–74, 255–56 (voicing healthy skepticism of analogies to domestic public law in the interpretation of standards of treatment in international investment treaties).

122. As Jeremy Waldron forcefully notes, arguing *mutatis mutandis* for the invocation of foreign law by U.S. courts, there is a deep value in examining how others have worked out similar problems in similar contexts — as a matter of practical reasoning, falling short of any kind of doctrine of *stare decisis*. JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 76 (2012) (pursuing two main lines of arguments: first "that we can learn from what other courts are doing when they address questions which are the same or similar to those we are addressing"; and second "the more challenging idea that there may be some virtue in sheer consistency across the decisions of different courts, even for courts belonging to different jurisdictions.").

the doctrine of the margin of appreciation *per se*. For example, in determining how much deference to afford the respondent in *Tecmed v. Mexico*, the Tribunal famously determined that the appropriate standard would be review for proportionality.[123] However, the Tribunal drew important inspiration from the ECtHR in tailoring its proportionality test. The Tribunal noted with approval the European Court's finding in *James v. United Kingdom* that a state should be entitled to a less lenient version of proportionality review where, as in *Tecmed* (and all investor-state arbitration), the state interferes with the property rights of a *non-national*.[124] The Tribunal emphasized the ECtHR's reasoning that:

> [N]on-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[125]

Whether or not we approve of the ECtHR's argument in *James*, the *Tecmed* Tribunal's use of that argument reflects the right kind of approach to judicial borrowing — based on reasoning rather than abstract doctrines. The *Tecmed* Tribunal drew from *James* because it provided guidance on the specific question of what kind of deference should be afforded a sovereign state in its treatment of foreigners — not because it embodied a convenient and generalizable abstract principle of deference. And indeed, these ideas have since found favor with subsequent investor-state tribunals.[126]

Thus the case law of the ECtHR may have an important role to play as tribunals work out how state action ought to be reviewed in different kinds of investment cases. Advocates of the margin of appreciation approach

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123. Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003).

124. *Id.*

125. James & Others v. United Kingdom, 21 Feb. 1986, § 63, Ser. A no 98, *quoted in Tecmed*, ICSID Case No. ARB(AF)/00/2, ¶ 122.

126. *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 312–13 (July 14, 2006) (citing *Tecmed* and *James* and finding that "these additional elements provide useful guidance for purposes of determining whether regulatory actions would be expropriatory"). Indeed we see this kind of borrowing from the ECtHR frequently, as for example in *Saipem S.p.A.*, where the Tribunal relied on ECtHR jurisprudence in establishing the principle, discussed above, that the setting-aside of or refusal to enforce a commercial arbitral award by a host state's national courts can qualify as a judicial expropriation in violation of an investor's BIT rights. Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, ¶ 130 (June 30, 2009) (relying heavily on the Court's reasoning that a commercial award can count as a "possession" within the meaning of the right to property under the ECHR, so long as the award is final and binding) (quoting and discussing Stran Greek Refineries & Stratis Andreadis v. Greece, 9 Dec. 1994, Ser. A no. 301-B).

are absolutely right, at least, in highlighting the value of that court's extensive jurisprudence toward working out the answers across a wide variety of different circumstances. While adopting the margin of appreciation doctrine wholesale is the wrong way to go, there is still much to be gained from looking at how the ECtHR applies the margin in specific cases.

CONCLUSION

In the absence of a system of appeal or formal precedent, the holdings of an arbitral award are only as persuasive as their underlying reasoning. But as I hope to have shown, this is just where the margin of appreciation falls short as a doctrine. In investment arbitration, the margin tends to be invoked to justify determinations of the standard of review without any substantive explanation of why a particular standard reflects the appropriate degree of deference in a particular context. In each of the cases analyzed, the margin has appeared to yield completely different standards of review; yet we, and future tribunals, are left with little impression as to why. From a reading of *Continental Casualty v. Argentina* and *Frontier Petroleum v. Czech Republic*, it seems as if LRM or reasonableness review simply follow inexorably from the notion of the margin.[127] The same can be said of *Saluka v. Czech Republic* and its review for clear and compelling evidence of error or improper conduct or the review for convincing evidence of fraud or material error in *Micula v. Romania*; and *Electrabel v. Hungary* is even more opaque.[128] Nothing about the margin of appreciation as a doctrine illuminates these variations, nor is any other reasoning presented. The doctrine is, in other words, employed more or less as a cheap substitute for any analysis of the deepest questions: in the face of treaty silence, what standard or standards of review are appropriate in investor-state arbitration? Under what conditions? And for what reasons?

At the same time, the false impression of consistency across cases like *Continental Casualty*, *Frontier Petroleum*, *Electrabel*, *Saluka*, and *Micula*, runs the risk of compounding itself in the future. If such cases are viewed as unproblematic instantiations of tribunals' application of a single doctrine,

127. Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008) (applying a searching LRM analysis); Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award (Nov. 12, 2010) (reviewing for reasonableness and good faith).

128. Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 273 (Mar. 17, 2006); Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008). *Electrabel* applies the margin of appreciation in two instances and in seemingly different ways. Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 6.92, 8.35 (Nov. 30, 2012). The Tribunal afforded Hungary a "reasonable margin of appreciation," again without articulating any particular test under such rubric, or differentiating between a "reasonable" and "modest" margin. *Id.* ¶ 8.35. And it also granted the State a "modest margin of appreciation," without explaining whether and how that might differ from a "reasonable" margin. *Id.* ¶ 6.92.

they risk muddying the analysis in future disputes. The cases we have thus far have come out differently on the key questions, with no explanation as to why. If we pretend that these are all simply applications of a single doctrine, the capacity for confusion and uncertainty will prove staggering.

Thus the import of the margin of appreciation into international investment law does active harm. Absent institutional centralization, the invocation of this open-ended doctrine tends to obstruct that process of dialogue essential to working out a more consistent approach to the standard of review over time. This is not necessarily a problem unique to the margin, but one that the margin produces in an especially severe way. As I hope to have shown, the problem of interpretive fragmentation concerning the standard of review in international investment law will not be readily resolved through an abstract, *a priori* doctrine, no matter how flexible. The better road is, here, the harder road — unity through well-reasoned arbitral practice and judicial dialogue. If this approach abstains from trying to resolve the problem of fragmented approaches to the standard of review in the short run, the reward will be a more coherent, certain, and legitimate approach in the medium to long term.

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Corporations as Lawmakers

Julian Arato*

This Article argues that multinational corporations have acquired the power to create primary rules of international law, at stark cost to the state's regulatory autonomy. It is widely recognized that states have granted private business corporations significant capacities to act on the international stage, including the capacity to bear international legal rights and even to directly enforce their rights through compulsory international adjudication. But what has gone relatively unnoticed is the corporation's emergent capacity to directly and formally author its international legal rights, by agreement with sovereign states, via an "internationalized" power of contract. This Article explains how this power of contract amounts to something more than a mere commercial power to engage foreign sovereigns in private legal agreements. It represents no less than the capacity to author meaningful and enforceable international legal norms, with priority over the domestic law of the state party—facially limited to the economic sphere, but with dramatic ripples throughout all domains of public life. I argue that this power arises out of the confluence of three seemingly disparate doctrinal shifts in international investment law and human rights jurisprudence, concerning: the legal status of state contracts; the theory of transnational property; and the law of corporate nationality. Finally, I turn a critical eye to these developments, drawing theoretical insights from domestic private law and public international law. I conclude that international legal doctrine has gone too far in empowering multinationals against the state, while remaining too hesitant to demand any form of corporate accountability.

INTRODUCTION

It is widely recognized that states have granted private business corporations significant capacities to act on the international stage.[1] Sovereigns have constituted corporations as direct bearers of international legal rights through a manifold of bilateral investment treaties ("BITs"), free trade agreements with investment chapters ("FTAs"),[2] and even certain regional

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1. *See, e.g.*, Anthea Roberts, *Triangular Treaties*, 56 HARV. INT'L L.J. 353 (2015); José Alvarez, *Are Corporations Subjects of International Law?*, 9 SANTA CLARA J. INT'L L. 1 (2011); ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW (2010).

2. Including certain major multilateral instruments like the trilateral North American Free Trade Agreement ("NAFTA"), the broad-based Energy Charter Treaty ("ECT"), as well as numerous bilateral

human rights treaties.[3] More radically, a great many of these treaties have endowed corporations with the capacity to directly enforce their rights through compulsory international adjudication—through investor–state arbitration or direct action before the European Court of Human Rights. But what has gone relatively unnoticed, and remains undertheorized, is the emergent capacity of the multinational corporation to create the law—to directly and formally author its international legal rights by agreement with sovereign states. This Article argues that over the last few decades the multinational firm has become a powerful and increasingly autonomous international lawmaker—an author of its own rights and obligations under public international law. This transformation has come at stark cost to the state's capacity to regulate in the public interest, with only tenuous grounding in state consent.

More specifically, this Article examines the multinational's capacity to make international law *via* a modern "internationalized" power of contract.[4] I am not here concerned with either indirect lawmaking through influence,[5]

instruments like the U.S.–Peru Trade Protection Agreement [hereinafter U.S.–Peru TPA]. *See* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993); United States–Peru Free Trade Promotion Agreement, U.S.–Peru, Apr. 12, 2006; Energy Charter Treaty, *opened for signature* Dec. 17, 1994, http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

3. For example, as legal persons, corporations are considered direct bearers of a wide range of general human rights under the European Convention on Human Rights, particularly the right to property. Convention for the Protection of Human Rights and Fundamental Freedoms), Nov. 4, 1950, 213 U.N.T.S. 221, at art. 34 (permitting corporations to bring suit before the court); protocol 1, art. 1 (enshrining the right to property for both natural and legal persons).

4. The term "internationalized contract" captures the idea that a contract between a natural or legal person and a state can become a source of international law, binding upon the state like any other international legal obligation. The modern form of internationalization, at issue in this Article, involves the elevation, or conversion, of a contract negotiated under the domestic law of some country—often the state party—into an instrument of international law through the operation of an overarching investment treaty. In other words, the idea is that certain protections in BITs or FTAs act to elevate domestic public contracts to the status of international legal instruments that bind the state party in much the same way as an international treaty. *See* Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005). The idea is distinct, though not entirely dissimilar from an older theory of the internationalized contract enshrined in the oil nationalization arbitrations of the nineteen seventies. *See, e.g.*, Awards on the Merits in Dispute between Texaco Overseas Petrol. Co./California Asiatic Oil Co. and the Gov't of the Libyan Arab Republic (Compensation for Nationalized Property), 17 I.L.M. 1 (1978) [hereinafter Texaco v. Libya]; *infra* Part III.A. The crucial difference is that under the old theory a contract could be internationalized only if the parties agreed to adopt international law as the law of the contract at issue—explicitly or implicitly. In the modern era, all contracts covered by an overarching BIT or FTA are presumed internationalized. Where such treaties apply, internationalization has become the new default rule—and arguably even a mandatory rule, given the difficulty of waiving BIT protection in investment contracts. *See, e.g.*, Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 176 (Feb. 12, 2010) [hereinafter SGS v. Paraguay] (finding that the *exclusive* forum selection clause in a contract between SGS and Paraguay, opting for resolving all disputes in Paraguayan courts, did not suffice to opt out of international arbitral jurisdiction under the overarching BIT). In any case, the results of internationalization through choice of law, or by default through the background operation of an investment treaty are the same: the contract will subsequently impose obligations on the state as a matter of international law, the full consequences of which will be explored further below. *See infra* Part I.A.

5. *See* Alvarez, *supra* note 1, at 5 (noting the significant influence corporations have had on the making of rules "governing trade, investment, antitrust, intellectual property, and telecommunications");

or with what is sometimes called soft or informal lawmaking (*e.g.*, standard-setting by industry groups).[6] I rather focus on direct and formal lawmaking, by agreement with sovereign states.

Through creative treaty shopping, corporations can attain international legal protection for their contracts with foreign sovereigns (*state contracts*). Under this aegis, their contracts become international legal instruments with priority over later-in-time conflicting national law, including public law and regulation. At the same time, counterintuitively, the scope of this protection is implicitly determined by an extraordinarily robust theory of property, which tends to privilege such contractual entitlements over all other domestic values. As a result, what may appear as merely private legal agreements between corporations and states turn out to have major consequences for domestic public law—significantly hindering the regulatory autonomy of the contracting state party. This internationalized power of contract represents no less than the capacity to author meaningful and enforceable international legal norms—facially limited to the economic sphere, but with potentially dramatic ripples throughout all walks of public life.

To be clear, I am arguing that corporations have developed the capacity to negotiate with states to create norms of *international law*—norms that bear a particular kind of relationship of priority to the state party's domestic legal order. Like all international legal rules, they trump domestic law *as a matter of international law*. This does not necessarily mean that internationalized contracts automatically invalidate conflicting domestic statutes or regulations as a matter of the state's internal law.[7] What it does mean is that nothing in the state's internal law can excuse a breach of the internationalized contract. In other words the internationalized contract bears the same relationship to domestic law as an international treaty: for internal purposes, the state may enact laws in breach of its international obligations; but so long as it keeps the conflicting laws on the books, its international responsibility will be engaged. What's more, modern internationalized contracts are

Vaughan Lowe, *Corporations as International Law Actors and Law-Makers*, 14 Ital. Ybk. Int'l L., 23, 23–26 (2004) (identifying corporate influence on the development of treaties and customary international through participation in adversarial litigation in international arbitration—arguing that by successfully advancing sustained litigation positions that shape public arbitral awards, corporations play an important role in the identification and elaboration of the usual sources of international law).

6. *See* Lowe, *supra* note 5, at 24–25 (noting corporate involvement in setting standards for industry best-practices and valuation techniques, which become critically important in the context of international litigation); Alvarez, *supra* note 1, at 5–6 (pointing to corporate codes of conduct); *see also* Benedict Kingsbury, Richard Stewart & Nico Krisch, *The Emergence of Global Administrative Law*, 68 L. & Contemp. Problems 15, 16 (2005).

7. The status of any conflicting national laws will depend on the openness of the constitutional order to international law—in other words, whether it has a pluralist or monist approach to the incorporation of public international law into domestic law. *See* James Crawford, Brownlie's Principles of International Law 88 (8th ed., 2012).

highly enforceable against delinquent states—indeed more so than many typical treaties.[8]

The new reality of corporate international lawmaking can be illustrated through a handful of examples. *Azurix v. Argentina* provides the basic model.[9] The dispute arose out of a thirty-year concession contract to provide water services in Buenos Aires, operated by a local subsidiary of the U.S.-based Azurix Corporation.[10] The project unraveled early on, due in part to public health concerns relating to water quality, water pressure, and a severe algae outbreak in a certain facility.[11] The government engaged in a series of formal and informal regulatory measures, eventually terminating the concession, and Azurix compelled arbitration under the Argentina–U.S. BIT.[12] The Tribunal considered that, under the auspices of the treaty, the contract generated international legal rights that took priority over the state's regulatory efforts and were thus fully compensable.[13]

In *CMS Gas v. Argentina*, another American investor brought a claim under the Argentina–U.S. BIT, claiming that the host state had destroyed the value of a gas transportation concession operated by its local subsidiary. The claim impugned a series of general regulatory measures implemented by Argentine authorities to manage the national fiscal crisis of 2001–2002. The Tribunal found that the measures did not completely vitiate the value of CMS's investment, and thus did not amount to a regulatory expropriation (that is, a taking). However, it held the state to a higher standard of property protection, ruling that even the partial diminution of the contract's value was a compensable violation of the company's rights.[14] Here too, the Tribunal found that the contract generated international legal rights that took priority over the state's efforts to regulate in the public interest—even though the state's measures stopped well short of fully depleting the value of the investment, and even given the context of a national emergency.

8. Indeed state contracts are far easier to enforce against states than most treaties through their connection to the powerful mechanisms for the enforcement of international arbitral awards. *Infra* Part I.A.

9. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006).

10. *Id.* ¶ 41.

11. *Id.* ¶¶ 124, 148. The importance of the public health issue was hotly contested, and in any event the government was far from blameless in the collapse of the project.

12. *Id.* ¶ 244.

13. *Id.* ¶¶ 374–77. It should be noted that the Tribunal awarded Azurix the fair market value of its investment, totaling over $165 million plus interest. *Id.* ¶ 420.

14. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 281 (May 12, 2005). The Tribunal awarded CMS the fair market value of the entire concession, including $133 million in losses (calculated through discounted cash flow ("DCF") analysis), plus interest, and ordered the sale of its remaining shares in the concessionaire to Argentina for an additional $2 million. *Id.* ¶¶ 468–69. Argentina initially refused to satisfy both the awards in *Azurix* and *CMS Gas*; however it recently relented when the World Bank conditioned consideration of a major loan package on payment of its outstanding debts under several arbitral awards (though at a substantial discount to both the principal and accrued interest, totaling around 25%). *See* Daniel Cancel, *Argentina Settles $677 Million Arbitration Cases with Bonds*, BLOOMBERG BUSINESS, Oct. 18, 2013, *available at* http://www.bloomberg.com/news/2013-10-18/argentina-settles-677-million-of-arbitration-cases-paying-bonds.html.

Aguas del Tunari v. Bolivia adds a crucial wrinkle, demonstrating the corporation's agency as a lawmaker. Like *Azurix*, the case involved a water concession—here held by a wholly-owned subsidiary of the U.S.-based Bechtel Corporation. Unlike the previous cases, however, there was no BIT in force between the U.S. and Bolivia, and neither Bechtel nor any of its downstream subsidiaries would have had access to arbitral jurisdiction at the time the contract was executed. Later, however, in the face of mounting social unrest against the project, Bechtel restructured its investment through a Dutch holding company in order to secure access to international arbitration under the Netherlands–Bolivia BIT (should the need arise). Bolivia ultimately terminated the concession in response to the growing social upheaval over the project, and Bechtel successfully sued the state on the basis of its newfound Dutch nationality.[15] Bechtel was thus able to internationalize the contract unilaterally, by augmenting its nationality after the concession entered into force.

What should stand out in each of these cases are two key assumptions about the relevant state contracts: *first*, that they created international legal obligations; and *second* that these obligations trumped the states' prospective attempts to regulate in the public interest. Though each of the contracts was explicitly governed by the law of the host state, on their own terms, the tribunals considered them to have been effectively internationalized, or transformed into international legal instruments, by operation of an applicable BIT. As a result, the tribunals considered these private instruments to have priority over the state's domestic regulatory efforts in situations implicating pressing public interests. In other words, in these cases the state contract appears as a source of international law—establishing legal norms that the state could not unilaterally vitiate, or even undermine, without engaging its responsibility.

In the first instance, this Article seeks to show that these remarkable assumptions are surprisingly well grounded in current doctrine, if not always well understood. Tribunals have given internationalized state contracts priority over domestic regulatory efforts at all levels, from executive measures to legislation, and across the full range of regulatory contexts—from the purely economic[16] to regulatory action in the face of risks to public health,[17] human rights,[18] and the environment,[19] and even to management

15. The Tribunal asserted jurisdiction, however the case was settled before going to the merits.

16. Eureko B.V. v. Poland, Partial Award (Aug. 19, 2005) (involving the privatization of a Polish insurance company).

17. For example, several water works cases implicated important issues of sanitation. *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006); Compañía de Aguas del Aconquija & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007).

18. See, for example, two further water works cases implicating not just sanitation, but more fundamentally, the basic human right of access to water: Biwater Gauff v. Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008); and Aguas del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005).

of national emergencies.[20] I argue that the multinational's capacity to create such far-reaching and indelible agreements can only be properly understood as the power to author international law.

This startling image—the multinational corporation as international lawmaker—arises out of the confluence of three seemingly disparate developments in international legal doctrine: (1) the mainstream recognition that state contracts are entitled to treaty protection; (2) the entrenchment of an extraordinary level of property protection in international investment law, along with the ascription of that property-style protection to investment contracts; and (3) the recognition that multinational corporations can alter or supplement their nationality in order to shop for protective treaties otherwise unavailable to nationals of their original home state.

While each of these trends has entailed remarkable doctrinal shifts—upending several classical principles of public international law—none, on its own, implies the radical idea that corporations actually author the law in any meaningful sense.[21] But taken together these developments produce a recognizable picture of robust international lawmaking. The first two developments, in contract and property, respectively comprise the *form* and *substance* of state contracts as law; the third, in the law of corporate nationality, accounts for the multinational's *autonomy* as a lawmaker. In this light, at least within the ambit of the pre-existing web of international investment and human rights treaties, the corporation appears as a basically autonomous actor empowered to directly make and enforce international law, with major effects for the domestic regulatory freedom of its contracting partners.

The link between the corporation's international legal metamorphosis and state consent is thin. The material developments have often not occurred through clear provision in treaty text or other clear agreement by the parties, but through the *interpretation* of broad and malleable terms in treaties on investment and human rights.[22] The corporation's ascent is as much a judicial innovation as a product of legislation. It has taken place through a

19. *See, e.g.*, Chevron v. Ecuador, UNITRAL, PCA Case No. 2009-23, First Partial Award on Track I (Sept. 27, 2013) (arising out of an $18 billion domestic court judgment against Texaco (acquired by Chevron) over the massive pollution in the Lago Agrio region through oil spills and toxic water dumping over twenty-five years).

20. See, most famously, the cases arising out of the Argentine financial crisis of 2001–2002: CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 281 (May 12, 2005); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); Enron v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007).

21. The first principle jettisoned by this development is the assumption that all contracts belong to the municipal law of some country. *See* ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 927 (9th ed. 1996) (hereinafter *Oppenheim's International Law*); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 168 (2d ed., 2012). The second is that corporations are all creatures of some municipal law, and are further best regulated by domestic law. *Oppenheim's International Law* at 859–60.

22. *See* Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289, 290 (2013) (observing, *mutatis mutandis*, a similar dynamic in the context of international organizations).

rich jurisprudence, arising out of *ad hoc* investor-state arbitration under BITs and FTAs, and, to an extent, regional human rights jurisprudence. The cases are occasionally contradictory, and remain in a perpetual degree of flux. Conclusions can only be drawn cautiously, and indeed each line of cases discussed herein has proven controversial at the margins. But what is most important for present purposes is the remarkable extent to which they agree on the basics. The doctrine is sufficiently clear in the most important aspects to warrant reimagining the role of corporations in international legal space—not only as rights bearers and enforcers, but also as lawmakers.

The picture is not an altogether happy one. The rise of the multinational corporation has taken a great many steps, some of which have advanced important global values. But the corporation's newfound lawmaking capacity comes at high cost to the nation state's domestic capacity to regulate in the public interest. Given the threat to domestic public values, it is not at all clear that this level of empowerment in the interest of private rights protection reflects the right trade-off. Moreover, the firm's lawmaking capacity comes basically unchecked at the international level—without much in the way of commensurate safeguards against corporate misfeasance, let alone a capacity for corporations to bear international legal responsibility for their own wrongful actions.[23]

On the one hand, as a matter of private law, there is much to criticize about each of the broad doctrinal developments central to the corporation's ascent. In the first place, we should challenge the aggressive vision of property implicit in investment arbitration. It is unclear why transnational property protection should be far more thoroughgoing than anything accepted in any municipal legal order[24]—and indeed such a robust vision of property seems especially destructive in the transnational context. Second, there is further reason to question the easy conflation of such robust transnational property protection with the protection of state contracts.[25] This fusion of contract and property leads to significant problems pertaining to the scope of protection associated with investment contracts, and the appropriate remedies. And third, we should adopt a more healthy skepticism of the corpora-

23. I do not mean only responsibility for violations of general international law, like human rights or international criminal law; the lack of corporate responsibility extends even to breach of contract. By way of exception, respondent states are increasingly bringing counterclaims against corporate claimants in investor-state arbitration. *See, e.g.*, Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 93 (Dec. 12, 2012) [hereinafter Burlington v. Ecuador]. This possibility obviously only arises once the investor has actually brought an action against the state, but the mere possibility underscores the need to develop rules for comprehending and categorizing corporate behavior in legal terms. For example, international law today offers no guidance regarding the attribution of acts by employees and officers to the corporation, or between parents and subsidiaries, etc.

24. *See generally* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 37 (2003) ("NAFTA tribunal decisions and dicta significantly exceed U.S. takings protections (already among the most protective in the world)"); HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011); CHRISTOPHER PIERSON, JUST PROPERTY: A HISTORY IN THE LATIN WEST (2013).

25. *See* James Stern, *Property's Constitution*, 101 CAL. L. REV. 277, 284 (2013).

tion's capacity to shop for treaty protection through selective investment structuring.[26] We should be especially suspicious in cases involving state contracts, where allowing the corporation to unilaterally acquire treaty protection by restructuring *after* contracting undermines the very notion of a bargain, producing stark problems of fairness.[27]

At the same time, however, it is important to keep sight of the bigger picture. Particular reforms to the international law of contracts, property, and corporate nationality are certainly desirable, but it may be that the overall emergence of the corporation as an international lawmaker is something of a *fait accompli.* The time may be drawing near where we will have to reassess how we grapple with the corporation's growing public role from the traditionally hesitant perspective of public international law. Given the multinational firm's capacity to directly make and enforce international law, without mediation by its state of nationality, we ought to challenge the laissez-faire attitude of international law to the corporate form, by comparison to the more robust formal understanding of its traditional subjects: states and international organizations.[28]

This Article seeks to provide the groundwork for a critical reassessment of the multinational corporation's privileged position in the international legal order, by exposing the full extent of the corporation's heretofore under-studied lawmaking potential. In Part I, I expound the idea of the state contract

26. The current outer limit is usually only extreme cases of abuse of the corporate form. *See* Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 93 (Apr. 15, 2009), *available at* http://www.italaw.com/documents/PhoenixAward.pdf; ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits ¶¶ 267, 268, 273, 279 (Sept. 3, 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1569.pdf; Tania Voon et al., *Legal Responses to Corporate Manoeuvering in International Investment Arbitration*, 5 J. INT'L DISP. SETTLEMENT 41 (2014); George Kahale III, *The New Dutch Sandwich: The Issue of Treaty Abuse*, 48 COLUM. FDI PERSPECTIVES (2011).

27. A few cases have begun to recognize the problem. *See, e.g.*, Burlington v. Ecuador, ICSID Case No. ARB/08/5, ¶ 132; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Annulment, ¶¶ 94–95 (Sept. 27, 2007), 14 ICSID Rep. 152 (2009). *But see* Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Award, ¶ 297 (5 Sept. 2008), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0228.pdf; Burlington v. Ecuador, ICSID Case No. ARB/08/5 Dissenting Opinion of Arbitrator Orrego Vicuña (Dec. 12, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1095_0.pdf. *See also* DOLZER & SCHREUER, *supra* note 21, at 175–77.

28. *See* Int'l Law Comm'n, *Articles on the Responsibility of States for Internationally Wrongful Acts*, UN GA Doc. A/56/10 (2001) (*hereinafter* ARSIWA); Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organizations*, Rep. of the Int'l Law Comm'n 61st Sess., May 4–June 5, July 6–Aug. 7, 2009, U.N. Doc. A/56/10, art. 2 (*hereinafter* DARIO); *see also* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, U.N. Doc. A/CONF.129/15 (on lawmaking through treaty). I accept the view that we ought to be cautious about "upgrading" the status of corporations by dubbing them subjects of international law. *See, e.g.*, Alvarez, *supra* note 1. It is certainly not the intention of the present study to advocate empowering corporations any further on the level of international law. The point is rather to unmask how much the law *already* empowers multinational firms. The venerable concept of subjecthood may produce more problems than it would solve, but we must still find a way to bring corporations into the system—to render them formal, knowable creatures of international law, and render them commensurately accountable.

as a form of international lawmaking by agreement. I explain why there are strong theoretical grounds for understanding state contracts as sources of international law and corporations as lawmakers—and why invoking the concepts of law and lawmaking adds value. Thereafter, in Part II, I turn to the three broad doctrinal developments that have driven the multinational's rise as an author of international law. I examine, first, the internationalization of state contracts under a variety of investment treaty provisions, focusing on the umbrella clause and the standard of fair and equitable treatment. Second, I turn to the question of the expansive notion of property at work in investor-state arbitration, and its graft onto contract protection. And third, I explore the viability of corporate treaty shopping through investment (re)structuring. Finally, in Part III, I turn a critical eye to these developments—drawing doctrinal and theoretical insight from domestic private law, as well as the structure and grammar of public international law.

I. Making Law Through Contract

This Part provides the theoretical justification for recasting corporations as international lawmakers. I assume, by hypothesis, the relevant doctrinal particulars that I will more firmly establish in Part II. My purpose here is to show how, in the abstract, an internationalized power of contract can become a power to make international law writ large, and why it matters. I aim to show, in other words, how a seemingly private exchange of *in personam* rights between a multinational corporation and a foreign sovereign can become, for the citizenry of the state party, a meaningful source of general law—a package of legal norms more akin to the public international treaty than the merely domestic contract.

I argue, *first*, that there are both formal and material reasons for reconceiving state contracts as sources of international law—under certain conditions. *Second*, I suggest that the multinational corporation should be understood as a more or less autonomous international lawmaker—whose capacity to make law cannot be dismissed as merely delegated by, or derivative of, the prerogatives of its original state of nationality.

A. *State Contracts as International Law*

Why call state contracts law at all? The issue goes deeper than differences between national legal cultures over the proper classification of contracts more generally. Though seemingly only an agreement between the state and a foreign private party, the internationally protected contract has significantly greater normative force, wider reach, and more indelible effects than its domestic analogue. These long-term agreements severely affect the state's regulatory autonomy, and thereby constrict the capacity of its citizens for democratic self-government. To continue viewing such agreements as sim-

ple instruments of commerce would seriously obscure their public scope. The force and depth of the internationalized state contract are only properly understood by analogy to the inter-state treaty—as a source of public international law.

It is not necessary to insist that all contracts, or even domestic public contracts, are sources of law *per se*. Domestic legal orders vary widely on the semantic question of whether contracts are to be understood as law, or rather as bundles of certain kinds of rights *protected* by law (i.e., the law of contracts). In civil law systems it is only natural to view the contract itself as a private source of law, obligatory only for the parties in their mutual relations.[29] Framed in this way, private persons share a limited degree of authority to make law, backed by the sanction of the state.[30] By contrast, in common law jurisdictions it is more uncommon and uncomfortable to refer to contracts as laws—despite some authority in positivist legal theory.[31] The term "law" is usually reserved for normative enactments of general application—including, for example, legislative statutes, generalizable judicial enactments (i.e., common law proper), and regulation by administrative agencies. Common lawyers tend to treat contracts as exchanges of certain kinds of rights between natural or legal persons that the law renders enforceable. They are thus classified in a way closer to property rights than law writ large, with the classical distinction being that contracts create *in personam* rights (rights held against the other party) as opposed to property rights, which are *in rem* (held against the world).[32] Neither is itself law, but rather a set of rights recognized by the law, and about which the law will have much to say.[33]

29. *See, e.g.*, CODE CIVIL [C. CIV.], bk. 3, tit. III, art. 1134 (Fr.) ("Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites" [Agreements lawfully entered into have the force of law for those who have made them]), *translation available at* http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

30. 2 MAX WEBER, ECONOMY AND SOCIETY 683 (G. Roth & C. Wittich, eds. 1978) ("Today it is fundamentally established that any content whatsoever of a contract, in so far as it is not excluded by limitations on the freedom of contract, creates law among the parties."); HANS KELSEN, PURE THEORY OF LAW 257 (2d. ed., trans. Max Knight, 1960) ("The legal order, by instituting the legal transaction as a law-creating fact, authorizes the individuals subject to the law to regulate their mutual relations within the framework of general legal norms created by legislation . . . by norms created by way of legal transactions.").

31. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012) (going even further by referring to wills as a form of unilateral law). Classical legal realism comes close to this view as well, with its emphasis on power and authority. *See, e.g.*, Robert L. Hale, 20 COLUM. L. REV. 451, 452 (1920) (In contracts, "particular legal rights and duties are created at the initiative of private individuals. But they are created (or modified or extinguished) by virtue of the power of mutual coercion (in the form of pre-existing rights) vested in the ordinary law in the two contracting parties.").

32. *See, e.g.*, Stern, *supra* note 25, at 298.

33. Property and contract differ in one crucially relevant respect. The law of property is a realm of structure. Property categories tend to be rigidly fixed, and attach rights to assets in very specific ways. By contrast, the law of contract represents the realm of choice—of *authorship*. The law of contracts typically allows parties to negotiate and distribute rights and obligations as they see fit, and to allocate risk however they want. Of course where the parties don't actually negotiate terms the law will often fill gaps according to a wide array of default rules. Admittedly, the law will occasionally displace negotiated

But for all the variation across domestic laws of contract, this issue of classification is not especially consequential. The difference in how civil and common law jurisdictions approach the classification of contracts does not seem to go much further than semantics. It implies no significant distinction about how contracts interact with the national legal order. The very same contract would be called "law" in one jurisdiction, and viewed as merely a private agreement enforceable by law in another—and the classification would imply no effect on the contract's disposition. I take no position on whether either semantic approach more accurately captures the normative significance of an enforceable agreement between two private parties, or even between a private party and the state.

The rationale for viewing the internationalized state contract as a source of law is more meaningful. While such contracts share a great deal with their purely domestic cousins, they are closer to instruments of public international law in two key respects: (1) their formal hierarchical relationship to domestic legal norms; and (2) their material impact on the citizenry of the state party. In other words, it matters that they are instruments of *international* law as opposed to *national* law, and that they have wide-ranging and indelible effects for domestic regulatory space. Moreover, (3) the conception of the internationalized state contract as a source of international law easily stands up to the critique of enforceability perennially leveled against the idea of law beyond the state. As against the domestic contract, the internationalized state contract presents a formidable and highly enforceable package of legal norms with priority over national regulatory initiatives—better understood as international law than a merely private exchange of rights and duties.

For purposes of this Part it will be useful to contrast two kinds of contractual instruments in the abstract, as ideal types. On the international side, the type is a long-term diagonal contract between a state and a foreign corporation, for example a concession to explore and extract oil and gas in a part of the state's territory conditioned on certain profit-sharing obligations. The contract comes under the protection of a standard BIT between that state and the corporate investor's state of nationality, containing the basic guarantees—concerning expropriation, fair and equitable treatment (*FET*), etc. This type represents the contracts at issue throughout this Article. I will refer to this type as "international state contracts." Contrast this to the closest domestic analogue, an identical concession contract between the state and a locally incorporated firm—what I will call the "domestic public contract." This type is the same as the state contract in all particulars except the nationality of the parties, whose relationship is here vertical rather than di-

contract terms according to mandatory rules—to different degrees in different legal orders. But, for the most part, in the law of contracts parties are free to author their respective rights and obligations for themselves—and the bargain they strike will have the force of law.

agonal. As a result, it is not entitled to treaty protection—and this is the crucial distinction.

The *first* consequence of the difference between these two types—the international state contract and the purely domestic public contract—concerns their formal position in the hierarchy of norms vis-à-vis the state party's municipal law. To put the point bluntly, the domestic public contract will generally occupy a low position within the national legal hierarchy, whereas the international state contract occupies a position outside and above the entire domestic legal order.

Say, for example, that the state enacts comprehensive environmental regulations that have the effect of depreciating our hypothetical investor's oil and gas contract. If the agreement at issue is a domestic public contract, the regulation will generally enjoy clear priority—it will simply trump the domestic investor's contractual rights.[34] The disposition of the contract is, here, purely a matter of domestic law, which will usually not insulate contracts from bona fide prospective regulation—at least not by default.[35] By contrast, the obligations imposed by the international state contract would not be vitiated by the state's environmental regulation, and may well require redress. This is because, under the auspices of a protective treaty, the state contract creates *international* legal obligations.

The point has been put in different ways. It is sometimes said that the protective treaty "internationalizes" the contract,[36] or that it "raises" or "elevates" the contract to the status of international law.[37] Another formulation is simply that a violation of the contract *becomes* a violation of the treaty.[38] But the general effect is the same: under the treaty's aegis, the state contract gives rise to international legal rights and obligations, violation of which

34. *See* Thomas Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885 (2000); Stern, *supra* note 25. As Serkin shows, things become more complicated where the parties negotiate robust protections against prospective regulation into the contract, as in certain domestic public-private partnerships. *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. Chi. L. Rev. 879, 895 (2011). The same situation arises in international contracts that incorporate stabilization clauses—i.e., clauses requiring that the state freeze aspects of its regulatory regime vis-à-vis the private party, or at least compensate the latter fully for any detrimental changes. *See* Alvarez, *supra* note 1, at 22; Paul Kuruk, *Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience*, 13 Mich. J. Int'l L. 43 (1991–92). I bracket discussion of both situations here, focusing primarily on contracts where the parties did not agree to incorporate such broad protections against prospective regulation.

35. Merrill, *supra* note 34; Serkin, *supra* note 34; *see also* Lise Johnson, *The Impact of Investment Treaties on Governance of Private Investment in Infrastructure* (EUI Working Papers RSCAS 2014/32,2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411575.

