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Foreign Investments and the Market for Law

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In this Article, Professors O'Hara O'Connor and Franck adapt and extend Larry Ribstein's positive framework for analyzing the role of jurisdictional competition in the law market. Specifically, the authors provide an institutional framework focused on interest group representation that can be used to balance the tensions underlying foreign investment law, including the desire to compete to attract investments and countervailing preferences to retain domestic policymaking discretion. The framework has implications for the respective roles of BITs and investment contracts as well as the inclusion and interpretation of various foreign investment provisions.

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I. INTRODUCTION

Larry Ribstein was blessed with an amazingly creative mind and with it he worked hard to develop a large number of generative ideas. Among his many intellectual strengths, Larry had a delightful ability to take another's argument, turn it on its side, and deliver it back to the author with new possibilities for scholarship. With Larry's spirit of intellectual generosity, we hope to do the same here, using his jurisdictional competition ideas. In particular, we consider the extent to which Larry's insights on jurisdictional competition can help to resolve controversies surrounding international investment law, through bilateral investment treaties ("BITs") and investment contracts.

Larry's insights regarding jurisdictional competition were particularly strong. Building on prior work in the area, Larry wrote a series of articles and a book highlighting the importance of choice of law for sparking jurisdictional competition among governments for laws desired by private parties, in particular contracting parties.[1] In essence, contracting parties utilize a number of means for maximizing their joint gains to transacting, including choosing the law and other rules that best serve their private interests.[2]

In *The Law Market*, Ribstein and O'Hara provided a framework for thinking about jurisdictional competition for governing law in which private parties on the demand side shop for governing laws supplied by states.[3] Those governing laws included rules for regulating and for otherwise helping the parties to order their conduct and relationships.[4] Through courts, the states also acted as neutral arbiters in cases where the parties sought conflict resolution, and in these cases, the courts issued

1. *See generally* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009); F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars,* 2001 U. ILL. L. REV. 561; Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies,* 2011 U. ILL. L. REV. 91; Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law,* 35 SEATTLE U. L. REV. 1165 (2012); Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law and Software Sales,* 8 GEO. MASON L. REV. 261 (1999); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law,* 67 U. CHI. L. REV. 1151 (2000); Erin Ann O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the United States and Europe,* 82 TUL. L. REV. 2147 (2008); Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law,* 2008 U. ILL. L. REV. 661 [hereinafter Ribstein & O'Hara, *Corporations*]; Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law,* 19 DEL. J. CORP. L. 999 (1994) [hereinafter Ribstein, *Delaware*]; Larry E. Ribstein, *E-Marriage and the Market for Marriage Law,* 2011 MICH. ST. L. REV. 1111 (2011); Larry E. Ribstein, *Ethical Rules, Law Firm Structure and Choice of Law,* 69 U. CIN. L. REV. 1161 (2001); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law,* 37 GA. L. REV. 363 (2003) [hereinafter Ribstein, *From Efficiency*]; Larry E. Ribstein & Bruce H. Kobayashi, *State Regulation of Electronic Commerce,* 51 EMORY L.J. 1 (2002).
2. *See generally* O'HARA & RIBSTEIN, *supra* note 1, at 66–73.
3. *Id.* at 66.
4. *See generally id.* at 65–84.

choice-of-law decisions that could be influenced by the parties' contract. For better or worse, jurisdictional competition can force states to become price takers in the market for law, with the result that many legal rules intended to be mandatory effectively become default rules.[5] Put differently, the desire to attract or at least retain assets, jobs, talent, and tax base can cause states to allow parties to opt out of local law. In the end, however, the states choose whether to enforce the parties' choice of law.

In *The Law Market*, Ribstein and O'Hara focused on describing the jurisdictional competition phenomenon in positive terms, and then determining which governmental institutions within the United States were best situated to make decisions about whether private parties should be permitted to opt out of governing laws. Specifically, in hard cases, the legal question typically pits competing interest groups against one another, with exit-affected groups pushing for private choice, and some domestic interests pushing for maximal retention of the influence of domestic laws and regulations. The authors proposed a federal choice-of-law statute designed to help ensure that these competing interests would have maximal representation in the choice-of-law decision. From this perspective, the choice-of-law decision is better housed in legislatures than in courts. Legislative decisions also promote clearer rule making than current judicial treatment of the enforcement of choice-of-law clauses, and that clarity would provide valued predictability for private parties. Furthermore, other sovereigns would be more likely to respect the wishes of a state with clear legislative determinations on the matter. Finally, clear rules would enable the law market to function more efficiently. To facilitate this institutional shift, O'Hara and Ribstein's proposed federal statute provided that choice-of-law clauses were to be enforced unless the state legislature provided otherwise. In addition to promoting the benefits stated above, the proposed statute would place a thumb on the scale in favor of enforcement of choice-of-law clauses, which could serve to facilitate the law market.

In this Article, we hope to extend the law market framework while adapting it to jurisdictional competition for international investment. Our aim is to find insights for the legal treatment of BITs and investor-state contracts, a topic unexplored in *The Law Market*. Because states actively seek to attract foreign investment through a variety of legal and economic incentives, the law market framework should provide an especially useful lens through which to view foreign investment law. States clearly compete to provide legal mechanisms that are appealing to foreign investors—including through BITs and foreign investment contracts. But the effects on the law market go deeper than these instruments. BITs and investment contracts make it easier for commercial activities and assets to cross national borders, which means that those instruments enhance global asset mobility. This mobility is key to the functioning of the law market more generally. Put differently, enhanced foreign in-

5. *See id.* at 15.

vestment increases jurisdictional competition pressures on the state to provide more appealing commercial laws across the board.

Although we are not the first to identify this connection between jurisdictional competition and foreign investment law, we believe that we are the first to give the topic sustained attention. Typically, authors view jurisdictional competition either as a normative good or bad.[6] For the former group, international investment instruments presumably should be promoted and interpreted as broadly as possible to continue to foster this jurisdictional competition.[7] For the latter group, international investment instruments presumably should be eliminated, scaled back, and/or interpreted as narrowly as possible to enable states to serve other important domestic interests.[8]

In the spirit of *The Law Market,* we instead focus on how best to ensure that all interests, exit-affected and otherwise, can participate in state commitments regarding foreign investment. As in *The Law Market,* we take this approach recognizing that jurisdictional competition for foreign investment is neither wholly good nor bad, as an objective matter.[9] Although many states work to attract foreign investment, it is reasonable to conclude that, in general, sovereigns strive to do this at the least possible cost to their sovereign authority.[10] The questions regarding a state's demand for foreign investment and willingness to pay for that investment with constraints on governmental authority is a function of the balance of interests within each state, which will differ across states. Thus, the best way for each state to determine its optimal tradeoff is to adopt mechanisms that promote participation by affected interests.

Foreign investment often implicates obligations that result from BITs negotiated by two nations' governments. In BITs, each state agrees

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6. To put it otherwise, scholars take positions on whether jurisdictional competition leads to a race to the top or to the bottom.

7. For example, to support his conclusions that Most-Favored-Nation provisions should be interpreted as broadly as possible, Schill argues, in part:

> The policies underlying investment treaties further justify the broadening of MFN treatment to include the host State's broader consent to investor-State dispute settlement. Their object and purpose consist in promoting and protecting foreign investment, *often with a particular focus on directing investment flows into developing countries*. A crucial factor to this objective is the protection of foreign investors by ensuring the stability and predictability of their investment activities and their investment-related rights. Above all, the enforcement of BITs' substantive obligations helps to transform mere statements of political intent into enforceable rights. Giving foreign investors recourse to investor-State arbitration *therefore adds to promoting foreign investment flows* and achieving the purpose of investment treaties.

Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored Nation Clauses,* 27 BERKELEY J. INT'L L. 496, 554 (2009) (emphases added).

8. *Cf.* Daniel C. Esty & Damien Geradin, *Environmental Protection and International Competitiveness: A Conceptual Framework*, 32 J. WORLD TRADE 5, 7 (1998) (discussing how competition for foreign investments can hinder environmental protection); H. Jeffrey Leonard, *Confronting Industrial Pollution in Rapidly Industrializing Countries: Myths, Pitfalls, and Opportunities*, 12 ECOLOGY L.Q. 779 (1985) (same).

9. *See* O'HARA & RIBSTEIN, *supra* note 1, at 12 (conceding that it is very difficult to determine how much constraint on law market freedoms is appropriate).

10. We set aside here the possibility that some constraints are essentially political in nature, as when political conservatives tie the hands of the government to raise tax rates or regulate industry conduct. This too could be a result of interest group competition.

to grant certain rights and protections to investors from the other state.[11] Commonly, BITs empower foreign investors to sue the host state for failure to abide by its promises.[12] In addition, some foreign investment takes place only after a contract is formed between a host state and the foreign investor.[13] In that investor/state contract, or "investment contract," the state agrees to provide certain protections to the investor, often in return for the investor taking on certain obligations regarding its conduct within the nation.[14] The investment contract could simply involve this exchange of obligations as a prerequisite either to the investor gaining permission to do business in the state or to the investor's willingness to make an investment, or both.[15] The investment contract can also be concluded as part of a transaction where the investor receives a concession or agrees to provide some good or service to the state.[16]

To a significant degree, the state's dilemma here is similar to that presented in *The Law Market*. States seeking to attract assets and other investments compete with one another to create legal environments that are desired by the investors. One desired rule is a commitment not to impose costly regulations on the investor. These commitments, however, can hamper efforts by domestic interests in the state to obtain laws that benefit them. Consider, for example, domestic pressures to protect air or water quality, or to raise the minimum wage. As a result, some domestic interest groups will pressure the government to provide laws that are less desirable to the mobile investors. The degree to which a state is willing to compete in the law market will turn on the relative balance of power between these competing interest groups. Treating the legal issues surrounding foreign investment might therefore benefit from an institutional analysis akin to that used in *The Law Market*.

The role of the state differs in the context of international investment, however, for several reasons, which will require a modification of the law market framework. First, in *The Law Market*, O'Hara and Ribstein did not fully consider state efforts to constrain legal reforms as a

11. CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 45 (2007).

12. *Id.*

13. Jason Webb Yackee, *Toward a Minimalist System of International Investment Law?*, 32 SUFFOLK TRANSNAT'L L. REV. 303, 321 (2009).

14. *Id.* at 322.

15. *See* Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT'L L. 1, 18–20 (2009) (providing example of construction and service contract as form of investment contract); Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 811–12 (2008) (using example of concession contracts as common form of investment contract).

16. Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 32 (1998); 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, 1585 (2009) (describing a concession made by Libya in a contract with British Petroleum); *see also* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 63 (2013) (discussing how investment contracts between private investors and public authorities can involve "a concession contract for developing natural resources or the privatization of government services like water and electricity").

device for attracting the mobile. In the international investment context, states often sign BITs with other states that can severely limit a state's ability to respond to competing domestic interests.[17] In addition, unlike in *The Law Market* context, BITs typically take legal questions out of the hands of state courts and place them into the hands of arbitral tribunals. Some choices of arbitration forum carry with them a choice to opt out of state law and into international law principles for purposes of determining the scope of the state's BIT obligations; by placing the ultimate determination in the hands of external arbitrators, the state loses its ability to fine-tune its legal incentives through interpretation of domestic laws.

