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Corporations as Lawmakers

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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 simple 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

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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 conflicting 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.

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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'Acadêmie 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.

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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

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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); *see 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-

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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-

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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-

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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

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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

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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

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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

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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.

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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

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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*.

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

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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-

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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]

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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]

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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.