36. *See, e.g.*, Noble Ventures v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 5 (Oct. 12, 2005) 16 ICSID Rep. 216 (2012); Alvarez, *supra* note 1, at 12; *see also infra* Part II.A.

37. Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 76 (Jan. 29, 2004), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC657_En&caseId=C6.

38. *See, e.g.*, SGS v. Paraguay, Jurisdiction ICSID Case No. ARB/07/29, ¶ 142 (Feb. 12, 2010), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1526.pdf.

will engage the state's international responsibility.[39] Crucially, such internationalization triggers the core principle that domestic law cannot excuse a state's violation of its international obligations nor its duty to compensate.[40] In the now-classical formulation of the Articles on State Responsibility, "[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."[41] So while national legislation or regulation will often trump a domestic public contract,[42] the same state action cannot excuse the violation of an otherwise identical internationalized state contract without engaging the state's international responsibility—at least as a matter of international law.

Put another way, in the case of domestic public contracts the state retains basic authority over the contract's disposition, and can rescind the agreement unilaterally or depreciate its value through subsequent regulation.[43] To the extent that its capacity to do so is limited, it would only be by national law—which can itself be altered by subsequent national law (though perhaps only with prospective effect).[44] Internationalized state contracts are more like treaties in that the state and the private party *share* authority over the contract's disposition, and the state cannot unilaterally terminate or vitiate the agreement without committing an internationally wrongful act.

Note that a state contract does not by any means *invalidate* contradictory internal law any more than a treaty does. As is usually the case with international legal obligations, breach simply triggers the twin duties of cessation and reparation (for which compensation and termination of the agreement will often suffice). The point is that a state contract entails a compensable international legal obligation that can be violated by national regulatory action—where the same action would have simply vitiated an analogous domestic public contract without being compensable.

Thus far I've presented the formal argument in functional terms, focusing on the relationship between internationalized state contracts and the domes-

39. There are important nuances in the doctrine relating to exactly what "internationalization" entails, described more fully below in Part II.A. But no differences seem to be implied by the choice between terms like "internationalization" or "elevation" of contracts, and I treat them as functional equivalents for the purposes of this Article.

40. ARISWA, arts. 3, 32.

41. *Id.* at art. 3; *see also* Vienna Convention on the Law of Treaties, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

42. Merrill, *supra* note 34. Even in cases where the municipal law of public contracts affords some protection to private parties from breach by the state, the available remedies are often significantly weaker than those available for the enforcement of private contracts. For example, Serkin notes that in the United States, "with only few exceptions, public contracts are enforced against governments with a liability rule instead of a property rule, and damages are typically limited to reliance instead of expectation damages." Serkin, *supra* note 34, at 916 ("[A] government can often avoid its contractual precommitments by paying money—and less money than a private party would have to pay.").

43. *Id.*

44. *Id.*

tic legal order. In my view this relationship is what's crucial. But the formal argument can be usefully recast from a positivist perspective on international law—in terms of the doctrine of sources. Under classical international law, the three plenary sources of law are, of course, treaties, custom, and general principles.[45] From a maximally formalistic, positivist stance, any argument for a new or additional source of law would have to trace its pedigree back to one of the plenary sources. In the case of modern internationalized state contracts the argument is an easy one. Putting aside custom and general principles, there is no difficulty at all tracing these contracts' pedigree back to treaties. Indeed it is through the direct operation of treaty provisions—in BITs and FTAs—that such contracts attain the force of international law. The overarching treaty is the plenary source of international law; the contract it internationalizes is simply a derivative legal source.

Examples of derivative sources of law abound in both international and domestic law. The clearest example, internationally, is the United Nations Security Council (UNSC)'s capacity to issue binding resolutions—often viewed as a quasi-legislative power.[46] The UNSC's legislative capacity is not a plenary source of international law, but is rather derived from a major multilateral treaty—it flows from Chapter Seven of the United Nations Charter. Similarly, in domestic law we typically view the legislature as the plenary lawmaker (though in constitutional democracies that honor is by rights only properly bestowed upon the constituent (or amending) power). Yet, in modern administrative states across the world, legislatures create subsidiary agencies, authorizing them by statute to issue binding regulations of all kinds. Administrative regulation is similarly a derivative source of law, whose pedigree traces back to the legislature (and ultimately, as case may be, the constitution). Cast in rigidly positivistic terms, the formal side of my argument is thus that the internationalized state contract has become a *derivative source* of international law—analogous to UNSC legislation, or, in domestic law, the administrative regulation authorized by statute.

There is a *second*, material reason why the internationalized state contract should be conceived as a source of international law, which goes to the invasive reach of these instruments within the domestic state's regulatory space. Beyond only raising the formal status of the state contract to the level of international law, these treaties afford such contracts startlingly broad sub-

45. Malcolm N. Shaw, International Law 49 (7th ed., 2014); Crawford, *supra* note 7, at 20; Statute of the International Court of Justice, art. 38(1)(a–c), Apr. 18, 1946 (I leave to the side the supplemental sources of international law listed at Art. 38(1)(d), including international judicial opinions and the writings of learned commentators, because these are generally taken to refer to finding out the content of the other principal sources).

46. Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 Int'l J. Const. L. 627 (2012) (examining the quasi-legislative capacities of the UN Security Council); Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 Fordham Int'l L.J. 542 (2004).

stantive protection—through even the most commonplace standards like FET and guarantees against expropriation. As already noted, such contracts have formal priority over conflicting domestic law at all levels, from administrative regulation and legislation to constitutional amendment. But at the same time, the substantive scope of what counts as a material conflict is extraordinarily expansive. Internationalized state contracts are insulated from domestic public law in all spheres, from the regulation of the environment and public health, to public morals, and even to the management of national emergencies.

Moreover, liability is not merely limited to complete (or nearly complete) takings. Insofar as the national regulation runs afoul of the treaty's expansive standards by abrogating the contract, materially breaching it, or even significantly depreciating its value, the state will breach an international obligation. The ambit of such forceful and pervasive contracts is not adequately captured by the notion of a simple exchange of mere rights *in personam*; by imposing an enormous hindrance on the capacity of the state party to govern, they affect the rights and capacities of the citizenry as a whole.[47]

Speaking in terms of our ideal types, at least, the state contract is in critical respects closer to the inter-state treaty than to its municipal analogue, the domestic public contract. While it may be something of a semantic issue whether or not domestic contracts are best understood as law writ large, there are strong formal and material reasons for viewing the state contract as a veritable instrument of international law. In view of its formal priority over domestic legal norms of any kind, from regulation and legislation to even constitutional amendment, the state contract relates to national law in the same way as the classical sources of international law. And in light of the extraordinary breadth of protection these contracts receive, and their constriction of the state party's capacity to regulate in all domains of public life, they appear materially closer to public law than any simple commercial exchange of rights and duties.[48]

Finally, *third*, it should be noted that internationalized state contracts are eminently enforceable. This is not the place to challenge the spurious (though perennial) argument that international law is "not really law" because it is not enforceable against delinquent states.[49] That fight has had more than enough air-time as it is. But it is still worth pointing out that

47. *See infra* Part II.B. For Schill, the study of public contracts in the interaction between national and international law reveals that "the theory of administrative law must recognize that in important areas the state does not govern anymore in an entirely unilateral manner by command and control, but increasingly cooperatively." Stephan Schill, *Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization*, 30 (Jean Monnet Working Paper No. 05/2013), *available at* http://www.jeanmonnetprogram.org/papers/13/documents/Schill.pdf.

48. *See* Schill, *supra* note 47, at 5–6.

49. The skeptical argument usually derives from an archaic conception of law, overly oriented toward enforcement, or an unwillingness to appreciate the myriad mechanisms for enforcement available under international law—prime among them being self-help.

internationalized state contracts are actually far more enforceable than most other sources of international law. They can be enforced against the state more easily and more regularly than typical international legal obligations for two principal reasons. First, the BITs and FTAs from which state contracts derive their international legal status also bestow upon private actors the direct capacity to sue states—to compel host states into international arbitration to resolve their contractual disputes. Aggrieved private parties need not petition their home state to press their claims, as would be necessary in trade disputes before the WTO.[50] Second, BITs and FTAs key into extremely powerful multilateral treaties for the enforcement of foreign arbitral awards, like the ICSID Convention[51] and the New York Convention.[52] Upon winning their case at arbitration, investors can rely on these treaties to effectively pursue a delinquent state's assets to the ends of the earth. So not only are there strong formal and material reasons to view the internationalized state contract as an authentic (if not plenary) source of international law; it is moreover a source of law that can be readily redeemed through a vast specialized architecture for investor-state arbitration and the enforcement of foreign arbitral awards.

B. The Corporation as International Lawmaker

Once we see state contracts as a source of international law, it is relatively easy to see how the corporation is an international lawmaker. But two objections may still be posed, to the effect that the capacity of corporations to make law is ultimately dependent on sovereign states. One objection might be that corporations are not really lawmakers in a full sense because they can only enact state contracts by agreement with states. It may thus seem that the real locus of lawmaking power comes from the host state. Second, and more significantly, it might seem as though whatever lawmaking capacities the corporation does have for itself are merely delegated or derivative of the sovereign prerogatives of its own original state of nationality, completely dependent on engaging the latter's treaty network. Both objections would miss the mark, but engaging with them helps reveal the corporation's surprising freedom of action on the international stage.

The first objection can be easily dismissed. As opposed to national law, which is usually promulgated unilaterally by particular institutions, international law is typically made by agreement between sovereign states—whether explicitly, *via* treaty, or tacitly *via* customary international law. We

50. *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2006). *But see* Crawford, *supra* note 7, at 12; Shaw, *supra* note 45, at 3; Anthony D'Amato, *Is International Law Really 'Law'?*, 79 Nw. U. L. Rev. 1293 (1984).

51. Int'l Ctr. for Settlement of Inv. Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159 (ICSID Convention).

52. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, July 6, 1988, 1252 U.N.T.S. 4739 (New York Convention).

have no difficulty viewing each of the parties to a bilateral treaty as lawmakers—on the contrary, the treaty is usually understood as the archetypal expression of the parties' sovereign power to enact international law. The power to make law does not come from either party, but rather derives from the background principle of *pacta sunt servanda* and the secondary rules of the law of treaties more generally.[53]

As with the treaty parties, both parties to an internationalized state contract are equal participants in making the law. The private party's capacity to enact international legal instruments is not simply derived from the sovereign prerogatives of the state party. It is rather derived from the background norms established in the overarching BIT, FTA, or other protective treaty through which the contract is internationalized. The legal character of the state contract is thus dependent on a pre-existing web of norms over and above either contracting party, and cannot be reduced to the state party's will alone. Moreover, as explained further below, corporations can even access treaty protection unilaterally, elevating a pre-existing domestic contract to the status of international law *after* the contract is already in force.

However, a more serious criticism remains open: is the corporation's lawmaking capacity nevertheless ultimately derivative of the lawmaking capacity of its own state of nationality? After all, BITs and FTAs only protect the investments of nationals of the states parties. It might thus be pointed out that an investor can only secure treaty protection by operation of treaties signed by its home state. It might therefore seem to follow that, to whatever extent it has the capacity to make law by agreement with a foreign host state, this capacity is no more than an expression of its *home state's* prerogatives. Indeed, this situation accurately characterizes the relatively circumscribed lawmaking capacity of individuals (i.e., natural persons). But multinational firms have much greater leeway, which grounds a far more significant lawmaking potential.

The secret lies in the multinational corporation's flexible form. A corporation can access BITs and FTAs between the target state and third states with relative ease, even though they would not be accessible to nationals of its original home state.[54] At least for purposes of acquiring investment treaty protection, corporations can readily change or augment their nationality. Firms can alter their nationality by reincorporating through complicated strategies familiar to tax planners, like corporate inversion or migration; but they can attain any number of new nationalities far more easily by creating or acquiring foreign subsidiaries through which to structure their investments. Indeed, international legal doctrine even recognizes that a corporation can restructure to take advantage of the host state's BITs and FTAs

53. Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (VCLT) ("*pacta sunt servanda*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith").

54. *See infra* Part II.C.

with third states *after* initially contracting with the state, as occurred in the *Bechtel* case,[55] so long as it does so before a dispute arises.[56]

It remains true that the corporation's lawmaking capacity is contingent on the action of states in a very general sense. It depends, after all, on a complex web of pre-existing treaties enacted by states to govern the flow of foreign direct investment.[57] And it is of course ultimately dependent on the firm's ability to incorporate in the first place, or to structure its investment through third states—all of which depends upon the national laws of particular sovereign states. It would certainly be wrong to say that the multinational corporation is not in any way dependent on the state for its capacity to make international law. But on balance the level of dependence is relatively low, and the corporation's lawmaking autonomy is relatively robust. Of course corporations lack the plenary capacity of the sovereign state to author international law on any topic. Yet the multinational firm's lawmaking potential is far greater than that of the individual investor, whose capacity to engage foreign sovereigns in internationalized state contracts is merely delegated or derivative of the sovereign prerogatives of her state of nationality.

The better analogy for the corporation's rise to the international stage lies in the story of public international organizations. Originally constituted by the states party to their constituent instruments, international organizations have proven capable of expanding their capacity to author the law beyond their enumerated powers—whether through judicial interpretation, or diverse forms of organizational action.[58] Their capacity to make law, such as it is, ultimately derives from their creators—but many organizations have subsequently grown more autonomous.[59]

Like the international organization before it, the multinational corporation was originally empowered on the international plane by states—but it

55. *See, e.g.*, Aguas del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005); *see infra* Part II.C.

56. *See* Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 93 (Apr. 15, 2009); ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits ¶¶ 267, 268, 273, 279 (Sep. 3, 2013); *see also infra* Part II.C.

57. Appreciating, of course, that there are certain major holdouts to the BIT regime, e.g., Brazil; and indeed partly in response to the recent Philip Morris arbitration implicating its public health regime, Australia has indicated that it will no longer sign BITs with dispute resolution provisions.

58. José E. Alvarez, International Organizations as Law-Makers (2006); Arato, *supra* note 22 (arguing that judicial bodies like the International Court of Justice and the European Court of Human Rights have transformed the scope and powers of their respective organizations through progressively interpreting their constituent instruments); Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 Germ. L.J. 979 (2011); Arato, *supra* note 46 (examining the quasi-legislative capacities of the UN Security Council).

59. The most dramatic example is that of the European Union, famously captured by Joseph Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991). The UN and Council of Europe are also particularly clear examples. *See* Arato, *supra* note 22, at 290 (on judicial transformation in those two bodies); Arato, *supra* note 46, at 644 (on transformation through quasi-legislative practice). *See also* Jan Klabbers, An Introduction to International Institutional Law (2d ed., 2009); J. Benton Heath, *Managing the Republic of NGOs*, 47 Vanderbilt J. Transnat'l L. 239 (2014); J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 Harv. Int'l L.J. (forthcoming 2016).

has relied on its flexible form to attain a significant degree of autonomy to make international law, by agreement with foreign sovereigns. It has been helped along, to be sure, by a great many favorable interpretations of the broad and malleable provisions incorporated in BITs and FTAs—a process which the next Part will address. But assuming the doctrinal particulars, for the moment, there is good reason to reimagine corporations as international lawmakers. They enjoy significant autonomy to navigate the global web of BITs and FTAs to secure treaty protection for their contracts with foreign sovereigns; and where they do so, such contracts have formal priority over conflicting national law of any type, across all areas of public policy. The multinational corporation thus possesses the power to make law by agreement with sovereign states—to establish private legal norms with major effects for domestic public law.

II. The Doctrinal Constellation

This Part considers sequentially the three developments central to the multinational corporation's emergent lawmaking potential, relating to state contracts, transnational property, and corporate nationality. Each of these developments entails surprising expansions of corporate power vis-à-vis host states and their citizens. None have been sufficiently studied in their own right, or subjected to adequate criticism. But the radical extent to which the doctrine empowers private corporations against the state only becomes apparent when they are drawn together.

Here I ground and illustrate the hypothetical analysis attempted above, by demonstrating that international legal doctrine supports extending investment treaty protection to state contracts, that such protection insulates them from state action that depreciates their value as iron-clad property entitlements, and that corporations may avail themselves of the full panoply of such protective treaties by changing or augmenting their nationality in the process of structuring particular investments. I consider in turn: (A) the emergence of the *formal* idea of the internationalized contract under modern international investment law; (B) the *material* extension of this legal source of law above and beyond national regulatory policy across all kinds of values; and (C) the widespread arbitral acceptance of creative corporate treaty shopping, which generates a sphere of autonomy where corporations become lawmakers.

A. The Modern Internationalized Contract

The first development central to the corporation's rise as an author of international law concerns the formal idea of the internationalized contract—the elevation of the state contract to the hierarchy of international legal norms, as an instrument of international law with priority over con-

flicting domestic law of any kind. The roots of this development extend back to the oil nationalization arbitrations of the nineteen-seventies.[60] However, it has come into full fruition in the modern era of international investment treaties, coalescing only through arbitral practice in the new millennium.

The very idea of "internationalized contracts" jettisons a classical maxim of international law: that contracts between states and private parties are fundamentally instruments of some national legal order, but not international law. The Permanent Court of International Justice (PCIJ) set out the traditional presumption in 1929, in the *Serbian Loans* case. The League of Nations Court held that "[a]ny contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[61] The most recent edition of *Oppenheim's International Law* confirms the PCIJ view in principle, noting that under classical international law "[i]t is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation."[62] In other words, a contract belongs to the legal order under whose law it was executed—i.e., the law of the contract—which is almost always explicitly or implicitly the law of some national order.

Even before the BIT era, there was some limited and controversial authority supporting the notion that certain state contracts could become instruments of international law, and not (or not merely) agreements under municipal law.[63] The idea was that the parties were free to adopt international law as the law of the contract, and evidence of this choice could be sought in an explicit choice of law clause or, in case of ambiguity, on the basis of other features of the agreement including the selection of international arbitration as a forum.[64] The parties' choice would thereby "internationalize" the contract—the theory goes—converting it into an international legal instrument whose conditions of breach, defenses, and remedies would be derived, in whole or in part, from public international

60. Texaco v. Libya, 17 I.L.M. 1 (1978).

61. Serbian Loans, Judgment, 1929 P.C.I.J. (ser. A) No. 14 at 41 (July 12).

62. *Oppenheim's International Law*, *supra* note 21, at 927 (noting, however, that the situation may be different in contemporary jurisprudence where there is an "additional element as denial of justice, or expropriation, or breach of treaty . . . ."); *see also* DOLZER & SCHREUER, *supra* note 21, at 168. Modern investor-state cases continue to confirm that the well-rehearsed principle still holds true for general international law, outside the context of BITs and FTAs. *See, e.g.*, Noble Ventures v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 5 (Oct. 12, 2005) ("The Tribunal recalls the well established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State.").

63. *See, e.g.*, Texaco v. Libya, 17 I.L.M. 1 (1978); *see also* Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550 (2009).

64. *See, e.g.*, Texaco v. Libya, 17 I.L.M. 1 (1978).

law.[65] Already in the seventies, then, the idea that state contracts have a place in the hierarchy of international legal norms was not unheard of.

Yet from the outset the theory of internationalized contracts was extremely controversial as a matter of general international law—not least because there exists no general international law of contracts. Absent any more sophisticated legal framework specific to contracts, the question and consequences of a state's breach of an internationalized contract had to be handled according to (or by analogy to) the general system of state responsibility for wrongful acts applicable to cases of treaty breach. In any case the idea did not go particularly far. Arbitral and judicial authorities were few and far between. And while the theory has been discussed across generations of scholarship, it never ultimately retained a great deal of traction.

The possibility of internationalized contracts only came into the mainstream in the investment treaty era—albeit under a number of different names. The modern mechanism lies not in general international law but in the vast web of treaties for the protection of foreign investment. The idea's resurgence has occurred through the operation and interpretation of thousands of BITs and FTAs—through which states have granted a relatively consistent set of property protections to private persons.[66]

As instruments for the protection of foreign property, it may not be obvious why investment treaties apply to contracts at all. Yet they have been extended to the protection of contracts in several crucial ways. Some explicitly incorporate guarantees for certain contracts, including provisions protecting large-scale "investment agreements,"[67] or even broader clauses insulating the investor from breach of any agreements entered into with the host state (known as an *umbrella clause*).[68] But more importantly, tribunals have interpreted these treaties' general protections as effectively internationalizing state contracts, including in particular the guarantee against expropriation, and the powerful but amorphous grant of fair and equitable treatment (*FET*). Though these provisions operate in very different ways, for present purposes the material result is similar: so long as a state contract can qualify as a covered "investment," these treaties insert private agreements with the state into the international legal hierarchy, and insulate them from breach or diminution by contrary domestic law.

65. *Oppenheim's International Law*, *supra* note 21, at 927; F.A. Mann, *State Contracts and State Responsibility* 54 AM. J. INT'L L. 572 (1960); R.Y. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156 (1961); Stephen Schewbel, *International Protection of Contractual Agreements*, 53 A.S.I.L. PROC. 266 (1959); Alfred Verdross, *Protection of Private Property under Quasi-International Agreements*, *in* VARIA JURIS GENTIUM, LIBER AMICORUM PRESENTED TO J.P. FRANÇOIS 355 (1959); James Hyde, *Economic Development Agreements*, 105 *Receuil des Cours de l'Académie de droit international* 267 (1962); A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist versus Dualist Controversies*, 12 EUR. J. INT'L L. 309 (2001); DOLZER & SCHREUER, *supra* note 21, at 167.

66. *See generally* DOLZER & SCHREUER, *supra* note 21, at 167.

67. *See, e.g.*, Trade Promotion Agreement U.S.–Peru, Apr. 12, 2006.

68. *Id.*

1. *Contracts as "Investments"*

For a state contract to qualify for BIT or FTA protection, the main jurisdictional prerequisite is that it must qualify as an "investment" under the treaty.[69] Tribunals are fond of explaining that not just any contract between a foreign investor and the state will qualify, and often identify a simple contract for the sale of goods as a hypothetical counterexample. As a one-off exchange, such a contract would not seem to satisfy the durational aspect of the definition[70] (nor perhaps the requirement of at least a minimal contribution to the host state's economy which some tribunals consider necessary).[71] But the bar is very low, and the large-scale state contracts at issue here will usually satisfy this legal standard without any difficulty.

The focus here is on contractual undertakings that would merit the description of "lawmaking" in both a formal and material sense.[72] The kinds of contracts at issue usually involve a long-term relationship between the putative investor and the state, and often entail some (temporary) transference of the state's sovereign prerogatives to the private organization.[73] These may include the exploration, extraction, and sale of a state's natural resources (minerals, oil and gas, etc.), the construction of fundamental infrastructure, and the operation of utilities. Typical utilities cases have involved contracts for the construction and maintenance of a major highway and the operation of tolls,[74] the modernization and provision of water infrastructure,[75] and the long-term provision of electric power.[76] The *SGS* cases, examined further below, involved contracts privatizing the state's power to inspect imports and levy customs duties,[77] and *Siemens v. Argentina* even entailed a partial contractual delegation of the state's control over immigration.[78] These agreements are typically long-term, entail substantial risks for

69. Dolzer & Schreuer, *supra* note 21, at 79–80.

70. *See, e.g.*, SGS v. Paraguay, Jurisdiction, ICSID Case No. ARB/07/29, ¶ 420 (Feb. 12, 2010).

71. Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009).

72. For a recent canvass of such state contracts, see Schill, *supra* note 47, at 5.

73. Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (Aug. 6, 2003). *See* Schill, *supra* note 47, at 5 (conceptualizing such state contracts within the frame of the state's public law); Serkin, *supra* note 34. This kind of transference can and should be analogized to the transference of sovereign functions to public international organizations. Gulieglmo Verdirame, *A Normative Theory of Sovereignty Transfers*, 49 Stan. J. Int'l L. 371, 371–72 (2013); Arato, *supra* note 46, at 646–47.

74. *See, e.g.*, Autopista Concesionada de Venezuela v. Venezuela, ICSID Case No. ARB/00/5 Decision on Jurisdiction (Sept. 27, 2001).

75. Aguas del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005) (2005); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 420 (July 14, 2006); Compañía de Aguas del Aconquija & Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007).

76. *See, e.g.*, Electrabel v. Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction Applicable Law and Liability (Nov. 30, 2012); Himpurna California Energy, Ltd. v. Indonesia, Final Award, 25 Y.B. Comm. Arb. 13, (UNITRAL Arb.), May 4, 1999.

77. *See, e.g.*, Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13.

78. Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007).

the investor, and are generally at least *expected* to benefit the economy of the host state in a meaningful way.[79]

As long as an investor's contract with a foreign sovereign can be characterized as an investment—and most can—it will qualify for treaty protection. Through the treaty's substantive guarantees, discussed further below, the contract will be thereby elevated from the status of a mere domestic agreement governed by national law to the international plane—converted into a bundle of international legal rights, directly enforceable by the corporation through compulsory investor-state arbitration.

So how do investment treaties elevate domestic contracts to the level of international law? In some instances they do so explicitly, through express protections for investment agreements or via umbrella clauses. But such provisions are not especially common and their applicability to domestic contracts has generated significant controversy. More generally, and perhaps more importantly, tribunals have come to extend the basic treaty protections to contracts—crucially through FET, but also via guarantees against expropriation, non-arbitrariness, and others. Because tribunals and scholars have most aggressively probed the nature, mechanics, and limits of internationalizing contracts in the context of umbrella clauses, that area of doctrine provides the best place to start. The next Section will thus begin with an examination of the principal debates surrounding the internationalization of contracts via the umbrella clause. The following Section will demonstrate how FET proves the much more significant vehicle for converting state contracts into international law, and requires more serious attention than it has yet received in this regard.

2. *The Umbrella Clause*

Treaty provisions that explicitly elevate an investor's contracts with the state to the level of international law provide the most obvious mechanisms for internationalizing state contracts. Some treaties expressly provide that their protections apply to any "investment agreement"—that is, a contract that actually establishes the investment, like the concession agreements or licenses considered above.[80] These clauses generally provide that any breach of this main structural agreement between the investor and the host state, by the latter, constitutes a violation of the state's obligations under the treaty. The umbrella clause operates in a similar way, though its scope has significantly further reach. These provisions are usually interpreted as elevat-

79. Oil and gas concessions today tend to include long-term rights to explore and extract, coupled with production-sharing or profit-sharing duties; public works, utilities, and infrastructure contracts may entail more or less thoroughgoing privatization—ranging from mere construction, to "build, operate, and transfer" (as in many waterworks cases) or "build, operate, and own" agreements. DOLZER & SCHREUER, *supra* note 21, at 80.

80. *See, e.g.*, Trade Promotion Agreement U.S.–Peru, Apr. 12, 2006; DOLZER & SCHREUER, *supra* note 21, at 79.

ing all contracts between the investor and the host state to the level of international law, whether the main investment agreement or even merely ancillary contracts associated with a broader investment. The idea is most clearly expressed in *Noble Ventures v. Romania*, where the Tribunal held that:

> In including [an umbrella clause] in the BIT, the Parties had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT. . . . [T]he Tribunal therefore considers the Claimant's claims of breach of contract on the basis that any such breach constitutes a breach of the BIT. . . . [T]he host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of the contract being thus 'internationalized', i.e. assimilated to a breach of the treaty.[81]

Tribunals have made serious and sustained efforts to grapple with the meaning of umbrella clauses, and to probe their limits. The jurisprudence on the umbrella clause is especially convoluted, but the confusion across the cases is also instructive. The first main issue is whether and to what extent umbrella clauses elevate contracts to the status of international law. While most tribunals tend to extend such provisions to state contracts, the question of how much protection such clauses offer has been controversial—specifically as to what extent they really insulate a covered contract from state action, and, most importantly, to what extent international law displaces the law of the contract. The second point of discord is whether a claimant must have a relationship of direct privity of contract with the host state in order to invoke an umbrella clause.

Regarding the first issue, there seem to be three main approaches relevant to the question of how far the umbrella clause transforms the municipal state contract into an instrument of international law: one, the outlier, being exceedingly restrictive; another completely embracing the internationalization thesis; and the third adopting a more nuanced, hybrid approach. The three approaches are nicely captured by a trio of cases decided between 2003 and 2012, brought by the same claimant, the Swiss customs inspection company Société Générale de Surveillance ("SGS"), against three different states (Pakistan,[82] the Philippines,[83] and Paraguay[84]).

81. Noble Ventures v. Romania, ICSID Case No. ARB/01/11, Award, ¶¶ 61, 62, 64 (Oct. 12, 2005); *see also* Dolzer & Schreuer, *supra* note 21, at 168 (An umbrella clause in a treaty protects a contract that an investor has entered into with the host state and is an expression of the maxim *pacta sunt servanda*. It follows that in the presence of an umbrella clause a breach by the host country of an investment contract with the foreign investor constitutes a violation of the treaty and can be raised in international arbitration).

82. Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13.

83. Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/06, Decision on Jurisdiction (Jan. 29, 2004).

The basic factual matrix in each of the *SGS* cases is largely the same. In each case the state sought to privatize customs inspections and the levying of customs duties on imports. SGS specialized in providing the relevant customs services at foreign ports, before imports reach their destination. In each instance the state contracted with SGS to provide inspection and customs levying services for inbound goods, thereby delegating to the company substantial aspects of their sovereign prerogatives to impose taxation duties. Each of the contracts was executed under the law of the host state, and each contract provided that the local courts would have exclusive jurisdiction over any disputes over the contracts (including, obviously, disputes over allegations of breach). In each case the main dispute concerned the failure of the state to pay substantial contractual fees to SGS for its services, and in each instance the company ignored the contract's exclusive forum selection clause, seeking relief instead through ICSID arbitration by appeal to Switzerland's BIT with the host state.

All three tribunals accepted that the contracts counted as investments.[85] But they diverged sharply on the question of whether and to what extent the umbrella clause insulated the contracts from simple breach, based on the state's failure to pay monies in the required time and amount.

In *SGS v. Pakistan* the Tribunal took an extremely restrictive approach. There the Tribunal simply held that it had no jurisdiction over purely domestic state contracts, and that the umbrella clause could not be interpreted as raising such contracts to the level of international law. The Tribunal emphasized the laconic terms of the umbrella clause, which provided that "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other contracting party."[86] Relying on a variety of textual and contextual canons of interpretation, it held that such ambiguous language could not support the monumental conversion—or in its words, "instant transubstantiation"—of purely domestic contracts into international treaties.[87] The Tribunal further appealed to the venerable (though increasingly disfavored) canon of *in dubio mitius*: that restrictions against sovereignty cannot be presumed.[88] The upshot of this approach is that, absent exceedingly clear language, treaties cannot be interpreted as transforming municipal contracts into instruments of international law.

84. Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Award (Feb. 10, 2012) [hereinafter SGS v. Paraguay, Award].

85. Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, ¶ 136; SGS v. Philippines, ICSID Case No. ARB/02/06, ¶ 101; SGS v. Paraguay, Jurisdiction, ICSID Case No. ARB/07/29, ¶ 117.

86. Agreement on Promotion and Reciprocal Protection of Investment, Switz.–Pak., ¶ 11, Nov. 7, 1995, RO 1998 2601.

87. Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, ¶ 172.

88. *Id.* ¶ 171.

Clearly the restrictive approach harmonizes well with the traditional principles of general international law. But despite the Tribunal's reasoning, the restrictive interpretation is difficult to square with the text of most umbrella clauses, and this narrow reading has remained a fringe position.[89]

The following year, the Tribunal in *SGS v. Philippines* explicitly distanced itself from *SGS v. Pakistan*. In the Tribunal's view, the umbrella clause in the Switzerland–Philippines BIT "would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT."[90] Thus in the Tribunal's view the contract between SGS and the Philippines came under the purview of the umbrella clause, and created an international legal obligation for the host state to refrain from engaging in action that would constitute breach of contract.

However the Tribunal did not consider that this position implied the "full-scale internationalization of domestic contracts"—as the Tribunal in *SGS v. Pakistan* had feared.[91] Most importantly, it found that the umbrella clause only imposed an international legal obligation to perform, and converted the consequences of non-performance into an issue of international law. "Article X(2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained."[92] Putting it another way, the Tribunal held that the umbrella clause

> . . . makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or *content* of such obligations into an issue of international law.[93]

According to the Tribunal, the scope of these contractual commitments can only be ascertained in light of the contract's terms, supplemented by the default and mandatory rules of the law of the contract—i.e. municipal law.

89. *But see* El Paso Energy v. Argentina, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006); Pan American Energy LLC v. Argentine Republic, ICSID Case No. ARB/04/8, Decision on Preliminary Objections (July 27, 2006), both of which supported several aspects of the reasoning in *SGS v. Pakistan*, without going as far toward closing off umbrella clause claims. Both Tribunals only went so far as to limit the umbrella clause to protecting contracts from sovereign acts—i.e., in the exercise of public power—as opposed to actions taken by the state in its capacity as a mere commercial party).

90. SGS v. Philippines, ICSID Case No. ARB/02/06, ¶ 115. The Tribunal held that the umbrella clause in the Switzerland–Philippines BIT was more explicit, providing that "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party." Agreement on Promotion and Reciprocal Protection of Investments, Switz.-Phil., ¶ 10, Apr. 23, 1999, RO 2001 438. The Tribunal also called into question its forbearer's reliance on the principle of *in dubio mitius*, as well as most of its textual arguments. SGS v. Philippines, ICSID Case No. ARB/02/06 ¶¶ 121–25.

91. SGS v. Philippines, ICSID Case No. ARB/02/06, ¶ 126.

92. *Id.* ¶ 126.

93. *Id.* ¶ 128.

And where the contract provides for an exclusive forum to resolve all contractual disputes, the existence of a breach and the amount of damage thereby caused can only be authoritatively determined by the contractually provided forum.[94] Noting that the contract here provided exclusively for local court jurisdiction, as in each of the *SGS* cases, the Tribunal issued a stay. It held that it would lack jurisdiction until such a time as the company submitted its claim before the Philippines courts and the latter rendered an authoritative judgment on the existence of a breach and the extent of any damages. Only then would the state's compliance become a matter of international law.

Finally, in 2010, a third Tribunal took a maximally expansive approach in *SGS v. Paraguay*, holding that the umbrella clause fully internationalizes municipal state contracts. The Tribunal first rejected what it viewed as the textual contortions of *SGS v. Pakistan*.[95] But *SGS v. Paraguay* went further still, departing from *SGS v. Philippines* regarding the scale of internationalization effected by an umbrella clause. Upon finding that the umbrella clause applied, the Tribunal held that a covered state contract would simultaneously create both domestic legal rights and international legal rights under the treaty. In the Tribunal's view it had no jurisdiction over the former, but unlike *SGS v. Philippines* it asserted full jurisdiction over the latter. For the Tribunal in *SGS v. Paraguay*, the umbrella clause required it to determine the disposition of the international legal rights generated by a covered contract, irrespective of the disposition of the national legal rights which would fall under the municipal law selected in the contract's choice of law provision. Likewise, even an exclusive forum selection clause choosing local courts for the determination of all contractual disputes would only affect jurisdiction over the national legal rights generated by the contract—without affecting the Tribunal's jurisdiction over any and all claims of breach under the treaty.

94. *Id*.

95. The Tribunal went even further than *SGS v. Philippines* in rejecting *SGS v. Pakistan*. While *SGS v. Philippines* distinguished itself from *SGS v. Pakistan* in part on the basis of differences in treaty text, the Tribunal in *SGS v. Paraguay* had to interpret an umbrella clause phrased identically to that at issue in the latter. SGS v. Paraguay, Jurisdiction, ICSID Case No. ARB/07/29, ¶ 169 (Feb. 12, 2010). Article 11 provides that "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." Agreement Concerning the Reciprocal Promotion and Protection of Investments, Switz.–Para., art. 11, Jan. 30, 1992, Fed. Auth. of the Swiss Confederation, http://www.admin.ch/opc/fr/classified-compilation/19920027/index.html. The Tribunal in *SGS v. Paraguay* found "no basis on the face of the clause to believe that it should mean anything other than what it says—that the State is obliged to guarantee the observance of its commitments with respect to the investments of the other State party's investors." SGS v. Paraguay, Jurisdiction, ICSID Case No. ARB/07/29, ¶ 168. The Tribunal noted in particular that the Swiss government was on record objecting to the *SGS v. Pakistan* holding. *Id.* ¶ 169 (citing "Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 SGS Société Générale de Surveillance S.A. versus Islamic Republic of Pakistan," Note under Cover of Letter from Swiss Government to ICSID Deputy Secretary-General, 1 October 2003, 19 MEALEY'S INT'L ARB. REP. E-1, E-2 (Feb. 2004)).