Second, *The Law Market* only considered situations where private parties entered contracts, but foreign investment often involves states as contracting parties. The state's contract provides it with an additional mechanism to make commitments in return for foreign investment. In investment contracts, states often undertake different obligations than those undertaken in the BIT, for a variety of reasons, raising questions about how to accommodate potentially contradictory promises. In particular, does the BIT, the contract, or some combination of the two best reflect the state's judgment about how to resolve the tension between attracting investment and retaining the sovereign authority to address other domestic interests?

Third, the institutional design questions differ in the foreign investment context, at least in those circumstances where states commit to allow independent arbitrators to resolve their disputes with investors. In the law market context, choice-of-law questions were determined either by courts or legislatures. In the foreign investment context, the state's statements about the governing rules are formed through legislative and executive decisions, with domestic courts playing little or no role. From an institutional perspective, then, resolving tensions between investment contracts and BITs can require a comparative institutional analysis between the executive and the legislative branches of government. But given that nation states differ significantly in their governmental structures, even this comparison will not work for all involved states.

Although BITs have been very popular in the last thirty years, they have recently been heavily criticized. Specifically, states, nongovernmental organizations ("NGOs"), and scholars have begun to question whether it makes sense for states to continue to sign BITs given their potential liabilities and the threat BITs pose to effective sovereign authority.[18] A

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17. Some BITs have sunset provisions that enable them to reverse course with respect to future investors, but only after a number of years, and other BITs have no sunset provisions at all. *See* PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 109 (1997) (describing the sunset clause of a particular BIT); LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 104–05 (2010).

18. *See, e.g.*, PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM 12–18 (2012), *available at* http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf;, Gus Van Harten et al., Public Statement on the International Investment Regime ¶ 8 (Aug. 31, 2010), *available at* http://www.osgoode.yorku.ca/public-statement/documents/Public%20Statement%

few states have decided that the marginal contribution to investment does not justify the costs of treaty commitments; these states are either walking away from prior treaty commitments or at least refusing to continue to agree to potentially far-reaching concessions in future BITs.[19] At the same time, and in part in light of the BITs controversy, a number of important issues have arisen in recent years regarding BIT interpretation and the interplay between BITs and investment contracts. We believe that a modified law market framework carries the promise of reshaping the debate toward one of how best to accommodate competing interests. This more neutral approach could lead to a watering down of foreign investment instruments at the margin, but it could prevent states from walking away from BITs and international arbitration.

We adapt the conceptual structure provided in *The Law Market* to help evaluate the claims of states, investors, arbitrators, scholars, and other active participants in the debate over the appropriate interpretation of foreign investment instruments. Part II provides background information about the growth of BITs as well as the multiple mechanisms that states use to make commitments designed to attract foreign investment. It also identifies some of the thorny interpretation questions that surround BITs and investment contracts. Part III explores the role of BIT umbrella clauses and offers a way for states to use a combination of umbrella clauses, treaty reservations, and investment contract provisions to most effectively fine-tune investment incentives. We also provide a preliminary discussion of the potential implications of our analysis for other BIT and contract provisions.

II. THE RISE OF THE BIT AND ITS INTERPLAY WITH INVESTMENT CONTRACTS

This Part provides a brief description of the rise of BITs over time in Section A and then situates BITs in the menu of state foreign investment commitment mechanisms in Section B. Section C then explains some of the BIT interpretation issues that have arisen in investment arbitration. Underlying these interpretation issues is the basic controversy

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20(June%202011).pdf. *But see Incorrect Claims About Investor-State Dispute Settlement,* EUR. COMM'N (Oct. 3, 2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151790.pdf (identifying the European Union's views about several inaccuracies related to the debate about investment treaties). *See generally,* THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel et al. eds., 2010) (gathering sources related to the debate about the value of investment treaties); SUSAN D. FRANCK, INVESTMENT TREATY ARBITRATION: MYTHS, REALITIES AND COSTS (forthcoming 2015) (same).

19. Russia, for example, has withdrawn from the Energy Charter Treaty; Ecuador has withdrawn from the ICSID Convention and is seeking to narrow the scope of its dispute resolution obligations. In slight contrast, Australia has decided to continue to pursue investment treaties but has rejected the use of arbitration as a method of dispute settlement given efficiency concerns and the net value of treaties as being "oversold." DEP'T OF FOREIGN AFF. & TRADE, AUSTL. GOV'T, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (2011), *available at* http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx; Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603, 650 (2013); *see also infra* note 27 and accompanying text.

over BITs and the question of whether BITs, on the whole and as interpreted, unduly hinder sovereign authority.

A. The Rise of the BIT

States turned to BITs after several failed attempts to use international vehicles to create shared global understanding about the law of international investment and the rights of foreign investors. An attempt to form a multilateral agreement on international investment failed miserably,[20] as did efforts to get the United Nations to come to an understanding about customary international law treatment of the meaning and content of expropriation.[21] In addition, the International Court of Justice ("ICJ") proved to be an unsatisfactory forum for clarifying and enforcing state obligations regarding foreign investor treatment for several reasons. To start, ICJ cases needed to be brought by the investor's state, and the resulting diplomatic complications chilled prosecutions.[22] Moreover, the ICJ rarely awards monetary damages; when it does, the ICJ awards the state—not the investor—damages, and collection can prove difficult.[23] In a sense, then, law market pressures facilitated the rise of investor rights where traditional international law efforts arguably failed.

By the late 1950s it seemed clear that in order to effectively protect foreign investment, investors would need their own enforcement rights. In many instances, national courts were a poor forum for resolving investor claims. Often, investors did not trust the host state's courts to render neutral decisions and/or doubted whether the host state's courts had sufficient expertise or resources to adjudicate complex transnational disputes. Meanwhile, the host states did not wish to cede their sovereign authority to another nation's courts.[24] Thus, investors needed to be able to bring their claims in neutral and expert nonstate forums. In order to facilitate such dispute resolution, the World Bank formed the Interna-

20. *See* Julie A. Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?,* 14 J. INT'L ECON. L. 157, 158–59 (2011); Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEO. J. INT'L L. 531, 578 n.209 (citing K. Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network* (1999), http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 140 (2006).

21. ANDREW NEWCOMBE & LUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT § 1.20, at 25–26 (2009); Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 678 (1998); Matthew C. Porterfield, *State Practice and the (Purported) Obligation Under Customary International Law to Provide Compensation for Regulatory Expropriations*, 37 N.C. J. INT'L L. & COM. REG. 159, 171–72 (2011).

22. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions,* 73 FORDHAM L. REV. 1521, 1536–37 (2005).

23. FRANCK, *supra* note 18.

24. *Cf.* Alejandro M. Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 9 TULANE J. INT'L & COMP. L. 93, 166 n.99 (1995) (noting similar problem regarding choice of law for foreign investment contracts).

tional Centre for Settlement of Investment Disputes ("ICSID"); its "primary purpose . . . is to provide facilities for conciliation and arbitration of international investment disputes."[25] States signed on to this forum for dispute resolution through a multilateral treaty formed by the World Bank and opened for signature in 1965.[26] Although the Convention provides basic rules of the road for ICSID arbitration, it does not by itself obligate states to participate in ICSID arbitration.[27] Instead, member states can consent to be bound by ICSID arbitration in other documents, including BITs and investment contracts.[28] Currently, 150 states are parties to the ICSID Convention,[29] with Ecuador, Bolivia, and Venezuela acting as vocal dissenters.[30] When states agree to ICSID arbitration, international law principles are used to resolve the parties' dispute, and there is no designated place of arbitration.[31] One consequence of this fact is that all ICSID member states have an obligation to help enforce the arbitration award, and no member state is permitted to decide that the award somehow violates its domestic laws.[32]

25. About ICSID, int'l Ctr. for Settlement of Inv. Disputes, https://icsid.worldbank.org/ICSID/Index.jsp (last visited July 12, 2014); *see also* Puig, *supra* note 20, at 550 (discussing the purpose of ICSID).

26. *About ICSID*, *supra* note 25.

27. *Id.*

28. For a discussion of the circumstances under which host nations are willing to agree to submit to ICSID arbitration in their BITs, see generally Todd Allee & Clint Peinhard, *Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions*, 54 INT'L STUD. QUART. 1 (2010).

29. *List of Contracting States and Other Signatories of the Convention* (as of November 1, 2013), INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, (Nov. 1, 2013), https://academia.edu/5423493/ICSID_3_LIST_OF_CNTRACTING_STATES_AND_OTHER_SIGNATORIES_OFTHE_CONVENTION (showing that although 158 states have signed the convention, only 150 have deposited their instruments of ratification). Of note, Canada, which avoided signing the ICSID Convention for over thirty years, ratified the Convention in November 2013. Press Release, Int'l Ctr. for Settlement of Inv. Disputes, Canada Ratifies the ICSID Convention (Nov. 1, 2013), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement138.

30. Bolivia withdrew from the ICSID Convention in May 2007, and under the Convention, the withdrawal takes effect six months after such notice is provided. Press Release, Int'l Ctr. for Settlement of Inv. Disputes, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3.
Ecuador withdrew from the Convention in July 2012. Press Release, Int'l Ctr. for Settlement of Inv. Disputes, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20. Venezuela withdrew from the Convention in January 2012, after Hugo Chavez made public statements denouncing the Convention. *Chávez No Aceptara´ los Fallos de un Órgano Internacional contra sus Expropriaciones* [*Chávez Will Not Accept the Rulings of an International Body against his Expropriations*], BBC MUNDO (Jan. 8, 2012), http://www.bbc.co.uk/mundo/ultimas_noticias/2012/01/120108_ultnot_venezuela_chavez_petroleo_exxon_fp.shtml.

31. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 54(1) Mar. 18, 1965, 4 I.L.M. 524 [hereinafter ICSID Convention] ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.").

32. *Id.* at art. 54; *see generally* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1115–1120 (2d ed. 2009) (discussing how ICSID functions as a mechanism for the settlement of investor-host State disputes).

Other arbitral venues are sometimes chosen in BITs and investment contracts, including the Stockholm Chamber of Commerce, the International Chamber of Commerce, and *ad hoc* arbitration under the UNCITRAL rules.[33] Arbitration awards rendered through any of these alternative means are likely enforceable under the New York Convention, which has over 145 signatories.[34] New York Convention arbitration differs from ICSID arbitration in that there will be a place of arbitration, and the courts of that state have some, albeit limited, authority to vacate the arbitration award.[35]

State negotiation of BITs started at about the same time as the formation of the ICSID Convention, with the first BIT signed between Germany and Pakistan in 1959.[36] BITs became increasingly common during the 1980s and 1990s as a mechanism for spurring growth in developing markets.[37] By 1999, 1800 BITs were in force across the world. By 2010, that number had grown past 2600.[38] The number of new BITs has slowed down in recent years, with a small number of states announcing an intention to back off the signing of new BITs.[39] Nevertheless, states regularly negotiate a sizable number of BITs, and the current number of signed BITs worldwide exceeds 2800.[40] The number of BIT disputes has also risen in recent years. In 1990, only one investment treaty arbitration had been conducted.[41] To date, more than 300 awards have been issued.[42]

Alongside the growth of BITs, there has also been a massive increase in foreign investment. By 2012, the global total of foreign direct investment stock was estimated to be approximately $23 trillion,[43] with

33. *See* Allee & Peinhardt, *supra* note 28, at 3–6 (identifying different types of dispute resolution options in treaties); Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 38–40 (2007) (discussing research about where claims have been brought); Yackee, *supra* note 15, at 808 (identifying different types of dispute resolution options in treaties).