Thus, for the Tribunal in *SGS v. Paraguay*, the umbrella clause had the function of fully internationalizing any state contracts meeting the minimal conditions of an "investment" in the host country. Unlike the previous two cases, the Tribunal asserted jurisdiction over the entire dispute. In its merits award, two years later, the Tribunal engaged in a full analysis of the Host State's performance under the contract as a matter of international law. It found several breaches, rejecting the state's contractual defenses, and assigned damages totaling $39 million, plus over ten years of interest accruing from the date of termination in 1999.[96]

In sum, the salient lesson of the *SGS* cases lies in the variety of available approaches to the protection of contracts under umbrella clauses, ranging in the extent to which they entail internationalization. Aside from the fringe interpretation that such clauses are not meant to internationalize contracts at all, represented by *SGS v. Pakistan*, the later *SGS* cases reflect the main competing views. The broadest theory, represented by cases like *SGS v. Paraguay*, implies that umbrella clauses completely internationalize municipal state contracts. On this view, such clauses turn state contracts into "pure" sources of international law, whose breach and the consequences thereof must be assessed within the framework of public international law, and in particular the law of state responsibility. On this reading the umbrella clause transforms state contracts into something close to a state-to-state treaty. The more nuanced view, reflected in *SGS v. Philippines*, is that umbrella clauses only transmute the contract into a kind of "hybrid" source, whose breach must be interpreted on the basis of the original law of the contract, with only the consequences of breach falling under the ambit of international law. Arbitral practice oscillates between these theories—though rarely as explicitly as the *SGS* cases, and most often only on the level of assumptions.

Aside from the issue of contract elevation, the umbrella clause jurisprudence poses a second important wrinkle concerning the issue of privity of contract: whether it is necessary for the claimant to be in a *direct* contractual relationship with the Respondent. In many instances claimants sue host states over contractual relationships which may be indirect on one or both sides. In some cases claimants have sued over contracts executed with state enterprises or local governmental bodies, which they have attempted to impute to the state. On the other side, corporate claimants frequently sue over disputes arising out of contracts between their subsidiaries and the host state. Sometimes this reflects conscious corporate planning—strategic investment structuring intended to secure an arbitral forum.[97] But more often than not it happens because the host State has required the firm to act through a local entity in hopes of stimulating the local economy—in full

96. SGS v. Paraguay, Award, ICSID Case No. ARB/07/29, ¶¶ 182–84, 188 (Feb. 10, 2012).
97. *See infra* Part II.C.

awareness that the foreign parent would be able to secure arbitral jurisdiction on the local subsidiary's behalf.

Here again the cases are divided. Some treaties explicitly allow indirect investors to take advantage of the umbrella clause, as in the ECT, which refers to "any obligations it has entered into with an Investor *or an Investment of an Investor*"—where "investments" of the investor includes its downstream subsidiaries.[98] But for the most part umbrella clauses are more ambivalent, and tribunals have interpreted them on this issue in both ways—sometimes expansively, and sometimes restrictively. On the one hand, in *Continental Casualty v. Argentina*, the Tribunal held firmly that the umbrella clause covered contracts between a corporation's subsidiary and the respondent state.[99] On the other hand, a growing number of cases have required privity of contract between the claimant investor and the host state, as in *Azurix v. Argentina*. The Tribunal there emphasized that Azurix and the Respondent had no contractual relationship on either side: the contract was undertaken by the province of Buenos Aires (as opposed to Argentina), and a local subsidiary of Azurix (as opposed to the U.S.-based company itself).[100]

The issue of privity strongly affects the central narrative of this Article—the emergence of corporations as international lawmakers. If privity were a precondition for considering a contract internationalized, as *Azurix* required in the context of the umbrella clause, the corporation's capacity to shop for

98. *ECT*, Art. 10(1) (emphasis added). According to the Reader's Guide to the ECT, "This provision covers any contract that a host country has concluded with a subsidiary of the foreign investor in the host country, or a contract between the host country and the parent company of the subsidiary." *See also* Limited Liability Company AMTO v. Ukraine, ICSID Case No. ARB/080/2005, Final Award, ¶ 110 (Mar. 26, 2008); DOLZER & SCHREUER, *supra* note 21, at 176.

99. Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 297 (Sept. 5, 2008) (holding that the umbrella clause at Article II(2)(c) in the U.S.–Argentina BIT did not require privity of contract, but rather that as long as contractual "obligations have been entered 'with regard' to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary . . . [of the investing corporation] is not in principle excluded"). Similarly, the Tribunal in *Noble Ventures* held that a contract between a foreign corporation and a state enterprise had to be attributed to the host state, meaning that the umbrella clause was in principle applicable. Noble Ventures v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 85 (Oct. 12, 2005). ("where the acts of a governmental agency are to be attributed to the State for the purposes of applying an umbrella clause . . . breaches of a contract into which the State has entered are capable of constituting a breach of international law *by virtue of the breach of the umbrella clause*.") (emphasis in original).

100. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 52 (July 14, 2006) (However, as discussed below, the *Azurix* Tribunal came to the opposite conclusion in the next breath in the context of FET); s*ee also* Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 223 (Apr. 22, 2005) (holding that the umbrella clause did not apply where the state had not contracted in its own name); Burlington Resources v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 12, 2012) (confirming that an investor cannot bring a claim under the umbrella clause over contracts concluded by its local subsidiary). *But see* Burlington Resources v. Republic of Ecuador, ICSID Case No. ARB/08/5, Dissenting Opinion of Arbitrator Orrego Vicuña (Nov. 8, 2012) (decrying the idea that a state can avoid the requirements of an umbrella clause by simply requiring a foreign corporation to engage in all contracting *via* a locally incorporated subsidiary, even if the latter is entirely wholly owned by the parent). *See also* DOLZER & SCHREUER, *supra* note 21, at 175–77.

BIT protection would be severely curtailed.[101] By contrast, as explained further below, under the interpretation proffered by *Continental Casualty*, its capacity to shop for treaty protection for its contracts would be more or less unrestrained.

Of all issues of interpretation in international investment law, the scope and function of the umbrella clause remains one of the most controversial. It is unclear how far umbrella clauses internationalize municipal state contracts between corporations and foreign sovereigns, if at all. And it is further unclear what conditions they impose on corporations seeking to invoke their terms, particularly regarding the issue of contractual privity. Under the maximally expansive interpretations on both issues—reflected in cases like *SGS v. Paraguay* and *Continental Casualty*—umbrella clauses fully elevate domestic state contracts to the status of international law. They pay no heed to how the sprawling multinational corporation actually executed the domestic contract—whether through the parent, a local subsidiary, or through intermediaries established for the sole purpose of securing BIT protection. But the picture becomes increasingly checkered as we take into account the qualifications imposed by *SGS v. Philippines* (on the continued relevance of the domestic law of the contract) or *Azurix* (requiring privity of contract to activate a treaty's umbrella clause as between a corporate claimant and the host state). As discussed further below, these more nuanced cases reflect much better approaches to the problem of grappling with contracts under the ambit of investment treaties.

3. *Fair and Equitable Treatment*

If umbrella clauses were the sole mechanism for raising contracts to the level of international law, it would be difficult to say unequivocally that the international investment regime has clearly established state contracts as sources of international law, or multinational corporations as international lawmakers. The approach taken by *SGS v. Paraguay* strongly supports such a view, but the moderate view adopted in *SGS v. Philippines* is more ambivalent. However, most of the twists and turns of the umbrella clause jurisprudence are tacitly elided by the jurisprudence on the more general, ubiquitous guarantee of FET. The umbrella clause cases are analytically valuable insofar as they help us frame and typify the central issues—and one of them, *SGS v. Philippines*, offers the best view for negotiating the balance between treaty protections and the bargained-for rights in state contracts. But the far more powerful guarantee of FET paves over all such nuance—and ultimately proves much more crucial.

None of the major limitations facing umbrella clauses arise where tribunals assess whether the state failed to afford an investor fair and equitable treatment regarding its contractual rights. Tribunals have consistently

101. *See infra* § II.C.

treated this provision as the functional equivalent of the umbrella clause for most purposes, perfectly capable of elevating contract norms to the status of international law.[102] As with the umbrella clause, tribunals have found states internationally liable for breach of contractual obligations under the rubric of FET. However, FET protection goes further than the umbrella clause in most respects.

First, tribunals tend not to worry about the presence or absence of privity of contract. Recall, for example, that the Tribunal in *Azurix* denied jurisdiction over the corporation's umbrella clause claims for lack of privity between the claimant and the host state. In the next breath, the Tribunal accepted jurisdiction over Azurix's FET claim arising out of the same contract and the same impugned measures, and ultimately found in the Claimant's favor.[103] And under FET there is no question of applying the law of the contract to resolve any aspect of the dispute, as required by the hybrid theory of *SGS v. Philippines* in the context of the umbrella clause.

Moreover, FET goes beyond the umbrella clause in that it protects the private party from a significantly wider range of action than formal breach of contract. As explained further below, tribunals have interpreted FET as an extraordinarily robust standard of property protection. Not limited to guaranteeing the literal observance of commitments, this standard protects state contracts from even governmental measures that merely depreciate the contract's value—on grounds ranging from discrimination to a failure to live up to the investor's legitimate expectations (which tend to be construed very broadly).[104] In other words, from the perspective of contract theory, FET imposes a whole host of terms on state contracts, ranging from the conditions of breach and defenses, to forum selection, to valuation and damages—without much leeway for parties to contract around these strictures.

According to most tribunals, the sole limitation in extending FET to the protection of contracts seems to be that it only protects them from sovereign acts—meaning public acts that an ordinary commercial party could not bring about, as opposed to state action taken in a merely commercial capacity (like the simple failure to pay debts).[105] In this alone umbrella clause

102. *See, e.g.*, Mondev v. United States, NAFTA, Award, ¶ 134 (2002) (referring to the NAFTA's FET provision, the tribunal held that "a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance"); SGS v. Paraguay, Jurisdiction, ICSID Case No. ARB/07/29, ¶ 146 (Feb. 12, 2010); Bayindar Insaat Turzim Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/09, Award, ¶ 377 (Aug. 27, 2009) [hereinafter Bayindar v. Pakistan].

103. Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, ¶ 377.

104. *See infra* Part III.B.1.

105. Consortium RFCC v. Royume du Morac, ICSID Case No. ARB/00/6, Award, ¶¶ 33–34 (Dec. 22, 2003); Bayindar v. Pakistan, ICSID Case No. ARB/03/9, Award, ¶ 377; *see also* Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 Award, ¶ 299 (June 21, 2011) (to be compensable under FET a breach of contract must involve the "misuse of public power"). *But see* SGS v. Paraguay, Award, ICSID Case No. ARB/07/29, (Feb. 10, 2012) (finding that even a failure to pay debts can constitute a violation of FET); DOLZER & SCHREUER, *supra* note 21 at 154 (questioning the validity of

protection seems to be broader than FET, with most tribunals making no comparable distinction.[106] However, in the present context this limitation is not especially meaningful. The main concern here is to demonstrate the priority of internationalized contracts over domestic law and regulation, all of which uncontroversially consists of sovereign acts.

Thus while the significant debates surrounding the umbrella clause help reveal the stakes of internationalizing contracts through treaty protection, the nuances mostly fall away where contracts are elevated through FET. This powerful standard generalizes the possibility of internationalization and renders it more complete. At the same time, it provides the crucial link between the idea of the internationalized contract and the theory of transnational property at the heart of international investment law.

B. *An Absolutist Conception of Transnational Property*

Once "internationalized," the state contract attains a level of protection from domestic actions that improperly depreciate its value. But how far does this protection go? This Section argues that the scope of protection involved is not determined by any law of contracts, or contract theory. The extraordinary degree of substantive protection afforded to state contracts can only be understood in light of a second, separate doctrinal trend: the entrenchment of an aggressive theory of transnational property in investment law and human rights jurisprudence, and its implicit ascription to state contracts.

This Section first probes the surprising breadth of the concept of property in international law. I demonstrate how arbitral jurisprudence gives the transnational property right a preeminence not found in any national legal order, justified in part by a misguided appeal to regional human rights case law. I then turn to the uncritical extension of these protections to contracts, as investments entitled to FET and protection against expropriation.

1. *The Breadth of Transnational Property Protection*

Investment treaties generally incorporate broad and malleable treaty standards aimed at protecting foreign property from undue interference by the host state. One of the central questions facing international investment law concerns how far these standards go. Under what circumstances can foreign investors claim compensation for regulatory measures that diminish the value of their investments? What kinds of state action are compensable? How much depreciation is necessary? To what kinds of assets do these standards apply? And what kind of compensation is appropriate? Investor-state arbitral practice tends to give startlingly broad answers to all of these ques-

the distinction, and noting that "even if the underlying relationship and the breach are clearly commercial, the motives of a government for a certain act may still be governmental).

106. SGS v. Paraguay, Jurisdiction, ICSID Case No. ARB/07/29; Dolzer & Schreuer, *supra* note 21, at 174.

tions. Semantically, the textual treaty standards protecting foreign property are not very different from standards found in many domestic legal systems.[107] However, tribunals have regularly expanded the ambit of these treaty guarantees.[108] Their interpretive practice has insulated the transnational property right from the state's public powers to a degree far outstripping anything found in national law.[109]

Specifically, tribunals have tended to expand treaty protection for transnational property to cover the total field of possible state action. In broad strokes, tribunals have proven willing to review state action at all levels (legislative, executive, or judicial, from the lowest organs of government to the heights of constitutional amendment), and across all regulatory domains (from taxation to public health, environmental action, and even the management of national emergencies). Moreover they generally afford transnational property extraordinarily deep protection from these measures. Like many national legal orders, investor-state tribunals police direct, targeted takings as well as regulatory efforts that completely (or nearly) destroy the economic value of an investment. But they go much further in requiring compensation for partial takings or even the simple diminution of an investment's value caused by general regulation—as in *CMS Gas v. Argentina*.[110]

The two central treaty standards undergirding the expansion of the transnational property right are also the most ubiquitous: the protection from expropriation without compensation, and the guarantee of fair and equitable treatment. Beyond requiring that foreign nationals be treated on at least equal footing to similarly situated nationals of the host state ("national treatment"), the expropriation and FET standards require that foreign investors be accorded a concrete minimum level of protection—as a matter of international law, without regard to domestic conceptions of property. Though the precise nature of each remains in flux, tribunals have tended to interpret both expansively. Taken together, these guarantees go far beyond merely standardizing property treatment across national legal systems; they reveal a theory of transnational property more robust than anything found in

107. *See* Been & Beauvais, *supra* note 24, at 62.

108. *See id.*, at 62–63; *see also* José Alvarez, The Public International Law Regime Governing International Investment 177–88 (2009).

109. Writing in 2003, Been and Beauvais focused on comparing the early arbitral jurisprudence under the NAFTA with U.S. takings jurisprudence. But when generalized, their basic conclusions are even more apt. A broader look at international investment law, ten years later, reveals an even wider disparity with takings standards in most domestic legal systems. As Been and Beauvais rightly note, U.S. takings protections are "already among the most protective in the world." Been & Beauvais, *supra* note 24, at 37; *see also* Terri L. Lilley, *Keeping NAFTA "Green" for Investors and the Environment*, 75 S. Cal. L. Rev. 727, 749–51 (2002) (comparing property protections across the United States, Canada, and Mexico). At the same time, investor-state tribunals constituted under other BITs and FTAs have tended to go significantly further toward protecting foreign property than NAFTA Tribunals, particularly as regards the interpretation of FET. *See* Alvarez, *supra* note 108, at 188.

110. *See, e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 281 (May 12, 2005).

national law, including even highly property-friendly national legal systems.[111]

Expropriation is the weaker of the two standards, though it already dwarfs analogous takings concepts in domestic law. International investment law does not prohibit states from expropriating foreign property *per se*. Investment treaties generally permit states to expropriate foreign investments for a public purpose, through due process of law, and on payment of prompt, adequate, and effective compensation (usually meaning the fair market value of the investment).[112] The key point is that they do not permit states to expropriate without compensation, either through direct takings or through "indirect" measures tantamount to an expropriation.[113] The crucial question, then, is on what basis these treaties permit drawing distinctions between compensable and non-compensable regulatory measures—whether the state's aims can be taken into account in some way, or whether it is solely a matter of weighing the impugned measure's effects.

Most BITs and FTAs say nothing about the relevance of the state's aims in determining whether a regulatory action amounts to a compensable indirect expropriation, and tribunals usually assume that such guarantees protect transnational property from domestic regulatory endeavors, regardless of their purposes. Many tribunals have adopted a "sole effects" test, looking only at the burden imposed by regulation. In a typical land-use claim, the Tribunal in *Santa Elena v. Costa Rica* held:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.[114]

This approach assumes that even bona fide, general regulatory efforts in the public interest are compensable where they amount to an expropriation, and that a failure to compensate the investor constitutes a breach of her treaty rights. The only qualification is that the deprivation be sufficiently substantial, and even here a number of tribunals have gone far towards allowing

111. *See* Been & Beauvais, *supra* note 24, at 37.

112. *See* Dolzer & Schreuer, *supra* note 21, at 99–100.

113. *Id.*

114. Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Final Award, ¶ 71 (Feb. 17, 2000), 5 ICSID Rep. 157 (2002). Note that *Santa Elena* involved a direct taking. The ethos is reflected in indirect expropriation cases as well. *See, e.g.*, Biwater Gauff v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 463 (July 24, 2008) (recognizing, with approval, "that many tribunals . . . have tested governmental conduct in the context of indirect expropriation claims by reference to the *effect* of relevant acts, rather than the intention behind them") (emphasis in original).

partial expropriation claims where the affected assets could be "conceptually severed" from the investment as a whole.[115]

The tide may be shifting against such an expansive view of regulatory expropriation. States have begun to pull back the scope of indirect expropriation in their more recent model treaties, especially in cases concerning general regulation, requiring tribunals to balance the state's aims in adopting the impugned measure against its effects on the investor.[116] The 2012 U.S. Model BIT places a heavy thumb on the scales in favor of public regulation, noting that "except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[117] The point is that in general states should not have to pay to regulate in the public interest. Additionally, a number of tribunals have indicated a willingness to read concepts of defer-

115. There is some dispute over how much is enough to give rise to a compensable claim of expropriation. The general rule is that the deprivation must amount to something close to a complete deprivation of the investment. But a number of tribunals have gone further, accepting the idea of "partial expropriation" whereby a deprivation of particular assets must be compensated where the assets can be conceptually severed from the larger investment. *See* Middle East Cement v. Egypt, ICSID Case No. ARB/99/6, Award, ¶¶ 138, 144 (Apr. 12, 2002), 7 ICSID Rep. 178 (2005); Eureko B.V. v. Republic of Poland, Partial Award, ¶¶ 239–41 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007). At the same time, another line of cases has rejected the possibility of partial expropriation in international investment law. *See contra* Grand River Enterprises Six Nations, Ltd. v. United States of America, Award, Jan. 12, 2011, ¶ 146, UNITRAL Arb. (holding that under the NAFTA only a complete expropriation of the entire investment would qualify for compensation); and Burlington Resources v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 398 (Dec. 12, 2012) (applying the test of expropriation "to the investment as a whole," and holding that "criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable"). Perhaps surprisingly, from the domestic lawyer's standpoint, it is this latter line of cases that has provoked incredulity among scholarly authorities. One leading textbook has decried the skeptical view in cases like *Grand River* as overly narrow, reflecting a failure "to distinguish between the questions of the definition of a taking and the extent to which an investment may have been expropriated." DOLZER & SCHREUER, *supra* note 21, at 119; *see also* Ursula Kriebaum, *Partial Expropriation*, 8 J. WORLD INVESTMENT & TRADE 69 (2007). The partial-takings enthusiasts go significantly further than domestic courts even in jurisdictions as property-friendly as the United States, where the Supreme Court has balked at adopting a notion of conceptual severance in regulatory takings cases. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1454, 1481 (2002) ("[E]ven though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as a whole' . . . . [W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."); Been & Beauvais, *supra* note 24, at 63–64.

116. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, U.S. MODEL BILATERAL INVESTMENT TREATY (2012), Annex B, para. 4(a) [hereinafter U.S. Model BIT] (noting that the determination of whether an action constitutes an indirect expropriation is a fact-specific inquiry that must take into account: the economic impact of the state's action or actions; the extent to which such actions interfere with "distinct, reasonable investment-backed expectations"; and the character of the government action).

117. *Id.*; *see also* FOREIGN AFFAIRS, TRADE, AND DEVELOPMENT CANADA, Model Foreign Investment Protection Agreement (2004), Annex B.13(1)(c) [hereinafter Canada Model BIT] ("Except in rare circumstances, such as when a measure or series of measures are so severe in light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.").

ence and balancing into expropriation provisions in existing treaties of the older, laconic style.[118]

But any real sea change remains far off. Most treaties do not yet specifically require tribunals to look at anything beyond a measure's effects. Moreover it is not clear that balancing is really a full solution. Tribunals that have introduced standards of review like "proportionality" and "the margin of appreciation" have varied wildly in how they draw doctrinal tests from these malleable concepts—to the point where it is not only unclear when and where these doctrines will be read into treaty rights, but also what level of deference they will entail.[119] Worse still, it often appears that invocations of these doctrines amount to little more than lip service. Even in applying these dignified concepts of deference tribunals have tended to leave the state precious little room for maneuver.[120] The scholarly instinct behind calls for greater judicial deference is usually a good one, reflecting an impulse to relieve some of the pressure on domestic regulatory authority posed by international investment law. And given significant institutional reforms—like a centralized investment court organized around doctrines of formal precedent—doctrines of deference could have an important role to play. But as things stand, doctrines like proportionality and the margin of appreciation are at best overly malleable and uncertain safety valves, and at worst mere window-dressing masking a strong preference for private property rights over other public values.[121]

Meanwhile FET goes significantly further, dwarfing even the more expansive theories of expropriation. It is far easier to establish a violation of FET than of expropriation, and the standard protects investors against a wide range of invasions of property that might not have had complete expropriatory effect. FET is usually portrayed as a kind of stopgap, to catch state action that may not be expropriatory but really should be compen-

118. *See, e.g.*, Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 193–95 (Sept. 5, 2008); Técnicas Medioambientales Tecmed v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003) [hereinafter Tecmed v. Mexico]; Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 312–13 (July 14, 2006); Occidental Petroleum Corporation v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 404–09 (Oct. 5, 2012). *See* Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. Int'l Disp. Settlement 577, 579 (2012); Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & Ethics H.R. 47, 76 (2010); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 283 (2010) (advocating for importing the ECtHR's "margin of appreciation" doctrine into international investment law).

119. I have argued elsewhere that, given the fragmented institutional structure of the investment regime, doctrines of deference are at best an inconsistent and incomplete fix. Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 Va. J. Int'l L. 545 (2014).

120. *E.g.*, Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122; *Azurix Corp.*, ICSID Case No. ARB/01/12, Award, ¶ 377 (July 14, 2006). *But see Continental Casualty*, ICSID Case No. ARB/03/9Award, ¶¶ 193–95; Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005) (both adopting substantially deferential approaches to scrutinizing the host states' regulatory choices).

121. Arato, *supra* note 119.

sated—including a denial of justice in domestic courts, or subjection to unfair practices that may not entirely annihilate an investment.[122] However, tribunals have interpreted the term so broadly that it has nearly eclipsed expropriation. It is the clear favorite among claimants, and accounts for the vast majority of awards in their favor.[123] Indeed, while many awards grounded in FET have found no expropriation, nearly every BIT award making a finding of expropriation has also found a parallel violation of FET.[124]

Textually, FET clauses tend to be remarkably spare, consisting of little more than the words "fair and equitable treatment."[125] However tribunals have made much of these four sparse words, infusing the phrase with dazzling substantive and procedural meaning. The Tribunal in *Tecmed v. Mexico* articulated the most frequently cited formulation, which is also among the most aggressive. Noting first that bad faith is not required for its violation, the Tribunal held that FET:

> requires the [host state] to provide treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, *free from ambiguity and totally transparently* in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investment, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . . The foreign investor also expects the host State to *act consistently*, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State . . . not to deprive the investor of its investment without the required compensation.[126]

122. Dolzer & Schreuer, *supra* note 21, at 132 ("Essentially, the purpose of the clause as used in BIT practice is to fill gaps which may have been left by the more specific standards, in order to obtain the level of investor protection intended by the treaties."); Jan Paulson, Denial of Justice in International Law (2005).

123. Rahim Moloo & Nathaniel Khng, (June 23, 2103) (working paper) (on file with author). *See also* Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment 4 (2013); Alvarez, *supra* note 108, at 177.

124. Moloo & Khng, *supra* note 123 (noting, further, that most exceptions involved cases where the FET was unavailable under the particular treaty, or where the Tribunal never reached FET in the interest of judicial economy).

125. In some treaties the phrase is supplemented by language referring to the minimum standard of treatment of foreign nationals under customary international law. *See* Treaty with Argentina Concerning the Reciprocal Encouragement and Protection Investment, U.S.–Arg., art. II(2)(a), Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993) ("Investment shall at all times be accorded fair and equitable treatment . . . and shall in no case be accorded treatment less than that required by international law.").

126. *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003) (also adding that "Any and all State actions conforming to such criteria should relate not only to the guidelines,

Needless to say, this is a broad and powerful rule for foreign investors. And it has found substantial support in subsequent cases.[127] The core idea is that FET protects the investor's "basic expectations," (sometimes framed more diminutively as "legitimate expectations" or "reasonable expectations"). For *Tecmed*, this includes consistency, non-arbitrariness, freedom from ambiguity, and "total transparency," as well as compensation for the deprivation of the investment. The latter aspect would already seem to entirely encompass the idea of expropriation, and the rest serve to broaden the protection due to foreign property substantially beyond that.

Today tribunals largely accept the centrality of the idea of legitimate expectations, organized around the same basic elements articulated in *Tecmed*—if not always going so far as that decision in delineating their boundaries.[128] Summing up a number of awards on FET, the Tribunal in *Bayindir v. Pakistan* considered that the standard is generally understood to include: an "obligation to act transparently and grant due process";[129] as well as obligations to refrain "from taking arbitrary or discriminatory measures";[130] "from exercising coercion";[131] or "from frustrating the investor's reasonable expectations with respect to the legal framework affecting the

directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations" and that the "investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments") (emphasis added).

127. Tribunals frequently quote the entire paragraph in full as an authoritative precedent on the meaning of FET. *See, e.g.*, Bayindar v. Pakistan, ICSID Case No. ARB/03/09, Award, ¶ 179 (Aug. 27, 2009) (acknowledging that *Tecmed* lays out a broad conception of FET, but nevertheless accepting it as an " 'authoritative precedent' with respect to the doctrine of legitimate expectations"); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 127 (Oct. 3, 2006); Oko Pankki Oyj v. Estonia, ICSID Case No. ARB/04/6, Award, ¶ 242 (Nov. 19, 2007) [hereinafter Oko Pankki Oyj]. *Waste Management v. Mexico*, decided the following year, provides a somewhat more restrained (but still quite expansive) version of the standard:

> The minimum standard of treatment of fair and equitable treatment is infringed by conduct . . . harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Waste Management v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004). *Tecmed* and *Waste Management* are frequently quoted together in support of a generally broad approach. *See, e.g.*, Bayindar v. Pakistan, ICSID Case No. ARB/03/09, Award, ¶ 178; Oko Pankki Oyi, ICSID Case No. ARB/04/6, Award, ¶¶ 239, 241–42.

128. *See* DOLZER & SCHREUER, *supra* note 21, at 145–60 (breaking the analysis of FET into legitimate expectations; stability; procedural propriety and due process; good faith; and freedom from coercion and harassment."). Of particular note for present purposes, Dolzer and Schreuer also include "compliance with contractual obligations." *Id*.

129. Bayindar v. Pakistan, ICSID Case No. ARB/03/09, Award, ¶ 178.

130. *Id*.

131. *Id*.

investment."[132] Most tribunals start with a relatively similar approach, and the main areas of debate entail how far the various elements go. With few exceptions, the level of protection turns out to be high.[133]

Additionally, FET claims are not subject to an effects threshold in the same way that expropriation claims are. All diminution in the value of assets that fails to comply with the standard is compensable, and tribunals have even held states in breach of FET where the actual damage caused turned out to be *de minimis* in effect.[134] Where the damage is sufficiently high, Tribunals have proven willing to award the fair market value of the entire investment—even if the state had not completely annihilated its economic

132. *Id.*

133. *See* ALVAREZ, *supra* note 94, at 108. A handful of NAFTA awards represent serious outliers, adopting very narrow interpretations of FET. I elide full consideration of these awards and the well-rehearsed debate they have engendered on the relationship between the international minimum standard and FET, because the issue largely turns on the particular text of the NAFTA. Unlike most BITs, NAFTA Art. 1105 only provides for FET as an aspect of the minimum standard of treatment under customary international law. NAFTA tribunals have differed drastically on how to interpret FET in this context. In very broad strokes, a handful of tribunals have held that the standard is completely limited to the customary minimum standard, reflected in the words of the 1926 *Neer* award requiring "outrage . . . bad faith . . . willful neglect of duty . . . or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." LFH Neer & Pauline Neer v. United Mexican States, (U.S. v. Mex.), 4 R.I.A.A. 60, 61–62 (1926), http://legal.un.org/riaa/cases/vol_IV/60-66.pdf. For example, the Tribunal in *Glamis Gold* held that Art. 1105 had not evolved far beyond the *Neer* standard, and thus set a high bar for Claimants Glamis Gold v. United States, (UNCITRAL), ICSID, Award, ¶¶ 22, 616, 627 (June 8, 2009) (requiring an act to be "sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete ladbbck of due process, evident discrimination, or a manifest lack of reasons. . .or the creation by the state of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations"); *see also* Cargill Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, ¶ 286 (Sept. 18, 2009); Mobil Investments Canada & Murphy Oil Corp. v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability, ¶ 152 (May 22, 2012). The three parties to the NAFTA (Canada, Mexico, and the United States) have all consistently advocated this limited view of FET under Art. 1105. *See* Interpretation of the Free Trade Commission of Certain Chapter Eleven Provisions (July 31 2001), *available at* http://www.state.gov/documents/organization/38790.pdf; TODD WEILER, THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION, AND MINIMUM STANDARDS OF TREATMENTS IN HISTORICAL CONTEXT 246 n. 690 (2013). By contrast, a number of NAFTA tribunals have treated FET as an autonomous treaty standard, broader than the international minimum standard. *See* Metalclad Corp. v. United Mexican States*,* ICSID Case No. ARB(AF)/97/1, Award, ¶ 100 (Aug. 30, 2000) [hereinafter Metalclad] (holding Mexico in breach of FET for failing to provide a "transparent and predictable framework"); Pope & Talbot v. Canada, UNITRAL, Award on the Merits of Phase 2, ¶ 110 (2001). The broad approach seems to be dominant, with yet a third line of cases adopting reasoning closer to the cases like *Glamis* (i.e. that Art. 1105 exclusively incorporates custom), but hewing toward the broader cases in finding that custom has substantially evolved since 1926. *See, e.g.* Merrill & Ring Forestry v. Canada, UNITRAL, ICSID Administered, Award, ¶ 192 (2010) (finding that FET protects against "all such acts or behavior that might infringe upon a sense of fairness, equity and reasonableness"); *Mondev*, ICSID Case No. ARB(AF)/99/2, ¶ 117 (noting that the rise of BITs has itself played a role in the development customary international law beyond *Neer*) ALVAREZ, *supra* note 108, at 177–88; PAPARINSKIS, *supra* note 123; DOLZER & SCHREUER, *supra* note 21, at 139; T. WEILER, *supra* at 247–48; Gabrielle Kaufman-Kohler, *Interpretive Powers of the Free Trade Commission and the Rule of Law*, *in* FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION, 175 (Emanuel Gaillard & Frédéric Bachand, eds., 2011).

134. *See, e.g.*, Biwater Gauff v. United Republic of Tanzania*,* ICSID Case No. ARB/05/22, Award (July 24, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf. One could of course question whether such cases are worth the expense.

use.[135] In such cases tribunals simply order a forced sale on top of all damages, requiring the investor to transfer its remaining assets to the offending state upon receipt of full compensation.[136]

Most states do not provide such expansive protection to private property within their own borders. Even highly property-friendly jurisdictions like the United States do not go as far as the typical tribunal's approach to the guarantee against regulatory expropriation, let alone FET.[137] Taking these standards together, transnational property is protected from state action at all levels of government, and across all fields. The government's regulatory aims are often considered irrelevant, or ascribed only weak importance (except where they show *bad* faith). Even partial deprivations of property are compensable, either through strong notions of conceptual severance or through a notion of legitimate expectations that far exceeds the role of expectations in domestic law (which is usually limited to those arising out of specific representations by the government).[138]

Why should the protection of transnational property be so much broader than the protection afforded to property under any national legal order? The expansive theory of property at work behind all of these interpretive moves is usually only implicit—something merely assumed, rather than explained and justified. But in the uncommon cases where tribunals engage in closer analysis, the justifications prove woefully thin.

Tecmed itself offered the clearest account for affording foreign nationals heightened protection, drawing on the jurisprudence of the European Court of Human Rights (*ECtHR*). The Tribunal placed great emphasis on a passage from the ECtHR case *James and Others v. United Kingdom*:

> . . . non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legiti-

135. *See* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 281 (May 12, 2005), 14 ICSID Rep. 158 (2012); *Azurix Corp.*, ICSID Case No. ARB/01/12, Award, ¶ 420.

136. *See CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8.

137. *See Been & Beauvais*, *supra* note 24, at 37; Lilley, *supra* note 109.

138. *See Metalclad*, ICSID Case No. ARB(AF)/97/1 (stability of legal systems enough); Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 10 ICSID Rep. 134 (2006). *Glamis Gold* provides an important exception, recognizing only a limited form of expectations based on actual representations by the government made "in order to induce investment." Glamis Gold v. United States (UNCITRAL) Award, ¶ 627 (2009). But *Glamis Gold* represents a small minority, and may itself be limited to the particularly confined text of the NAFTA provision on FET. *See supra*, note 133 (on the debate around NAFTA Art. 1105).

> mate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[139]

The *Tecmed* Tribunal particularly stressed the concern about political participation, emphasizing that "the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because investors are not entitle[d] to exercise political rights reserved to nationals of the State."[140] As Arbitrator in the NAFTA case *Thunderbird v. Mexico*, Thomas Wälde generalized from the reasoning in *James*, stating that "international investment law is aimed at promoting foreign investment by providing effective protection to foreign investors exposed to the political and regulatory risk of a foreign country in a situation of relative weakness."[141]

Without denying that there is some truth to the idea that foreign investors are more vulnerable to domestic legislation than nationals, this logic does not stand up as a justification for enshrining a level of transnational property protection beyond levels known to national law. First of all, the rationale is overly formalistic, by limiting the focus to formal political rights. It vastly underestimates the material power and influence of foreign capital on domestic politics, especially in the developing world. So while it is of course possible that foreigners may be unfairly subjected to domestic regulation, it is not clear why they should be entitled to heightened protection as a general rule. It certainly makes sense to have international standards for the protection of private property; but it is not at all clear that these standards should be set so high. Second, it is not clear that nationals should bear a greater burden than non-nationals in all cases, particularly where the public interest at issue involves fundamental human rights or global public goods like the environment or health.

Moreover the reference to human rights jurisprudence in this context is misleading, and seems to over-glorify the idea that non-nationals should be entitled to substantially higher protection than nationals. After all, the ECtHR was not taking a clearly principled stance in *James*. That case did not actually involve foreign investment, but was in fact purely vertical. The Claimants were British property holders dispossessed of residential real estate in London on the basis of recent tenant-friendly legislation by British authorities. The issue of foreign nationality only arose because the Claimants argued that the court should *import* the heightened standards of property protection for foreign nationals under international law *into* the European

139. James v. United Kingdom, App. No. 8793/79, Eur. Ct. H.R. ¶ 63 (1986), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507, *quoted in* Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003).

140. Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, ¶ 122. *See also* Azurix Corp., ICSID Case No. ARB/01/12, Award, ¶¶ 311–12 (finding that the reasoning in *Tecmed* and *James* provides "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation").

141. Thunderbird v. Mexico, NAFTA (UNCITRAL) Sep. Op. Arbitrator Thomas Wälde, ¶ 4 (2006) (citing *James v. U.K.*, App. No. 8793/79, Eur. Ct. H.R., ¶ 63).

Convention. In refusing to do so, the Court merely acknowledged that "there *may well* be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned . . . especially as regards a taking of property effected in the context of a social reform."[142] The Court's references to the vulnerability of foreign investors to domestic legislation and their lack of participation rights were not meant as a statement of principle, but something closer to a hypothetical observation.

The tacit and unjustified theory of transnational property characteristic of international investment jurisprudence has had a substantial impact on states. It is a matter of concern for developed and developing countries alike. There is a real argument that, as things stand, the prevailing understanding of property in investor-state arbitration is leading to serious regulatory chill.[143] And states' reactions have been telling: Canada and the United States have gone to great lengths to weaken expropriation protection in cases of bona fide general regulation,[144] and have repeatedly sought to dilute FET protection in the context of the NAFTA.[145] Others have gone further still, resorting to exit by freezing their BIT programs,[146] or by withdrawing from certain BITs altogether.[147]

Yet the system remains exceedingly strong. The vast majority of BITs remain firmly in place, and states are continuing to sign new BITs and even large-scale multilateral investment treaties.[148] Moreover, as demonstrated

142. James v. United Kingdom, App. No. 8793/79, EUR. CT. H.R. ¶ 63. This sentence is always left out in investor-state awards, even though it makes clear that the Court's statement, quoted in *Tecmed* and elsewhere, is relatively hesitant.

143. Been & Beauvais, *supra* note 24, at 132. *See also* Alvarez, *supra* note 1, at 22 ("To the extent a standard such as that in [*Tecmed*] protects foreign investors from regulations that change over time because of changing information about health risks or changes in a government's capabilities or willingness to respond to such concerns, such protections of investors' 'legitimate expectations' are controversial"; moreover "poorer states may find the high expectations for the transparency and predictability of government action implicit in [*Tecmed*] impossibly difficult to satisfy.").

144. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, U.S. Model Bilateral Investment Treaty (2012), Annex B, ¶ 4(b); *see also* FOREIGN AFFAIRS, TRADE, AND DEVELOPMENT CANADA, Model Foreign Investment Protection Agreement (2004), Annex B, ¶ 4(b); Model Agreement for the Promotion and Protection of Investments, CAN. (2004), Annex B.13(1)(c); ALVAREZ, *supra* note 108, at 188.

145. *See supra,* note 133.

146. For example, Australia has frozen signing BITs with investor-state provisions in response to a strong ongoing challenge by Philip Morris over its plain packaging laws. AUSTRALIA DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, *available at* http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx.

147. Ecuador has already withdrawn from its BIT with the United States, and Bolivia, South Africa and Venezuela have also withdrawn from a number of BITs. Ecuador is further considering withdrawing from a twenty-six pre-existing BITs on grounds that they have caused serious regulatory chill. See reports in state media on the recent conclusions of the Commission for Integrated Citizen Audit of Investment Treaties and the System of International Arbitration, established by Ecuadorian President Rafael Corea, *available at* http://www.andes.info.ec/en/news/international-commission-analyzes-26-bilateral-investment-treaties-will-recommend-end (noting public statement by commission member Muthucumaraswamy Sornarajah that "if the treaties are kept the way they are, Ecuador will not be capable of acting in favor of the public interest.").

148. The United States is currently negotiating two major multilateral investment treaties. The Trans-Pacific Partnership (*TPP*) would link twelve states in the Pacific region, and the Transatlantic

below, where the host state is party to *any* investment treaties, corporations will be able to access treaty protection by structuring their investments through the country's treaty partners—and indeed, sophisticated corporations will seek to access the most protective treaty available.[149] Finally, tribunal practice under extant treaties does not show signs of especially significant change. While recent attempts to reconsider the appropriate standard of review may be promising, initial scholarly excitement in this area has yet to be redeemed in practice.[150] In many cases concepts like proportionality appear to function as mere window dressing, as in the remarkably expansive *Tecmed* and its progeny.[151] But even accepting that some tribunals have deployed deferential standards of review with greater rigor, like the Tribunal in *Continental Casualty*,[152] this form of arbitral self-limitation is at best an irregular and incomplete mechanism for reform.[153]

2. *Fusing Property and Contracts as Investments*

The entrenchment of a highly protective theory of transnational property dovetails with the issue of the previous Section in that it is extended to state contracts that have been internationalized by investment treaties. FET and guarantees against expropriation are uncritically extended to a wide spectrum of assets, including contracts between sovereigns and foreign investors. And such protections are not, for the most part, tailored to accommodate differences between contracts and the more classical forms of real and personal property. Contracts are afforded the full scope of these protections, guaranteeing them against action ranging from takings[154] to the mere diminution of value caused by a frustration of the investor's legitimate expectations.[155]

The simple fusion of the expansive theory of property with contract claims is most often explained by a strangely circular reasoning. The expla-

Trade and Investment Partnership (*T-TIP*) would link the United States with the member states of the European Union.

149. *See infra* Part II.C.

150. Stone Sweet, *supra* note 118, at 76; Burke-White & von Staden, *supra* note 118, at 283; Schill, *supra* note 118, at 579.

151. Tecmed v. Mexico, ICSID Case No. ARB(A)/00/2, Award, ¶ 122, (May 29, 2003) (purporting to apply proportionality review) (citing James v. United Kingdom, 8 Eur. Ct. H.R. 123 (1986)); *see also* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award ¶¶ 312–13; Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award, ¶¶ 404–09, (May 29, 2003).

152. Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/09/9, Award, ¶¶ 193–95 (Sept. 5 2008) (subjecting Argentina's emergency actions to a least restrictive means test, and upholding most of the impugned measures under that standard).

153. *See* Arato, *supra* note 119.

154. *See, e.g.*, Revere Copper v. Overseas Private Investment Co., Award, (Aug. 24, 1978).

155. *See, e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 281 (May 12, 2005) (finding that the damage to the Claimant's gas transport concession caused by Argentina's emergency measures was not so extensive as to give rise to an expropriatory taking, but holding the Respondent responsible for compensating the Claimant for diminishing the value of the concession through measures that contravened the latter's legitimate expectations).

nation starts by noting that BIT negotiators generally shied away from referring to the concept of "property" as such, out of concern that the range of assets covered by the concept might prove too limited.[156] Instead, negotiators almost invariably opted for the term "investment," which seemed less connected to pre-existing jurisprudential notions. Moreover, the resultant treaties tended to define investment broadly—often explicitly including contracts, and frequently extending to "assets of any kind."[157] As noted above, state contracts practically always satisfy the definition.[158] The circle is finally closed by the assumption that the substantive treaty standards, incorporated and developed with the categories of real and personal property in mind, simply apply to all covered investments without differentiation.[159]

Once tribunals find state contracts entitled to protection under the treaty, they tend to adjudicate the investor's contract claims on the basis of the usual aggressive property theories implicit in the adjudication of FET or expropriation claims regarding any other kind of asset. This fusion of property theories with contract rights insulates protected contracts from regulatory change to the same (expansive) extent as tangible assets and other more classical categories of property. It does so by supplementing or displacing contract terms explicitly negotiated by the parties, almost invariably to the advantage of investors. Private contracts between the state and foreign nationals are thus converted into robust entitlements that significantly hinder the regulatory capacities of the host state.

However, contracts are not the same as real or personal property, and it is not clear why they should be treated as such. Unlike the rigid classical categories of property, contracts are negotiated bundles of rights and obligations, chosen against the background of a web of background default (and only occasionally mandatory) rules incorporated under the law of the contract—covering all issues, from breach and defenses to questions of damages. They are, after all, bargains. If they are to be treated as a form of quasi-property, they should still be subject to sophisticated rules oriented toward their negotiated nature—for example through nuanced default rules favoring party autonomy, negotiation, and the exchange of information, rather than ham-handed mandatory terms.[160] As Hanoch Dagan points out, in domestic law the concept of property comprises a wide variety of types of assets connected to very different values, without subjecting these to identical rules that pave over their differences.[161] From this perspective there is no

156. John Sprankling, The International Law of Property 24 (2014); Zachary Douglas, The International Law of Investment Claims 172 (2009).

157. *See, e.g.*, Bilateral Investment Treaty, U.S.–Arg. Nov. 14, 1999; Dolzer & Schreuer, *supra* note 21, at 62–63.

158. *See supra* Part II.A.1.

159. *See, e.g.*, Sprankling, *supra* note 156, at 24; Douglas, *supra* note 156, at 172; Dolzer & Schreuer, *supra* note 21, at 62–63.

160. Ian Ayres & Robert Gertner, *Filing Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 87–89 (1989).

161. Dagan, *supra* note 24, at 27–31.

problem with viewing contracts as a form of property as such, so long as they are treated in a way sensitive to their particular nature.[162] This insight is just as valuable in the context of international investment law, and quite a bit more pressing.

What is crucial is that in the context of state contracts, the protections associated with FET and expropriation *are not negotiated*—at least not between the host state and the investor. Once internationalized, state contracts are augmented with these highly investor-friendly protections by default. And these defaults are highly sticky—that is, they are very difficult to contract around.[163] The assumption is generally that the contract does not opt out of BIT provisions, but that substantive and procedural treaty terms displace conflicting contract terms. This is a crucial insight: it is not a problem that such contracts are extremely one-sided as such; but it is extremely problematic that, under the auspices of a BIT or FTA, investors need not negotiate for such asymmetric protection.

The possibility of powerfully investor-friendly contracts is not unknown in the history of international law. In particular, private corporations have in the past extracted similar guarantees from the host state through incorporating provisions known as "stabilization clauses" in their contracts, freezing aspects of the state's regulatory policy vis-à-vis the concessionaire for the duration of the contract (for example by exempting the investor from changes in the tax regime).[164] Christopher Serkin has aptly shown that analogous arrangements exist in national law as well. Serkin explains how, in U.S. law, contracts forming public-private partnerships can entrench public policies that bind the government in the future. These contractual regimes freeze the relationship between the parties by specifically guaranteeing total compensation in the event that the government pursues regulatory change to the private party's detriment.[165] But crucially, in the context of stabilization clauses and domestic public-private partnership agreements, such high levels of protection are negotiated by the parties—indeed they represent, *ipso facto*, specific guarantees of a continued level of treatment that would establish legitimate and reasonable expectations by even a very narrow standard. One can readily assume that the state has priced such favorable treatment into the deal.

By contrast, no such negotiation is necessary in the case of state contracts coming under the auspices of an investment treaty. Through internationalization, investment treaties infuse state contracts with the whole host of broad protections that have been interpreted into FET and expropriation.

162. *See id.*, at 34–35.

163. *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2084 (2012) (developing a concept of "sticky" default rules, meaning defaults that can only be contracted around in special ways, e.g. through use of very specific language—making them difficult, but not impossible to contract around).

164. *See* Alvarez, *supra* note 1, at 22; Kuruk, *supra* note 34.

165. Serkin, *supra* note 34.

They constitute, in effect, a robust web of substantive and procedural default rules. And the defaults are particularly sticky. For some tribunals, terms like the procedural right to arbitrate are so sticky that they would arguably amount to mandatory rules.[166] As a result, arbitral jurisprudence tends to just assume that states should be on notice that any contracts with investors coming under an investment treaty will be entitled to this heightened level of protection. This assumption is all the more troubling in view of the fact that corporate investors can restructure their nationality to acquire BIT protection *after* executing the contract, discussed further below.[167]

The fusion of the broad theory of transnational property with the idea of the internationalized contract thus accounts for a vision of state contracts as a source of public international law. On the one hand, through treaty-based internationalization, state contracts are inserted into the international legal hierarchy, and bestowed protection from domestic law. On the other hand, the ascription of aggressive property protection to such contracts insulates them from deprivation or even mere diminution of value caused by regulatory measures at all levels of state action, chilling the state's regulatory autonomy across all fields. Seen in this light, these seemingly private instruments impose serious constraints on the public law of the host state, and severely limit the capacity of its citizenry to engage in democratic self-government. Put another way, once imbued with such forceful property protection, the internationalized contract emerges as an indelible international legal obligation opposable to the state party. These seemingly private legal norms thus turn into a form of public law in the private interest.

166. Ayres & Gertner, *supra* note 160, at 121 ("As the cost of contracting around a default rule becomes extremely large, the default rule starts to look like an immutable rule."). *SGS v. Paraguay* is an example of a tribunal treating a BIT provision entitling investors to ICSID arbitration as such a sticky default rule that it seems to approach the mandatory. Recall that the state contract adopted Paraguayan Courts as the *exclusive* forum to resolve all contractual disputes. The Tribunal's pure-internationalization stance implied that even such an explicit clause would be insufficient to defeat the default for international arbitration set by the BIT. *See* SGS v. Paraguay, ICSID Case No. ARB/07/29, Award, ¶ 179 (Feb. 10, 2012) (indicating that the BIT rule was still a mere default, but requiring an even more explicit waiver—perhaps one actually mentioning the BIT right to international arbitration being waived by name). The pure-internationalization approach thus treats ICSID arbitration as a remarkably sticky default bordering on a mandatory rule. But note that the hybrid approach of SGS v. Philippines, ICSID Case No. ARB/02/06, (Jan. 29, 2004) goes the other way, treating the BIT's arbitration clause as a much less sticky default. The latter Tribunal took the contracting parties' choice seriously, finding that the contract's exclusive forum selection clause (choosing Philippine Courts) sufficed to waive ICSID jurisdiction for the resolution of the underlying contract claims. *SGS v. Philippines*, ¶ 153 ("The Tribunal cannot accept that standard BIT jurisdiction clauses automatically override the binding forum selection of a forum by the parties to determine their contractual claims."). It remains to be seen whether Tribunals would accept a maximally explicit contractual waiver of ICSID jurisdiction or other BIT protection that expressly mentions the relevant investment treaty. *See* S.I. Strong, *Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?*, 29 ICSID Rev.—FILJ 690 (2014) (noting that in 2013 Colombia attempted to impose such restrictions in a concession agreement, but ultimately reversed course in the face of overwhelming opposition by concessionaires). Note, in any case, that it is not at all clear in any of these cases *why* the tribunals consider that the defaults set by the BIT should be understood as more or less sticky—this is a major lacuna in the jurisprudence, which I will confine to a subsequent paper.

167. *See supra* Part II.C.

C. Corporate Nationality and Treaty Shopping

Taking together these developments in the international law of contracts and the protection of foreign property, the state contract appears to have emerged as a source of international law. However, the overarching thesis of this Article—that corporations should be understood as autonomous lawmakers—does not yet follow. I posited in Part I that the corporation's capacity to make law should not be reduced to a derivative or delegated power dependent on the treaty arrangements of its home state. In this Section, I demonstrate how the doctrine's reverence for the corporation's flexible form affords the multinational business enterprise significant leeway to acquire treaty protection for its contracts with foreign sovereigns, far beyond the scope of those treaties ratified by its state of nationality. The secret lies in its capacity to augment its nationality by structuring or restructuring its investment through wholly owned subsidiaries, allowing it to take advantage of an enormous range of investment treaties which the parent could not otherwise access.

As with the law of contracts, international investment law here upends a second basic assumption of international law regarding corporate nationality: that the corporation is purely a creature of national law, which exists only by grace of the municipal law of some country. *Oppenheim's International Law* again provides the classical formulation: "[i]t is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its siege social to be in the same state."[168] By contrast, international investment law gives more credence to the multinational existence of modern corporate entities. Of course investment treaties permit corporations to sue foreign sovereigns under treaties between the latter and their home state of nationality. But the doctrine does not insist that the corporate parent's nationality is its *only* nationality for purposes of asserting BIT protection and arbitral jurisdiction. It rather accepts that corporations can augment their nationality by structuring investments through subsidiaries in third states, and thereby assert protection under those states' treaty networks as well as that of the parent's state of nationality.

Through a series of arbitral awards over the last decade, investment tribunals have indicated a deep unwillingness to look through corporate subsidiaries in assessing whether they qualify as nationals of a state party to a particular BIT, absent extreme abuse (almost prejudicially branded a form of "veil piercing" based on what is sometimes called "the veil of nationality").[169] Consistent doctrine enables multinationals to easily shop for BIT

168. *Oppenheim's International Law*, *supra* note 21, at 859–60.

169. Tokios Tekeles v. Ukraine ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 56 (Apr. 29, 2004) (emphasizing irregularity of equitable veil piercing). On the idea of a "veil of nationality," see, for

protection wherever they choose to invest, not only before investing but even afterwards.[170] As regards contractual agreements, then, the multinational can unilaterally raise a state contract to the level of international law by creatively restructuring its downstream ownership structure—in principle without the assent or even knowledge of the state party to the agreement. Given the normative force of such contracts and their impact on domestic regulatory freedom, the jurisprudence justifies viewing corporations as autonomous lawmakers, significantly independent from both the host state and their original state of nationality.

The corporation's capacity to shop for treaty protection by shifting its nationality is nicely captured by the 2005 Decision on Jurisdiction in *Aguas del Tunari v. Bolivia*.[171] The case involved a concession contract for the provision of potable water and sewage services in the City of Cochabamba and, eventually, hydroelectric power.[172] Bolivia negotiated and executed the contract with Aguas del Tunari (*AdT*), a Bolivian corporation controlled by the U.S.-based Bechtel Corporation. The Concession was concluded in September, and took effect on November 1, 1999.[173] Bolivia's selection of AdT as concessionaire gave rise to major social and political unrest from the beginning, due to a perceived lack of transparency in the selection and negotiation processes, coupled with widespread fears of drastic rate increases that might affect the population's fundamental human right of access to water.[174] Initial unrest turned into intense civil society action against the concession, culminating in major violent protests in early 2000.[175] In response, Bolivia terminated the concession in April—a mere five months into the forty-year contract. AdT filed for ICSID arbitration under the Netherlands–Bolivia BIT.[176]

AdT sought damages from Bolivia over the allegedly wrongful termination of its state contract. As in the cases considered above, AdT portrayed the contract as an internationally protected legal instrument insulated from Bolivia's prospective regulatory action, regardless of the state's aims in responding to extreme societal unrest in a context implicating sensitive

example, MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY 325 (2013).

170. *See, e.g.*, Mobil Corp., Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela,ICSID Case No. ARB/07/27, Decision on Jurisdiction (Jun. 10, 2010), ¶ 190; ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits ¶¶ 267, 268, 273, 279 (Sept. 3, 2013).

171. Aguas del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005).

172. *Id.* ¶¶ 52–54. Cochabamba is the fourth largest city in Bolivia, with a population of nearly two million.

173. Aguas del Tunari v. Bolivian Republic of Venezuela, ICSID ARB/02/3, ¶ 55.

174. *Id.* ¶ 63.

175. *Id.* ¶ 73.

176. *Id.* ¶ 8.

human rights issues.[177] Here, however, it was not a foregone conclusion that the contract came under the aegis of any international treaty. The novel question posed by *Aguas del Tunari* was how Bechtel, a U.S. company, and AdT, a Bolivian company, were able to secure access to investor-state arbitration through a treaty between Bolivia and the Netherlands. Deciding by majority, the Tribunal held that a corporation is not only able to shop for treaty protection by supplementing its nationality through acquiring or establishing foreign subsidiaries, but that it may do so unilaterally, even after investing—i.e., after the state contract has already come into force. And an investor need not even notify the host state of its maneuvers.

When the Cochabamba water concession was initially executed, Bechtel controlled a 55% stake in AdT, structured through a subsidiary incorporated in the Cayman Islands. The contract listed AdT as the concessionaire and the Cayman company as a "Founding Shareholder." The latter was wholly owned by Bechtel. Bolivia was not party to any BIT or FTA with either the United States or the Cayman Islands. At this stage the contract thus remained purely an instrument of Bolivian law, and could not be said to create any international legal rights for either Bechtel or AdT. Neither entity could claim access to BIT protection. Moreover, the Concession explicitly barred any transfer of a controlling stake in AdT to any other company, absent Bolivia's consent.[178]

Nevertheless, as social unrest began to unfold Bechtel sought to restructure in order to protect its investment. Bechtel initially contacted Bolivian authorities directly, through its local counsel, to request consent for a simple transfer of all of its intermediary Cayman subsidiary's shares in AdT to one of Bechtel's Dutch subsidiaries. Bechtel's counsel assured Bolivian authorities that the change would leave AdT "under the same control," with "no adverse effect or impact for the Bolivian Government, for Bolivian entities or the town of Cochabamba."[179] Needless to say this restructuring would have endowed Bechtel with substantial international rights that would, in the event of a dispute, prove quite adverse to Bolivia: by advantageously transforming the nature and force of the concession contract, and by generating access to ICSID arbitration. In any case, although Bolivian authorities approved the request,[180] Bechtel ultimately took a different approach. The firm restructured its investment by inserting a new Netherlands subsidiary into the chain of ownership and transferring all of Bechtel's stock in its

177. *See* Aguas del Tunari v. Bolivian Republic of Venezuela, ICSID ARB/02/3, ¶ 55; Letter by Earthjustice to Petition to Participate as Amici Curiae (2003).

178. Bolivia attempted to argue—to no avail—that this provision, and the Concession more generally, were "carefully structured to preclude changes in the foreign ownership of AdT that might bring it within the coverage of a BIT." *Aguas del Tunari, S.A., v. Republic of Bolivia* (ICSID Case No. ARB/02/3) Decision on Respondent's Objections to Jurisdiction, ¶¶ 156, 165 (Oct. 21, 2005).

179. *Id.* ¶¶ 68, 182.

180. *Id.* ¶ 68.

Cayman subsidiary to the new Dutch entity.[181] In Bechtel's view, this approach did not require Bolivia's consent because no shares in AdT were directly transferred, and its assurances regarding its earlier request no longer applied—positions which Bolivia strongly challenged at arbitration.

The Tribunal ultimately asserted jurisdiction, siding with AdT on all counts. In particular, it held that the contractual restrictions on transferring shares only applied to the "founding shareholders" (Bechtel's Cayman subsidiary) and not "ultimate shareholders" (Bechtel itself). In other words it blocked transferring shares in AdT, but not transferring shares of any entity that itself possessed shares in AdT.[182] And the Tribunal considered Bechtel's assurances only applicable to its original proposal, which it never ultimately pursued.[183] Thus finding that AdT was legitimately restructured, it remained for the Tribunal to determine whether AdT could claim protection under the Netherlands–Bolivia BIT by reference to the Dutch vehicle newly inserted into AdT's upstream ownership chain.

The Netherlands–Bolivia BIT provides that for purposes of the treaty a "national" of the Netherlands includes not only Dutch citizens and companies, but also "legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party."[184] Obviously Bechtel's wholly-owned Dutch subsidiary possessed formal indirect control over AdT, because it wholly owned the Cayman intermediary that itself possessed a controlling stake in AdT. The dispute came down to whether the treaty term "control" meant only ultimate or effective control, or whether it meant the mere legal potential to control. For AdT the phrase had the latter, broader valence, thus potentially

181. The precise restructuring was more complex in several respects, but the additional wrinkles are immaterial for present purposes. For the full restructuring process, see *id.*, ¶¶ 71, 156–80.

182. *Id.* ¶ 165. Note that this is another case of a sticky default, and one where it is not at all clear that stickiness is appropriate. *See supra*, text accompanying note 158. One might say that the Bolivian lawyers responsible for drafting the contract simply did a bad job, leaving a loophole available to Bechtel to change its nationality in some other way. But it was clear that the parties intended *something* with the clause on transferring the company. Why should the default penalize the state here for failing to adopt a sufficiently express prohibition? To paraphrase Charles Fried, it is not enough to say that in the absence of fully clear choice the status quo ante should stand. CHARLES FRIED, CONTRACT AS PROMISE 64–65 (1981) ("The strict or literal view [that the loss should lie where it falls] always enforces or ratifies *some* distribution of risk. . . . The reasons why some losses are shifted and others are not are as various as the law itself, but there must *be* reasons."). In *Bechtel*, the Tribunal was tasked with deciding the default, and its assumption of a sticky one reflects just as much a jurisprudential choice as the opposite conclusion: extending the logic of the clause in question to the unanticipated case that ultimately arose. Either way, justification is sorely lacking. And in this case it is difficult to see any reason why a sticky default in favor of the supposed "status quo" permitting restructuring for nationality would be appropriate.

183. *See* Aguas del Tunari v. Bolivian Republic of Venezuela, ICSID ARB/02/3, ¶ 55. Decision on Respondent's Objections to Jurisdiction, ¶ 189 (Oct. 21, 2005). In the Tribunal's words, "it is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT." *Id.* ¶ 330(d).

184. Netherlands–Bolivia BIT, art. 1(b)(iii). Such provisions are fairly common. They extend protection to foreign investors where they are required to operate through a subsidiary incorporated in the host state (in the interest of creating local jobs and generally stimulating the local economy).

encompassing "not only the ultimate parent of AdT, but also the subsidiaries of the parent above the Claimant."[185] In Bolivia's view, by contrast, the phrase "controlled directly or indirectly" had to be read in the former light, limited to the ultimate controller or at least the "effective" or "actual" controller of AdT (which, in its view, meant Bechtel either way). In other words, Bolivia's view required determining the "reality of the corporate personality," and looking through any mere corporate shells in the ownership chain.[186] Bolivia argued that the Dutch intermediary was a merely hollow investment vehicle which did not meaningfully "control" AdT and thus could not generate BIT protection.

The Tribunal again held against Bolivia. By majority, it held "that the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity."[187] By contrast, the Tribunal considered Bolivia's position untenable. The Tribunal considered limiting the provision to a single ultimate controller to be irreconcilable with the text, which references both "direct and indirect control," and further rejected any "effective control" test as "sufficiently vague as to be unmanageable."[188] According to the majority, all that matters is to identify whether any entity in the Claimant's upstream chain of ownership has the appropriate nationality and the mere legal capacity to control the Claimant—irrespective of whether it may in turn be controlled by nationals of third states.

Aguas del Tunari thus stands for two crucial propositions. First, a corporation can in principle shop for treaty protection to which it might otherwise not have access, by structuring its investment through intermediary subsidiaries seated in states party to BITs or FTAs with the target host state—a practice fondly dubbed the "Dutch sandwich" by its adherents and detractors alike.[189] In other words, a corporation can be truly multinational in a legally significant sense. And second, a corporation can acquire treaty protection for its contracts with a state even *after* such contracts are executed

185. Aguas del Tunari v. Bolivian Republic of Venezuela, ICSID ARB/02/3, ¶ 223. Decision on Respondent's Objections to Jurisdiction, ¶ 189 (Oct. 21, 2005).

186. *Id.* ¶ 222 (quoting Resp. Counter Mem., ¶ 139).

187. *Id.* ¶ 264. The Tribunal further considered AdT's view to enjoy more support in comparative corporate law. It found that as a legal concept pertaining to corporations, the notion of control is generally associated with the mere capacity to control, not that capacity's actual exercise, and is thus usually measured simply in terms of shareholding percentile. *Id.* ¶ 245.

188. *Id.* ¶ 246. Moreover, the Tribunal considered that such an uncertain view of the Treaty's scope could not be squared with the object and purpose of the BIT, which it took to be "stimulat[ing] the flow of capital and technology" to the Treaty parties. *Id.* ¶¶ 241, 247.

189. *See* Kahale, *supra* note 26. The sandwich is "Dutch" because, as in the instant case, corporations frequently structure their investments through the Netherlands, which has a particularly extensive network of especially protective BITs (approximately 98 according to the current UNCTAD database), and very inviting national law of incorporation. Note, however, that Bolivia withdrew from its BIT with the Netherlands in response to the outcome in *Aguas del Tunari*.

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and in force.[190] This means that it can *unilaterally* elevate a state contract to the level of international law, *post hoc*, without even notifying the state party.[191] Under this rule, the corporation can treat the domestic law of the contract as merely optional.

The slightly earlier 2004 Award in *Tokios Tekeles v. Ukraine* rounds out the logic of *Aguas del Tunari* on investment structuring, demonstrating the extent to which tribunals balk at scrutinizing corporate ownership chains in relation to nationality. Here the Tribunal held that, absent extreme abuse of the corporate form, investors can even sue their own state of nationality through creative investment structuring. Tokios Tekeles, a Lithuanian company, brought suit against Ukraine under the Ukraine–Lithuania BIT.[192] Ukraine protested that the company was itself 99% owned by two Ukrainian individuals, and thus to allow the suit to go forward would essentially internationalize a suit between Ukraine and its own nationals. The Tribunal refused, by majority, to "pierce the corporate veil,"[193] holding that "under the terms of the Ukraine–Lithuania BIT . . . the only relevant consideration is whether the Claimant is established under the laws of Lithuania."[194] Because Tokios Tekeles met this (meager) test, the Tribunal refused to look through its corporate nationality and asserted jurisdiction.[195]

Neither *Tokios Tokeles* nor *Aguas del Tunari* was unanimous on the issue of corporate treaty shopping, and both were subject to scathing dissents. In *Tokios Tokeles*, the President of the Tribunal insisted that framing the issue in terms of veil piercing and abuse of the corporate form was "beside the point," and practically prejudicial—completely obscuring the economic realities and imposing a heavy burden on respondent states to show that corporate claimants engaged in extreme malfeasance.[196] More generally, the dissent in *Aguas del Tunari* argued that opening the door to corporate treaty

190. Aguas del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction ¶¶ 180, 330(d) (Oct. 21, 2005).

191. Restructuring may close off umbrella clause claims under the line of cases requiring privity. However, it would create no such problem for the investor vis-à-vis FET. *See, e.g.*, Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 420 (July 14, 2006); *see also supra* Part II.A.

192. The Ukraine–Lithuania BIT defines "investor" very broadly as "any *entity established* in the territory of the Republic of Lithuania in conformity with its laws and regulations." Ukraine—Lithuania BIT; Tokios Tekeles v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 28 (Apr. 29, 2004).

193. Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, ¶¶ 54–56.

194. *Id.* ¶ 38.

195. The Tribunal noted in passing that the Claimant appeared to have engaged in "substantial business activity" in Lithuania, though it refrained from affirmatively deciding so—reemphasizing that that the question "is not relevant to our determination of jurisdiction." *Id.* ¶ 37.

196. Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion of President Prosper Weil, ¶ 21 (Apr. 29. 2004) (accepting that there is no evidence that Tokios Tokeles abused the corporate form, but insisting that the question of abuse or "lifting of the veil . . . is beside the point"). Weil challenged the majority's excessive formalism, whereby all that matters "is the fact that the investment has been made by a corporation of Lithuanian nationality, whatever the origin of its capital and the nationality of its managers." *Id.* ¶ 11. He contended that the "assumption that the origin of the capital is not relevant and even less decisive" is unwarranted, and here led to the perverse conclusion that two Ukrainian individuals could effectively bring an international suit against their own state of nationality as foreign investors. *Id* ¶ 6. For Weil, the majority's appeal to the language of veil piercing completely

shopping through investment structuring and restructuring would completely undermine the reciprocal nature of the BITs and FTAs in question. The dissent objected that the majority's interpretation would transform each party's bilateral obligations under the BIT into an "infinite offer to arbitrate"—not only to nationals of the other party, but to nationals of *any* country, so long as they are able to structure their investment through any kind of investment vehicle incorporated in the other state party.[197]

The dissenters in *Aguas del Tunari* and *Tokios Tekeles* perceived the stakes well, but their challenges fell on deaf ears and soon faded to the background. The majority rules established in these early cases have since become completely entrenched, and contemporary tribunals take the viability of treaty shopping practically as a given—including even through *post hoc* restructuring. Thus in *Mobil Corp. v. Venezuela* the Tribunal accepted outright that "the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch–Venezuela BIT."[198] The fact of *post hoc* restructuring to acquire treaty protection was of no consequence, taken on its own. "Such restructuring could be 'legitimate corporate planning' as contended by the Claimants or an 'abuse of right' as submitted by the Respondents. It depends upon the circumstances in which it happened."[199] Under the contemporary rule, the only exception pertains to situations of extreme abuse or bad faith, particularly where restructuring occurs after a dispute has arisen.[200] As noted by the Tribunal in *ConocoPhillips v. Venezuela*, "the stan-

obscured the issue: in his view all that matters, and all that should matter, is "the simple, straightforward, objective fact" that the dispute is not really about foreign investment at all. *Id.* ¶ 21.

197. Aguas del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB/02/3, Dissenting Opinion of Arbitrator José Luis Alberro-Semerena, *Id.* ¶¶ 8–9. 16 ICSID Rep. 303 (2005). Emphasizing the essentially reciprocal nature of BITs and FTAs, and noting that examples of infinite offers of arbitration do exist in certain contexts—for example the global offers included in certain countries' statutes on foreign investment—Alberro-Semerena strongly rejected that such an open-ended interpretation could accurately characterize the exchange of rights and duties in a bilateral treaty—absent clear language or any other evidence. *Id.* ¶ 9. Moreover the Dissent questioned Bechtel's restructuring in this particular case, emphasizing the timing and shrouded nature of its maneuvers. *Id.* ¶ 16.

198. Mobil Corp., Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction (Jun. 10, 2010), ¶ 190.

199. *Id.* ¶ 191. *See also* ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits ¶¶ 267, 268, 273, 279 (Sept. 3, 2013) (considering it irrelevant—absent more—that ConocoPhillips' sole business purpose in restructuring through Dutch "corporations of convenience" was to acquire ICSID jurisdiction).

200. Mobil Corp. v. Venezuela, ICSID Case No. ARB/07/27 ¶ 205 (noting that "with respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute . . . 'an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.'") (quoting Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 144 (Apr. 15, 2009)); ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30. In both cases the Tribunals declined jurisdiction over aspects of the respective disputes born before the relevant restructuring processes were complete. Mobil Corp. v. Venezuela, ICSID Case No. ARB/07/27 ¶ 206; ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30 ¶¶ 287–89.

dard is a high one,"[201] and tribunals must bear in mind "how rarely courts and tribunals have held that a good faith or other related standard is breached."[202] Indeed, only one investor-state tribunal has yet dismissed a case for failure to meet this lofty test.[203]

There is often little a state can do to preempt corporate maneuvering to secure BIT protection. Some BITs and FTAs grant the treaty parties a degree of control by incorporating a "denial of benefits" clause. These clauses allow a party to deny treaty access to enterprises that are formally nationals of the other party, but maintain no substantial business activities there and are themselves controlled by third-party nationals. The U.S.–Peru TPA, for example, includes a standard denial of benefits provision,[204] as do the NAFTA[205] and the Energy Charter Treaty,[206] as well as several of the more progressive model BITs.[207] However, several tribunals have held that states must proactively deny benefits and give notice before a dispute arises, leaving the utility of such clauses in doubt.[208] In any case, denial of benefits provisions are not especially common and can themselves be circumvented

201. ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30 ¶ 275.

202. *Id.*

203. Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 93 (Apr. 15, 2009) (holding, on slightly different grounds and with perhaps more skepticism than usual, that "if the sole purpose of an economic transaction is to pursue an ICSID claim, without any intent to perform any economic activity in the host country, such transaction cannot be considered as a protected investment").

204. U.S.–Peru TPA, art. 10.12(2) ("A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise."). *See* Voon et al., *supra* note 26, at 13–15.

205. NAFTA, art. 1113(2).

206. ECT, art. 17.

207. U.S. Model BIT, art. 17; Canada Model BIT, art. 18.

208. *See, e.g.*, Plama Consortium v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶¶ 161–62 (Feb. 8, 2005) (holding that under the ECT a state must give advance notice to deny treaty benefits, though "a general declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors"); Yukos Universal Ltd. (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶ 458 (Nov. 30 2009). *But see* Pac Rim Cayman v. El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, ¶ 4.83 (Jun. 1, 2012) (ruling that denial of benefits under the CAFTA–DR need not occur before the investor claimed benefits by filing for arbitration); Guaracachi America & Rurelec v. Bolivia, PCA Case No. 2011-17, Award (Corrected) ¶ 372 (Jan. 31, 2014) ("Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled. All investors are aware of the possibility of such a denial, such that no legitimate expectations are frustrated by that denial of benefits."). On the controversy surrounding denial of benefits clauses, see further Voon et al., *supra* note 26; Loukas Mistelis & Crina Mihaela Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty*, 113 PENN ST. L. REV., 1301, 1320–21 (2009); NILS ELIASSON, 10 YEARS OF ENERGY CHARTER ARBITRATION, *available at* http://www.offentligupphandling.se/filearchive/4/41105/Report%20Years%20of%2020ECT%20Arbitration,%2030%20June%202011.pdf. Note, in this regard, that the Canada Model BIT of 2004 allows a party to deny benefits to a shell corporation "subject to prior notification," while the 2012 U.S. Model BIT imposes no such condition. Canada Model BIT (2004), art. 18(2); U.S. Model BIT (2012), art. 17.

through careful investment structuring where the state is party to other more favorable investment treaties. Beyond appeal to such specific treaty protections, states can also attempt to protect themselves from corporate treaty shopping by negotiating explicit restrictions on restructuring in the state contract itself. But as *Aguas del Tunari* amply shows, such constraints must be crafted meticulously, and corporations may well be able to find ways around them.[209]

* * *

To sum up the argument of this Part: if the form and substance of corporate lawmaking derives from a blend of contract and property ideas, the autonomy of the corporate lawmaker arises out of arbitral doctrine on the law of corporate nationality. The corporation is not beholden to its state of nationality to effectively internationalize its state contracts with foreign sovereigns, because it can take advantage of third-states' BITs and FTAs through careful investment structuring. And neither is it fully beholden to the host state with whom it contracts; indeed it can even elevate state contracts to the level of international law unilaterally, after they come into force (though not, perhaps, after a dispute has arisen). The image of corporations as lawmakers does not come into focus via analysis of any of these three trends on their own. But taken together these developments produce a striking vision: at least within the ambit of the pre-existing web of international investment treaties, the corporation appears as a basically autonomous actor empowered to make and directly enforce international law—with palpable effects for the domestic regulatory freedom of its contracting partners.