34. Franck, *supra* note 22, at 1549 nn.109–10.

35. *Id.* at 1547–57 (comparing enforcement procedures).

36. Wong, *supra* note 20, at 147–48.

37. *Compare* Working Grp. II (Arbitration and Conciliation), Comm'n on Int'l Trade Law, Rep. on its 53d Sess., Oct. 4–8, 2010, ¶ 85 U.N. Doc. A/CN.9/712 (Oct. 20, 2010) (referring to "more than 2,500 investment treaties in force" and citing to the UNCTAD dataset without acknowledging that signed treaties may be in force) *with* Marie-France Houde, Org. for Econ. Cooperation & Dev., *Novel Features in Recent OECD Bilateral Investment Treaties*, *in* INTERNATIONAL INVESTMENT PERSPECTIVES 144 (2006) (suggesting only 1700 IIAs were in force) *and* Catherine M. Amirfar & Elyse M. Dreyer, *Thirteen Years of NAFTAs Chapter 11: The Criticisms, The United States's Responses, and Lessons Learned*, 20 N.Y. INT'L L. REV. 39, 39 (2007) (indicating over 2000 IIAs are in effect).

38. *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 833 (2012).

39. UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT xix–xx, U.N. Sales No. E.13.II.D.5 (2013) [hereinafter UNCTAD, *WIR 2013*] (indicating that in the early 1990s around four IIAs were signed per week, whereas in the last three years, the average has dropped to one IIA per week).

40. FRANCK, *supra* note 18.

41. *Id.*

42. *Id.* (identifying that over 272 awards in 202 different cases were public by January 2012 and noting that, on average, about thirty awards are rendered every year).

43. *See* UNCTAD, *WIR 2013, supra* note at 39, at xv, 217; *see also* UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES 84–86, U.N. Sales No. E.12.II.D.3. (2012) [hereinafter

approximately seventy percent of that investment subject to the protections of BIT treaties.[44] Although it is not clear whether the investment causes the BITs or vice versa,[45] it is clear that foreign investment opportunities would be considered substantial by any government.

BIT provisions vary, but all BITs contain rights that the signatory states each agree to provide to the other's investors. Most commonly, BITs ensure national treatment (legal treatment on a par with what the nation provides to domestic investors) and most-favored nation ("MFN") treatment (investors from the counterparty will receive protections granted in BITs the host state forms with other nations).[46] In addition, BITs typically provide the investors with rights to the state's full protection and security of foreign interests, rights to compensation in the event of state expropriation, and an unfettered right to transfer assets and profits out of the country.[47]

BITs also ordinarily empower investors to sue the signatory state for breaches of the BIT, and modern BITs tend to include a dispute resolution provision which designates a forum for the resolution of investor-state treaty disputes. Common forums for dispute resolution include ICSID, the International Chamber of Commerce, and the Stockholm Chamber of Commerce.[48] Some treaties provide for *ad hoc* arbitration (outside the auspices of arbitral institutions) using UNCITRAL arbitration rules.[49] A few BITs require investors to bring their claims in domestic courts.[50] BIT treaty provisions are typically interpreted and enforced using international law principles, but choice-of-law problems can arise. In this context, the choice is typically one between international law and the domestic law of the host state.[51]

Over time, umbrella clauses also became common features of BITs.[52] Where present, umbrella clauses serve to close gaps in BIT protections by separately stating that the state agrees to comply with its commitments.[53] The language in umbrella clauses can vary, but often the

UNCTAD, *WIR 2012*]; UNITED NATIONS CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2011: NON-EQUITY MODES OF INTERNATIONAL PRODUCTION AND DEVELOPMENT xii, 191, U.N. Sales No. E.11.II.D.2. (2011) [hereinafter UNCTAD, *WIR 2011*].

44. UNCTAD, *WIR 2013, supra* note 39, at 217; UNCTAD, *WIR 2011, supra* note 43, at 102–03, 191.

45. *See* Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, *1960–2000*, 2008 U. ILL. L. REV. 265, 281–82 (suggesting that BITs spur foreign direct investment, which in turn spurs the creation of more BITs).

46. Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisource Investment Claims,* 99 AM. J. INT'L L. 835, 837 (2005).

47. *Id.*

48. Franck, *supra* note 33, at 12.

49. *See supra* note 33 and accompanying text.

50. Allee & Peinhard, *supra* note 28, at 1–2; Yackee, *supra* note 15, at 811 n.5.

51. NEWCOMBE ET AL., *supra* note 21, at 75–120; Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 191, 201 (Katia Yannaca-Small ed. 2010); *see generally* HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW (2013).

52. Shany, *supra* note 46, at 837.

53. *Id.*

wording is vague and broad. For example, the clause might provide that each state shall maintain the obligations it has incurred with respect to "the covered investments."[54] Another common phrasing is that each state agrees to keep its "commitments concerning the investment."[55] Arbitral tribunals disagree over whether such umbrella clauses work to elevate investor-state breach of contract claims to treaty violations resolvable in the arbitral venues chosen in the applicable BIT.[56] We return to this question in Part III.

Scholars debate whether, to what extent, and under what circumstances, the BITs successfully increase foreign investments.[57] Some claim that BITs substantially benefit host-state economies,[58] but pessimists argue that so many BITs now exist that states receive little or no special benefit to signing them.[59] Others argue that BITs are just one mechanism for encouraging foreign investment and that domestic law coupled with investment contracts and political risk insurance can provide as much benefit to the state as a BIT.[60] A few scholars have begun to tease out the specific circumstances where BITs provide investment incentives.[61] Part of the difficulty in resolving this debate is a distinct lack of good data on foreign direct investment;[62] in addition, BITs work together with other state commitment devices, so tracking increased investment due solely to the BIT is nearly impossible.[63] Regardless of the actual marginal effect of signing BITs these days, the timing of BIT signing[64] and com-

54. *See id.* at 837 n.13 (citing Agreement for the Promotion and Protection of Investments, India-UK, Apr. 14, 1994, art. 3(3), 34 I.L.M. 935 (1995); Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Russ.-U.S., June 17, 1992, art. 2(2)(c), 31 I.L.M. 794 (1992)).

55. *See* Wong, *supra* note 20, at 162.

56. *See infra* Part III.C.1.

57. *Compare* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 111 (2005) (concluding that BITs work to substantially increase FDI into signatory countries) *with* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 434 (2011) [hereinafter Yackee, *Alternative Evidence*], *and* Clint Peinhardt & Todd Allee, *Failure to Deliver: The Investment Effects of US Preferential Economic Agreements*, 2012 WORLD ECONOMY 757 (finding that very few countries experience increased investment flows after signing preferential economic agreements, including BITs, with the US).

58. Salacuse & Sullivan, *supra* note 57, at 111–12.

59. For example, Yackee argues that BITs are not meaningfully correlated with political risk measures, nor do insurers seem to take BITs into account when deciding insurance terms. In addition, limited surveys of in-house counsel for large corporations suggest that companies do not view BITs as playing a major role in investment decisions. Yackee, *Alternative Evidence, supra* note 57, at 414–26. Evidence that BITs have reached their saturation point can be found in the recent shift toward multilateral investment treaties.

60. *Id.*

61. *See, e.g.*, Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment,* 65 INT'L ORG. 401, 402 (2011) (finding that BITs increase FDI only when the host state is not later challenged before ICSID); Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L ORG. 1, 2 (2011) (reviewing conditions where BITs are linked with increased investment).

62. Yackee, *Alternative Evidence, supra* note 57, at 410–11.

63. *Id.* at 413.

64. Elkins et al., *supra* note 45, at 267.

mon treaty preamble language[65] make clear that a primary motive for states in undertaking BIT commitments is to attract foreign investment. Indeed, some suggest that host countries seeking to attract foreign investment (rather than the capital export states) drives the decisions about whether and when to enter into BITs.[66]

BITs enable foreigners to invest in a state without needing to specifically negotiate with the host government for assurance of rights protections.[67] Even where BITs do provide protections, however, some investors nevertheless negotiate investment agreements with the host state.[68] The investment contract can serve several purposes. First, the contract might form because the investor is providing goods or services to or on behalf of the government, such as customs inspections or water services, and investment rights naturally become a subject of this negotiation. Second, an investor might need concession rights or special permission to operate within the host state, and those negotiations include the investment rights. Third, an investor might wish to form an investment contract in order to provide an additional vehicle for enforcement of its rights, or it might seek additional rights not provided in the BIT.[69] Sometimes investment contracts can affect an investor's ability to obtain cheap political risk insurance.[70] Finally, investment contracts become a vehicle for the state to extract obligations and commitments from the investor, a

65. *See, e.g.*, Agreement Between the Government of the Italian Republic and the Government of the United Mexican States for the Promotion and Mutual Protection of Investments, It.-Mex., Nov. 24, 1999, *available at* http://www.economia.gb.mk/files/appris_en/appri_italia.eu.pdf ("[B]earing in mind that the promotion and the mutual protection of these investments require that favourable economic and legal conditions be maintained . . . ."); Agreement Between the Government of the Republic of Armenia and the Government of the Lebanese Republic on the Promotion and Reciprocal Protection of Investments, Arm.-Leb., Sept. 16, 1998, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/139 ("Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States . . . ."); Agreement Between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Barb.–Venez.,July 15 1994, *available at* http://unctad.org/sections/dite/iia/docs/bits/venezuela_barbados.pdf ("Recognizing that agreement upon the treatment to be accorded to such investment will stimulate the flow of capital and technology and the economic development of the Contracting Parties . . . .").

66. *See* Elkins et al., *supra* note 45, at 246 (noting that host countries tend to sign BITs in clusters, whereas home country signings are more stable over time, and concluding from this pattern that the capital importers decide whether and when to sign BITs); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 177–78 (2005) (suggesting that developing countries turned to BITs largely because, in the 1980s, developed countries reduced their development aid and other lending to multilateral development banks, which necessitated seeking private foreign investment); *but see* Salacuse & Sullivan, *supra* note 57, at 73–74 (suggesting that the initial success of BITs was driven largely by negotiation programs promulgated by European states).

67. Jason Webb Yackee, *Do We Really Need BITs?: Toward A Return to Contract in International Investment Law*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 121, 131 (2008) [hereinafter Yackee, *Toward A Return*] (citing Thomas W. Wälde, *The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INVEST. & TRADE 183, 204–06 (2005)).

68. *Id.* at 133, 140.

69. *Id.* at 134 (using example of "stabilization clauses").