III. Four Pathologies of Corporate Lawmaking

Corporations have emerged as international lawmakers through the confluence of three trends in international investment law jurisprudence. But the importance of this phenomenon transcends the seemingly narrow confines of the doctrinal regime from whence it comes. At a higher altitude, international law has come to allow multinational business firms to chill, even potentially freeze, regulatory policy space in countries with which they contract—to recreate domestic law in their own image. The rise of corporations as lawmakers threatens local and global public values, as diverse as economic development, human rights, and the protection of public health and the environment. It is a profound development—one that international law has created, yet one with which the law has as yet failed to come to grips. This final Part seeks to clear the ground for much-needed critique of

209. Aguas del Tunari, S.A., v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005).

the recent legal empowerment of corporations through international investment law. For the time being I only seek to draw out four pathologies that emerge from this story. Each will require sustained further study.

The mere possibility that private corporations and foreign states can create international legal arrangements by mutual agreement is not necessarily a problem. We may have no qualm with the creation of international legal norms by internationalization through negotiation in the famous style of *Texaco v. Libya*. It is not necessarily a bad thing that states and private firms can negotiate super-contracts at arm's length. Such deals are not unknown in either international or domestic law, and may be necessary to accomplish major infrastructure projects in some cases. The problem in international law today is that, under prevailing interpretations, the web of BITs and FTAs internationalize *all* state contracts—that all state contracts under their ambit are elevated to the status of super-contracts by default. Even worse, the defaults seem awfully sticky—close, indeed, to mandatory rules. Add to this the capacity of global business firms to select such rules unilaterally—to graft them on to already executed contracts by shopping for treaty protection—and the scope of the problem starts to come into focus.

This story helps illuminate four specific and acute pathologies endemic to international law today. The first two are *doctrinal*—arising out of the constellations examined in Part II: first, the confusion between the logics of contract and property in international investment law doctrine; and second, the admission of corporate nationality shopping in cases involving contracts. The third pathology is *institutional*. Even if we can identify doctrinal solutions to the pathologies internal to investment law jurisprudence, it is hard to see how these problems can be fully addressed within the current patchwork structure of the global investment regime. Even accountability for change in international investment law today remains diffuse and elusive. We are in dire need of new institutional arrangements, based on multilateralism and systematized dispute settlement. The fourth pathology is *conceptual*. Irrespective of the doctrinal or institutional particulars at work in international investment law, this story should make clear that the time has come for international lawyers to rethink the position of business firms within global legal space.

Corporations have emerged as international lawmakers through a series of doctrinal constellations, and these jurisprudential linkages provide a natural starting point for critique. Two constellations are particularly problematic: the unexplained fusion of property and contract; and the admission of corporate nationality shopping in contract cases. These account, respectively, for the transformation of state contracts into a (derivative) source of international law, and the emergence of corporations as largely autonomous lawmakers. From a private law perspective it seems that both constellations create serious fairness concerns. At the same time, from the perspective of

public international law it seems that each seriously implicates the core notion of state consent.

The first pathology is thus the propertization of contracts through international investment treaties. Again, for the purpose of understanding the dynamic between treaties and contracts, it is helpful to think of BITs and FTAs in terms of default rules. On the one hand, (i) investment law treats contracts as if they were any other classically rigid form of property, making it difficult to contract out of the default protections set by the treaty. In other words, BITs and FTAs create very sticky defaults. The tendency is to assume that the treaty grafts protections onto any subsequently negotiated contract, rather than the reverse assumption: that conflicting contract provisions reflect the parties' intent to opt-out of the background treaty. On the other hand, (ii) these defaults set an exceedingly high level of protection for investors. Provisions like FET graft highly capital-friendly protections onto contracts, pertaining to conditions of breach, the state's available defenses, and even the appropriate method of calculating damages.

In the old conception of the internationalized contract—where the contract was elevated to the level of international law by express agreement between the state and the private party—there could be no question of consent to the operation of international law for the determination of any and all rights not specifically negotiated by the parties. The state would have clearly consented to fill gaps in the contract with a host of legal terms drawn from public international law. The parties, for better or worse, *chose* international law as the law of the contract. By contrast, in the modern investment regime it is presumed that the state party pre-committed, through the overarching BIT or FTA, to supplement the terms of any covered foreign investment contract with provisions drawn from the treaty and general international law—displacing the agreed law of the contract for the purpose of filling gaps. This difference already raises questions about consent in the context of terms like FET. Did the parties really intend such vague provisions to displace national law as the law of the contract? Absent *any* specific language in BITs and FTAs to that effect, perhaps outside of umbrella clause cases, it seems a stretch to assume that the states parties intended their investment treaties to act as a complex of default contract rules.

But investment law doctrine goes much further.[210] Even if one accepts the idea that states intended BITs and FTAs to apply to contracts by default, as a baseline set of protections against which negotiations can take place and as gap-fillers, it is quite another thing to assume that states intended to make these rules sticky, or even mandatory. The instinct that treaty rights should presumptively trump subsequently negotiated contract terms should seem

210. At least it tends to go further, under the general approach to contracts under FET and expropriation claims, and in umbrella clause cases in the school of *SGS v. Paraguay*. The better approach—pioneered in umbrella clause cases by *SGS v. Philippines*, but as yet sorely lacking in FET and expropriation case law—is considered further below.

particularly suspect from the perspective of state consent. This kind of rigidity is characteristic of the law of property, with its inflexible forms. But contract is the realm of choice—the domain of party autonomy. Clearly states intended investment treaties to apply to contracts in some way, but it is hard to imagine that they intended to make subsequent contractual choice and negotiation so difficult. It seems more likely that the received doctrine suffers from a category mistake.

Even if we postulate away the problem of consent, the dominant theory of contract internationalization generates glaring problems of fairness and efficiency. Not only does the doctrine treat BITs and FTAs as sticky default rules, but provisions like FET set the defaults at highly investor-friendly levels—most evidently by infusing contracts with protections for the investor's legitimate expectations in the style of *Tecmed*. In effect they provide investors with a maximizing insurance policy by default—shifting the bulk of contractual risk to the state. It is neither just nor efficient to expect states to start all negotiations so squarely on the back foot. It is suspicious that so much of the risk lies with one party by default, especially if the defaults are hard to contract around. To the extent that states remain at all unaware of their weak negotiating position—and especially its stickiness—the arrangement seems clearly unfair. But even assuming states consented to such an arrangement, and approach their contracts with investors from a position of perfect rationality, this approach to the treaty/contract conundrum seems likely to prove grossly inefficient in the long run. Rational states will have to respond by pricing the risk into their contracts. In thinking about current doctrine, it is worth asking whether investors would want to pay for such a high level of risk insurance, and whether the doctrine as it presently stands will really promote investment in the long term.

The seeds of a doctrinal solution can be found in the umbrella clause case law, in the decision in *SGS v. Philippines*. States and tribunals should call into question the easy conflation of state contracts with property protection and property remedies in investment arbitration. Assuming the possibility that contracts are entitled to some kind of international protection under various investment clauses, it does not necessarily follow that a treaty must fully internationalize all covered contracts. In other words, it does not follow that international arbitrators are entitled to disregard the law of the contract for purposes of determining the existence of a breach, the method of calculating damages, the appropriate forum, and so on.[211] We can take state contracts more seriously as *bargains* by relying on the negotiated law of the contract to determine whether a breach has occurred, while looking to public international law to determine the consequences of breach. This is the approach pioneered by the tribunal in *SGS v. Philippines*, treating contracts

211. Such is the consequence of the full internationalization approach adopted by *SGS v. Paraguay* and FET cases like *Azurix v. Argentina*.

as a kind of hybrid source of international law[212]—and not a pure source in the sense implied by the later *SGS v. Paraguay*.[213] By this view, even if the consequences of breach of contract should be derived from public international law, the scope and meaning of the contract should be derived from the law of the contract itself[214]—which is (almost) always the municipal law of some country.[215] And the same should be true when analyzing contracts under the other treaty standards, like FET and expropriation. Under the *SGS v. Philippines* approach, the assumption is that later-in-time contracts opt out of conflicting terms in the overarching BIT or FTA—reducing the treaty to a collection of ordinary default rules that provide a baseline for negotiations, and fill gaps as necessary.

At the same time, we ought to go further toward challenging the peculiarly aggressive vision of property implicit in most investor-state arbitral awards. Here we can gain important insight from domestic and comparative property theory. Even outside the realm of contractual disputes, the maximalist conception entrenched in investor-state arbitral practice assumes a primacy of property rights over other domestic values unimaginable in most modern societies, including both capital importing and capital exporting states.[216] The primacy of property rights is all the more perplexing when grafted onto the ill-thought-through doctrine of international contract protection under investment treaties—even merely by default.

There is ample room to revisit the more aggressive doctrines, like legitimate expectations under FET. And surely some solace can be found in the notions of deference and the standard of review.[217] Concepts like FET and indirect expropriation should not be assessed solely on the basis of the effects of a State's measure on the investor's bottom line, even where treaty text is vague about the relevance of bona fide regulatory purposes. Some degree of balancing is warranted. And indeed tribunals and scholars are increasingly coming to accept this position. However, care must be taken to avoid perpetuating the extremely property-oriented position by paying mere lip-service to malleable concepts like proportionality and the margin of appreciation. Likewise, seemingly progressive citations to ECtHR-style balancing in cases like *Tecmed* and *Azurix* have to be taken with caution.[218]

212. Société Générale de Surveillance S.A. v. Republic of Philippines, ICSID Case No. ARB/02/06, Decision on Jurisdiction (Jan. 29, 2004).

213. Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Jurisdiction (Feb. 10, 2012); *id.*, Award (Feb. 10, 2012).

214. Société Générale de Surveillance S.A. v. Republic of Philippines, ICSID Case No. ARB/02/06; James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351 (2008).

215. *Oppenheim's International Law*, *supra* note 21, at 927; DOLZER & SCHREUER, *supra* note 21, at 168.

216. Jeremy Waldron, "Public Rule of Law," Keynote, Inaugural Conference of the International Society of Public Law, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480648.

217. *See* Stephan Schill, *supra* note 118; Burke-White & von Staden, *supra* note 118; Arato, *supra* note 119.

218. *See* Turkuler Isiksel, *The Rights of Man and the Rights of Man-Made: Corporations and Human Rights*, Working Paper (2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546401.

The second doctrinal pathology lies in the linkage between the idea of internationalized contracts under BITs and FTAs and the ease with which corporations can shop for treaty protection—even for already existing contracts. This is the doctrinal move responsible for the corporation's wide sphere of autonomy as a lawmaker. In the first place, there is ample room to question the leeway that investment law doctrine currently affords multinational firms in shopping for treaty protection. It is still not clear why the doctrine so easily dismisses looking through subsidiary investment vehicles as an anathema form of "veil piercing." Perhaps the very image of the veil of nationality is prejudicial. It leads too easily to the pervasive conclusion that looking through ownership chains is appropriate only given extreme abuse of the corporate form. In any case, the assumption that treaties between states for the reciprocal protection of one another's nationals create infinite offers to arbitrate claims by any multinational creative enough in its planning should be subjected to quite a bit more scrutiny.

Whatever the merits of corporate nationality shopping generally, however, the extension of these ideas to contract claims must be challenged in the strongest possible terms. The doctrine recognizing the viability of restructuring for BIT protection produces alarming problems of fairness in this context. It is difficult to accept the position that the domestic law of the contract is merely optional for the private party. And indeed a handful of cases are beginning to recognize the problem that allowing unilateral corporate restructuring to effectively change the law of the contract might go too far in straining the legitimate expectations of the *host state*—under the rubric of a privity requirement.[219] However, the issue only seems to have arisen in umbrella clause cases, and is generally ignored in the much more important context of FET. Recall that in *Azurix* the Tribunal refused to elevate the contract via the Treaty's umbrella clause for want of privity, but nevertheless extended FET protection to the contract without any comment on the apparent discrepancy. Just as importantly, we would not want a formalism like privity to get in the way of fairness on the other side—that is, fairness to the investor. What about the situation where the Claimant was forced to incorporate a local subsidiary and all contracting with the state had to occur through the local investment vehicle? It is not clear that we should always allow the Respondent to avoid liability for breach of protected con-

219. Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 132 (Dec. 12, 2012) (undercutting the viability of forum shopping in cases involving investment contracts by conditioning invocation of the umbrella clause on a relationship of contractual privity between the claimant and the host state); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic ¶¶ 94–95 (Dec. 25, 2007); Siemens v. Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007). *But see* Continental Casualty v. Argentina, ICSID Case No. ARB/09/0, Award, ¶ 297 (Sept. 5, 2008) (finding no need for claimants to demonstrate privity of contract with the host state); Burlington v. Ecuador, ICSID Case No ARB/08/5, Dissenting Opinion of Arbitrator Orrego Vicuña (Nov. 8, 2012).

tracts simply because it required the investor to contract through a locally incorporated entity.

The problem is that the notion of privity raised by cases like *Azurix* and *Burlington* simply misses the mark. The domestic legal concept of privity certainly points to an important problem in the context of treaty shopping through corporate shells, but it does not fully capture the problem. On the one hand, it seems underinclusive in that it would allow restructuring in cases of BITs, like that in *Aguas del Tunari*, which allow the local subsidiary to bring suit if it is legally controlled by a corporate national of the other treaty party. Since it would always be the contracting subsidiary bringing suit in these cases, a privity consideration would not bar upstream restructuring as a means of transmuting the contract into international legal rights—even after its entry into force. At the same time, a privity rule may also be overinclusive, insofar as it would bar cases where the investor is required to execute its investment contracts through a local subsidiary and the BIT does not provide for the local subsidiary to bring suit. Privity thus seems, in this context, more confusing than useful for determining the appropriate bounds of contract-based suit.

The relevant consideration should be timing, rather than the identity of the parties emphasized by the notion of privity. We should be suspicious of contract claims where the firm acquired jurisdiction by restructuring its investment *after* executing the contract, regardless of which corporate entity ultimately brings the claim. This means going further than the current doctrinal limit, which calls for scrutiny only where restructuring occurred after the dispute arose. But there is equally reason to be tolerant of a lack of privity where the corporate structure in place at the time of execution would otherwise have secured jurisdiction under the relevant BIT or FTA.

It should also be noted that the approach to the internationalization of contracts in *SGS v. Philippines* would release much of the pressure here as well. If that hybrid approach were adopted, not just for umbrella clause claims but for all treaty protections, then the most glaring injustices of the treaty-shopping rule would fall away. Because the acquisition of treaty protection would leave the law of the contract intact, it would no longer be possible for an investor to unilaterally displace large swaths of a contract with more favorable terms *ex post*. Restructuring for treaty protection would still be questionable from the perspective of state consent, but it would lose much of its sting for host states in contractual relationships with foreign investors.

Even with numerous doctrinal fixes at hand, however, the global investment regime suffers from a third pathology—arising out of its institutional deficiencies. The basic problem is the fragmented nature of the international investment regime—comprised of thousands of BITs and FTAs, and developed by hundreds of arbitral tribunals, constituted on a one-off basis. As we have seen, the patchwork nature of the treaty regime empowers the flexible

multinational corporation. But at the same time the fragmented character of the system makes it exceedingly difficult for states to effect systemic change. From the perspective of a state party to a number of BITs or FTAs—as most states are—terminating or amending a single treaty would accomplish little, so long as it remains party to other more favorable treaties with third states. Corporations can simply change their nationality—not only to acquire treaty protection, but to acquire the best form of treaty protection available under the host state's treaty network. A single state interested in seriously reforming its position under international investment law must look at reforming every treaty to which it is a party—which also requires the cooperation of all its treaty partners. From a global perspective, reformers have to envision *all* (or most) states reforming *all* of their treaties. Given the realities of corporate treaty shopping, change on the level of bilateral treaties is not impossible—but it is a big task.

The second side of the institutional problem is that accountability for the nature of the regime is diffuse and elusive. Imagine that in a (democratic) national state the default rules for the protection of domestic public contracts were identical to those enshrined under the most aggressive readings of a BIT—that any kind of diminution in the value of the contract by the state would be fully compensable, calculated in terms of expectation damages. Even if we consider such an investor-centric rule odious, it would not necessarily be completely illegitimate. At the very least there would be institutions accountable to the citizenry for the consequences of such a rule. And those institutions would be able to change the rules going forward. In international investment law there are no such accountable institutions. There is no unitary judiciary, and no unitary legislative power. Single states may be accountable to their citizens, but as we have seen the path for a single state to reform its obligations is remarkably hard.

The deficiencies of our institutions compound and entrench the doctrinal paradoxes that have so empowered multinational firms against the state. Ultimately, they call into question the legitimacy of the investment regime as a whole. The problem is evident for many in the field, and at least, in broad outline, the right solutions are clear.[220] The most obvious long-term solution to the many problems engendered by the patchwork nature of the regime—not least the inequalities and irregularities generated by corporate treaty shopping—is its replacement with a multilateral investment treaty. Likewise the long-term solution to the fragmented arbitral jurisprudence is institutional centralization and systematization—through a standing tribunal, perhaps modeled on the structure of the appellate mechanism of the

220. *See Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, United Nations Conference on Trade and Development (UNCTAD) Report, June 2013 No. 2, *available at* http://unctad.org/en/publicationslibrary/webdiaepcb2013d4_en.pdf. See further the over sixty articles comprising a special issue of *Transnational Dispute Management* in response to (and named after) the report, *Reform of Investor-state Dispute Settlement: In Search of a Roadmap*1 Transnat'l Disp. Mgm't, (2014), *available at* http://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=52.

WTO.[221] Any kind of full proposal lies far beyond the scope of the present Article. And serious institutional solutions will involve significant tradeoffs that will have to be negotiated, in any case. Suffice it to say that multilateralization and institutional centralization should be the touchstones of long-term reform.

The fourth pathology, finally, is conceptual. As the doctrinal puzzles surrounding corporate treaty shopping make clear, international law has had trouble coming to grips with the global business as a unified actor. The dogged focus on corporate forms rather than the large-scale organization of business enterprises is a case in point. Arbitral apprehension of looking through corporate entities unduly empowers global firms—allowing them to shift and shed their nationality in order to take advantage of international legal rights that seem clearly not meant for them. I thus raise one final point, only by hypothesis for the time being—shifting gears to assess the rise of the multinational corporation as a lawmaker at a higher level of altitude.

It is worth returning to the structure and grammar of public international law, to ask whether we must now conceive of the multinational firm as a unified semi-public actor for purposes of international law. And if so, what normative and prescriptive consequences might follow? In light of their autonomy and growing capacity to make law, it would be irresponsible to dismiss global firms as merely national entities. Through their engagement with the vast network of investment treaties—admittedly contingent, yet still real and entrenched—multinational corporations have emerged as global agents, grossly empowered by the international legal order, but not fully encompassed by it. International law does not even have rules for attributing acts to corporations, let alone for assigning them civil or criminal responsibility.

In view of the corporation's empowerment within international law, it appears increasingly uncomfortable to hold to the aging notion that the multinational business enterprise is at most a mere object of international law, best regulated by the national state. Even though international law has provided the essential engine for empowering the corporation against the state, it has since failed to cope with the rise of corporate power. At present the doctrine takes corporate capacities insufficiently seriously. In view of the multinational's increasingly public capacities—including literally authoring the law—the time has come to challenge the laissez-faire attitude of international law to the corporate form by comparison to the more robust formal understanding of the traditional legal subjects: states and public interna-

221. Joseph Weiler, *Editorial*, 25 Eur. J. Int'l L. 963, 966 (2014) (rightly pointing out that much of the success of any scheme to centralize and systematize investor-state dispute resolution will turn on the mechanism for the selection of judges). Weiler further wonders, tongue only partially in cheek, whether it would be sacrilege to propose simply piggybacking on the already-constituted WTO Appellate Body rather than founding a new court. *Id.*

tional organizations. Ultimately we can and should expect more of states—the plenary authors of international law—toward providing international legal rules that render corporations more accountable.

IV. Conclusion

Under the present web of international investment treaties, corporations can author international law by agreement with sovereign states. In some cases, through creative treaty shopping, they can even unilaterally elevate domestic contracts with the state to the level of international law. Global firms can reshape the domestic law of their contracting partners in their own image—with tangible effects for the host state's populace. At the same time, their emergent power has no counterweight at the international level, in the form of international legal responsibility or other accountability mechanisms.[222] The doctrinal status quo puts both local and global public values at serious risk. And the difficulty of effecting coherent systemic change under current institutional arrangements entrenches the problem. To borrow Max Weber's phrase, BITs and FTAs have become an iron cage[223]—both for states and, in the long run, investors.[224] The problem of the day is to chip away at the cage, and ultimately to break it, to achieve a more balanced regime for the protection and promotion of investment across the globe.

Given the complexity of the global investment regime, and the asymmetric capacity of global firms to navigate its currents, what can be done? Institutional and doctrinal solutions are at hand, but the road toward achieving them is a hard one. The ideal solution is, of course, the most distant. This is the grand approach, of large scale systemic change, through multilateralization and institutionalization. These are important goals, but it is important to see that quite a bit of progress can be made more immediately through rethinking the private law concepts undergirding the investment regime. Both states and arbitral tribunals can make important inroads on this score, and both bear a certain responsibility to do so.

What can states do in the short to medium term? There are at least two clear areas where states can do better to protect themselves: in negotiating

222. And of course the investment regime acts as a powerful shield against *domestic* liability. *See* Chevron v. Ecuador, UNITRAL, PCA Case No. 2009-23, First Partial Award on Track I (Sept. 27, 2013).

223. Max Weber, The Protestant Ethic and the Spirit of Capitalism 123 (trans. Talcott Parsons, 1992).

224. The point bears repeating: if the default levels of protection remain exceedingly high, then states will have to price such levels of protection into their contracts accordingly. It is not at all clear that investors would want to contract for such high levels of protection if they actually had to pay for them in the deal. And if the defaults set by BITs and FTAs are so sticky that contracting out is not feasible, it will become very difficult for parties to negotiate an optimal level of risk in their contracts—which would undermine the prospect of making a deal at all. This would, incidentally, frustrate a primary purpose of BITs and FTAs: the promotion of foreign direct investment.

contracts with foreign investors, and in negotiating, amending, and jointly interpreting investment treaties with their treaty partners.

Most immediately, states can be more careful in their contracts with foreigners. They can do better to close off the risk of *ex post* nationality shopping through careful contract drafting, and can similarly experiment with waiving aspects of BIT protection—for example by negotiating liquidated damages provisions. And if investors balk at such waivers, states can try to build the risk of internationalization and investor-state arbitration into the price of their contracts.

Though solutions on the level of contract negotiations are a start, they will not be enough. To the extent that BITs apply to contracts at all, they constitute packages of (mostly) default rules. It is not at all clear why the defaults should be set so favorably for investors—a product, I suggest, of confusing contracts with more typical forms of property like real estate. And it is additionally unclear why the defaults should be so sticky. States need to change their treaty obligations, either through renegotiation or—where there is sufficient will—by advancing joint interpretations of particular terms in existing treaties.[225] States need to reset the default position in BITs and FTAs on more balanced and nuanced terms appropriate to the law of contracts. And they need to be clearer about when treaty defaults can be contracted around easily, or when and why it ought to be more difficult.

What about the tribunals? Surely the responsibility for change is not all in the state's lap. Arbitral tribunals simply have to do better. What tribunals *must* do is refrain from standing in the way of states' attempts at achieving a more balanced investor-state regime. In terms of contracts, they must take seriously attempts by the parties at negotiating waivers for various provisions.[226] Tribunals should not treat BITs as immutable rules in the face of contractual bargains, and must be much more careful about treating them as sticky defaults—especially when such stickiness functionally converts them into mandatory provisions. Stickiness may make sense in some cases, but there have to be reasons—and tribunals must do better about making those reasons clear.[227]

225. Anthea Roberts, *Recalibrating Interpretive Authority*, COLUM. FDI PERSPECTIVES, No. 113, Jan 20, 2014, *available at* http://ccsi.columbia.edu/files/2014/01/FDI_No113.pdf; *see also* Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation and Their Diverse Consequences*, 9 L. & PRAC. INT'L CTS. & TRIBS. 443 (2010).

226. Such was the case with regard to treatment of exclusive forum selection clause in the *SGS* cases. *See* Société Générale de Surveillance S.A. v. Phillipines, ICSID Case No. ARB/02/06, Decision on Jurisdiction (Jan. 29, 2004) (respecting the contract's exclusive selection of domestic courts for the resolution of all contractual disputes), and Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Jurisdiction (Feb. 10, 2012); *id.*, Award (Feb. 10, 2012) (displacing an identical clause with international investor-state arbitration under the BIT); *see also* Crawford, *supra* note 214.

227. Though the Tribunal in *SGS v. Paraguay* never made the point clearly, we might justify its decision to replace the contract's forum selection clause with BIT arbitration by appeal to a penalty default with an information-sharing rationale. The Tribunal might have said that an exclusive forum selection clause that specifically mentions waiving treaty arbitration would suffice to contract out of the BIT right to investor-state dispute settlement, while a forum selection clause like that in the actual

Tribunals must also respect states' attempts to scale back the levels of protection in their treaties. Where states sign BITs that draw back the levels of protection inhering in FET or expropriation provisions, as in several of the most recent Model BITs, tribunals must respect the states parties' choices. Similarly, where states advance joint interpretations scaling back the level of protection in already extant treaty provisions, tribunals must respect the states parties' interpretive authority. At a bare minimum, tribunals must not stand in the way of states' attempts at creating a more balanced investment regime.

The issue of whether tribunals should walk back more settled interpretations is of course more complicated, even where these interpretations today seem egregious. This is the thorniest question. On the one hand, states continue to re-ratify treaties even after odious interpretations have become known to them. But on the other hand states are often stymied in their attempts at changing treaty rules, especially given the ease of forum-shopping. This question probably cannot be answered the same way for all matters of interpretation. And given the patchwork nature of the global investment regime, we can expect that different answers will emerge across different tribunals.

In the long term the only real solution involves multilateralization and institutionalization. This is the only way to adjust the regime without simply falling into the trap of strategic forum shopping. Multilateralization and institutionalization represent the best prospect for breaking the cage of today's BITs and FTAs. And distant as these prospects might seem, incentives for large-scale change are perhaps more closely aligned than ever before. The era when mainly investors from Western States sued while Eastern and Southern States got sued is rapidly coming to a close.[228] The large-scale regional FTAs under negotiation between the United States and the European Union (Transatlantic Trade and Investment Partnership) and between the United States and eleven countries throughout the Asia-Pacific region (Trans-Pacific Partnership) may prove to be the crucial testing grounds.[229]

contract—exclusively selecting domestic courts with no mention of international arbitration—would not pass muster. The argument would be that while the latter was plenty explicit, requiring the maximally explicit former approach would force the state to reveal information to investors in the contracting process—specifically the information that a BIT exists, and that signing the contract would waive BIT rights. This kind of penalty default would thus penalize the state unless it were upfront with the investor about her rights.

228. Chinese multinationals' increasing engagement with the global investment regime is doubtless accelerating this shift. *See, e.g.*, *Ping An Life Insurance Company of China v. Kingdom of Belgium*, ICSID Case No. ARB/12/29 (involving a suit by a Chinese insurance company against Belgium, arising out of the latter's nationalization of a bank in which Ping An had heavily invested).

229. For Weiler, "solutions are at hand and not only for the TTIP . . . but also as a model for a whole rethinking of the pathologies of BITs and perhaps as a micro-example for what may later be regarded as a 'best practice' for BIT reform and even, in the longer run, a model for a multilateral investment agreement. There would be poetic justice if the two greatest trading blocs, instead of walking away from the problem, charted an agreed functional way ahead." Weiler, *supra* note 221, at 966.

All these changes are workable and worthwhile. It is thus not impossible that the empowerment of corporations to make law will be scaled back—to some degree or another. Still, for now, their newfound position in global legal space seems alarmingly secure. The phenomenon of corporations as lawmakers is a bizarre product of a relatively obscure regime of international law. But it is a reality with profound consequences for public values, domestic and global. International law must now find a way to come to grips with the global corporate interests that it has itself so empowered—however contingent this state of affair may be.

THE LOGIC OF CONTRACT IN THE WORLD OF INVESTMENT TREATIES

JULIAN ARATO*

Investment treaties protect foreign investors who contract with sovereign states. It remains unclear, however, whether parties are free to contract around these treaty rules, or whether treaty provisions should be understood as mandatory terms that constrain party choice. While investment treaties clearly apply to contracts in some way, they are silent as to how these instruments ultimately interact. Moreover, arbitral jurisprudence has varied wildly on this point, creating significant problems of certainty, efficiency, and fairness—for states and foreign investors alike.

This Article reappraises the treaty/contract issue from the ex ante perspective of contracting states and foreign investors. I make three novel claims: one conceptual, one descriptive, and one normative. First, I argue that investment treaties must be understood as having generated a rudimentary, yet broad, law of contracts—governing agreements between states and foreign investors on pivotal issues, from substantive rights and duties, to damages and forum selection. Second, I argue that this emerging international law of contracts has developed sporadically, irregularly, and inconsistently, due in part to a tendency among tribunals to confuse the logics of contract and property. As a result, it remains undecided whether contracting parties should understand background treaty norms as defaults, sticky defaults, or mandatory terms—leaving the meaning of their contracts under a cloud of doubt. Third, I argue that the best way to resolve this problem for both states and investors, ex ante, *is generally to privilege their contractual arrangements over background treaty rules. Even when these parties have different interests and values at stake, the treaty/contract problem is not zero-sum. Both sides usually stand to benefit from the freedom to negotiate around treaty rules as mere defaults—though I explore certain cases where treaty norms might justifiably exert a greater pull. In general, prioritizing party choice is not only optimal from the economic standpoint—it also provides states with the tools to secure their future capacities to regulate in the public interest.*

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INTRODUCTION

A traditional maxim of international law holds that all contracts are purely instruments of some domestic legal order.[1] Until very recently a contract between a private party and a foreign state, like any contract between private parties, would create rights and obligations under only the domestic law chosen by the parties. Today, however, this maxim is no longer correct.[2] Most clearly in the realm of sales, the 1980 Convention on the International Sale of Goods (CISG) has established a robust regime governing transnational contracts for the sale of goods, augmenting such instruments with a host of default and mandatory terms.[3] More recently, and far more quietly, a regime of international contract law has emerged in the field of foreign direct investment (FDI). A great deal of international contracting takes place under a manifold of treaties for the protection of foreign investments, which augment contracts between states and foreign investors—in whole or in part—with international legal rules. The advent of this world of investment treaties has subtly brought into being a rudimentary law of contracts—a broad complex of default and mandatory rules that alter contracts between states and foreign investors in relation to all kinds of questions, from the conditions of breach and defenses, to damages and forum selection. However, unlike the CISG, this emerging law of contracts has developed only sporadically, inconsistently, and irregularly. Contracts between states and foreign investors are no longer purely instruments of national law. But a better international law of contracts is essential if we are to remain sensitive to both the needs of foreign capital and the vitality of local and global public values.

The root of the problem is that investment treaties tend to say nothing, or only very little, about how they relate to contracts.[4] They often clearly apply to contracts between states and covered foreign investors (state contracts), either explicitly or by evident implication.[5] Some treaties even incorporate provisions that equate breach of a state contract with breach of the treaty (the "umbrella clause").[6] But treaties generally do not spell out the consequences of their application to

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1. *See, e.g.*, Payment of Various Serbian Loans Issued in France (France v. Serbia), Judgment, 1929 P.C.I.J. (ser. A) No. 14, at 41 (July 12) ("Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.").

2. *See* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 229-230 (2015).

3. U.N. Convention on the International Sale of Goods, 52 Fed. Reg. 6262, 6264–6280 (Mar. 2 1987), Art. 6 ("The parties may exclude the application of the Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.")

4. *See* James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351, 360-61 (2008); Arato, *supra* note , at 249.

5. *See* Arato, *supra* note , at 249.

6. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 166–178 (2d ed., 2012).

contracts—for questions of breach, defenses, forum selection, calculating damages, or the whole host of terms articulating the life of any contractual agreement.[7] From the perspective of contract theory, crucial questions remain totally unaddressed: are treaty rules on such matters defaults that the contracting parties can simply negotiate around, or are they mandatory rules that take precedence over conflicting contractual provisions? If mere defaults, how difficult is it for the parties to opt-out? What level of clarity or specificity is required and why? Are the answers the same for all kinds of treaty provisions, or are some mandatory and some merely default? Are some defaults "stickier" than others? And what about the parties' contractual choice of law—what is the proper relationship between the demands of the treaty and the whole host of rules selected by the parties by implication, through their choice of law clause?

The broad problem can be illustrated through a simplified hypothetical. Assume that two countries, Acadia and Ruritania, have established a bilateral investment treaty (BIT), to promote and protect the flow of investment across their territories. The treaty lists contracts as covered investments, along with real property, intellectual property, and so on. It further guarantees foreign investors against expropriation, requiring that an expropriating state compensate the investor for the "fair market value" of her loss. As will be discussed below, in contract cases this standard of damages is generally taken to mean *expectation damages*.[8] By contrast, assume that the Ruritanian law of public contracts only guarantees investors reasonable *reliance damages* when the state breaches—so as not to bind the government's hands if future regulatory exigencies arise.[9] An Acadian investor contracts with the government of Ruritania to operate a dolomite quarry for twenty years. The contract comes under Ruritanian law, and makes no express mention of damages. Ten years into the deal, Ruritania cancels the contract, citing newly discovered environmental concerns about dolomite mining. Assuming an expropriation occurred, which standard of damages controls? The domestic standard (reliance damages), or the treaty standard (expectation damages)? And what if the parties had included a provision in their contract expressly limiting

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7. The closest these treaties come to defining their relationship to contracts is by requiring investor-state tribunals to apply both national law (contract) and international law (treaty), with priority to the latter in case of *conflict*. *See* Crawford, *supra* note , at 353. But this conflicts rule only applies if treaty provisions are presumed mandatory. *See id.* Express contract terms would not properly "conflict" with diverging defaults. *See* Richard Craswell, *Freedom of Contract* 1-2 (Coase-Sandor Inst. for Law and Econ., Working Paper No.33, 1995). For a clear example of this relationship in international law, private parties are expressly empowered to contract around most provisions of the CISG – a multilateral treaty enacted exclusively by states. *See* CISG, *supra* note ___, Art. 6. ("The parties," meaning the private parties to a covered sales contract, "may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").

8. *See infra* Part II.B.

9. *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 957-58 (2011); *see also* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, SOUTH. CAL. INTERDISCIPLINARY L. REV. 467 (1999).

damages (liquidated damages)? Surprisingly, international investment law does not adequately resolve these questions.

This Article grapples with the treaty/contract problem systematically, as a question of contract theory. I argue that privileging party-choice in the context of transnational investment contracts is the best way to protect *both* the private law values of fairness and efficiency and the state's capacity to govern in the public interest.

From the ex ante perspective of contracting states and foreign investors, the ultimate relationship between treaty and contract will be of fundamental importance. As a purely commercial matter, the relative rigidity or flexibility of the treaty regime will bear strongly on the parties' ability to negotiate efficiently. At the same time, as a political matter, these questions will determine whether and how a state desiring foreign direct investment might effectively work protections for its future capacity to regulate *into* its contractual arrangements with foreign investors. Thus it is unsettling that the treaty/contract relationship remains generally undecided and, moreover, that it is so often decided the wrong way.

Uncertainty is the more glaring problem. It is clearly undesirable for all parties if, ex ante, they cannot predict whether tribunals will give effect to their contractual efforts to opt out of treaty rules ex post. Yet, in the face of treaty silence on the treaty/contract issue, arbitral jurisprudence has been highly uneven and irregular—often resolving these questions merely on the level of assumptions.[10] As a result, the meaning of state contracts in the world of investment treaties remains under a cloud of doubt.

But the deeper problem is that tribunals too often slip into an overly rigid and formalistic approach, prioritizing treaty provisions over duly negotiated contractual bargains.[11] This tendency is usually bad policy, with negative implications for both states and investors. It undercuts the autonomy of the parties, thereby undermining their capacity to allocate risk as they see fit. For the investor, this means risks associated with the viability and profitability of the project. States share those commercial concerns, but also bear responsibility for the full range of non-commercial values of import in their respective societies. States negotiating investment contracts thus have to seriously manage the risk that any such project might create future regulatory chill. In other words, the tendency of arbitral tribunals to implicitly prioritize treaty norms over states' and investors' contractual arrangements ultimately reduces both parties' ex ante flexibility to negotiate efficiently; at the same time, it weakens the state's capacity to define the scope of its potential future liability under an investment treaty *through* contract, which risks damaging the flow of foreign capital in the long run—the very goal that investment treaties are meant to achieve.