70. Some home state insurance programs require an investment contract with the host state. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 449 & n.165 (2008) [hereinafter Yackee, *Conceptual Difficulties*] (citing France as an example).

topic that is never the subject of the BIT.[71] If a state wishes to obtain these reciprocal obligations through means other than domestic law provisions, the state might actively encourage investors to enter into investment contracts. We now turn to a consideration of how BITs, investment contracts, and domestic law all work together as state commitment mechanisms.

B. State Commitment Mechanisms: BITs, Investment Contracts, and Domestic Law

BITs are just one of at least three vehicles available to the state to express a commitment to protect foreign investments. As mentioned above, although BITs enable many investors to invest in a state without entering into a formal agreement with the host state, the parties do sometimes negotiate investment contracts. No good data exists on how often such contracts form, but investment contracts are apparently common in the natural resources, public utilities, infrastructure, and manufacturing sectors.[72] Therefore, it is not unusual for an investor's dispute with a host state to involve both a contract and a treaty claim. In addition, the domestic laws of each nation are also relevant to a foreign investor's activities within a host state. Domestic law places compliance and other legal obligations on the investor. Often, domestic law also provides benefits to investors, including investor protections and favorable rules for contract interpretation.[73] Because the three mechanisms—BITs, investment contracts, and domestic law—all influence an investor's legal rights, some comparison of these alternative options is warranted.

One might ask which vehicle is likely to provide the most extensive investor protections. Consider first a comparison of BITs and investment contracts. A state negotiating on behalf of its local investors might well have more bargaining leverage than would an individual investor negotiating with the host state because the home state represents multiple investors. Put differently, if investors can aggregate their influence through the state, then they can exercise greater market power which could result in the host state's willingness to cede more of its sovereign authority.[74] There are countervailing factors, however. A state's investment contract with a single investor is likely more private than a BIT, so it is less subject to public scrutiny. A single investor may be able to curry

71. *See* Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working,* 59 HASTINGS L.J. 241, 266 (2007) [hereinafter Bjorklund, *Private Rights*] (noting that BITs are asymmetric in that only the states, not the investors, undertake obligations).

72. Yackee, *Toward a Return*, *supra* note 67, at 133.

73. Generally applicable contract law can be helpful, as can provisions that constrain government action. In the United States, for example, the Takings, Due Process, and Dormant Commerce Clauses can all work to provide investor protections. Some countries have embedded into their domestic law a promise to arbitrate disputes with foreign investors. Yackee, *Credible Commitment, supra* note 15, at 811 n.5 (stating that approximately twenty developing countries have done this).

74. Yackee, *Toward A Return*, *supra* note 67, at 131–32.

special favor with the host state's officials in order to receive benefits that the state would not grant to all foreign investors.

Even when this special favor is not obtainable, states can have good reason to exercise restraint in the granting of BIT protections. Recall that investor protections limit the sovereign's authority to serve other constituent interests. Given this cost to investor protections, a state might prefer to economize on those protections where possible to preserve regulatory authority and minimize dispute resolution risks. Because BITs and investment contracts work in tandem, a state might rationally choose to grant minimal baseline protections in the BIT, which apply to all investors from a given nation, and then grant additional rights in investment contracts as needed to induce particular investments. Consider, for example, the difference between mobile investors and those who seek to extract natural resources not readily available elsewhere.[75] The former investors might need more inducement than the latter. A broad BIT grants more than is necessary to investors in immobile sectors, so the state might obtain these investments at lower cost by providing the immobile investments basic protections through the BIT, while providing the mobile investments additional protections through the contracts.

A state might also reserve some investor rights for contracts in order to obtain reciprocal obligations by the investor. As mentioned earlier, BITs are asymmetric in that they impose obligations on the state without placing any obligations on the investor.[76] From a public policy perspective, the state might prefer to grant some rights only in return for investor commitments. Consider, for example, the common inclusion of stabilization clauses in investment contracts.[77] These stabilization clauses protect the investor against regulatory changes, and they typically grant investors significantly more protection than the expropriation provisions found in BITs.[78] By reserving these rights to contracts, the state can extract return promises on the part of the investor to comply with certain standards of conduct. These contractual devices can also work a type of "price discrimination," where investors who are willing to undertake obligations "pay" less, in terms of future risks, than those who do not undertake the obligations.[79]

75. This distinction between mobile and extractive industries is also mentioned in Elkins et al., *supra* note 45, at 294. They find that extractive economies are less likely to sign BITs than are other nations. *Id.*

76. *See supra* note 71 and accompanying text.

77. For a general discussion of stabilization clauses, their role in investment agreements, and the choice-of-law issues that arise in determining their scope, see Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215 (1996).

78. Yackee, *Toward a Return*, *supra* note 67, at 134.

79. Of course, the BIT is not a necessary vehicle for engaging in this price discrimination. A state could work with investment contracts alone to provide the marginal incentive necessary to each investor. Indeed, Brazil has announced just such a strategy with its decision not to enter any BITs. *See generally* Elizabeth Whitsitt & Damon Vis-Dunbar, *Investment Arbitration in Brazil: Yes or No?*, INV. TREATY NEWS (Nov. 30, 2008), http://www.iisd.org/itn/2008/11/300investment-arbitration-in-

This use of investment contracts to price discriminate may face pragmatic limitations, however. BITs may have special advantages in that they are public devices that can most effectively signal to the outside world that a state is committed to the development of an investor-friendly reputation. Perhaps BIT signaling is more powerful than contract signaling because breaches of a BIT are more public and more notable to the media than are breaches of individual contracts. Where the BIT commitments are necessary to effectively signal the state's pro-investor commitment, then that state's BITs might be drafted to provide maximal protections. If so, then there may be little room for the host state to promise more in its contracts.

Now consider domestic law. In one sense, domestic laws act more like treaties than contracts: rights given to investors are general rights and therefore might prove ineffective at targeting any particular investment. Some domestic laws apply to all investors, both local and foreign, regardless of national origin, which makes them even broader than BITs. But other domestic laws can be targeted to a particular industry, such as the petroleum industry, and can therefore fine-tune incentives on an industry level. In many countries, however, laws are not designed to operate on a single firm—that would take an investment contract.

Although both are more general vehicles for state commitments, BITs and domestic law may differ with regard to their durability and effectiveness. Specifically, some scholars argue that domestic laws are more easily changed than treaty provisions because treaties are long-lasting, and vested rights form around the protections promised at the point of investment.[80] This lock-in effect can occur for domestic laws too, but treaty modifications can take the assent of two states whereas domestic law reform requires only the affirmative decision of the host state. In addition, the enforcement of domestic laws can require the cooperation of the host state's courts rather than neutral arbitrators,[81] which can impede their effectiveness. Thus, overall, domestic law may be both less durable and less effectively enforced.

Importantly for our purposes, these three sovereign commitment mechanisms—domestic law, treaty, and investment contract—work together and carry the potential of supplementing and even modifying one another. Treaties and domestic laws can work at a more general level with contracts fine-tuning rights granted to individual investors on an as-

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brazil-yes-or-no/ (noting that Brazil has chosen to induce investment through contract rather than BITs without a loss of foreign investments, but also that Brazil's domestic export industries were unhappy with the lack of BITs).

80. For a discussion of the potential lock-in effect of treaties, see for example Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175 (2007) [hereinafter Bjorklund, *Mandatory Rules*].

81. This is not always the case, however. Greece's foreign investment law apparently includes a promise by the state to arbitrate its failure to comply with its commitments, and Libya, India, Greece, Pakistan, Morocco, Iran, and Mali have similar laws that apply to the petroleum sector. Yackee, *Conceptual Difficulties*, *supra* note 62, at 447 & n.153 (citing A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 187 (1962)).

needed basis. The BITs are particularly useful to investors because they tend to include commitments on the part of the state to have disputes resolved by nonstate third parties. But the state can do the same for domestic laws and investment contracts, through either domestic statutes or BIT umbrella clauses.

When thinking conceptually about how to interpret each of these sources, it is useful to keep in mind the basic tradeoff that all states face in the market for investment law: each state wants to attract foreign investments at the lowest possible cost to its sovereign authority. Put differently, foreign investment is just one of several interests that pressure a state to take action, and the more a state binds itself, the less it is able to respond to other pressures.[82] Given differences in economic and political environments across states, states vary significantly in the degree to which attracting foreign investment becomes a functional priority. An active competitor state will face relatively little countervailing pressure. For a noncompetitor state, the countervailing pressures dominate. For the passive competitors, probably the bulk of states, the marginal tradeoff is most important to state decision making.

C. BIT Interpretation Questions

BITs tend to contain vague language, which is not surprising. After all, these instruments are negotiated between two nations that often occupy different positions to govern a potentially broad variety of investments over a long period of time. Later BITs and subsequent amendments might become more specific,[83] but even then much essential BIT language remains unclear, sometimes even aspirational. For example, states often agree to comply with principles of customary international law;[84] they promise foreign investors "fair and equitable treatment;"[85] they condition foreign investor protections on the firm conducting "sub-

82. *Cf.* Elkins et al., *supra* note 45, at 277–82 (stating that BITs entail significant sovereignty costs for the home country). Elkins et al. define sovereignty costs more broadly than we do here. In addition to restraints on the state's ability to regulate, they include the costs of negotiating treaties and the political costs of garnering domestic support for them. *Id.*

83. *See, e.g.*, Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 79–83 (2013) (detailing evolution of BIT language toward more specific provisions designed to remove interpretive discretion from arbitral tribunals).

84. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, art. 5(1), Feb. 19, 2008, S. TREATY DOC. NO. 110-23 [hereinafter US/Rwanda BIT]; Agreement Between the United States of America and the Socialist Republic of Vietnam on Trade Relations, U.S.-Viet., ch. IV, art 3(1), July 13, 2000, STATE DEPT. NO. 02-9 [hereinafter US/Vietnam BIT].

85. *See, e.g.,* US/Rwanda BIT, *supra* note 84, at art. 5(1); US/Vietnam BIT, *supra* note 84, at ch. IV, art. 3(1); Agreement Between the Czech Republic and Ireland For the Promotion and Reciprocal Protection of Investments, Czech-Ir., art. 2(2), June 28, 1996, 2079 WORLD I.P. ORG. 1-36088 [hereinafter Czech/Ireland BIT], *available at* http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=249673; Treaty Between the United States of America and the Kingdom of Morocco Concerning the Encouragement and Reciprocal Protection of Investments, U.S.-Morocco, art. II(3), July 22, 1985, S. EXEC. REP. 100-32. [hereinafter US/Morocco BIT];. Agreement on the Encouragement and Reciprocal Protection of Investments, Belg.-Indon., Jan. 15, 1970, art. 1(1) [hereinafter Belgium/Indonesia BIT].

stantial business activity" in the home state;[86] they agree not to take "unreasonable,"[87] "arbitrary,"[88] or "unjustifiable"[89] measures; they promise to create "favorable conditions"[90] or to "encourage such investments"[91] for some matters; and they reserve the right to take actions necessary for "the maintenance of public order"[92] or necessary to protect "health."[93]

Decision makers at the venue chosen in the BIT will give meaning to these vague provisions by judging, *ex post*, whether the state's actions have complied with the stated standards. Where there is room for interpretation regarding the meaning of these provisions, one question is whether national law (of the host state) or international law principles apply to provide such meaning. When the BIT chooses ICSID arbitration, then international law principles will govern the tribunal's deliberations, but when the BIT chooses other venues for dispute resolution, the applicable law can be less certain. In any event, the choice of forum and the governing law can significantly affect the ultimate determination of the state's obligations and its resulting liabilities.