Much of the confusion arises out of the fact that investment treaties apply to both foreign-owned property and contracts between states and foreign investors,

10. *See infra* Part II.

11. *See infra* Part III.

without drawing much of a distinction between these categories. Investment treaties are designed and interpreted with property protection in mind—a Blackstonian vision of property law, oriented around fixed rules for particular assets.[12] For example, they classically protect foreign-owned real and personal property from expropriation, and other forms of interference. But these treaties typically apply to a much broader, open-ended category of "investments," including contracts between sovereigns and foreign investors.[13] What does it mean for a treaty to afford protection to a contract?

By contrast to property, the logic of contract is normally oriented around party choice. Parties choose the basic rules that bind them. To the extent that contracts are supplemented by default rules, or even altered by mandatory provisions under a particular domestic legal order, the goal is usually to give better effect to what the parties wanted,[14] or to impute what they would have wanted had they considered an issue.[15] Of course national laws of contract occasionally entail certain mandatory rules and sticky defaults that protect important areas of public policy rather than party choice—and some nations more than others.[16] But in essence, if the law of property is the realm of fixed categories and rigid rules, the law of contract is the realm of flexibility and choice.[17] One might think that, to the extent investment treaties apply to contracts at all, they would do so in a way tailored toward effectuating the parties' contractual arrangements. Yet investment treaties are often interpreted as applying to contracts in much the same way as they apply to property, imposing rules that take precedence over provisions agreed to by the contracting parties. Quite apart from the issue of uncertainty, this kind of rigidity poses significant problems for states and investors alike.

This Article makes three main claims: one conceptual, one descriptive, and one normative. Conceptually, I argue that investment treaties create contract law—if only informally. Their merits, in this regard, thus have to be analyzed and assessed in terms of contract theory. Critically, the treaty/contract issue cannot be

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12. *See* Arato, *supra* note , at 234, 238 & n.33. *See generally* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L., 397, 406 (2010).

13. *See* Arato, *supra* note , at 231; Yackee, *supra* note , at 402-03.

14. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 57-73 (2d ed. 2015).

15. *See, e.g.*, Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 Colum. L. Rev. 1603, 1631–33 (2009); *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (advancing the concept of "penalty defaults," which set background rules at levels the parties would *not* have wanted in order to incentivize parties to contract out—for example, to reveal information).

16. HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (forthcoming 2017).

17. *See, e.g.*, HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 83-84 (2011).

properly understood without taking into account the ex ante perspective of the parties to an investment contract. It matters to contracting parties whether or not they are able to contract around treaty rules. Formalities aside, it must be understood that the resolution of the treaty/contract question will have a deep material effect on the meaning of any state contract negotiated against the background of an applicable investment treaty. These effects must be understood (and evaluated) from the point of view of those economic operators whose activity investment treaties seek to stimulate: foreign investors and states.[18] This perspectival shift helps illuminate the deep indeterminacy in the arbitral jurisprudence on the treaty/contract issue, and reveals a better path.

This Article's descriptive claim is that, in the face of treaty silence, answers to these questions have been few, irregular, and generally thinly justified. Arbitral tribunals have come down on all sides of this issue, privileging treaty over contract here, and contract over treaty there.[19] If anything, tribunals slightly tend toward the former position—but they usually resolve the issue only implicitly. I argue that, as things stand, the vagaries surrounding the treaty/contract issue create real problems of predictability, efficiency, and fairness that are now beginning to come to light in practice.

Normatively, I argue that the prevailing interpretive tendency to subordinate contractual choice to treaty rules is usually bad policy.[20] It creates unjustified impediments on the state's ability to regulate, which in turn impedes both states' and investors' capacity to negotiate and contract efficiently ex ante. All this potentially hinders the very flow of foreign capital that investment treaties are meant to induce. I contend that, as a general principle, states and foreign investors should be able to freely contract around treaty rules—left, in other words, to manage their respective risks as they see fit. While there may be some cases where treaty rules should be difficult, or even impossible, to contract around, such instances must be carefully justified—either in terms of values immanent to the logic of contract (like information sharing), or external values (like environmental protection).

This Article proceeds as follows: Part I begins by exploring the meaning of a contract, and attempts to analytically separate a number of ways in which we might think about the relationship between investment treaties and the contracts to which they apply. I start from the position that any contract is a complex legal instrument, often going far beyond its express terms. The codified choices of the

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18. *Cf.*, *mutatis mutandis*, Panel Report, *U.S.—Sections 301–310 of the Trade Act of 1974*, ¶¶ 7.81–7.82, WTO Doc. WT/DS152/R (adopted Dec. 22, 1999) [hereinafter *Section 301*](indicating, in the context of the WTO, that in interpreting a "treaty the benefits of which depend in part on the activity of individual operators," an interpreter must take the perspective of such operators into account in order to give effect to the treaty's object and purpose). Indeed, the *Section 301* Panel noted that in the WTO/GATT context "the rationale in all types of cases has always been the negative effect on economic operators"). *Id.*, ¶ 7.84.

19. *See infra* Part II.

20. *See infra* Part III.

parties are always supplemented by a great many default and mandatory provisions, drawn from the applicable "law of contracts." I argue that thinking in terms of default rules, sticky defaults, and mandatory terms provides the right rubric for understanding the possible interactions between investment treaties and state contracts.

Part II examines how investment tribunals have approached these questions in practice, and how they have justified their approaches (if at all). I focus principally on rules relating to the protection of investor expectations, damages, and forum selection. In each area it will become apparent that answers have been inconsistent, irregular, and almost always left implicit. However, the tribunals tend to assume that treaty rules are effectively mandatory, or at least highly sticky.

Part III advances a normative argument about how the treaty/contract issue ought to be approached, when left ambiguous by the treaty text. I argue that, in general, the principle ought to be that explicit contractual terms trump treaty provisions as the authentic expression of the contracting parties' division of risk. As a matter of treaty interpretation, the presumption that treaties create mere defaults hews closest to the object and purpose of investment treaties as a matter of international law—namely, to protect *and promote* foreign direct investment. Moreover, there are strong policy reasons for understanding most treaty rules as mere defaults based in both the structure of private law (like efficiency and party autonomy) and extrinsic public values (such as public health, the environment, and the state's capacity to regulate and to control its liability for major privatization projects more generally). Yet all this should only be taken as a presumption. There may be good reasons why, in certain cases, treaty rules ought to be understood as sticky defaults—even when the treaty text gives no indication one way or the other. Here I explore the possibility that the forum selection clause makes a good candidate. But, crucially, I argue that in all such cases adjudicators must justify constraining the principle of choice in light of the values of international investment law—a regime best understood as a system of private law *sensitive* to public values.

I. PUBLIC AND PRIVATE VALUES IN THE LAW OF CONTRACTS

This Part briefly considers the meaning of a contract in both domestic and transnational legal orders. I first distinguish between formal and material conceptions of the contract, in the context of diverse background rules in national legal systems. Second, I examine the meaning of a contract within the transnational system of international investment law, distinguishing between the logics of property and contract. I then provide an ideal-typical schema for exploring the possible relationships between treaty and contract to frame the analysis in the descriptive and normative Parts that follow.

A. The Material Contract: Defaults, Sticky Defaults, and Mandatory Rules

As Robert Scott puts it, the explicit terms of any contract reflect only the tip of the

iceberg.[21] In all national legal orders, contracts are formally (and sometimes informally) augmented by a manifold of legal rules, covering all kinds of potential price terms—from basic obligations like good faith, defenses, and damages to procedural rights like forum selection.[22] The full meaning of a contract can only be appreciated in light of a host of regulatory, legislative, and constitutional rules that affect its disposition.[23]

Though the parties may not have explicitly negotiated over the apposite background rules, all such terms must be considered part of the deal—and sophisticated parties will have to take this edifice into account ex ante in their negotiations. For an example from U.S. law, if a domestic company contracts with the City of Chicago to set up municipal parking meters, the private party will want to know whether the government retains the right to back out of the contract, or to vitiate its value through regulatory action.[24] Absent any explicit agreement by the parties, the background rules of the Illinois law of public contracts will obviously affect the terms of the deal, and will have to either be priced in or contracted around. Similarly, even if the government is not entitled to simply back out, the investor will want to consider whether any special rules about public contracts entitle the city to pay only limited damages in case of regulatory breach.[25] As it happens, in many domestic systems, including the United States, the law of public contracts subjects states only to reliance damages by default—not expectation damages.[26] Such background rules on damages are price terms, which sophisticated private parties must either stomach, price in, or contract around through express language on indemnification for regulatory change.

Not all background rules relate to contracts in the same way. Ian Ayres usefully distinguishes between defaults, sticky defaults, or mandatory rules.[27] Classically, default rules supplement contracts and fill gaps, and parties are free to contract around them.[28] Mandatory rules, by contrast, cannot be contracted

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21. Scott uses this turn of phrase in his lectures. For the core idea, *see* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 133 YALE L.J. 541, 544 (2003).

22. Ayres & Gertner, *supra* note , at 88.

23. *Id.* at 87-88.

24. *See* Serkin, *supra* note , at 895.

25. *See id.* at 916.

26. *Id.*

27. Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2084 (2012).

28. *Id.* at 2034.

around.[29] Sticky defaults lie somewhere in between.[30] They can be contracted around, but doing so requires more concerted action than with ordinary defaults—typically some requirement of clear statement, or via the adoption of certain formalities in the contract.[31]

Mandatory rules are only justifiable where they protect some value, which might be intrinsic to the logic of contract (like equality of information, or the protection of unsophisticated parties)[32] or extrinsic public goods (like the prohibition on slavery).[33] Like mandatory rules, sticky defaults are meant to protect certain values—though to a weaker degree.[34] Typically, the values concerned here are relational, and would not be undercut if informed and sophisticated parties were to opt out.[35] Moreover, sticky defaults may be more or less difficult to contract around. Some may be subject only to clear statement rules.[36] Others might be stickier, requiring parties to use special language.[37] For example, in cases where parties are likely to have asymmetric information, stickiness can have the function of forcing better informed parties to disclose information to their counterparties by insisting that attempts to contract out must use language that discloses the necessary information.[38] In general, however, mandatory rules and sticky defaults are the exception.[39] Absent compelling justification in intrinsic or extrinsic values, it is generally best to leave it to the parties to allocate risk and price amongst themselves as they see fit—choice is, after all, the central fundament of contract, key to the core private law values of autonomy, utility, and community.[40]

In transnational contracts the situation becomes more complex in a number of ways. First, it should be recognized that investment contracts are not always negotiated under the law of the host state; often the parties negotiate over the law of the contract by incorporating a "choice of law" provision.[41] The parties' choice

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29. *Id.* at 2087.

30. *Id.*

31. *Id.*

32. DAGAN & HELLER, *supra* note , at ch. 10.

33. Craswell, *supra* note , at 1-2.

34. Ayres, *supra* note , at 2084.

35. *Id.* at 2088.

36. *Id.* at 2037.

37. *Id.*

38. *Id.* at 2062.

39. *Id.* at 2087-88.

40. DAGAN & HELLER, *supra* note .

41. George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial*

of law dictates, in the first cut, which national law will apply to their contract, thereby filling gaps through default rules, and potentially augmenting its express terms *via* sticky defaults and mandatory terms.[42] Still, so far, the situation is still basically similar to the above.

Second, such contracts may come under the ambit of an international treaty, which imposes its own set of default rules – as with transnational sales contracts coming under the ambit of the eighty-four party CISG. That multilateral treaty expressly imposes its own set of (mostly default) background contract terms, which displace any conflicting defaults or mandatory terms in the national law of the contract. Private contracting parties are still able to contract around the CISG if they do so explicitly – hardly anything in it is mandatory.

Given the multiplicity of legal orders involved, things are already more complex – but at least in the context of the CISG the basic structure and hierarchy of norms is clear. The meaning of any covered sales contract can only be ascertained by careful analysis of the express terms of the contract (in the first instance), as supplemented by a web of background terms found in the CISG, and with any remaining gaps filled by the national law of the contract.

Investment treaties provide a more vexing wrinkle. Insofar as an investment treaty applies to contracts between the state and a foreign investor, it becomes—like the CISG—an additional source of background rules.[43] As with transnational sales contracts, any such investment contract may be augmented by defaults and mandatory provisions arising out of two legal orders—the chosen domestic law of the contract, and any opposable international investment treaty. The problem, here, is that it is not at all clear how investment treaties, national contract law, and express contract terms are supposed to interact.

What is clear is that these relationships matter to states and investors alike. The bottom line is that, from the ex ante perspective of the contracting parties, any background treaty rules that apply to the contract must be considered materially part of the deal. Without clarity as how such treaties and contracts will ultimately relate, it is impossible for contracting states and investors to know just what kind of legal arrangements they are getting into.

B. Property and Contract in International Investment Law

One major source of the confusion surrounding the treaty/contract question arises out of the treaties themselves. In extending their coverage to a wide range of "investments," these treaties tend to muddy the lines between contract, classical

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Agreements, 3 INT'L TRADE L.J. 311, 311 (1978).

42. *Id.*

43. *Investment Treaties*, INT'L INST. FOR SUSTAINABLE DEV., http://www.iisd.org/investment/law/treaties.aspx [https://perma.cc/M8CN-V3ER] (last visited Apr. 6, 2016).

forms of property, and myriad other assets.[44]

Investment treaties are agreements between two or more states, governing interactions between each state and foreign private parties hailing from the other(s).[45] Their twin purposes are to protect foreign investors' assets and promote foreign direct investment (FDI).[46] They codify a number of basic protections, framed largely in the style of property rules—in particular guarantees against expropriation and standards like "fair and equitable treatment" (FET).[47] These protections are generally explicitly or implicitly linked to rules on damages.[48] Investment treaties also create important procedural protections for investors. Critically, they endow private investors with the capacity to sue states directly before international arbitral tribunals (investor-state dispute settlement), and they key into powerful mechanisms for the enforcement of foreign arbitral awards.[49] Put another way, investment treaties seek to promote foreign direct investment by mitigating three typical areas of risk: the risk that a host state will afford insufficient protection to the investment as time goes on; risks associated with suing a sovereign state, as a foreigner, before its own courts; and the risk that, upon losing at litigation, a state will simply refuse to pay up.

Though framed as treaties establishing rules for the protection of foreign property—in other words, property law—these treaties apply to a surprisingly broad range of assets, including not only real and personal property, but also intellectual property, going concerns, and a vast range of contracts with the state (state contracts).[50] There has been some debate about the extent of these treaties' scope.[51] But there has been precious little discussion about whether they apply to

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[44] Arato, *supra* note ___, at 271. For a rare counter-example, see Philip Morris Brands SÀRL, et al. v. Oriental Republic of Uruguay, ICSID Case ARB/10/7, Award, ¶¶ 267-270 (July 8, 2016) [hereinafter *Philip Morris v. Uruguay*] (carefully distinguishing the trademarks at issue from classical real property, finding that, unlike the latter, the former generally do not include rights of use insulated from state action); and at ¶ 423 (distinguishing between trademarks and contracts, for purposes of determining the content of legitimate expectations protected under FET).

45. DOLZER & SCHREUER, *supra* note , at 13.

46. *Id.,* at 22, 29-30.

47. *Id.*, at 13.

48. *Fair and Equitable Treatment*, UNITED NATIONS CONFERENCE ON TRADE AND DEV. 88-89 (2012), http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf [https://perma.cc/7SP7-FB9H].

49. DOLZER & SCHREUER, *supra* note , at 310.

50. *Id.*, at 62-63.

51. *See Poštová Banka, A.S. v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, ¶ 333 (Apr. 9, 2015) (sovereign debt did not qualify as a covered asset); *SGS Société Générale de Surveillance S.A. v. Republic of Para.*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 93 (Feb. 12, 2010) [hereinafter *SGS v. Paraguay*] (noting that a one-off contract for the sale of goods might not qualify as an investment).

all covered assets in precisely the same way.[52]

Here we are concerned with contracts specifically, and to draw out the treaty/contract problem it is enough to contrast the basic orientation of contract law with the law of real property. Here I put to the side the normative, substantive question of how far these treaties ought to protect foreign property rights,[53] and focus only on the form of that protection. Whatever we think about the content of the various substantive and procedural treaty standards, it is fairly clear that they are meant to apply to foreign property holdings in much the same way that national property law would. Investment treaties afford a set of consistent protections to foreign property owners, in order to mitigate certain risks and induce FDI. In the context of property, it makes sense that these protections are relatively certain, rigid, and stable. This resonates well with the logic of property, where a putative investor relies on a *received* regime of property law in planning an investment, for example in land development.[54] The law of property affords only limited space for investors to choose how the law will apply to their holdings.[55] Investors may have options, but property law places little emphasis on choice.[56] The rules are not generally up for discussion—they just have to be known (or knowable) in advance.

The logic of contract has a different orientation. Here, the general principle is that parties have the capacity to regulate themselves—to negotiate, and allocate risk as they see fit.[57] True, as explained above, they do so against a complex

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52. This Article represents part of a broader project, in which I seek to disaggregate how investment treaties are applied to different categories of investment, in light of the varied values that different corners of private law seek to promote. *See* Arato, *supra* note , at 247, 292 (regarding contract and property). *See also* Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 363 (Zachary Douglas, Joost Pauwelyn, & Jorge Viñuales, eds., 2014) (distinguishing between property, contract, and value as different categories of investment); Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property*, 36 MICH. J. INT'L L. 557, 560 (2015) (exploring how investment treaties seem to "propertize" IP); *but see Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, ¶¶ 267-270 (distinguishing trademarks from classical forms of property).

53. As I have suggested elsewhere, arbitral tribunals have tended to assume an overly rigid "Blackstonian" vision of property in interpreting investment treaties, which may well go too far toward displacing the state's capacity to define the scope of property rights. *See* Arato, *supra* note , at 247. It is certainly up for debate whether the dominant conception of property in arbitral jurisprudence affords states sufficient flexibility, or—more crudely—whether investment treaties afford too much substantive protection to foreign property. However, these questions necessitate going too far afield for present purposes, and I confine a more systematic treatment of the concept of property in international investment law to a future paper.

54. *Id.* at 238 n.33.

55. *Id.*

56. *Id.* at 286.

57. Scott & Schwartz, *supra* note __, at 87–88; Dagan & Heller, *supra* note ___, at ___; Arato, supra note ___, at 238 n.33.

background of norms—which fills gaps, and occasionally nudges parties to contract in certain ways (sticky defaults) or even forces them to do so (mandatory rules).[58] But the basic principle is that parties get to choose how to govern their relations.

While it is perfectly clear how investment treaties apply to foreign property holdings, it is much less obvious how their varied provisions ought to act on a contract between a foreigner and a state. Clearly treaties apply to contracts, but it remains unclear whether and to what extent their provisions should augment contractual arrangements between the parties—or even displace them. The issue is almost invariably undecided in the treaties, and is too often overlooked when it comes to arbitration.[59]

As will be discussed further in Part III, there are two main harms here. The first is more glaring—the jurisprudence on this issue is highly irregular and inconsistent, leaving significant uncertainty about the meaning of contracts between states and foreign investors where an investment treaty applies. Even assuming perfect rationality among states and foreign investors, such uncertainty provides a serious hurdle to efficient contracting and makes it extremely difficult for states to manage potential risks to their regulatory autonomy. The second potential harm lies in making the wrong choice about how treaties and contracts ought to interact. Too often tribunals simply assume that treaties apply to contracts as they would to any other asset: on the property model.[60] In other words, there is a tendency in investor-state jurisprudence to treat contracts as assets subject to a fixed set of treaty rules.[61] As I argue in Part III, this confusion creates significant inefficiencies that harm both states and investors.

C. How Might Treaty and Contract Relate?

The starting point cannot be overstated: as soon as we decide that an investment treaty applies to contracts, we create an international law of contracts—even if only partial, thin, and rudimentary. This much international investment law has already done. What remains to determine is what kind of law of contracts it is: whether this regime should be understood as thin or thick, rudimentary or sophisticated; and

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58. *See* Ayres, *supra* note , at 2084.

59. Crawford and Abi-Saab are among the few authorities to have recognized the problem. See Crawford, *supra* note , at 352–53; *ConocoPhillips Petrozuata, et. al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, Dissenting Opinion of Georges Abi-Saab, ¶ 32 (Sept. 3, 2013) [hereinafter *ConocoPhillips*, Abi-Saab Dissent] ("a treaty claim is necessarily based on a right that has been allegedly violated. If that right is created by contract, it is this contract that governs its legal existence *and the modalities of this existence, including its contents and limits*") (emphasis added). Abi-Saab adds, "to assert, as does the Majority, that the treaty applies, without taking into consideration the terms of the contract, amounts to revising and rewriting the contract." *Id.*, ¶ 32.

60. Arato, *supra* note , at 231.

61. *Id.* at 271.

what values such choices might serve. As the next Part will suggest, these choices remain very much open, thanks to vague treaty language and highly varied jurisprudence. But before turning to the cases, it is worth conceptually schematizing the possible relationships between treaty and contract, to organize our analysis going forward.

In assessing how treaty and contract might interact, what matters are the material relationships. We must not only look at the treaty terms that are formally applicable to contracts, but to any provisions that materially affect the disposition of the contractual deal—even if only implicitly. The most obvious formal provision is the "umbrella clause" which equates most breaches of contract with a breach of the treaty.[62] But provisions guaranteeing investors fair and equitable treatment (FET), or protecting their assets from regulatory takings ("indirect expropriation") can also strongly affect the disposition of the contract—for example by protecting an investor's expectations, by providing more favorable measures of damages than might be available under the law of the contract, or by providing access to advantageous international fora.[63] What matters from the ex ante point of view of the contracting parties, and what should matter from the point of view of dispute settlers ex post, is the material scope of the deal.

Schematically there are four types of relationships available between a treaty provision and a contract. The first possibility is that a treaty rule has no effect on any contractual provision. The latter totally contracts out of the former. Here the explicit terms of the contract take precedence, as do all default and mandatory terms incorporated therein through the choice of law provision. The entire meaning of the agreement is determined by domestic law, except in the rare instance where the treaty fills gaps left by both the express contract and domestic background rules. Note that this is close to the position that the treaty does not apply to the contract at all, and most forcefully separates the logic of contract from the logic of property rules. It is, however, difficult to square with the text of most treaties, which generally indicate clearly that they apply to contracts in *some* way—as covered investments.

The second possibility is that a treaty rule does not trump any express choice by the parties, but may augment background rules in the relations between the parties. By this view, the treaty rule supplants any conflicting background rules set by the domestic law of the contract, but still only fills gaps in any particular contract.[64] The parties can contract out of the treaty rule with no added difficulty.

62. Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRADE INNOVATIONS 102 (2008), https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf, [https://perma.cc/42V8-LFGJ].

63. Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 11-12 (2013).

64. *See SGS Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 169 (Jan. 29, 2004) [hereinafter *SGS v. Philippines*] (finding that the contracting parties had contracted around the treaty provision providing for investor-state arbitration). Crawford and Douglas come closest to this view in discussing exclusive forum selection

The CISG explicitly adopts this approach for transnational sales contracts.[65] I suggest, below, that most of the time this also represents the better approach in the law of foreign direct investment—most resonant with both the goals of investment treaties and the logic of contract.

The third possibility is that a treaty rule creates a sticky default, which parties can contract around only under certain conditions—typically via requiring certain formalities, or a clear statement rule.[66] For example if a treaty makes international arbitration available as a forum for resolving disputes, it might be held that the contracting parties can only waive the treaty rule if they do so in a certain way. The rule might require an exceptionally clear waiver.[67] An even stickier rule would require specific language to validate a waiver—that is by only recognizing waivers of BIT jurisdiction that mention the treaty by name.[68]

Fourth, a treaty term might impose a mandatory rule that cannot be waived under any circumstances. Few argue explicitly that investment treaty provisions are fully mandatory, though occasionally commentators have explored whether it might not be possible to waive treaty protection by contract *in toto*.[69] However, this kind of thinking is implicit in some of the cases, discussed further below, in which tribunals make assumptions that effectively render treaty provisions impossible to contract around.

Note that these categories are ideal types. There is no reason why answers need be the same for all treaty rules. But it is essential that the relationship between treaty and contract be certain and predictable vis-à-vis any particular treaty provision. Otherwise it becomes extremely difficult for contracting parties to plan ex ante. To that end, the ideal solution would be to clarify how each treaty norm relates to contracts in the treaty text – as is done in the CISG.[70] Note, however, that this would call for the amendment of thousands of treaties. What follows is thus primarily an argument for how adjudicators ought to approach the treaty/contract in the face of treaty silence. At the same time, it serves as a normative argument for how treaty drafters might best address the issue in tomorrow's treaties.

In the next Part, I suggest that tribunals have varied markedly in answering this question—usually without even considering the issue explicitly. This

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clauses. Crawford, *supra* note , at 363; Douglas, *supra* note , at 363.

[65] CISG, *supra* note , art. 6.

66. *See* Ayres, *supra* note , at 2048 (discussing sticky defaults in domestic law).

67. *See id.*

68. *See id.* at 2048-49.

69. *See* S.I. Strong, *Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?,* 29 ICSID REV. 690, 691 (2014); Bart Smit Duijzenkunst, *Of Rights and Powers: Waiving Investment Treaty Protection*, EJILTALK!, http://www.ejiltalk.org/of-rights-and-powers-waiving-investment-treaty-protection/ [https://perma.cc/H27K-QZ9P].

[70] CISG, *supra* note , at art. 6.

irregularity poses a serious harm for both states and investors as they seek to structure investment deals ex ante. The cases do, however, suggest a tendency toward privileging treaty over contract. In Part III, I argue against this tendency, and conclude that the general rule should be respect for party choice—a baseline that best serves the interests of both investors and states. However, I suggest that this rule must be nuanced and flexible, and I explore the possibility that in limited cases sticky defaults and mandatory rules may be appropriate where justifiable in light of compelling intrinsic or extrinsic values.

II. Irregularities and Assumptions in Investor-State Jurisprudence

This Part examines how investment tribunals have approached the relationship between contract and treaty in practice, and how they have justified their approaches (if at all). To illustrate the uncertainty of the adjudicative status quo, I focus on three specific provisions found in most treaties: forum selection, the substantive guarantee of fair and equitable treatment (FET), and damages. Answers to the treaty/contract question have been inconsistent and irregular within and across each term. Any of these provisions may be price terms—and potentially important ones—relating to common questions over which contracting parties regularly consider and dicker over in their negotiations. Nevertheless, investment treaties are almost invariably silent on how their terms interact with contracts, and tribunals have been highly inconsistent and unclear in grappling with these questions. At most, it appears that tribunals tend to assume that treaty rules are either mandatory or highly sticky—a tendency I challenge directly in Part III.

A. Forum Selection

Forum selection provides the clearest example of how tribunals have diverged on the relationship between treaty and contract. As it happens, tribunals have given closer attention to the relationship on this issue than in any other context. This is largely because the leading cases have turned on a relatively uncommon investment treaty provision known as the "umbrella clause," which has the effect of elevating contract claims to the level of treaty claims.[71] Disputes under such clauses necessarily put the treaty/contract issue front and center. I discuss these controversial provisions in further detail elsewhere.[72] As generally understood, umbrella clauses transform at least some kinds of contractual promises between

71. Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶¶ 54-56 (Oct. 12, 2005) [hereinafter *Noble Ventures*]. Note that this question need not arise exclusively with regard to the umbrella clause—it can and does arise in FET and expropriation cases as well. *See, e.g.*, *CMS Gas*, ICSID Case No. ARB/01/8, Award, ¶¶ 296-303.

72. Arato, *supra* note , at 251–58.

states and investors into obligations actionable under the treaty.[73] For our purposes, the issue is what happens when those underlying contracts include *exclusive* forum selection clauses, limiting jurisdiction to the national courts of the host state.

The leading cases here are *SGS v. Philippines* and *SGS v. Paraguay*—which, conveniently, involved the same company, similar contracts, and similar facts. Each of the contracts was executed under the law of the host state, and each contract provided that the local courts would have exclusive jurisdiction over any disputes over the contracts.[74] In each case, the main dispute concerned the failure of the state to pay substantial contractual fees, and, in each instance, the company ignored the contract's exclusive forum selection clause, seeking relief instead through investor-state arbitration by appeal to Switzerland's BIT with each host state.[75]

Both tribunals faced the same tension.[76] On the one hand, the umbrella clause expressly elevates contracts to the level of the treaty, creating arbitral jurisdiction under the treaty's dispute resolution clause. On the other hand, the contracts themselves expressly disclaimed any jurisdiction other than that of national courts. Each tribunal had to consider which provision controlled.

SGS v. Philippines provides a nuanced and uncommonly well-reasoned authority on the treaty/contract issue. Most importantly, it found that the umbrella clause only imposed an international legal obligation to perform, and converted the consequences of non-performance into an issue of international law. In the Tribunal's view, the umbrella clause

> makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law.[77]

According to the Tribunal, the scope of these contractual commitments can only be ascertained in light of the contract's terms, supplemented by the default and mandatory rules of the law of the contract—that is, municipal law.[78] And, where the contract provides for an exclusive forum to resolve all contractual disputes, the existence of a breach and the amount of damage thereby caused can only be

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73. Id.; *see, e.g., Noble Ventures*, ICSID Case NO. ARB/01/11, ¶ 53.

74. *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 34 (Feb. 12, 2010); *SGS v. Philippines*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 22 (Jan. 29, 2004).

75. *SGS v. Paraguay*, ICSID Case No. ARB/07/29, ¶¶ 125-176; *SGS v. Philippines*, ICSID Case No. ARB/02/6, ¶ 67.

76. *SGS v. Paraguay*, ICSID Case No. ARB/07/29, ¶ 125; *SGS v. Philippines*, ICSID Case No. ARB/02/6, ¶ 92.

77. *SGS v. Philippines*, ICSID Case No. ARB/02/6, ¶ 128.

78. *Id.*

authoritatively determined by the contractually provided forum.[79] Forum selection is, after all, part of the deal—a price term that could have been negotiated non-exclusively but, here, was not. Noting that the contract provided exclusively for local court jurisdiction, the Tribunal issued a stay.[80] It held the claim inadmissible until such a time as the company submitted its claim before the Philippines courts and the latter rendered an authoritative judgment. Only then would the state's compliance become a matter of international law.[81]

Six years later, *SGS v. Paraguay* departed from *SGS v. Philippines* on this issue, privileging the treaty provision providing investors with access to investor-state arbitral jurisdiction over the contract's exclusive forum selection clause opting for domestic courts.[82] The Tribunal's key assumption was that treaty and contract could be kept wholly discrete.[83] The Tribunal held that, once covered as an investment, state contract would simultaneously create both domestic legal rights and international legal rights under the treaty.[84] In the Tribunal's view it had no jurisdiction over the former, but it asserted full jurisdiction over the latter.[85] And, unlike *SGS v. Philippines*, it viewed the contract's exclusive forum selection clause as no bar to adjudicating the treaty claims.[86] For the Tribunal in *SGS v. Paraguay*, the umbrella clause required it to determine the disposition of the international legal rights generated by the covered contract, irrespective of the disposition of the national legal rights under the municipal law of the contract.[87] In its view, even an express, exclusive forum selection clause choosing local courts for the determination of all contractual disputes would only affect jurisdiction over the national legal rights generated by the contract—without affecting the Tribunal's jurisdiction over any and all claims of breach under the treaty.[88]

From the ex ante perspective of the parties to an investment contract, these cases differ markedly in their bearing on the parties' contractual autonomy. Under

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79. *Id.*

80. *Id.* ¶ 175.

81. *Id.* ¶ 128.

82. *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶¶ 131, 138-142 (Feb. 12, 2010).

83. *Id.* ¶¶ 177-184.

84. *Id.* ¶¶ 167, 176, 181.

85. *Id.* ¶ 130.

86. *Id.* ¶ 174.

87. *Id.* ¶ 175 & n.104.

88. *Id.* ¶¶ 142, 174. Ultimately, the Tribunal ruled against the State on the merits—finding the State responsible for several breaches of contract, rejecting its contractual defenses, and assigning damages totaling $39 million plus interest. Société Générale de Surveillance S.A. v. Republic of Para., ICSID Case No. ARB/07/29, Award, ¶¶ 182–184, 188 (Feb. 10, 2012).

the rule adopted by *SGS v. Paraguay* and others like it, treaty provisions offering investors access to investor-state arbitral jurisdiction attain something like mandatory status.[89] Even when the treaty claim at issue arises directly out of the underlying contract, via the umbrella clause, express and exclusive contract terms on forum selection will not displace the treaty's provision on dispute settlement. Rather, on this view, the treaty forum (or fora) will be available irrespective of the parties' arrangements—a point which would be of obvious significance to parties negotiating contracts under the ambit of investment treaties. The approach in cases like *SGS v. Philippines*, by contrast, hews much more closely toward the arrangements negotiated by the contracting parties.[90] On this reading, treaty provisions on dispute resolution represent only a default, which can be contracted around via clear express language in the contract.[91]

The treaty/contract issue surrounding forum selection is not limited to umbrella clause cases. It has emerged in numerous cases invoking the standard substantive protections like expropriation and FET, though rarely as explicitly as the *SGS* cases. Of these, the very recent *Crystallex* Award represents an important precedent.[92]

Crystallex charts a clear middle ground between *SGS v. Philippines* and *SGS v. Paraguay*. This Tribunal acknowledged that it might be possible for parties to contract out of treaty dispute resolution, but it imposed a heavy burden of clarity on any contracting parties attempting to do so. If *SGS v. Paraguay* viewed treaty dispute resolution as effectively mandatory, and *SGS v. Philippines* understood it as a simple default, *Crystallex* understood it as something in between – a classic sticky default, which parties might be able to contract around if they did so in just the right way. In the its words,

> even if the Tribunal were minded to find that an investor may waive by contract rights contained in a treaty, any such waiver would have to be formulated in clear and specific terms: a waiver, if and when admissible at all, is never to be lightly admitted as it requires knowledge and intent of

89. For an example outside the context of the umbrella clause, see *Parkerings*, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007) (asserting a similar argument in a case turning on FET).

90. *See also* Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Para., ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 142 (May 29, 2009) [hereinafter *BIVAC v. Paraguay*] ("Assuming that [the umbrella clause] does import the obligations under the Contract into the BIT ... [t]his would include not only the obligation to make payment ... [under] the Contract, but also the obligation (implicit if nothing else) to ensure that the Tribunals of the City of Asunción were available to resolve any 'conflict, controversy, or claim which arises from ...' the Contract.").

91. *See* Crawford, *supra* note , at 363-64; *see also* GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAIN IN INVESTMENT TREATY ARBITRATION 122-24 (2013).

[92] *Crystallex Int'l Corp. v. Bolivarian Repub. of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, (Apr. 4, 2016) [hereinafter *Crystallex*].

forgoing a right, a conduct rather unusual in economic transactions.[93]

In this case, the contract contained an explicit and exclusive forum selection clause, opting to resolve all disputes in Venezuelan courts.[94] But this, for the Tribunal, was not enough to overcome its presumption against an investor's waiver of treaty fora.[95] Though waiver might be possible, even a clear contractual statement of affirmatively opting for domestic courts to the exclusion of all other fora would not do the trick. As is typically the case with sticky defaults in domestic law, the Tribunal indicated that some special language would be required.

Importantly, the Tribunal gave some indication of the kinds of magic words that might make a contractual waiver effective to displace the background treaty fora. The Tribunal notes, in the negative, that the contractual forum selection provision "makes no mention of the Claimant's rights under the BIT, and no reference to the BIT in general terms or to the Claimant's right to seek recourse in arbitration for the alleged violation of those rights."[96] Though the Tribunal never comes out and says that such references would have made a difference, it clarified that what it was looking for, and could not find, were "indices that the Parties did in fact contemplate such a set of circumstances," and that the investor affirmatively agreed to dispense with his right to a treaty-based forum.[97]

The Tribunal did not explain its rationale for viewing forum selection as a sticky default in any great depth, but we can reverse-engineer some of its thinking from its cursory discussion of what language might have made such a waiver effective. In finding that an express but *general* exclusive forum selection clause was not enough, the *Crystallex* Tribunal tentatively suggested that what was missing was some express reference to the treaty – as an indication that the Parties *specifically* contemplated discarding treaty arbitration. Conversely, to get around such a sticky default, the parties would have to include language evidencing their mutual awareness of what was being given up. As will be discussed further in Part III, below, the justification for such a rule might be to ensure that parties contracting under the ambit of a BIT share pertinent information in their negotiations.[98] Specifically, a sticky default of this kind would ensure that a party seeking to foreclose investor-state dispute settlement ensure that the other party is aware of his right to compel international arbitration, and that the parties consciously agreed to give it up.[99]

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[93] *Crystallex*, ICSID Case No. ARB(AF)/11/2, ¶ 481.

[94] *Id*., at ¶ 482.