The ultimate enforceability of an arbitration award can also turn on the dispute resolution venue. Where arbitration occurs outside of the ICSID Convention, the arbitration will have a seat, which is the designated place of arbitration. When arbitration has a seat, arbitration awards are subject to vacatur under the laws of the place of the seat, and the arbitral decision is subject to the mandatory laws of the seat.[94] Under the ICSID Convention, the arbitration has no seat, so the resulting award is not formally subject to such vacatur.[95] Awards rendered under the ICSID Convention must be enforced by other nations who are members of the ICSID Convention. Awards rendered outside the ICSID Convention likely fall under the New York Convention, which deals with enforcement of arbitration awards more generally.[96] Awards rendered under the New York Convention must be enforced (subject to limited exception) by other nations who are members of the New York Convention. Cross-border enforcement of awards rendered in national courts are a good deal less certain than either of these forms of arbitration, be-

86. *See, e.g.*, US/Vietnam BIT, *supra* note 84, at ch. IV, art. 15(2); US/Morocco BIT, *supra* note 85, at art. I(3)(a)–(b).

87. *See, e.g.*, US/Vietnam BIT, *supra* note 84, ch. IV, art. 3(2); Czech/Ireland BIT, *supra* note 85, at art. 2(2).

88. *See, e.g.*, US/Rwanda BIT, *supra* note 84, at art. 8(3)(c); US/Morocco BIT, *supra* note 85, at art. II(3).

89. US/Rwanda BIT, *supra* note 84, at art. 8(3)(c).

90. *See, e.g.*, US/Vietnam BIT, *supra* note 84, Annex H, at 4.6; Czech/Ireland BIT, *supra* note 85, at art. 2(1).

91. Belgium/Indonesia BIT, *supra* note 85, at art. 2(1).

92. *See, e.g.*, US/Morocco BIT, *supra* note 85, at art. IX(1).

93. US/Rwanda BIT, *supra* note 84, at art. 8(3)(c)(ii).

94. *See* Bjorklund, *Mandatory Rules*, *supra* note 80, at 186–87 (discussing the New York Convention).

95. *Id.* at 193.

96. *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 [hereinafter New York Convention].

cause to date no multilateral agreement imposes an obligation on national courts to enforce judgments rendered in other nation's courts.[97]

Even though the dispute resolution provisions in a particular BIT typically are clear enough to determine the governing forum and law, the BIT can work in conjunction with other BITs and with investment contracts to create significant uncertainty. First, there is the question of whether the MFN provision in a BIT extends to the dispute resolution provisions of other BITs.[98] Consider, for example, a purely hypothetical situation where the United States enters into a BIT with Greece which does not provide for ICSID arbitration,[99] but Greece later enters into a BIT with Singapore that provides for ICSID arbitration. Does the MFN clause in the U.S./Greece BIT work to give a U.S. investor the right to force Greece to ICSID arbitration, by virtue of the fact that Greece has promised Singaporean investors a right to use ICSID arbitration? Scholars actively debate this question,[100] and arbitral tribunals have come to conflicting determinations.[101]

Questions that surround the interplay between BITs and investment contracts are even thornier.[102] BITs can provide one mechanism for resolving investment disputes in treaties, while an investment contract entered into with a BIT-covered investor contains a different dispute resolution provision.[103] How should we think about the interplay of these provisions? One possibility is to treat the two documents as addressing separate matters; thus, where the parties' dispute involves the treaty, the treaty dispute resolution provision applies, and where the dispute involves the contract, the contract provision applies.[104] Although in theory

97. This judgment recognition obligation does sometimes exist on a regional level, however. For example, each of the EU member nations must enforce judgments rendered in other EU member courts. *See generally* Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12).

98. *See* Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law,* 33 MICH. J. INT'L L. 537, 553–59 (2012).

99. Most BITs signed prior to 1985 do not provide for investor-state arbitration. Yackee, *Alternative Evidence, supra* note 57, at 409.

100. Scholars who think the MFN clauses should work to extend the dispute resolution clauses include: STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 193 (2009) [hereinafter Multilateralization]; Stephanie L. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2 ARB. BRIEF 30, 31 (2012). Scholars who disagree include Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT'L DISP. SETTLEMENT 97 (2011); Yackee, *Conceptual Difficulties,* supra note 70.

101. Parker, *supra* note 100, at 43, contains an extended discussion of tribunal treatments of this question. A handful of states have begun to address the scope of the MFN provision directly in their BITs or separately through *ex post* exchanges of interpretive understandings. *See* James Harrison, *The International Law Commission and the Development of International Investment Law*, 45 GEO. WASH. INT'L L. REV. 413, 428–29 (2013) (providing examples).

102. For a general discussion of many of the issues raised here, see Shany, *supra* note 46.

103. The contract could provide for arbitration, in a different forum than that provided in the BIT. Alternatively, the BIT could call for arbitration while the contract provides for court resolution of contract disputes. *See* Yackee, *Toward a Return, supra* note 67, at 138 (providing Chile as an example of a country that refuses to provide rights to arbitration in its investment contracts).

104. This approach was taken in SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pak., ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶¶ 146–55 (Aug. 6, 2003) [hereinafter

this seems like a sensible allocation, in practice investor-state disputes often involve both types of disputes. Should the treaty and contract provisions be read to call for a bifurcation of claims for separate resolution by separate decision makers, using potentially different sources of law?[105] Some scholars and arbitration panels worry about the potential costs of bifurcation of claims, including (1) increased expense, and (2) potentially conflicting determinations and awards, which could undermine enforcement efforts.[106]

If claims are to be kept together, should they proceed according to the BIT or the contract dispute resolution provisions? What happens, for example, if the BIT calls for ICSID arbitration with no obligation to first exhaust domestic remedies and the investment contract provides that disputes must be resolved in national courts?[107] If instead, for problems deriving from the same investment and same government conduct, the BIT calls for ICSID arbitration and the investment contract calls for non-ICSID arbitration, where is the seat of the arbitration, and what procedures must the arbitral tribunal use? Or, more perplexingly, what is the legal regime for the consolidation of related claims and issue preclusion, given the risk of inconsistent outcomes?

Even if claims under treaties and investment contracts would not ordinarily be kept together, what if the relevant BIT contains an umbrella clause? If the state effectively promises in the BIT to comply with its contractual commitments, does the umbrella clause give the investment treaty tribunal jurisdiction to determine the breach of contract claims? If it does provide jurisdiction, what governing law should the tribunal use to resolve the contract claims? The BIT will typically either explicitly or implicitly call for the application of international law to treaty disputes, but the investment contract might call for the application of national law.

For this Article, we take on the question of how to best treat the interplay of the BIT with the investment contract. We do not resolve all of the interpretation questions that have arisen in this context. But we do offer an approach to interpretation that encourages states to compete effectively in the market for investment law while still enabling them to serve countervailing domestic interests where needed. As we explain *in-*

SGS v. Pakistan]; Compañía de Aquas del Aconquija, S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 96 (ad hoc comm. July 3, 2002).

105. This was the ICSID tribunal's resolution in *SGS v. Pakistan*, *supra* note 104. The Pakistan-Swiss BIT called for ICSID arbitration and included an umbrella clause, but the contract between SGS, a Swiss company, and Pakistan called for disputes to be arbitrated exclusively in Pakistan under the Pakistan Arbitration Law. *Id.* The tribunal took jurisdiction over SGS's treaty claims but not its contract claims. *Id.*

106. *See, e.g.*, Bjorklund, *Private Rights, supra* note 71, at 256–61 (discussing problems associated with duplicative and fragmented proceedings); Shany, *supra* note 41, at 838 (discussing problems of inconvenience, expense, and inconsistent decisions).

107. *See* Shany, *supra* note 41, at 837 (noting this complication). In *SGS v. Phillipine*, an ICSID tribunal acknowledged that it could take jurisdiction over a breach of contract claim as a treaty violation but decided to stay its proceedings until the Philippines courts could determine the contract claim because the concession contract stated that contract claims were to be resolved in Philippine courts. SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶¶169–176 (Jan. 29, 2004) [hereinafter SGS v. Philippines].

fra, one important mechanism for doing this is to offer an approach that enables states to carefully calibrate investment incentives. Our analysis begins with Larry Ribstein's jurisdictional competition framework.

III. THE CONCEPTUAL FRAMEWORK AND ITS IMPLICATIONS

In this Part, we draw upon and extend the law market framework to analyze jurisdictional competition for foreign investments. Our goal is to encourage different thinking about the overlapping roles of BITs, investment agreements, and domestic investment law, with a particular focus on the first two. We offer a functional analysis of the rules of foreign investment, in particular eschewing formal legal doctrines often applied to this area of law. For example, we view BITs and investment contracts as two forms of a state's expression of its commitment to investors. In regard to the state's relationship with investors, the treaty need not always operate as a form of super-law that trumps other forms of investment law, regardless of the language used in the BIT and the contract. Similarly, for purposes of this Article, we avoid formal law categories such as "third-party beneficiaries"[108] and "'derivative rights' models,"[109] which can have the effect of choosing among legal documents for reasons unrelated to the role that the documents serve for states and investors. As part of our functional analysis, we consider how best to house and interpret state commitments, given the state's goal to compete for foreign investments while economizing on sovereignty costs. By way of conclusion, our analysis indicates that for many countries and investors, the best result often will be to elevate an investment contract, where one exists, over the applicable BIT, and we propose at least one mechanism to make that possible.

Section A briefly describes the basic jurisdictional competition framework presented in *The Law Market*, as well as other works by Larry Ribstein. Section B extends this law market analysis to the context of foreign investment, where states act as both law providers and parties to investment agreements. Section C uses the analysis developed in Section B to draw implications for some of the current issues surrounding BIT drafting and investment treaty arbitration.

A. The Law Market

In *The Law Market*,[110] O'Hara and Ribstein developed a stylized conceptual framework to illustrate the incentives that confront states in a world where people and assets are mobile. A market metaphor highlighted the fact that no single state can exercise monopoly power over

108. *See, e.g.*, Bjorklund, *Mandatory Rules*, *supra* note 80, at 189 (using the third-party beneficiary characterization and then claiming that the investors therefore cannot abrogate the rights conferred on them in BITs).

109. Bjorklund, *Private Rights*, *supra* note 71, at 264 (discussing derivative rights model as competitor to third-party beneficiary model).