[95] *Id*.

[96] *Id.*, at ¶ 482.

[97] *Id.*

[98] *See* Ayres, *supra* note , at 2092-96

[99] *See infra*, Part III.C.

Finally, it bears noting that, at the time of litigation, the Claimant's and Respondent's interests do not always fall on the same side of this issue. While in above cases it was always the Respondent invoking the contract's exclusive forum selection clause, the same kind of clause stymied a Respondent's efforts in *Oxus Gold v. Uzbekistan*. There the Tribunal ruled against the Respondent's attempt to bring counterclaims against the Claimant under a contract associated with the investment in light of a contract clause vesting exclusive jurisdiction in national courts. The Tribunal considered that the contract's forum selection clause "constitutes a sort of carve-out from a potential jurisdiction under the BIT and deprives the Arbitral Tribunal of any jurisdiction over such counterclaims."[100] As in *SGS v. Philippines*, the BIT dispute resolution provision was, in the Tribunal's view, a mere default. Unlike in *SGS v. Philippines*, the Tribunal's emphasis of the contractual provision accrued to the Claimant's benefit.

B. Legitimate Expectations and Stabilization

The content of substantive investment treaty standards remains the gravitational issue in international investment law, and none more centrally so than the vague catch-all guaranteeing investors fair and equitable treatment (FET). The thorniest point of contention is whether it includes an obligation on states to protect an investor's "legitimate expectations," and, more specifically, to what extent that includes an obligation to compensate investors for losses arising out of regulatory change (such as a duty of "stabilization").[101]

Tribunals have disagreed fiercely on just how far FET entails a guarantee of regulatory stabilization (if at all).[102] To be clear, there is no need here to take a position on the debate over FET's precise substantive content. At issue here is a question hidden inside of the stabilization debate: whether and to what extent the treaty standard augments contracts between host states and foreign investors, and whether it is something that can be contracted around.

To contextualize the issue from the contracts perspective, absent any investment treaty, stabilization is something for which parties often can and do contract.[103] Most national legal orders have special rules for public contracts—

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[100] *Oxus Gold v. Republic of Uzbekistan*, Final Award, UNCITRAL (17 Dec., 2015).

101. Dolzer & Schreuer, *supra* note , at 82-85.

102. Compare Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 260-261(May 22, 2007) [hereinafter *Enron*] (holding that FET entails a strong obligation of legal stabilization); with *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, ¶ 423 (holding that FET entails only a weak stabilization protection against general legislation); and *Mesa Power Group v. Government of Canada*, PCA Case No. 2012-17, ¶ 502 (Mar. 24, 2016) (holding, in the context of the NAFTA, that "legitimate expectations in and of itself does not constitute a breach of [FET], but is an element to take into account when assessing whether other components of the standard are breached.").

103. *See* INT'L FIN. CORP., STABILIZATION CLAUSES AND HUMAN RIGHTS 4-5 (2009).

meaning contracts with the government, or sub-units of the government, and in some cases with state-owned enterprises.[104] Usually the defaults are government-friendly.[105] It would be uncommon for a national legal order to guarantee an investor against legislative change by default. In the U.S. law of public contracts, for example, a private party is not, by default, guaranteed against general legislative changes that diminish the value of her contract with the government.[106] But to the extent parties are sufficiently concerned about the risk of regulatory change, they can negotiate for a stabilization clause.[107] Stabilization is, in other words, a price term–one which investors are not entitled to by default, and which they will have to pay for. And the same goes for transnational contracts, absent an applicable investment treaty.

The usual question in international investment law is to what extent FET provisions impose a stabilization requirement on states at all, vis-à-vis any kind of asset.[108] Our question is related but conceptually independent from the issue of content. The question for us concerns how FET operates in contract cases—specifically where the investment is itself a *negotiated* agreement between the state and foreign investor reflecting their agreed allocation of risk—whether the treaty grafts an obligation of stabilization on to such contracts, and to what extent the parties can contract around the treaty standard.

Notice that no such issue arises with pure property cases, where it poses no problem that the treaty establishes received rules for the disposition of foreign property, binding the state over and above its own property law. With property, the point of the treaty is clearly to provide investor-friendly rules to attract investment.[109] The only debate vis-à-vis property claims is about how far the substance of the standard extends. But in contract cases an additional issue arises: how much to respect the parties' own efforts to allocate risk. Investor-state cases involving contracts have thus far tended to debate the issue of content vigorously; but they have generally disposed of the contracts-specific questions only on the

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104. *See generally* ROBERT MELTZ, CONG. RESEARCH SERV., R42635, WHEN CONGRESSIONAL LEGISLATION INTERFERES WITH EXISTING CONTRACTS: LEGAL ISSUES 7-9 (2012).

105. *See id.*

106. *See id.* at 9.

107. *See* Serkin, *supra* note , at 958. Note that such clauses are considered unconstitutional in some national legal orders, due to their potential to constrain future governments' ability to regulate. *Id.* at 886 n.27; Howard Mann, *Stabilization in Investment Contracts: Rethinking the Context, Reformulating the Result*, INV. TREATY NEWS (Oct. 7, 2011), http://www.iisd.org/itn/2011/10/07/stabilization-in-investment-contracts-rethinking-the-context-reformulating-the-result/ [https://perma.cc/Q44Q-HQK3].

108. Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 20–29 (2013); *see also* Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Law*, 12 J. WORLD INV. & TRADE, 783, 805-06 (2011).

109. DOLZER & SCHREUER, *supra* note , at 19.

level of assumptions.

As Dolzer notes, jurisprudence on legitimate expectations is in a state of flux.[110] The case law can be usefully divided into two lines, reflecting broad and narrow approaches to legitimate expectations. The cases are quite a bit messier, but this simplified division serves to illustrate the underlying treaty/contract issue. Note at the outset that all of the cases seem to agree that normally, in protecting expectations, FET will materially add *something* to state contracts within its ambit. Clearly, the cases differ on how much FET adds (ultimately a question of substantive content). But, more importantly for our purposes, the cases further differ on how much the content of FET will depend on just what the contractual arrangements entail in particular cases—in other words, on whether and how much a tribunal must dig into terms of the contract to determine just what an investor can legitimately expect.[111] For one line of cases, FET contains a robust guarantee of legitimate expectations, applicable in full to investment contracts regardless of the underlying contractual arrangements; on the other view, FET imposes only a narrower minimal core on investment contracts, which may be expanded (and perhaps even contracted) by the terms of the underlying contract.

The broad approach to legitimate expectations in contracts cases is typified by a series of gas disputes against Argentina arising out of the 2001-2002 financial crisis, including *Sempra v. Argentina*, *Enron v. Argentina*, and *CMS Gas v. Argentina* (collectively the *Argentine Gas Cases*).[112] Each of these disputes arose out of regulatory changes that severely devalued long-term gas distribution contracts between the private investors and the Argentine state.[113] In the early 1990s Argentina embarked on a comprehensive privatization program, part of which involved designing a regulatory framework covering the gas sector designed to attract foreign direct investment.[114] The framework included guarantees that companies could calculate rates in U.S. dollars and convert them to pesos at the prevailing exchange rate, to be recalculated every six months for the thirty-five year

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110. Dolzer generally supports the view that, under the legitimate expectations component of FET, contracts should establish *some* stabilization duty. *See* Dolzer, *supra* note , at 25-26. *But see* Crawford, *supra* note , at 373 ("The relevance of legitimate expectations is not a licence to arbitral tribunals to rewrite the freely negotiated terms of investment contracts.").

111 I owe this important clarification to Julianne Marley.

112. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) [hereinafter *Sempra*]; *Enron*, ICSID Case No. ARB/01/3; and CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005) [hereinafter *CMS Gas*]. *See generally* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* THE YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008/2009, at 379 (Karl P. Sauvant, ed., 2009) (discussing the decisions in the Argentine gas cases).

113. *See* Alvarez & Khamsi, *supra* note , at 379-88.

114. *Id.* at 388-89.

life of the contract.[115] At the time, the peso was also pegged to the dollar.[116] As Argentina slipped into financial crisis in the l990s, the state took a series of emergency measures altering the regulatory framework for gas distribution: repealing the convertibility guarantees (requiring rates to be set in pesos); converting all rates from dollars into pesos at a rate of 1:1 ("pesification"); and subsequently devaluing the peso.[117] Needless to say, these measures severely depreciated the value of the underlying contracts and undermined their viability as investments.[118]

CMS, Sempra, and Enron each sued Argentina under the U.S.—Argentina BIT.[119] The key question in each case was whether the treaty guaranteed the investor rights of legal stabilization beyond what was contained in the contracts– whether, in other words, FET grafted a duty of stabilization onto the underlying contracts between the investors and the Argentine State.[120]

First, each case defined FET broadly to include a duty of stabilization.[121] The Tribunal in *CMS Gas* held that "[t]here can be no doubt ... that a stable legal and business environment is an essential element of fair and equitable treatment."[122] The *Enron* Tribunal concurred, adding that the standard protects investor expectations "derived from the conditions that were offered by the State to the investor at the time of the investment [and on which the investor relied]."[123] For Enron, such "offers" are not limited to the terms of the contract, but include the state's regulatory regime at the time of investment.[124] In each case the tribunal further noted that the stabilization component of legitimate expectations was an

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115. *Id.*

116. *See Sempra*, ICSID Case No. ARB/02/16, ¶ 82; *id.* at 389.

117. *Sempra*, ICSID Case No. ARB/02/16, ¶ 116; *Enron*, ICSID Case No. ARB/01/3 ¶ 72; *CMS Gas*, ICSID Case No. ARB/01/8, ¶ 65.

118. *Enron*, ICSID Case No. ARB/01/3, ¶ 81; *CMS Gas*, ICSID Case No. ARB/01/8, ¶¶ 69-72.

119. *Sempra*, ICSID Case No. ARB/02/16, ¶ 5; *Enron*, ICSID Case No. ARB/01/3, ¶ 4; *CMS Gas*, ICSID Case No. ARB/01/8, ¶ 4.

120. Each of these contracts included some stabilization clauses of their own, but they fell short of the degree of stabilization being read into the treaty. *See* Alvarez & Khamsi, *supra* note , at 388-89, 391-92. The implicit issue here is whether the treaty clauses would afford investors greater protection than that available under the contracts.

121. Each tribunal was careful to note that the State might not be under a total stabilization requirement, but none clarified how far the requirement goes. *See CMS Gas*, ICSID Case No. ARB/01/8, ¶ 277; *see also Enron*, ICSID Case No. ARB/01/3, ¶ 261; *Sempra*, ICSID Case No. ARB/02/16 ¶ 300.

122. *CMS Gas*, ICSID Case No. ARB/01/8, ¶ 274.

123. *Enron*, ICSID Case No. ARB/01/3, ¶ 262.

124. *See id.* ¶ 264.

objective standard–to be assessed only in light of a measure's effects on the investor's bottom line, and not in light of the state's regulatory aims.[125] Each tribunal found Argentina had violated its obligation to provide FET. As the Enron Tribunal stated, "[t]he measures in question ... have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented."[126]

What is hardly discussed in any of these cases is the relationship between FET and the underlying contracts, or the extent to which the tribunals' interpretations of the standard affect the contractual arrangement. Much like *SGS v. Paraguay*, *Sempra* merely waves the question away formalistically. According to the *Sempra* Tribunal, treaty claims and contract claims can be neatly separated.[127] In its view, the FET claim involves only the treaty, not the contract, because it arises out of the state's legislative action and not exclusively and merely a commercial dispute about the contract–as if such things can be neatly separated.[128] Materially, on this view, FET protects investors' expectations to the same degree no matter how they choose to invest; if the investment is structured through a contract, the treaty standard simply supplements that contract. In other words, the tribunals treat the contracts as generic assets, which are subject to additional treaty protections like "legitimate expectations" under FET on the pure property model.

If, however, we change our perspective to the point of view of the parties negotiating such a contract ex ante, it becomes clear that any such background rule must be considered as materially part of the deal. Where stabilization is permissible in national law at all, its presence or absence becomes a price term like any other. The assumption in the *Argentine Gas Cases* is that the treaty creates a background norm requiring the state to afford investors a degree of legal stabilization, whether or not they specifically negotiate a stabilization clause. At a minimum, on this interpretation of FET, stabilization becomes a default rule applying in contractual relations between states and foreign investors, regardless of whether or not the law of the contract includes any such principle. While it is not entirely clear whether this treaty-based default is something the parties could have expressly contracted around, the tribunals' strict separation of treaty and contract implies that the full measure of legitimate expectations under FET is effectively mandatory.

Another line of cases—typified by *Parkerings v. Lithuania*—presents a far narrower approach to FET in contract cases.[129] *Parkerings* concerned a 1999

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125. *Sempra*, ICSID Case No. ARB/02/16, ¶ 304; *Enron*, ICSID Case No. ARB/01/3 ¶ 268; *CMS Gas*, ICSID Case No. ARB/01/8, ¶ 280-281.

126. *Enron*, ICSID Case No. ARB/01/3, ¶ 264.

127. *See Sempra*, ICSID Case No. ARB/02/16, ¶ 310.

128. *Id.* ¶¶ 99-101.

129. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007) [hereinafter *Parkerings*]; *see also* EDF Servs. Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8, 2009) [hereinafter *EDF*] (objecting to the idea that FET might mean "the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal

contract between Parkerings, a Norwegian Company, and the municipality of Vilnius, for the creation, operation, and enforcement of a new public parking system in the city.[130] The company was to retain, for a period of thirteen years, the rights to collect parking fees, and to enforce the system through clamping delinquent cars and imposing fines.[131] Less than one year into the contract, however, the national government began taking measures that undercut Parkerings's rights under the contract—including the passage of national legislation that prohibited private companies from collecting parking fees and enforcing violations.[132] Lithuania eventually terminated the contract, and Parkerings sued the State under the Norway—Lithuania BIT.[133]

Parkerings claimed that Lithuania violated FET by frustrating the company's legitimate expectations.[134] The Tribunal was, however, fairly circumspect in its view of the treaty standard. In particular, the tribunal found that a contract does not, of itself, give rise to expectations actionable under FET—nor does it create an obligation on states to stabilize their laws vis-à-vis the investor.[135] The Tribunal emphasized that a "State has the right to enact, modify, or cancel a law at its own discretion," as a corollary to its "sovereign legislative power."[136] To the extent that FET entails any protection of an investor's expectations, no investor could legitimately expect that signing a contract with a state would entail a tacit promise of stabilization. To the contrary, the Tribunal stated that "any businessman or investor knows that laws will evolve over time."[137]

Importantly, the Tribunal focused on the deal as actually negotiated by the parties, emphasizing in particular the absence of a stabilization clause in the underlying contract.[138] As the Tribunal pointed out, in contract it is up to the parties themselves to allocate risk as they see fit.[139] If an investor wants to reduce risk, she "must anticipate that the circumstances could change, and thus structure [her]

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regulatory power and the evolutionary character of economic life").

130. *Parkerings*, ICSID Case No. ARB/05/8, ¶ 82.

131. *Id.* ¶ 84.

132. *Id.* ¶ 328.

133. *Id.* ¶¶ 195, 201, 234.

134. *See id.* ¶¶ 196-197.

135. *Id.* ¶¶ 337-338.

136. *Id.* ¶ 332.

137. *Id.*

138. *Id.* at ¶¶ 334-338.

139. *Id.*

investment in order to adapt it to the potential changes of legal environment."[140] The Tribunal rightly analyzed expectations in terms of the parties' own risk allocation. Parkerings "could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilisation clause ... protecting it against unexpected and unwelcome changes."[141] If grounded in an express commitment in the underlying contract, it might indeed become legitimate to expect such stabilization for purposes of FET.[142] But crucially Parkerings would have had to pay for such a right, likely yielding a less attractive deal—assuming the state would have agreed at all. The Tribunal thus held that "[By deciding to invest notwithstanding this possible instability, the claimant took the *business risk* to be faced with changes of laws possibly or even likely to be detrimental to its investment."[143]

Nevertheless, the Tribunal did not entirely limit the effect of FET in contract cases. It considered that the treaty *does* impose a residual requirement on the state to refrain from exercising its legislative power "unfairly, unreasonably or inequitably" to the detriment of its private contracting partners.[144] But it viewed this condition minimally, and found no evidence that Lithuania ran afoul of its obligations under the BIT.[145] In other words, for the Tribunal, FET imposes certain minimum levels of treatment on contracts, though the treaty standard's protection of legitimate expectations can be ratcheted up where the contract itself contains specific commitments like a stabilization clause or other heightened guarantee.[146] Left open is the borderline question of whether even the minimal vision of FET could be ratcheted down by the contracting parties by sufficiently explicit waiver, though importantly, nothing in the Tribunal's reasoning excludes the possibility that such conditions are themselves mere defaults (or sticky defaults). Ultimately, the line between the contents of FET and the treaty/contract question remains muddy. What is clear is that, for this line of cases, the content of an investor's legitimate expectations in contract cases depends mightily on what the state and foreign investor worked out in their deal.

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140. *Id.* ¶ 333.

141. *Id.* ¶ 336.

[142] *Id.* ¶ 332.

143. *Id. See also EDF*, ¶ 217 ("Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework.").

144. *Parkerings*, ICSID Case No. ARB/05/8, ¶ 332.

145. *Id.* ¶¶ 336-338.

[146] *Id.*, ¶ 332; *see also EDF*, ¶ 217; *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, ¶ 423 ("changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power...and do not modify the regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change.'").

The two lines of cases discussed above diverge sharply as to the *content* of legitimate expectations in FET. *CMS Gas*, *Enron*, and *Sempra* contemplate an objective test with strong stabilization effects.[147] *Parkerings* and its ilk contemplate a much more minimal test of fairness and reasonableness that is not based purely on the material effects of legislative change.[148] But they also differ on the separate issue of the relationship between treaty and contract. Abstracting from the substantive content of FET, both lines of cases seem to assume the treaty standard represents a background default against which all contracting takes place. But they differ on whether and to what extent the underlying deal is relevant to determining just what the guarantee of legitimate expectations might entail. The implication of the *Argentine Gas Cases* is that legitimate expectations is comprehensive and effectively mandatory. This is particularly clear in *Sempra*, which, like *SGS v. Paraguay*, forcefully frames FET as a treaty obligation totally distinct and severable from the contract – one which applies in full force on top of any investment contract, regardless of what the contract says.[149] By contrast, the implication of *Parkerings* and its ilk is that FET's contents depend mightily on what the contracting parties actually agreed. On this reading, FET includes a minimal core, but it clearly acts as a kind of default-it can be ratcheted up, and arguably even watered down, by the contracting parties.

For analytical purposes I have tried, here, to keep separate the question of FET's content and that of its relationship to investment contracts. It bears noting that in the real world, however-the world actually lived by parties engaged in negotiating investment projects-these questions surely interrelate. Indeed, the content of the FET standard will turn out to matter quite a bit, from the perspective of contract theory, when we turn to the normative question of how adjudicators *ought* to resolve the treaty/contract question.[150] If FET is an extremely robust standard of protection incorporating a stabilization requirement, then it will be critical to the state (and arguably to investors) to be *able* to contract around it. However, the sting of the problem dissipates as the interpretation of FET narrows. Even if, in contract cases, the core of FET is mandatory, but limited to something like a guarantee that the state will use its sovereign powers in good faith, its consequences would be far less intrusive.

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147. *Sempra*, ICSID Case No. ARB/02/16, Award, ¶ 304 (Sept. 28, 2007); *Enron*, ICSID Case No. ARB/01/3, Award, ¶ 268 (May 22, 2007); *CMS Gas*, ICSID Case No. ARB/01/8, Award, ¶ 280-281 (May 12, 2005).

148. *Parkerings*, ICSID Case No. ARB/05/8, ¶¶ 336-338.

149. *See Sempra*, ICSID Case No. ARB/02/16, ¶¶ 296-304. This formalistic recitation obscures the material relationship between these instruments. From the point of view of two contracting parties negotiating ex ante, the question of whether their deal will create a stabilization obligation for the state by triggering a treaty obligation will absolutely bear on the material meaning of the contract. If known and understood, it would be viewed as an implied price term that obviously affects the allocation of risk.

[150] *See infra*, Part III.

C. Damages

The realm of potential interactions between treaty and contract on questions of substantive law goes well beyond standards of treatment like FET and expropriation. Indeed, investment treaties create fulsome regimes of background rules which, if applicable, would cover most aspects of the life of the contract. Of these, rules on the measure and calculation of damages are among the most important.

All contracts entail rules on damages—either in their express terms, or by default under the law of the contract. Often, in national legal orders, contracts with the state are not automatically subject to the fullest measure of expectation damages. In such instances, where the government opts to breach, investors are typically entitled to some lesser measure—like recuperation of reasonable reliance damages.[151] The rationale is typically an entrenchment concern about regulatory autonomy and the possibility of chill—a worry that one government might tie the hands of future governments through privatization contracts.[152] By contrast, the usual measure of damages in international investment law is, today, fair market value (FMV).[153] In cases involving the expropriation of property, FMV is typically measured in terms of the present value of the asset, taking into account its capacity to generate income over time.[154] Applied to contracts, this measure of damages is more or less equivalent to expectation damages. If the law of the contract calls for mere reliance damages by default, but the investment treaty calls for FMV, which controls? And what happens when the parties explicitly negotiate for a particular measure of damages, say in a liquidated damages clause? Here again the cases display significant variation, without much explicit discussion of the issue.

Notably, investment treaties do not usually include express, general provisions on damages applicable to each and every treaty standard.[155] Typically, provisions on expropriation do include language on compensation—usually invoking FMV.[156] But standards like FET tend to be laconic on the issue, leaving much up to the adjudicator's discretion.[157] Suffice it to note, for present purposes,

151. *See* Serkin, *supra* note , at 916; *see also* Daniel R. Fischel & Alan O. Sykes, *Government Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 316 (1999).

152. Serkin, *supra* note , at 894-96; *see also* Arato, *supra* note , at 273.

153. Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13).

154. *See, e.g.*, *id.*

155. Renne-Yves Tschanz & Jorge E. Viñuales, *Compensation for Non-Expropriatory Breaches of International Investment Law: The Contribution of the Argentine Awards*, 26 J. INT'L ARB. 729, 729-30 (2009).

156. SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW, 78-79 (2008).

157. *See* Alvarez & Khamsi, *supra* note , at 404-05; Tschanz & Viñuales, *supra* note , at 729.

that the tendency is to read FET in light of customary international law principles of compensation applicable in relations between states, which ultimately means FMV.[158]

Some cases simply assume that, once a treaty breach is involved, damages must be assessed under international law principles. *CMS Gas*, *Sempra*, and *Enron* are typical in this regard. Again, these tribunals each found Argentina in breach of FET for enacting emergency measures that severely diminished the value of the investors' contracts.[159] Once these tribunals determined that the state had violated FET, they simply assumed that the appropriate measure of damages was to be drawn from international law—meaning, in their view, FMV.[160] Under that rubric, the tribunals measured each private party's losses in light of expected future earning potential over the thirty-five year life of the contract, calculated via discounted cash flow (DCF) analysis—which amounts to a sophisticated approach to expectation damages in the context of long term investment contracts.[161]

While each of the *Enron*, *Sempra*, and *CMS Gas* Tribunals took pains to explain why FMV was the appropriate measure for assessing violations of FET as a matter of international law, none even considered whether international law was the right place to look in cases arising out of contracts. None examined whether the appropriate measure of damages might rather be found in the underlying contract over which the claim arose—either in its express terms, or in the default rules of the law of the contract (Argentine law in each case). They simply took as a given that international law supplied the answer.[162] Under this rule, contracting parties

158. *See See* Alvarez & Khamsi, *supra* note , at 404-05; Tschanz & Viñuales, *supra* note , at 735.

159. *Sempra*, ICSID Case No. ARB/02/16, Award, ¶ 304 (Sept. 28, 2007); *Enron*, ICSID Case No. ARB/01/3, Award, ¶ 268 (May 22, 2007); *CMS Gas*, ICSID Case No. ARB/01/8, Award ¶ 281 (May 12, 2005).

160. *Sempra*, ICSID Case No. ARB/02/16, ¶¶ 400-403; *Enron*, ICSID Case No. ARB/01/3 ¶¶ 359-363; *CMS Gas*, ICSID Case No. ARB/01/8, ¶ 410.

161. *Sempra*, ICSID Case No. ARB 02/16, ¶ 416; *Enron*, ICSID Case No. ARB/01/3, ¶¶ 384–385; *CMS Gas*, ICSID Case No. ARB/01/8, ¶ 411.

[162] A similar issue regarding investment contracts and FMV arose in *ExxonMobil v. Venezuela* and *ConocoPhillips v. Venezuela*. *See Venezuela Holdings et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014)[hereinafter *ExxonMobil*]; *ConocoPhillips Petrozuata, et. al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (Sept. 3, 2013) [hereinafter *ConocoPhillips*]. These cases involved similar underlying oil contracts, which contained specific clauses limiting contractual damages. *ExxonMobil*, ¶ 61; *ConocoPhillips*, ¶¶ 375-376. Like the *Argentine Gas Cases*, the *ExxonMobil* Tribunal held that the appropriate damages rule under the applicable BIT was FMV (for an expropriation claim). In these cases the contracts were between investors and state-owned entities. In ExxonMobil, the Tribunal ignored, and thereby effectively displaced, the contractual limitations on compensation explicitly incorporated in the contract—finding those limitations opposable only to the state-owned entity that was formally party the contract, and not the State itself. *Exxon Mobil*, ¶ 373. The issue has yet to be addressed fully by the Tribunal in *ConocoPhillips* (the Tribunal has yet to rule on damages at time of writing). Yet, arbitrator Georges Abi-Saab raised the issue preemptively, in a dissent to the Decision on Jurisdiction and Merits (prior to his resigning from the tribunal for health reasons). *ConocoPhillips*, Abi-Saab Dissent, ICSID Case No. ARB/07/30. In

would have to assume, ex ante, that investment treaties displace domestic contract law on the question of damages in FET (and expropriation) cases, establishing expectation damages as the new background rule. And while it is not entirely clear how sticky such a rule might be, from the way these tribunals formalistically severed treaty and contract the strong implication is that expectation damages qua FMV should be understood effectively mandatory.[163] It seems unlikely that these tribunals would have been swayed by even express contractual provisions on damages.[164]

Other tribunals have taken a more nuanced approach to damages in disputes arising out of investment contracts, more mindful of the parties' underlying contractual arrangements. *Kardassopoulos & Fuchs v. Georgia* addressed the issue in particularly clear dicta. Seemingly echoing the *Argentine Gas Cases*, the *Kardassopoulos* tribunal noted that the claims were treaty based–grounded in violations of FET and expropriation.[165] As a result, for the Tribunal, "the relevant provisions for the purpose of both liability and quantum are contained in the treaties and, more broadly, international law"[166]—which, for both claims turned out to be FMV.[167] However, the Tribunal did not treat the separation between treaty and contract as entirely strict. It noted, that its "finding is without prejudice to a host State and an investor's ability to contractually limit the compensation which may be owed following an expropriation where a treaty is also in play."[168] The Tribunal added that it would be "loathe to accept the categorical denial of such an

Abi-Saab's view, even if the treaty imposes an FMV standard, any express limitations on profits must be considered in assessing the contract's fair market value for purposes of assessing compensation or damages. *Id.*, at ¶ 34 ("the calculation of the market value of the nationalized investment *in casu* – consisting of contractual rights...has necessarily to take into account (i.e. to pass by or be filtered through) the compensation clauses of these Agreements which quantify and limit those rights protected by the BIT.")In other words, for Abi-Saab, FMV cannot act to impose a measure of expectation damages blind to express provisions in the contract that limit compensation, because that would *overstate* the contract's value on the open market. Crucially, he explains that this conclusion rests "not only on legal, but also on economic grounds....How can any *homo economicus* exercise rational choice as a 'willing buyer' of ConocoPhillips shares or contractual rights in the Strategic Association Agreements, calculate the price he would be willing to pay, without factoring in (or taking into account) the terms of the compensation clauses of the Agreements?" *Id.*, at ¶¶ 35, 37.

163. *See, e.g.*, *Sempra*, ICSID Case No. ARB/02/16, ¶ 401.

164. *See also ExxonMobil*, ICSID Case No. ARB/07/27, ¶¶ 61, 373.

165. Kardassopoulos & Fuchs v. Republic of Georg., ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, ¶ 480-481 (Mar. 3, 2010) [hereinafter *Kardassopoulous*].

166. *Id.* ¶ 480.

167. *Id.* ¶¶ 501–504, 533–534.

168. *Id.* ¶ 481.

arrangement ... as a matter of law."[169] Clearly, in its view, the treaty rule on damages is only a default.

Going further, the Tribunal began to consider how informed parties might contract around a treaty on questions of damages—asking, in other words, how sticky the treaty default might be. The Tribunal drew attention to an exchange with the Claimants at oral argument, where the latter hesitantly acknowledged that investors and governments could contract around an investment treaty through a clear liquidated damages clause or other cap on damages.[170] One of the Arbitrators (Vaughn Lowe) pressed the Claimants on this point, asking the crucial question of what such a clause would look like if the parties intended to contract around the treaty.[171] The Claimants responded that to validly contract out, the clause "would [have to] say '...notwithstanding article 11 of the Energy Charter Treaty, the parties hereby agree that...', or it would say 'Notwithstanding the provisions of public international law...'"[172] The Claimants' point was similar to that of the *Crystallex* Tribunal in the context of forum selection: that contracting out would be possible if the contractual language indicated both parties' awareness of the existence of the relevant treaty standards.[173] Put in contract theoretical terms, on the Claimants' understanding, the treaty rules on damages would thus represent a fairly sticky default, whose stickiness would be justified on an information-sharing rationale.[174]

Ultimately, however, *Kardassopoulos* did not decide the issue. In the end the Tribunal did not inquire into whether the contract or treaty took precedence in this case because it determined that that the question would make no material difference.[175] In view of the particular stabilization clauses in the underlying contract, the Tribunal considered that "the result would be the same as the application of international law principles of compensation."[176] The Tribunal thus disposed of the damages issue under the FMV principles of the relevant treaties.

From the ex ante contracting perspective, the *Argentine Gas Cases* and *Kardassopoulos* offer two competing answers to the treaty/contract issue. Each of these cases accepts that FMV reflects the correct approach to damages under FET

169. *Id.*

170. *Id.* ¶ 481.

171. *Id.*

172. *Id.*

173. *Id.*; *See Crystallex,* ICSID Case No. ARB(AF)/11/2, ¶ 482.

174. The *Kardassopoulos* discussion is exceptionally helpful analytically because, like *Crystallex*, it raises the all important question of how a sticky default might be contracted around—a point even domestic courts frequently elide, but which strongly tests the rationale behind the rule's stickiness. *See* Ayres, *supra* note , at 2092-96.

175. *Kardassopoulos*, ICSID Case Nos. ARB/05/18 & ARB/07/15, ¶ 483.

176. *Id.* ¶ 482.

(meaning expectation damages in contract cases). However, the former cases simply assume that a violation of FET invokes the international law standard of damages, whatever the contract (or law of the contract) provides.[177] *Kardassopoulos*, by contrast, acknowledges that the contracting parties can control damages in their own arrangements if they do so expressly.[178] From the contracting perspective, the former approach positions treaty damages as something like a mandatory background rule. The latter rather understands treaty damages as a default–leaving it unclear just how sticky a default it might be.[179]

D. Jurisprudence and Uncertainty

The jurisprudence on the treaty/contract issue lies in disarray. The question is handled irregularly within and across all treaty issues, from forum selection to substantive obligations and damages. Such uncertainty is a real problem in private law. From the ex ante perspective, states and foreign investors cannot be confident about the meaning of any contract they ultimately adopt. Will the contract be augmented by the background norms set by an applicable investment treaty? If so, are such provisions mandatory, or are they subject to negotiation—can, in other words, the parties opt out of treaty arrangements if they prefer to allocate risk in a different way? And, if the treaty rules are mere defaults, how sticky are they? Must parties do anything specific to contract around their parameters, to ensure that tribunals give force to their choices? The cases give wildly different answers to these questions, typically without much explanation.[180] Such uncertainty is problematic, to say the least, in the sensitive realm of high risk, high value foreign investment projects—where it can strongly affect the state's regulatory capacities and where disputes often turn into "bet the company" cases.

As a first step, it is essential to see how tribunals' implicit choices affect investment contracts, and what they mean for future contractual negotiations between states and foreign investors. It is crucial, in this regard, to get past the formalistic idea that treaty and contract claims are on purely separate tracks. Treaty and contract cannot be neatly separated. In Crawford's words, "treaties and contracts are different things. But they are not clean different things ... between

177. *Sempra*, ICSID Case No. ARB/02/16, Award, ¶¶ 400-403 (Sept. 28, 2007); *Enron*, ICSID Case No. ARB/01/3, Award, ¶¶ 359-363 (May 27, 2007); *CMS Gas*, ICSID Case No. ARB/01/8, Award, ¶ 410 (May 12, 2005).

178. *See Kardassopoulos*, ICSID Case Nos. ARB/05/18 & ARB/07/15, ¶ 480-481.

179. *Id.* ¶¶ 480–482.

180. Only a handful of cases address the treaty/contract issue directly. *See, e.g.*, *Crystallex,* ICSID Case No. ARB(AF)/11/2, ¶¶ 481-482; *Kardassopoulos*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, ¶ 211 (Mar. 3, 2010); *SGS v. Philippines*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 92 (Jan. 29, 2004).

them there is no great gulf fixed."[181] As Abi-Saab puts it, to simply "assert... that the treaty applies, without taking into consideration the terms of the contract, amounts to revising and rewriting the contract."[182] Taking the ex ante perspective of states and foreign investors—as contracting parties—helps to clarify how their messy interactions might be better harmonized.

Under most interpretations, where a treaty claim arises out of a contract dispute the treaty adds (or can add) *something* to the contract—whether a heightened standard of treatment under FET, a new measure of damages, or access to international fora. Cases like *SGS v. Paraguay* and the *Argentine Gas Cases* insist that these additions arise purely out of the treaty and are completely separate from the contract.[183] But this reasoning is overly formalistic—focused too much on the general relationship between international and national sources of law, and not enough on the private law logic of those very contracts the treaty seeks to protect.[184]

From the ex ante perspective of the parties to an investment contract, the strict separation refrain only obscures the treaty's material, economic effect on the contract. Formalities aside, if the contracting parties are aware that an overarching treaty will add to or alter their bargain, they will have to consider such alterations materially part of the deal. From their point of view, the treaty creates a fairly comprehensive set of background rules supplementing their arrangements. Parties with any sophistication will have to price these norms into their contract, or weigh whether to contract around them.

From this vantage point, it becomes clear how much it matters *how* we think about these background norms—a point distinct from the *content* of the treaty provisions, and obscured by the neat separation of treaty claims from contract claims. If, as in the strict separation logic, an investor's treaty rights cannot be affected or disclaimed by the terms of the contract, then the treaty provisions act as mandatory investment protections and cramp the parties' ex ante ability to efficiently allocate risk. But if the treaty rules are defaults, as in the reading of *Kardassopoulos*, *Crystallex* or *SGS v. Philippines*, the parties may then dicker over

181. Crawford, *supra* note , at 373.

[182] *ConocoPhillips*, Abi-Saab Dissent, ICSID Case No. ARB/07/30, ¶ 32.

183. *See, e.g.*, *Sempra*, ICSID Case No. ARB/02/16, Award ¶ 310 (Sept. 28, 2007)

[184] Contrast this to the logic of the CISG, as an international treaty which clearly seeks to erect international background rules to govern transnational sales contracts, but which explicitly allows private non-state actors to contract around its terms. *See* CISG, art. 6. Nothing about the *general* relationship between international law and national law prevents an international treaty from envisioning—even encouraging—private parties to opt out through their transnational contracts. To the contrary, enshrining the capacity to opt out is one of the CISG's central features. Though investment treaties differ from the CISG in their silence on this issue, it is important to see how nothing about the general relationship between international and national law bars treaties from establishing a more integrated approach oriented toward private party choice. The real question Tribunals should be asking is: what kind of relationship between treaty and contract do BITs envision, interpreted in light of their object and purpose to protect and promote foreign direct investment.

them in their negotiations as they would with any other price term.[185] On this reading the treaty may well change the baseline for negotiations from potentially more lenient default structures in the national law of the contract, perhaps putting the state more on the back foot. But the parties will still be able to negotiate over the ultimate allocation of risk and reward.