110. O'HARA & RIBSTEIN, *supra* note 10.

the provision of legal rules for private parties who can remove themselves—by agreement or otherwise—from its reach. Within this law market framework, states act as suppliers of legal rules, and private parties are the consumers who demand desirable legal rules to facilitate their private transactions. Private parties can almost always avoid particular laws by removing themselves, their assets, and their activities from that state. In addition to avoiding unfavorable laws, parties can seek out favored legal regimes by locating themselves, their assets, and/or their activities in a location with preferred law.[111] In fact, for many legal questions, parties can ensure that their choice is respected by inserting choice-of-law clauses into their contracts. Choice-of-law clauses are routinely enforced in U.S. courts,[112] and, in some cases, the clause is enforced even when the parties have no physical connection to the jurisdiction chosen.[113] When parties can reach out to other jurisdictions to choose their governing law, the law market is better facilitated and party control, legal clarity, and expectation management is maximized.[114]

Parties demand governing laws for many purposes. The law serves as a standard form to fill in the inevitable gaps, where the contract language is silent or ambiguous. A strong set of default rules helps the parties to economize on the costs of drafting their agreements.[115] In addition, the parties seek a set of mandatory rules, including applicable regulations, that work well for them, given their structures and the nature of their activities.[116] Parties choosing law do so at the point in time when they enter into a contract, but their choice is one for the future, to govern future disputes according to the law that may be in place at that time. Sometimes parties seek the application of one or more particular legal rules that they think is necessary to fully protect their commercial interests. If parties cannot fully foresee the nature of future disputes, however, then they might seek favorable general (rather than specific) rules. If they cannot know the precise content of the law that might be in

111. This insight is drawn from Charles Tiebout. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures,* 64 J. POL. ECON. 416, 418 (1956) (presenting models where people reveal their preferences for locally-provided public goods by choosing where to live).

112. *See* O'HARA & RIBSTEIN, *supra* note 1, at 82–84; Ribstein, *From Efficiency, supra* note 1, at 369–385.

113. In general, contracting parties in the U.S. must choose a law that is connected to the parties and/or the transaction. *See* U.C.C. § 1-105(1) (2001) (parties can choose any law that bears a reasonable relation to the transaction); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (for mandatory rules, a prerequisite to enforcement of a choice-of-law clause is that there be a "substantial relationship to the parties or the transaction," or that there be another "reasonable basis for the parties' choice"). Under the Second Restatement provision, however, a court can enforce a choice-of-law clause where it finds that there is another reasonable basis for the choice besides the parties' connection to the state. *Id.* Moreover, six states have enacted statutes directing forum courts to enforce choice-of-law clauses in high-value commercial contracts without regard to whether the chosen law bears any relation to the parties and their transaction. CAL. CIV. CODE § 1646.5 (West 2014); DEL. CODE ANN. tit. 6, § 2708 (West 2014); FLA. STAT. ANN. § 685.101 (West 2014); 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2014); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2014); TEX. BUS. & COM. CODE ANN. §§ 35-51–35-52 (West 2014).

114. O'HARA & RIBSTEIN, *supra* note 1, at 28–29.

115. *Id.* at 31.

116. *See* Ribstein & O'Hara, *Corporations, supra* note 1, at 669.

effect or applied at the time of the dispute, then they might seek something even more general—a state with a pro-business general legal environment. In this sense, parties not only seek desirable present law; they also seek to attach themselves to a state that appears to be committed to protect their interests in the future.[117]

In addition to contributing to predictability and better fit, party choice can sometimes enable private parties to conduct business in multiple jurisdictions according to a single law.[118] When this is possible, firm policies, which inevitably track the governing legal rules, can be uniform, or at least simplified.[119] Substantive law is typically chosen with a choice-of-law clause. Procedural law, which influences the parties' obligations as well as the costs of settling disputes, can be chosen with choice-of-court and arbitration clauses. Moreover, parties can select a forum that will respect their choice of governing law.[120]

If private parties are mobile, and if the assets that they bring to the state are sufficiently valuable, then the states might be willing to compete to provide a desirable legal environment for them. By providing favorable contract, property, and regulatory law, among others, the state can facilitate local investment and other commercial activities. States can provide such an environment in multiple ways, including through substantive domestic law reform. Delaware provides a strong example within the United States,[121] and Singapore,[122] Switzerland,[123] Bermuda,[124] and Vanuatu[125] provide examples from outside the United States.

Alternatively, the state can retain its domestic laws but allow at least mobile private parties to opt out of those laws through choice-of-law clauses. The state's decision as to whether to actively compete in a law market and/or to consent to parties opting into the law of other jurisdictions will turn on the interest group balance within the state. Put differently, the private parties themselves will need effective representa-

117. *See* O'HARA & RIBSTEIN, *supra* note 1, at 111 (noting that success of Delaware corporate law is due in part to the fact that Delaware's franchise fees commit the state to providing high-quality corporate law in the future).

118. *Id.* at 26.

119. *Id.*

120. *Id.* at 73. The most common way to do this is to specify that disputes will be resolved in the courts of the state whose law is chosen. *Id.*

121. Larry Ribstein's work was significant in showing this. *See generally supra* note 1.

122. *See* Christopher M. Bruner, *Market-Dominant Small Jurisdictions in a Globalizing Financial World* 38–48 (Washington & Lee Legal Studies Paper No. 2013-19, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343111 (documenting Singapore's position as a world leader in wealth management).

123. *See id.* at 48–57 (documenting Switzerland's ability to attract banking business through its bank secrecy laws).

124. *See id.* at 27–37 (documenting Bermuda's dominance in the reinsurance industry).

125. While best known for its beaches and as the location for the filming of the television show *Survivor*, Vanuatu is also well known for its bank secrecy laws and lenient financial services regulations. *See* Barbara T. Kaplan & Patrick T. O'Brien, *Secrecy Associated with Offshore Banking is Evaporating*, 119 BANKING L.J. 736, 740 (2002); Anthony D. Todero, Note, *The Stop Tax Haven Abuse Act: A Unilateral Solution to a Multilateral Problem*, 19 MINN. J. INT'L L. 241, 267 (2010); *but see* Adam H. Rosenzweig, *Why Are There Tax Havens?*, 52 WM. & MARY L. REV. 923, 957 (2010) (suggesting that states like Switzerland and Belize may be even more attractive than Vanuatu for bank secrecy).

tion with government lawmakers in order for the state to respond to law market pressures. Although traditional public choice theory posits that outsiders will lack effective voice within a legislature, in reality the desire to attract, or at least retain, the benefits of their local activities can ensure that outside (or at least potentially outside) interests are weighed.[126] These interests can be fueled by "exit-affected" interest groups, or domestic interests that benefit from attracting outsiders.

Ribstein's scholarship emphasized the important potential role of lawyers in facilitating law reform.[127] Lawyers are, of course, experts in the law; they have a comparative advantage both in organizing to exert political pressures and in drafting legislation, and, they have their own interest in ensuring that local law is appealing to the mobile.[128] Lawyer licensing rules ensure that a lawyer has a connection with the state where the lawyer is licensed to practice, and licensing requirements often enable the exclusion of outside lawyers from local legal business.[129] Laws that are desirable to mobile parties have the effect of attracting legal business to the state, to the benefit of locally-licensed lawyers. Through this mechanism, additional pressures can be placed on the state to cater to the mobile.

Nevertheless, these exit-affected interests must compete with the interests of others, including negatively-affected third parties, regulatory authorities, and parties poorly represented in the contractual setting. The relative influence of both the mobile and competing interests will vary across the states.[130] As a result, state sensitivity to law market pressures also will vary.

This variation deserves more focus. In the law market, some states are active competitors, some are passive competitors, and some are noncompetitors. Active competitors have a priority to pursue domestic law reforms designed to attract people, businesses, and/or assets to the state. For example, Delaware actively pursues corporate law reforms, and it has been a leader in both usury law and trust law reforms. Florida has put in place a variety of laws, including tax laws, designed to attract retirees to the state. Outside of the United States, several nations are known as popular places to register commercial ships, based in part on their lax regulation of the ship's activities. These "flag of convenience" states include Panama, Antigua, the Bahamas, Liberia, Malta, and the Marshall Islands.[131] Some nations adopt laws designed to make it possible for wealthy individuals to protect their assets from creditors and governments. Such nations include Nevis, the Channel Islands, Cook Islands, Cayman Islands, Bermuda, Belize, Bahamas, Switzerland, and Liechten-

126. O'HARA & RIBSTEIN, *supra* note 1, at 14–15.
127. *See, e.g.*, Ribstein, *Delaware, supra* note 1; Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing,* 69 MO. L. REV. 299 (2004).
128. O'HARA & RIBSTEIN, *supra* note 1, at 74–75.
129. *Id.* at 75.
130. *Id.* at 80–81.
131. For statistics on foreign registries, see generally *List of Flags of Convenience*, WIKIPEDIA (Jan. 4, 2014, 9:24 PM), http://en.wikipedia.org/wiki/List_of_flags_of_convenience.

stein.[132] Some nations, like France and Singapore, have taken strong measures to ensure that the nation is a desirable venue for international commercial arbitration.[133] These are just a few examples.

Many states are not primarily motivated to attract others to the state, but they are nevertheless motivated to avoid the loss of valuable jobs, tax revenues, and other assets. These states, which we can call "passive competitors," are willing to take defensive measures when necessary to preserve local opportunities. Such measures might include adopting competitive law reforms tried in other states. For example, some U.S. states reluctantly relaxed their usury laws after Delaware and South Dakota repealed theirs in an effort to keep banks from relocating elsewhere.[134] Alternatively, some states will retain their domestic substantive laws but agree to enforce choice-of-law clauses, even where they have the effect of enabling some parties to circumvent local law.[135] The U.S. Supreme Court articulated the position of the passive competitor in *Bremen v. Zapata Off-Shore Company* when it made the following oft-quoted statement: "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[136] Moreover, in some instances, including arbitration law[137] and tax rules,[138] states adopt separate rules for domestic and international activities in an effort to attract outside opportunities without eroding the influence of domestic law.

Finally, a third group of states will refuse to respond to law market pressures. In these states, lawmakers decide that other values and interests take precedence over those reflected in competitive law reforms. Often, these states have large markets and/or other desirable attributes that will prevent mass exodus by business interests, at least with regard to particular legal matters.

It is important to keep in mind that a state can be an active competitor in some areas, a passive competitor in others, and a noncompetitor in still others. Put differently, the balance of competing interest group pressures within a state often will cause the state to vary in its sensitivity to law market pressures across economic, social, and political contexts.

In *The Law Market*, Ribstein and O'Hara proposed that U.S. law be altered so that courts must enforce choice-of-law clauses unless the state

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132. *See Asset-Protection Trust*, WIKIPEDIA (Apr. 8, 2014, 4:07 PM), http://en.wikipedia.org/wiki/Asset-protection_trust.

133. *See* Erin O'Hara O'Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT'L REV. L. & ECON. 87 (2014).

134. O'HARA & RIBSTEIN, *supra* note 1, at 48.

135. *Id.*

136. 407 U.S. 1, 9 (1972).

137. Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101, 101 (2012) (identifying states like California, Texas, and Florida that have enacted separate state statutes related to international commercial arbitration).

138. *See generally* Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice?*, 34 QUEEN'S L.J. 505 (2009) (providing examples of common tax incentive schemes for attracting foreign capital).

legislature deems enforcement inappropriate.[139] Ultimately, the proposal shifts questions regarding the enforceability of choice-of-law clauses from the courts to the legislature. Shifting to *ex ante* legislative determinations would provide more clarity and, therefore, more effective guidance to private parties.[140] This improved clarity would provide outsiders with better ability to respond to the legal rule, and it would therefore force the state to internalize the costs of refusing to enforce choice-of-law clauses.[141] At the same time, competing interest group pressures would be more effectively felt in the legislature than in the courts.[142] Thus, both the costs and the benefits of enhancing party choice would have a maximal chance of effectively being taken into account.

B. The Market for Foreign Investment Law

1. Supplying Foreign Investment Protections

Foreign investment naturally fits into a jurisdictional competition framework. After all, as indicated earlier, many states entering BITs are primarily motivated to attract foreign investments, or at least to not lose investment opportunities to other countries that *have* signed such agreements.[143] BITs are a critical part of the jurisdictional competition for foreign investments, but other legal tools provide desired legal rules to investors, including domestic law and investment contracts negotiated with individual investors. The differing legal tools for attracting foreign investment have different features. BITs provide rights to investors from a single nation without necessarily providing those same rights to either domestic investors or investors from other nations.[144] Domestic laws typically extend rights to all investors, domestic as well as foreign. In contrast, an investment contract provides rights to a single investor only. These legal mechanisms work together in the law market. Given the aggregate impact, it makes more sense to analyze BITs as just one tool, albeit an important one, in the marketplace for law.

In the context of the law of foreign investment, choice of law operates somewhat differently. In *The Law Market,* the role of the state is

139. O'HARA & RIBSTEIN, *supra* note 1, at 199–215. An example of such a statement would have been the now-abandoned choice-of-law rules in the U.C.C. § 1-301 (2001), replaced with Uniform Commercial Code, revised § 1-301 (2008), which as proposed followed the European approach of not allowing a choice-of-law clause to work to deprive consumers of legal protections available in their home states. Regulation 594/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, 12.

140. O'HARA & RIBSTEIN, *supra* note 1, at 205–06, 209.

141. *Id.* at 209–210.

142. *Id.*

143. There is evidence that states worry most about losing their competitive edge when other states in their region or in their economic competition group are actively engaged in in signing BITs. Elkins et al., *supra* note 45, at 292, 298. In addition, however, there is evidence that some nations sign BITs in order to qualify for international loans. *See id.* at 295 (finding that states seeking assistance from the IMF are more likely to sign BITs).

144. MFN provisions can work to extend rights provided in one BIT to foreign investors from other nations as well. Yet, states can negotiate BITs to only extend rights to a single state's foreign investors, and, in any event, states need not provide the same rights to foreign and domestic investors.

limited to providing substantive legal rules, forums for dispute resolution, and choice-of-law principles for determining the governing law. In foreign investment law, the law market shifts. The state is not just a mediator of the obligations of private parties; here, it also binds itself to provide certain protections to investors, through contract, domestic law, and treaty. Moreover, as a direct party to investment disputes, the state is highly unlikely to agree to bind itself to the governing law or courts of another sovereign state. Thus, choice-of-law questions are unlikely to entail a pure choice between two states' laws; the divergence does not eliminate choice-of-law questions, however. Instead, the choice is one between the domestic law of the state, international law principles, or some combination thereof.

International law can be implicated for at least two reasons. First, BIT rights may not have an equivalent in domestic law. For example, a BIT might affirmatively offer investors freedom from or compensation for regulatory expropriations even though no such protections exist in a signatory state's domestic laws. In such a circumstance, the content and scope of the protection, as well as applicable damages, might be determined according to international rather than domestic law.

Second, in some investment documents, a state will bind itself to comply with international law or with decisions of a tribunal that would apply international law principles to define its duties. For example, BITs commonly obligate the state to provide protections at a level provided in customary international law, and they make direct reference to common international law principles such as "national treatment" and "most-favored nation" status. With the insertion of international law, the state sometimes relinquishes its right to apply otherwise mandatory domestic laws without financial consequences. Consider, for example, *S.D. Meyers v. Canada,*[145] where the tribunal found that Canada's ban on PCB exports violated NAFTA because it had an arbitrary and discriminatory impact on U.S. investors that generated about five million dollars in damages.

For states, the choice of international law is typically part and parcel of the choice of forum. When a state makes a commitment to abide by international law principles, that commitment is made effective through a corollary commitment to have disputes resolved outside national courts. Thus, it is common in BITs and in some investment contracts for the state to agree that disputes with investors will be resolved in international arbitration, through ICSID or otherwise.[146] When the state chooses international arbitration, the tribunal has access to publicly available decisions of other tribunals that have dealt with investment disputes. These mechanisms help to encourage a consistent development of international

145. Second Partial Award, (NAFTA/UNCITRAL 2002), http://www.italaw.com/sites/default/files/case-documents/ita0752.pdf.

146. Scholars have identified range of dispute resolution options in investment treaties. Allee & Peinhardt, *supra* note 28, at 2; Yackee, *Credible Commitments*, *supra* note 15, at 806.

law principles,[147] although they are far from perfect in this regard.[148] Of course, states can also agree to resolve disputes in arbitration using domestic law principles.[149] But the important point here is that the state loses its authority to interpret international law principles for purposes of determining its obligations in the BIT.

As with the general law market, states differ in their positions on foreign investment law, with some states acting as active competitors, some as passive competitors, and others as noncompetitors. Active competitors will use the legal mechanisms—BITs, domestic law, and specific investment contracts—to take the lead in providing desirable legal protections to foreign investors. South Korea is a good example of an active competitor for foreign investment, because it has signed a large number of strong BITs and has worked hard to put in place domestic law reforms.[150] Passive competitors might not have a strong independent agenda to maximize foreign investments, but they will commit to use at least some of the legal mechanisms, where necessary, to ensure that they retain some ability to attract, or at least retain, foreign investors.[151] For noncompetitor states, other domestic concerns commonly swamp out any state interest in attracting foreign investors. South Africa and Australia might reasonably be placed in this group. South Africa has indicated a desire to not sign BITs unless it intends to export capital to the other country, and it has strong domestic pressures weighing against nondiscriminatory treatment of investors.[152] South Africa recently introduced legislation to: (1) eliminate access to international dispute resolution and

147. Joshua B. Simmons, *Valuation in Investor-State Arbitrations: Toward A More Exact Science*, 30 BERKELEY J. INT'L L. 196, 205–08 (2012).

148. *Id.*

149. *See* Donald Francis Donovan, *The Relevance (Or Lack Thereof) of the Notion of "Mandatory Rules of Law" to Investment Treaty Arbitration*, 18 AM. REV. INT'L ARB. 205, 209 (2007) ("In investment arbitration . . . the national law provided for in an investment contract would generally be the law of the host state, which naturally has the closest links to the transaction."); Ama S. Bekoe, Comment, *The Illusory Choice: Examining the Illusion of "Choice" in Choice of Law Provisions–A Country Study Exploring One Aspect of Foreign Investment in the Caribbean*, 42 HOW L.J. 505, 524 (1999) (noting that national law can govern investment contracts).

150. South Korea has sixty-two bilateral investment treaties in force. *Bilateral Investment Treaties for the Reciprocal Protection of Investments*, KOREA EXIMBANK, http://koreaexim.go.kr/en/fdi/invest_02.jsbit.ly/1d6xliK (last visited July 14, 2014).

151. *See* Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 155 (2005) (stating that a primary motivation for states entering BITs may be to retain previous investments).

152. Statement on the Cabinet meeting of 20 July 2010, REPUBLIC OF S. AFR. (JULY 20, 2010), *available at* http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-held-20-july-2010; Dr. Rob Davies, Minister of Trade and Indus., Speech Delivered at UNCTAD Investment Policy Framework for Sustainable Development at University of Witwaterstrand (Jul. 26, 2012) (transcript available at http://www.gov.za/speeches/view.php?sid=29391&tid=77861); Agreement for the Promotion and Reciprocal Protection of Investments, S. Afr.-Zim., Nov. 27, 2009, http://dti.gov.za/parliament/040610_RSA_Zimbablowe_Agreement.pdf. Statement on Cabinet meeting of 24 March 2010, REPUBLIC S. AFR.(Mar. 25, 2010) http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-held-24-march-2010; Peter Leon et al., *South Africa Declines to Renew Bilateral Investment Treaties with European Union Member States*, MONDAQ (Oct. 5, 2012), http://mondaq.com/x/195&6/international+trad+investment/South+Africa+Declines+to+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States.

instead require dispute resolution to occur through South African courts or local ADR methods, and (2) make compensation for expropriation equivalent to the standards provided in the domestic constitution, which fail to grant investors full market value for expropriated investments.[153]

While states vary in their relative appreciation of the value of treaties, it is difficult to identify states that are always hostile to taking measures to protect foreign investors or their investors investing abroad. Almost all states have signed at least one BIT; even states that have only signed a handful of BITs, like Ireland,[154] nevertheless work hard to be investment-friendly through domestic laws and institutions. Although law market pressures here seem strong, states nevertheless differ markedly in both the number of BITs joined and the strength of the rights provided within them, as well as in the quality of rights provided in domestic legal rules and investment contracts.

Regardless of their respective stance in the foreign investment law market, all states face a tradeoff when providing rights related to foreign investment. Competing interest groups will pressure the state to provide lesser protections to foreign investment for various reasons. First, some constituents might want states to retain unfettered regulatory authority, at least for some matters, rather than precommitting to elevate investor rights over those of other constituents. Other constituents might push for domestic investors to be given the same rights and protections as foreign investors, which could have the effect of narrowing the set of rights granted to foreign investors. Still other groups might fight to protect domestic competitors from foreign entry into their product and service markets.

As with the general law market, lawyers likely play an active role in the development of investment law. In investment planning, investment regulation, and conflict management, foreign investors will need local legal services to support their commercial activities within a state. That said, investment treaty arbitration itself does not seem to attract much local business. Available empirical evidence indicates that multinational law firms generally dominate the representation of parties in investment treaty arbitration, whereas local firms appear to be relegated to provid-

153. *See* Linda Ensor, *Bill To Limit Arbitration for Foreign Investors*, BDLIVE (Oct. 31, 2013, 5:52 AM), http://www.bdlive.co.za/business/2013/10/31/bill-to-limit-arbitration-for-foreign-investors. The restriction on dispute settlement and substantive rights may generate problems. *See id.* (stating the draft bill is "likely to cause jitters among South Africa's already skittish foreign investors"). Similarly, although the new Abbott government may back-pedal from the earlier Gillard government, Australia has indicated its desire to eliminate investment rights related to dispute settlement. AUST. GOV'T, DEP'T OF FOREIGN AFF. & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 14 (2011), *available at* http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx; Jürgen Kurtz, *The Australia Trade Policy Statement on Investor-State Dispute Settlement*, ASIL INSIGHTS (Aug. 2, 2011), http://www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-state-dispute-settlement. *See also generally* Jürgen Kurtz, *Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication*, 27 ICSID REV. 65 (2012).

154. Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 361–62 (2007) (discussing the relative lack of investment treaties in Ireland).

ing strategic local insights.[155] It is not clear how much that matters, however, because the formalized disputes likely make up only a small fraction of the legal business generated by foreign investment.