On the specific question of how contract and treaty provisions interact, the cases are irregular, inconsistent, and often markedly unclear. Most simply make assumptions about how treaties and contracts interact—and their assumptions are not always the same.[186] Indeed, only a few cases consider the issue explicitly—for most it is a matter of reading between the lines to excavate their underlying assumptions. Still, there do seem to be trends. The tendency seems to be to treat investment treaty provisions as effectively mandatory, as in the *Argentine Gas Cases* and *SGS v. Paraguay*.[187] But a significant minority of tribunals have taken party choice in contract more seriously, viewing investment treaties as defaults of varying degrees of stickiness. As in *Kardassopoulos* and *Crystallex*, some tribunals have viewed treaty provisions as highly sticky defaults, which apply unless the contracting parties opt out with exceedingly clear and specific language.[188] And a handful of others buck the trend even further, as in *SGS v. Philippines* and *Oxus*, viewing treaty provisions as simple defaults, wholly subject to contracting party choice.[189] These variations are not limited to any particular treaty provision or issue, and they are occurring with increasing frequency.

The main goal of this Part has been to highlight and analyze the disorder in the case law on the interaction between treaty and contract. One normative point should, however, already be obvious. The current state of uncertainty is hugely problematic from the ex ante perspective of contracting parties—states and foreign investors—who cannot be confident about the material meaning of any contractual arrangements under the shadow of an investment treaty. This makes planning extremely difficult and expensive, as rational states and investors will have to build insurance into their arrangements. And it adds significant transaction costs to the contracting process. If sufficiently well understood, such uncertainty risks seriously chilling contractual relations between states and foreign investors—precisely the opposite of what investment treaties seek to achieve.

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185. *See, e.g.*, *Kardassopoulos*, ICSID Case Nos. ARB/05/18 & ARB/07/15 ¶¶ 216-223.

186. *Compare SGS v. Philippines*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 134 (Jan. 29, 2004) (viewing treaty dispute resolution provisions as defaults), *with Crystallex,* ICSID Case No. ARB(AF)/11/2, ¶ 482 (viewing treaty dispute resolution provisions as highly sticky defaults), *and SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶¶ 138-142 (Feb. 12, 2010) (viewing treaty dispute resolution provisions as mandatory).

[187] *See also ExxonMobil,* ICSID Case No. ARB/07/27, ¶¶ 61, 373.

188. *Kardassopoulos*, ICSID Case Nos. ARB/05/18 & ARB/07/15 ¶ 481; *Crystallex,* ICSID Case No. ARB(AF)/11/2, ¶ 482.

189. *SGS v. Philippines*, ICSID Case No. ARB/02/6, ¶ 134; *BIVAC v. Paraguay*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 148 (May 29, 2009).

The next Part shifts more fully from the descriptive to the normative. I start from the position that certainty and consistency of any kind would already be a boon.[190] However, I argue that tribunals' apparent tendency to privilege treaty norms over negotiated contract provisions reflects the wrong approach from the perspective of contract theory–in most, though perhaps not all instances.

III. EFFICIENCY, AUTONOMY, AND CHOICE

Thus far I have argued that the moment investment treaties are made to apply to contracts, they establish some kind of international law of contracts. Given that the treaties are invariably laconic on this issue, however, it is difficult to determine just what kind of law they create. Investment treaties clearly establish full panoplies of substantive and procedural rules that relate to all investments in some way. Their application to contracts might be fully extensive—supplying norms ranging from breach, defenses, and damages to forum selection. Investment treaties might also be read more narrowly, as applying to contracts more minimally than they would to assets like real property. Likewise, these treaty rules might be read as rigid provisions that apply over and above the parties' choices, or more flexibly as defaults to be contracted around. On all these questions the treaties remain silent—and the jurisprudence has only compounded the uncertainty facing states and investors contemplating contractual relations. An international law of contracts is gradually emerging, but its contours are yet to be defined.

This Part examines how the treaty/contract issue ought to be approached. Contrary to the prevailing tendencies, I suggest that it should generally be presumed that explicit contractual provisions trump treaty provisions as the authentic expression of the contracting parties' division of risk. In the first place, as a matter of treaty interpretation under international law, a general presumption that treaties create mere defaults is essential to the object and purpose of these treaties—to protect and promote foreign direct investment. There are also strong policy reasons for understanding most treaty rules as mere defaults, grounded in both the logic of private law and in concern for public regulatory values. But, crucially, this conclusion is not an absolute. Even on these rationales there may be reasons why, in certain limited cases, treaty rules ought to be understood as sticky defaults. By hypothesis, I explore the possibility that the forum selection clause makes a good

[190] Note that the problem of *certainty* is not is not likely to improve through arbitral action alone, given that investment tribunals are constituted on a one-off basis with total discretion to reinvent the wheel on this issue in each case. *See* Arato, *supra* note , at 294. Treaty change is necessary – either to clarify the treaty/content relationship as is done in the CISG, or–more radically–through instituting a centralized investment court along the lines recently championed by the European Union. But note, on this issue, change need not be systemic to have an important effect – it is not essential that all investment treaties change all at once. Clarifying the treaty/contract relationship in any one treaty will have the effect of enhancing certainty for its states parties, and all covered investors. *See further infra*, Conclusion.

candidate.[191] It may even be that some treaty provisions ought to be understood as mandatory. But crucially, I argue that these choices must be justifiable in light of both the positive law of the treaty and the private and public values it seeks to promote.

Since the nature of the treaty/contract relationship is generally undecided in treaty text, the first touchstone for treaty interpretation must always be the investment treaty's object and purpose. This entails, in most cases, the twin overarching goals of protecting and promoting investments. Investment treaties are not solely about endowing foreign direct investment with protections as a matter of justice or fairness to the investors. States rather agree to afford such protections in order to *encourage* investment, which they view as essential drivers of development and a key component of diversified economic health.[192] If states did not want to induce investment, they would not sign modern investment treaties.

Yet different provisions may well serve these treaties' goals in different ways. There is no reason to assume that answers to the treaty/contract issue must be the same across all provisions of an investment treaty. Neither the treaties nor customary international law require any single generalizable approach. True, as Crawford notes, the customary conflicts rule applies in investor-state arbitration—whereby international law prevails over domestic law in case of conflict.[193] But a conflict would only arise if we assume the treaty creates mandatory rules. As Craswell explains, a contract does not conflict with a contrary default rule in any meaningful way, since the key function of default rules is to give way to the choices of the parties.[194] And the relationship between international law and national law poses no particular problem in this regard, as clearly evident in the realm of transnational sale of goods. The multilateral CISG is, after all, almost completely comprised of default rules, which private actors can freely contract around.[195] The real problem, investment law, is just that the treaties expressly apply to contracts-as-investment, yet completely fail to address how treaty and contract thus interrelate. In the absence of any other general rules of international law on point, the issue of how contract relates to treaty must be asked anew vis-à-vis each particular treaty, and each particular treaty provision, bearing in mind the overarching object and purpose to protect and promote foreign direct investment.

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[191] *See Crystallex,* ICSID Case No. ARB(AF)/11/2, ¶ 482.

192. *See* DOLZER & SCHREUER, *supra* note , at 22, 29-30; Anne van Aaken & Tobias Lehmann, *Sustainable Development in International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW AND POLICY 317, 329-332 (Roberto Echandi and Pierre Sauvé eds., 2013) Anthea Roberts, *Triangular Treaties*, 56 HARV. INT'L L.J. 353, 380; Yackee, *supra* note , at 398. For a more nuanced take, *see* José Alvarez, *A BIT on Custom,* N.Y.U. J. INT'L L. & POL., 17, 41-42 (2009) (rejecting a "mono-causal" explanation of why States sign BITs, and advancing a number of important geo-political considerations in play).

193. Crawford, *supra* note , at 353.

194. Craswell, *supra* note , at 1.

[195] CISG, *supra* note , art. 6.

The outstanding question is whether there might yet be some guiding principle, and, if so, where to find it.

What is clear is that, to the extent treaties apply to contracts, the point is in part to protect the parties' contractual arrangements. Certainly investment treaties are meant to provide an added level of security to the parties' relations. But the point is just as surely to do so in a way that encourages contractual relations between states and foreign investors—to better enable the parties to plan together, and allocate risk in their joint affairs—not to make planning more difficult. From this point of view, it would be quite problematic if treaties were to stand in the way of the parties' ability to allocate risk as they see fit—at least as a general matter. Bearing in mind that treaties apply to investment contracts *in order to protect the bargain*, and to promote such bargaining in the future, it stands to reason that treaty protections should not generally denature contractual arrangements freely negotiated by states and foreign investors. If the goals of the treaty are understood as calling for *respect* for investment contracts, then it stands to reason that the guiding principle to resolving the treaty/contract question should be drawn from within the private law logic of contract.[196]

A. The Value of Choice in the Logic of Contract

It is useful to consider more closely the core conceptual difference in the logics of contract and property, in light of the goals of investment treaties to protect and promote foreign direct investment. With property, protection and promotion demand a certain kind of application of the treaty rules. To act as inducements, the treaty rules will have to impose a regular set of protections for foreign-owned property. The regularity of these protections, along with the levels of protection and the availability of an international forum are the incentives to invest. With contracts the situation is different. Here foreigners and sovereigns negotiate the risks themselves in the first cut. They structure and govern their own relationships. In this context, it is no longer clear that superimposing treaty protections on the asset in question—a carefully negotiated allocation of rights, duties, and risks—will have a positive effect on promoting investment. For the most part, ex ante, states and investors alike will want their own choices to control. Anything they cannot control will have to be priced into the contract. Too much rigidity can seriously undercut the parties ability to reach efficient outcomes, and too much stickiness can make the transaction costs of drafting intolerably high.

Put another way, in most instances, the closer that treaties come to imposing property-style rules on contracts, the more pressure they will put on the desirability of contracting in the first place. And herein lies the problem with the current tendency among investment tribunals, who do just that when they assume that treaty rules simply trump contract provisions negotiated by the parties.[197] Property and

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196. DAGAN & HELLER, *supra* note ; Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 254–56 (1983).

197. *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶¶ 37-42 (Feb. 12,

contract have quite distinct organizational logics—and only the logic of contract serves to adequately guide the disposition of investment treaty provisions in cases of investment contracts. In light of the objects and purposes of investment treaties, there is good reason to distinguish between property and contract here, and to treat contract claims with quite a bit more nuance than we have seen.

The basic organizing principle in the logic of contract is choice. There are, of course, great debates about the ultimate value (or values) of contract—whether it is the autonomy of the parties,[198] or a more utilitarian vision of efficiency.[199] This is not the place to wade deep into that discourse. Suffice it to say that across all these visions of contract *choice* is ultimately fundamental. The centrality of choice is obvious for those that emphasize autonomy and promise as the moral and legal core of contract.[200] But choice plays just as big a role in utilitarian theories of contract. In the law and economics approach of scholars like Schwartz & Scott, efficiency is the central value—not autonomy—but, critically, efficiency is left up to the market.[201] Party choice is still given as much respect as possible because, on this view, the parties are usually themselves better positioned to allocate risk efficiently than courts or legislatures—particularly in the case of sophisticated parties engaged in commercial contracts.[202] Cutting a middle path between these classic theories, one recent and compelling account makes choice the centerpiece. Dagan and Heller's liberal "choice theory of contract" gives autonomy pride of place, but builds efficiency into the theory as one of the primary goods contracting parties seek to achieve (along with community).[203] This approach usefully distinguishes between types of contracts as an important aspect of choice. In at least some kinds of contracts, particularly commercial contracts between sophisticated parties, efficiency is all the parties seek to achieve—and we can assume that their choices are oriented toward such outcomes. In other kinds of contracts, values like community might be emphasized—as with marriage contracts or non-profit charters.[204] Thinking about contracts in terms of types may affect our assumptions

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2010; *Sempra*, ICSID Case No. ARB/02/16, Award, ¶¶ 372-373 (Sept. 28, 2007); *Enron*, ICSID Case No. ARB/01/3, Award, ¶¶ 202-209 (May 27, 2007); *CMS Gas*, ICSID Case No. ARB/01/8, Award, ¶¶ 115-123 (May 12, 2005).

198. *See, e.g.*, DAGAN & HELLER, *supra* note , at chs. 4-7; FRIED, *supra* note , at 71-73; Kraus, *supra* note , at 1611-19; Seana Valentine Schiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 520 (2008).

199. *See, e.g.*, Schwartz & Scott, *supra* note , at 552.

[200] *See, e.g.*, FRIED, *supra* note , at 71-73; Kraus, *supra* note , at 1611-19; Schiffrin, *supra* note , at 520.

201. Schwartz & Scott, *supra* note , at 618.

202. *Id.*

203. *See* DAGAN & HELLER, *supra* note .

204. DAGAN & HELLER, *supra* note , at ch.6.

about just what the parties have chosen in particular instances, and may give reason to nudge parties one way or another through sticky defaults and mandatory rules. But ultimately, on this theory, the point of contract law is to prioritize choice—to make choice meaningful. The bottom line is, whether we emphasize efficiency or autonomy, and whatever values particular parties emphasize in particular contracts, it should be clear that choice lies at contract's heart.

The logic of contract law is thus inextricably oriented around respect for party choice: choices about what kinds of contract to adopt, and choices about the terms within any particular contract.[205] To the extent that investment treaties apply to contracts, they create contract law—and this law should resonate with contract's basic logic. In determining the interaction between investment treaty and state contract, the first principle should be respect for the contracting parties' own choices—though this surely means treaties will apply differently to contracts than other assets like real property, or, for that matter, sovereign debt or intellectual property.[206] Treaties, in other words, should not normally be used to rewrite contractual arrangements.[207] Whatever their content, the basic presumption should be that investment treaty norms apply to contracts as no more than defaults, which the parties are free to contract around.

B. The Value of Choice in International Investment Law and Policy

Beyond bringing the burgeoning investment treaty law on contracts into greater coherence with contract theory, the choice-oriented approach advocated here offers real policy payoffs for international investment law. Most debates in the field treat the interests of states and investors as essentially zero-sum. The battle lines tend to be drawn over how much investment treaties impinge on the state's policy space,[208] or how much they undercut its sovereign authority.[209] Too often

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205. DAGAN & HELLER, *supra* note .

[206] *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, ¶ 481(Recalling that trademarks are not normally insulated from regulatory interference, the Tribunal explained that "if investors want stabilization they have to contract for it.").

207. Crawford, *supra* note , at 373-74.

208. Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 10 (2014).

209. Critics have tried to reconceive international investment law in public law terms, in hopes of rebalancing the regime toward states. *See* William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 304-08 (2010) (invoking the "margin of appreciation"); Mattias Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, EUR. SOC'Y INT'L L. REFLECTIONS, May 25, 2015, at 1, 4 n.2, 7 (invoking "proportionality" and "subsidiarity"); Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 76 (2010) (invoking "proportionality"); *see also* Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review*, 3 J. INT'L DISP. SETTLEMENT 577, 579-80 (2012). I am sympathetic to public law scholars' concern about the

this debate is portrayed as a conflict between commercial lawyers who tend to be "investor-friendly," and "state-friendly" public lawyers—as if private law is intrinsically insensitive to public regulatory values.[210] The approach advocated here belies this false distinction, to the benefit of states and investors alike. The treaty/contract issue is not zero-sum. The question of whether a treaty or contract norm gets priority does not easily divide into "investor-friendly" and "state-friendly" approaches. At least from the ex ante perspective, neither rigidity nor flexibility clearly favors one party or the other. Indeed, rigidity generally undermines *both* sides' interests ex ante, while flexibility is generally the optimal approach.[211]

The basic problem is that too much rigidity prevents states from adequately managing the significant risks entailed in high-value contracts with private parties—not least to their long-term regulatory autonomy. Take, for example, a typical damages rule. It is usually understood that the proper measure of damages for a violation of FET is fair-market value (FMV), which amounts to expectation damages in contract cases.[212] What if, however, the contract was negotiated under a national legal order that provides only reliance damages by default for contracts with the state? Or what if the parties explicitly selected a liquidated damages provision?

From the state's perspective, the stickier the FMV rule is, the more difficult it becomes for states to manage risks to their capacity to regulate in the future. High-value contracts with foreign investors will have an unavoidable chilling effect on subsequent regulation, which may in turn chill the prospect of contracting. This is all the more problematic when it comes to contracts in sensitive areas like the extractive industries or water services, which are perennially likely to generate risks to health and environment. And the chilling effects will be felt all the more acutely

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threat the regime poses to public values. But I am skeptical of the too-easy invocation of national or transnational public law doctrines as a panacea for global investment law—for both principled and contingent reasons, given current institutional arrangements. *See* Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545, 548-52 (2014); *see also Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion of Gary Born, ¶¶ 190-191 (rejecting the majority's transposition of the margin of appreciation into international investment law).

210. This is assuredly not true. As this Article has sought to demonstrate in one particular area, a nuanced approach to private law can be highly sensitive to public values. *See, e.g.*, DAGAN, *supra* note . Particularly in the transnational context, the power of contract can be highly liberating for states concerned to protect their public values.

[211] Notably, even *ex post*, it is not clear that any particular resolution to the treaty/contract issue will always hew toward one party or the other. Take, for example, a rule that treaty dispute resolution clauses are mere defaults. This cut against the Claimants in *SGS v. Philippines*, where the exclusive forum selection clause in the underlying contract prevented bootstrapping the contract claims to the level of the treaty via the umbrella clause. But the same rule cut against the Respondent in *Oxus*, where the Respondent was equally barred from bringing counterclaims against the Claimant under a contract that exclusively selected domestic courts for dispute resolution.

212. Tschanz & Viñuales, *supra* note , at 737.

by emerging economies. A rational state will have to price such risks into their contracts.

And herein lies the problem for investors—who may well want to shoulder more risk in the hopes of greater reward. In the context of foreign direct investment, some degree of risk in the hopes of greater rewards is , after all, the point. While it may seem, at the point of litigation, that any investor would want an investment treaty to offer as much protection to the private party as possible, the matter has to be assessed ex ante. If the treaty protections imposed on a contract are too great, the State may be pushed into offering investors less attractive investment opportunities in order to insure itself, or may even be dissuaded from contracting under the shadow of the treaty altogether. Such chilling effects are precisely the opposite of what these treaties seek to achieve—the protection *and promotion* of foreign direct investment.

By contrast, much of the sting of even highly investor-friendly rules would be removed if they merely provided default baselines—if, for example, the parties can contract around the presumption of FMV, that is, expectation damages, inhering in the treaty. True, the state might find itself on the back foot in contract negotiations—as compared to negotiating a similar contract with its own national, in which the law of the contract might entail a lesser measure (such as reliance damages) by default.[213] But, much more importantly, the power would still lie with the contracting parties to allocate the risks among themselves.

Contract represents *the* crucial tool for states to structure projects with investors in ways that allocate risk at tolerable levels. To the extent that states are concerned about the possible effects of high-value investment contracts on their capacity to regulate in the future, they ought to be able to insure against such risks in the structure of the deal. But these strategies only mitigate risk if such contractual choices are ultimately given effect. If highly protective treaty provisions are treated as mandatory rules, as is apparently implied by the rigid interpretations of investment treaties espoused by cases like *CMS Gas* and *SGS v. Paraguay*, it becomes much more difficult for states to manage their risks ex ante. The consequence of such a rule is not just regulatory chill, but *contractual chill*. If treaty provisions like a robust version of legitimate expectations or expectation damages are effectively mandatory, states will have to price these background norms into their deals with foreign investors in order to insure themselves—and in some instances the risks might dissuade them from contracting at all. Perhaps counterintuitively, the basic rule that contractual choices ought to be given priority over treaty norms *enhances* the autonomy of the state.

The approach here benefits investors as well. It might seem that foreign investors would want investment treaties to afford as much protection as possible. This would certainly appear to be the case from a glance at any investor's brief at the point of litigation, when investors are often engaged in bet the company cases. And it may be that as far as assets like real property go, the more treaty protection offered the better the inducement to invest. But this is not the case in contract.

213. *See* Serkin, *supra* note , at 916.

Particular investors may simply not value certain provisions—when, for example, they trust the state's national courts. To the extent that the state party values avoiding international arbitration, such investors should be able to offer opting out. In other cases, investors may *want* to take on some risk—no business venture is risk free, and in at least some cases an the appeal of foreign investment is the possibility of taking on elevated risks in the hopes of high rewards. And as importantly, sometimes such risks can be more efficiently managed in other ways, through, for example, political risk insurance.[214] Investors surely want some measure of security in engaging with foreign sovereigns, but not necessarily at the expense of all rewards. Certainly, at the least, they want states to be *able* to negotiate over risk. If, however, treaties create rigid rules that mandate certain allocations of risk, investors may not be able to secure the risk profile they want. If, for example, states are forced to anticipate paying expectation damages where changes in regulation vitiate the value of a contract, they may not be willing to negotiate with foreign investors at all—and even if so, a rational state will have to price in such risks. If the investor wants to shoulder some of the risk, say by agreeing to a liquidated damages provision, she should be able to make a meaningful offer to do so.

Finally, generally speaking neither party would want too many treaty provisions to be sticky, at risk of balooning the transaction costs of drafting. There may be some special exceptions where good policy reasons require making certain provisions more difficult to contract around—which I consider further below. But, in general, all parties should prefer to have confidence that their choices will be enforced without having to engage in too many drafting acrobatics.

The point is that, at least ex ante, investors and states alike should prefer an arrangement in which the treaty enables them to allocate risk as they see fit. The investor still gets a sizeable benefit from the treaty, which generally put in place highly protective provisions on breach, defenses, damages, and forum selection by default. Thus the state begins negotiation somewhat on the back foot. But at the same time the State will still be able to manage its risk so long as the parties' contractual choices ultimately take precedence over the background treaty norms.

C. Justifying Constraints on Choice

Insofar as investment treaties apply to contracts, their provisions should be presumptively understood as doing so only by way of defaults. The general rule should be that the contracting parties' choices prevail over background treaty

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[214] Public and private insurers offer investors insurance against political risks. DOLZER & SCHREUER, *supra* note ___, at 228-229. The Multilateral Investment Guarantee Agency (MIGA) is a good example. The MIGA is an international institution, connected to the World Bank. It offers prospective investors an array of schemes to ensure themselves against political and regulatory risks. *Id.* As importantly, it acts as an important go-between facilitating relationships between investors and states before disputes arise and in their early stages – often obviating the need for dispute resolution. *See* www.miga.org/who-we-are.

protections. Yet there may still be instances in which constraints on party choice might be justifiable.

Though they differ widely in extent, most national legal orders do incorporate some limits on contracting parties' capacity to choose how to structure their arrangements—partially (via sticky defaults) or completely (via mandatory rules).[215] Such constraints on party choice are usually justified in one of two broad ways: on grounds intrinsic to the logic of contract, or on the basis of external values. The first type of justification considers sticky defaults and mandatory rules appropriate where they serve to *enhance* party autonomy, for example by putting the parties on equal footing or by correcting for certain market failures.[216] These kinds of constraints serve to ensure the rules of the game, protect basic fairness among contracting parties, and the like. A second type of justification for constraining choice relies on extrinsic values—including, classically, mandatory rules invalidating contracts of enslavement or contracts to commit a crime.[217]

The same logic might apply to the treaty/contract issue in international investment law. Although in general there are strong reasons to allow parties to contract around treaty norms, there may be specific instances in which it makes sense to treat a particular treaty provision—or aspects of it—as sticky or mandatory. And as in national law, such reasons might be either intrinsic to the logic of contract, or extrinsic in the service of some other value.

Again, it must be borne in mind that the treaties do not clearly resolve the matter one way or the other, in general or vis-à-vis any of their norms. So interpreters are left to explore the issue on the basis of principles. Given the importance of the basic principle supporting party choice in investment contracts,[218] significant caution should be exercised here. A first corollary is that any such departure from the general rule favoring contractual choice must be justifiable and justified—not simply assumed, as several of the cases have been wont to do.[219] Ideally, we would also expect that, in determining that a default is sticky, a tribunal would afford some explanation of *how* the parties could have contracted out—for the benefit of future contracting parties.[220] A second corollary is that there are strong reasons to limit the pool of such exceptions. The greater the

215. *See, e.g.*, Ayres & Gertner, *supra* note , at 87.

216. *See, e.g.*, Ayres, *supra* note , at 2095-96.

217. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 764-65 (1983).

218. *See supra* Part III.A.

219. *Sempra*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); *Enron*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *CMS Gas*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

220. Ayres, *supra* note , at 2055 ("[I]n deciding any contractual issue concerning defaults, judges should presumptively provide ... contractual language that would allow future contractors to achieve the results desired by the losing party."). *See, e.g. Crystallex,* ICSID Case No. ARB(AF)/11/2, ¶ 482 (suggesting that a contractual exclusive forum selection clause will only be effective to waive treaty arbitration if it mentions the investment treaty by name).

number of sticky treaty defaults, the more complicated drafting becomes—which has an exponential effect on transaction costs.[221] There may be reasons to deviate from the general rule in some cases, but such sticky defaults should be based on especially compelling reasons and not be stricter than necessary.

Keeping these principles in mind, it is easier to start with the possibility of intrinsic justifications for constraints on contractual choice in investment treaties. The example of forum selection clauses provides a plausible example where stickiness might be justified—though I raise it only by hypothesis here, in full recognition that there may be countervailing reasons to limit investor-state dispute resolution to a default. The *SGS* cases reveal two distinct visions of interaction between contract and treaty on the issue of forum selection.[222] *SGS v. Philippines* privileges the contracting parties' choice to *exclusively* select national courts for the resolution of all disputes arising out of the contract—thereby displacing the treaty forum.[223] On this view, the treaty does not rewrite the contract.[224] *SGS v. Paraguay*, by contrast, privileges treaty over contract.[225] There, even an express clause exclusively selecting national courts does not waive the investor's right to international arbitration under the treaty.[226] On this view, from the ex ante perspective the treaty provisions must be understood as effectively mandatory. As argued above, the *SGS v. Paraguay* interpretation rests on a faulty premise that treaty and contract are radically separate, which should be discarded.[227] There is no good reason why fully informed and sophisticated investors and sovereign states should not be *able* to structure their investments around treaty jurisdiction. Indeed, investors may well want to disclaim such rights if it can fetch them a better price—especially if they are sufficiently confident in the national courts. But that does not mean such a provision should be easy to contract around.

Though treaty provisions on international dispute resolution should certainly be understood as defaults, there may be reason to treat them as relatively sticky. Recall that investment treaties are international agreements between states to protect their nationals, and most states are subject to numerous such

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221. Ayres, *supra* note , at 2055.

222. *See SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶¶ 128-129 (Feb. 12, 2010); *SGS v. Philippines*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶¶ 139-143 (Jan. 29, 2004).

223. *See SGS v. Philippines*, ICSID Case No. ARB/02/6, ¶ 143; *accord BIVAC v. Paraguay*, ICSID Case No. ARB/07/9, Objections to Jurisdiction, ¶ 152 (May 29, 2009).

224. Crawford, *supra* note , at 374. Crawford incidentally, chaired the *SGS v. Philippines* tribunal. *See also ConocoPhillips*, Abi-Saab Dissent, ICSID Case No. ARB/07/30.

225. *See SGS v. Paraguay*, ICSID Case No. ARB/07/29, ¶¶ 128-129.

226. *See id.* ¶¶ 125, 128-129.

227. *See supra* Part II.C.

instruments.[228] Investment treaties are meant to afford protection to all covered nationals, whether they know it or not. And there is real concern about whether investors are fully aware of their treaty rights in making the decision to invest abroad—indeed, the empirical evidence shows that, with the exception of repeat players in certain fields, like oil and gas, investors are often not aware that they might be empowered to sue host states before an international tribunal.[229] Arguably, then, there may be cause to push states to convey information to putative investors about their default rights to treaty fora, where they may not otherwise be aware of what they are giving up.

If such concerns about information asymmetries were sufficiently compelling, treaty provisions on dispute resolution might justifiably be act as a particular kind of sticky default—meant to force states to convey information about treaty rights to foreign investors—as apparently envisioned by the Tribunal in *Crystallex*.[230] Fully informed contracting parties could still get around such a clause, but only by including language evidencing that all sides were sufficiently informed. On this view, even the following clause might not suffice: "*all disputes shall be resolved exclusively before the courts of [x country]*." Though expressly exclusive, such a clause would not guarantee against the relevant information asymmetries. On this view, to contract around the treaty, states would have to ensure that the contractual clause put the investor on sufficient notice, for example by stating "notwithstanding the [BIT]..." or "notwithstanding the existence of any international fora ...".[231] Such clauses would ensure that the investor had been aware of her rights, and was thus satisfied with the contract's reallocation of risks.

Notice that this account is also similar to the Claimants' argument in *Kardassopoulos*, on the question of liquidated damages.[232] In my view, however, stickiness makes less sense in that context. To insist that all treaty provisions should be similarly sticky goes much too far—forcing the parties to disclaim the treaty by name any time they expect a contractual provision to deviate from its terms. Even aside from the transaction costs such drafting would involve, there is generally not sufficient reason to question the substantive deal between the parties. Any justification for treating forum selection as a special case would have to derive from

228. *See* Yackee, *supra* note , at 398.

229. *See* Yackee, *supra* note , at 400.

[230] *Crystallex,* ICSID Case No. ARB(AF)/11/2, ¶ 482.

231. *Id.* In another instance, Colombia contemplated this sort of reasoning in a 2014 draft concession contract, which sought to waive "investment arbitration contemplated in any [BIT] or other international treaty." República de Columbia, Ministerio de Transporte, Agencia Nacional de Infraestructura, "Contrato de Concesión Bajo el Esquema de APP No. [*] de [*]" [Model Agreement], *translated in* Strong, *supra* note , at 692. As an aside, it would be wiser for the *state* to opt for a more general waiver clause, rather than mentioning any particular BIT by name, because arbitral jurisprudence generally allows corporate investors to change their nationality to access myriad treaties with relative ease—even *after* executing the contract. Arato, *supra* note , at 275–76.

232. *Kardassopoulos*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, ¶ 481 (Mar. 3, 2010).

the structural importance of that particular provision.

There may indeed be compelling reasons for viewing treaty provisions on forum selection as sticky defaults. International dispute resolution by non-national arbitrators is, after all, the central structural innovation of the investment treaty regime—on which all confidence in the application of other treaty standards is based and on which the key enforcement mechanisms rely.[233] Given its structural and institutional weight, there are arguably special reasons to ensure that parties are sufficiently aware of what they are giving up—which may justify stickiness in this limited context. But this rationale should not be taken too far vis-à-vis other treaty standards. In the context of damages, for example, there is much less reason to worry about whether parties would not be aware of the precise meaning of a damages cap—whether or not they knew of the existence of the treaty.

And what of extrinsic values? It is possible that some treaty rules might be justifiably considered sticky, or made sticky, for reasons wholly external to the logic of contract—for example, in the service of protecting the state's capacity to engage in environmental or public health regulation. regulate in the areas of environment, or public health. A rationale for stickiness, in such contexts, would involve a classic concern about agency costs. The point is best expressed through hypothetical. The state's capacity to regulate in the public interest is an omnipresent controversy in international investment law. Investment treaties tend not to include general exceptions provisions granting states carve-outs for bonafide regulation in the public interest.[234] But occasionally such clauses appear, typically modelled on the WTO General Agreement on Tariffs and Trade (GATT).[235] For example, the 2012 Canada—China BIT provides a long list of carve-outs on the model of GATT Art. XX, covering *inter alia* regulation in the interest of protecting public health, the environment, public morals, and more.[236]

Imagine a hypothetical investment treaty on this model, which includes a typical FET protection, along with a clause modeled on GATT Article XX, exempting the state from liability for any measures necessary to secure public health, environmental protection, and public morals. An investor negotiates and

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233. The status of investor-state judgments as *international arbitral* awards links them to extremely powerful mechanisms for the enforcement like the New York Convention on foreign arbitral awards—allowing investors to effectively pursue delinquent states' assets across the globe. DOLZER & SCHREUER*, supra* note , at 310.

234 Céline Lévesque & Andrew Newcombe, *Canada*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 88 (edited by Chester Brown, 2013). Increasingly treaties have incorporated more specific clauses to that effect with regard to indirect expropriation claims, but generally not in the context of FET. *See* Arato, *supra* note ___.

235 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

236 Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, art. 33 (2012)[Hereinafter Canada—China BIT]. Several of Canada's BIT's include clauses of this kind. *See* Lévesque & Newcombe, *supra* note , at 88.

executes a contract to explore dolomite in the state with a relatively low level official in the ministry of finance (or even a representative of a state-owned entity). Assume the contract includes a sweeping stabilization clause, guaranteeing the investor full compensation for any subsequent regulation that undermines the value of the contract. A year later the legislature passes sweeping environmental reforms that reduce the investor's future profitability by 60%, and the investor brings suit under the Treaty. Can the State take advantage of the exceptions clause, or does the contract's stabilization clause trump the State's treaty protection? In other words, is the exceptions clause a mere default, a sticky default, or is it mandatory?

Since the issue is speculative, we can momentarily skip the question of proper interpretation and start with the normative question: what would be the rationale for making such an exceptions clause difficult to contract around? In my view, there is a compelling argument about agency costs here. The reality of foreign direct investment is that major investment projects are often executed by relatively low ranking state actors—and often employees of state owned enterprises. Many states lack the resources (or expertise) to rigorously vet these contracts across all government agencies for whom they might be relevant. If a hypothetical treaty exeptions clause were a mere default, a contractual stabilization clause like the above would seem to have the effect of abrogating the exception completely. States might thus be justifiably worried about the possibility of lower level officials without all relevant expertise waiving the state's regulatory exemptions under the treaty. Making the treaty exceptions sticky or mandatory would go a long way toward addressing these agency costs. A mandatory rule would eliminate such costs completely, though at the expense of some of the State's bargaining power should it affirmatively want to offer such a stabilization clause in full knowledge of the consequences. A sticky default rule, dependent on a "notwithstanding international law" clause, would at least help ensure that the state officials were contracting on behalf of the state with adequate information.

Agency costs might provide a good justification for making a general exceptions provision resistant to contractual opt-out. If states were to contemplate enacting such a clause, they might take pains to make it sticky or even mandatory. Of course, if they were so inclined, it would be best to do so explicitly in the treaty text—in the mode of the CISG, or in national contract law-by indicating whether the clause could be waived at all, and if so, by what magic words. We need not speculate about how an interpreter should address this question absent any affirmative treaty language. Suffice it to say that extreme caution would be appropriate.

Framed in formal international legal terms, treating a *limited* set of treaty norms as sticky defaults could—in principle—resonate with the object and purpose of investment treaties. But such instances would have to be strictly justified. The treaties' twin goals are, again, to protect and promote foreign direct investment.[237] In the context of contractual investments, this means respecting the parties' bargains. In most cases this will mean privileging the parties choices. However,

237. *See* Yackee, *supra* note , at 398.

partially constraining choice may be occasionally necessary to ensure that the law is protecting real bargains—ensuring that they are arms-length deals between sufficiently sophisticated parties. And treaty parties may well seek to constrain party choice in the service of values wholly extrinsic to the logic of contract. This may mean that some treaty norms are properly understood as stickier than others.

IV. Conclusion: Toward a Better International Law of Investment Contracts

Investment treaties are creating a new international law of contracts, governing arrangements between states and foreign investors. But they are largely silent about what kind of law they create, and in particular how their norms relate to the express choices made by states and foreign investors in their covered contracts.[238] I have argued that the jurisprudence lies in disarray, creating unbearable uncertainty.[239] The case law's unjustified divergences make investing through contract insecure and highly inefficient, and pose a real threat to the state's regulatory autonomy. I have proposed, here, a principled way of grappling with the problem, grounded—perhaps counterintuitively—in private law.[240]

Drawing from the logic of contract, the basic organizing principle should be the choice of the parties. Privileging contractual choice in investment law is, unsurprisingly, the best way to enable investors to secure efficient contracts with foreign sovereigns. But it is equally the best way to empower states, without giving up on all security for investors. Contractual freedom here *enables* states to manage risk to their regulatory capacities. Privileging choice recognizes that the contracting parties are best positioned to regulate their interactions themselves, and empowers them to do so. This means understanding treaty norms as mere defaults, which can be overturned by any explicit contract language (if not choice of law). To the extent that they apply to contracts, treaties should serve the logic of contract—as systems of private law oriented toward self-regulation by private parties.

As a corollary to that principle, however, a degree of constraint on party liberty can be autonomy enhancing in some instances.[241] Privileging the treaty over terms in the contract may make sense under certain limited circumstances—as, for example, a sticky default in cases when informational asymmetries seem likely to create a market failure, or otherwise undermine the goals of the investment treaty. Given their centrality in the treaty system, forum selection provisions might be a plausible candidate.[242] Constraints on choice might also be justified on the basis of

238. *See* Arato, *supra* note , at 546.

239. *See supra* Part II.

240. *See supra* Part III.

241. *See* Ayres & Gertner, *supra* note , at 97.

242. *See supra* Part III.C.

values completely extrinsic to contract—though here in particular such constraints would be far more legitimate where formally enacted in the treaty text. But in any case, adjudicators ought to view such situations as exceptional, and carefully justify deviation from the norm by appeal to the logic of contract itself—rather than by simply insisting on the formal difference between treaty and contract claims, or by appealing to the general conflicts rule governing international law and national law.