2. *Institutional Questions*

How can states best balance competing interests when making their decisions related to the legal regulation of international investments? As conceived by O'Hara and Ribstein, the law market functions most effectively when the state makes choice-of-law clause enforcement decisions through the legislature, rather than the judiciary.[156] In the context of international investment law, the institutional choice question is somewhat different, for at least three reasons. First, states organize government decisions in different ways, with both monist and dualist governments making investment law, and thus broad generalizations about where choice-of-law decisions are best housed are difficult. Second, in the context of investment law, the adjudicative bodies very typically are not state entities, raising thorny delegation problems. Third, some foreign investor rights are created by the state acting through its Executive, a factor not present in the classic law market paradigm.

In the context of foreign investment, the choice-of-law question often takes the form of scope interpretation. Specifically, irrespective of what body adjudicates the investment dispute, the governing law question (domestic or international) typically turns on how broadly to interpret BIT language, the location of the borders between BITs and investment contracts, and whether the BIT or the investment contract should control when the two conflict. Some cases involving foreign investment may involve national courts adjudicating a host state's domestic foreign investment law. Yet, for investment contracts or treaty claims, which are arguably the lion's share of formal disputes, nonstate adjudicative bodies must evaluate a host state's legal obligations. From a functional perspective, a tribunal attempting to locate the border between BITs and investment contracts should take into account how each of these documents is formed, and the derivative legal obligation.

For democratic nations operating according to separation of powers principles, BITs will require ratification (and possibly *ex ante* delegations of acceptable terms) by the Legislature, whereas agents of the Executive branch likely negotiate investment contracts on the state's behalf without formal legislative participation. Even monist states—where domestic legislation implementing and ratifying a treaty is not required—have

155. *See* Franck, *Myths and Realities*, *supra* note 18 (identifying that the repeat players in the market for investment treaty arbitration counsel tended to be larger international firms but that local counsel are used strategically on an *ad hoc* basis to provide legal services).

156. O'HARA & RIBSTEIN, *supra* note 1, at 12.

been known to seek outside support, through public referendum or otherwise, as a prerequisite to signing onto investment treaties.[157]

With democratic mechanisms, BITs might have the advantage of reflecting broader interest group accountability and less capture than investment contracts, with less danger of corruption. If so, then BITs arguably arise in a better institutional environment where broader interest group participation might foster a more careful consideration of the tradeoffs between the net value of foreign investment and competing policy objectives. Put differently, if a state's goal is, or should be, to attract foreign investment at the lowest possible cost to state sovereignty, then the legislature (or public referendum) may be the better institution to house those commitment decisions. By contrast, decisions made by the Executive branch alone, especially in the context of nonpublic contract negotiations, are less likely to fully incorporate competing constituent interests.

On the other hand, investment contract negotiations by Executive agents can more quickly and effectively generate clear, finely-calibrated commitments. Investment contracts enable greater clarity of obligation than BITs because they are specific to a particular investment and drafted by a small, fixed group. Moreover, investment contract terms are not incorporated into domestic law through the participation of a multimember legislative body. When different legislators have differing views of the optimal strength of a nation's commitment to foreign investors, then we can expect the resulting textual commitment to be more vague, include compromise language or other carveouts, and otherwise deprive investors of relative certainty regarding their rights and obligations. Contractual provisions are less likely to suffer such shortcomings.

Additional factors better enable investment contracts to provide clearer and more finely-calibrated rights and obligations than BITs. BITs reflect the agreement of two states, which offer generalized and derivative commitments to investors for the lifetime of the BIT.[158] The negotiating states presumably contemplate that the BIT will provide "one size fits all protection" in that it will cover a variety of foreign investors (whether individuals, small or large entities, or private or publicly held corporations), and protect a potentially diverse array of investment activities that could come to either state. In that context, BIT language will necessarily be somewhat vague in order to effectively encompass the interests of all potential investors irrespective of the size of the investor, the investor's relative commercial leverage, the type of investment activi-

157. Costa Rica is a case in point. Although a monist state, see Alexis Mourre, *Perspectives in International Arbitration in Latin America*, 17 AM. REV. INT'L ARB. 597, 601 (2006). Costa Rica engaged in a two-year public referendum process prior to the implementation of the Central American Free Trade Agreement. Alberto R. Coll, *Wielding Human Rights and Constitutional Procedure to Temper the Harms of Globalization: Costa Rica's Battle Over the Central American Free Trade Agreement*, 33 U. PA. J. INT'L. L. 461, 461–63, 536–43 (2011).

158. Some but not all BITs have sunset provisions that permit them to continue for at least ten years with an option to renew. Franck, *Legitimacy Crisis*, *supra* note 22, at 1530 n.31. In virtually all cases, however, states signing BITs appear to contemplate long-term commitment.

ty involved, and the idiosyncrasies of the moment in time the investor invests. By contrast, the investment contract covers one state and one investor, at a specific time, contemplating a specific type of investment activity. This more particularized negotiating environment better enables a clearer and more careful articulation of the extent to which the state precommits itself, in terms of protections, dispute resolution process, and choice of governing law.[159] States provide these commitments in a document that describes the investor's own obligations, which are given in return for a state's express undertakings.

Thus, relative to BITs, specific investment contracts carry the potential for the state to economize on its sovereignty costs, both with less generous promises and by constraining the discretion granted to external tribunals to determine the scope of its commitments. At the same time, the contracts can provide investors with a better sense of their investment risks. More importantly, clear commitments can save both parties dispute resolution costs down the road and generate enhanced *ex ante* certainty.

Given the tradeoffs between legislative and executive decision making, foreign investment decisions made by dualist governments presumably should involve some combination of the two institutions. To some degree, states do blend institutional participation. Perhaps the best institutional implementation would be for the state to negotiate the general parameters of its obligations in BITs and to provide more specific protections in investment contracts under the proviso that the Executive's authority to negotiate contract terms is constrained by the Legislature. Under this institutional structure, states can make valuable reputational commitments to protecting foreign investments in their BITs, but they can carefully calibrate their commitments in individual investment contracts. Legislative constraints on contract terms could work to temper the problems associated with capture, silent interests, and potential corruption. Constraints could take many possible forms, including both procedural constraints (i.e., requiring notice and comment periods between the drafting and the ultimate signing of investment contracts) and substantive restrictions (i.e., prohibitions on investment contract terms that compromise the state's ability to protect air and water quality). Legislative constraints would make it more likely that competing domestic interests are reflected in the contracts. Although nothing guarantees that a state will make wise decisions, this institutional structure better enables the state to encourage investment at lowest possible cost to domestic interests, as opposed to other alternatives.[160] When the institutional struc-

159. Yackee, *Conceptual Difficulties, supra* note 70, at 452–53.

160. From this perspective, it becomes clear why it would not make sense for a state to abandon BITs in favor of only using investment contracts. Yackee, *Toward a Return, supra* note 67, at 137 (suggesting that states should consider taking this course). BITs obligate a state to undertake general commitments, often through the cooperation of the Executive and Legislative branches of government. As such, the general commitments enable the state to establish a reputation for respecting foreign investor rights. Investors who are comfortable proceeding with these rather vague rights can invest in the state without negotiating a specific contract with the state. Contracts negotiated with the

ture forces careful consideration of the tradeoffs up front, states will be less likely to retreat from their commitments on the back end.[161]

C. *Implications of a Law Market Analysis for Foreign Investment Law Questions*

As previous Sections have described, BITs and investment contracts are two commitment devices states use to attract foreign investment. Each of these mechanisms has strengths and weaknesses, and the two serve interrelated roles that carry the promise of working together to produce more effective incentives than either could achieve alone. As a functional matter, we advocate that these instruments be interpreted in ways that take into account their strengths, limitations, and interrelated roles. As part of that functional analysis, interpretation doctrine should reflect the comparative institutional and drafting advantages of these documents.

As mentioned above, BITs are often negotiated and ratified with the cooperation of a state's legislative branch; in general, legislatures are better able to take into account competing constituent interests than is the executive acting alone.

In contrast, investment contracts are negotiated and signed by executives and might not be subject to public debate. Despite this weakness, investment contracts provide a valuable environment for states to fine-tune their commitments to international investments. In order to harness this advantage of investment contracts while tempering their potential costs, states can create legislative checks on the contract terms or procedures by which such contracts are executed. Where such checks are possible, the investment contracts are more likely to enable the state to more carefully calibrate the rights of the investor based on the particular investment, its benefit to the country, the degree to which protections are necessary in order to induce a particular investment, and the reciprocal responsibilities of the investor in connection with its investment.

From a functional perspective, careful calibration of the state's commitments is important. Recall the most basic tradeoff facing all states: to compete as effectively as desired for foreign investment at the lowest possible cost to other policy goals. States will vary in the extent to which they are prepared to tie their hands behind their backs, because they differ with respect to (1) the extent to which they desire foreign investment and the types of investment they seek to attract, (2) the degree of reputation deficit that must be made up in order to attract that investment, and (3) the importance to the state (given constituent interest

state can provide clearer rights that are more carefully calibrated to the needs of the investor and state, but they can also be plagued by corruption and rollover of other domestic interests. Contracts, if effectively constrained, can produce benefits not obtainable in the BIT, but the two mechanisms work together to potentially provide optimal benefits to both state and investor.

161. This solution may not be an option for monist states, unless opportunities for legislative and/or populist interventions arise as a matter of political economy in response to news of the terms of investment contracts.

groups) of attaining competing policy goals. In general, our functional approach calls for treating international investment questions in ways that maximize state abilities to fine-tune their commitments while designing legal rules with an eye toward facilitating states' abilities to house their commitment decisions in the government institution that is best situated to ensure sound decision making. Under such circumstances, the law market for foreign investment can function at its best.

This Section will explore the implications of our analysis for the treatment of some issues that have arisen recently in investment disputes. Subsection 1 will consider the implications of this analysis for the interpretation of BIT umbrella clauses. Subsection 2 will consider whether states should be permitted to contract out of umbrella clauses and provide a mechanism for enabling such opt outs in investment contracts. Subsection 3 briefly discusses other contractual mechanisms that states can use to temper the costs of delegating BIT interpretation and enforcement to nonstate adjudicators. Finally, Subsection 4 provides some preliminary thoughts on the implications of our analysis for tribunal interpretations of MFN provisions.

1. Umbrella Clauses

When BITs include provisions declaring that each state agrees to comply with its commitments, including contractual obligations, such language carries the potential to convert a state's ordinary breach of contract into a treaty violation. As mentioned earlier, investment treaty tribunals have struggled with the question of whether umbrella clauses give the tribunal jurisdiction to hear breach of contract claims, and, if so, whether national or international law applies to resolve such claims. States should be empowered to use a BIT to confer such authority on the tribunal because such promises can enable the state to commit to providing a favorable forum to investors for their contract disputes and a single forum for resolution of all disputes. Tribunal decisions interpreting BITs as denying such jurisdiction can unjustifiably limit the state's ability to use the BIT to provide maximal protections, an important tool for jurisdictional competition.

Of course, the question of whether an umbrella clause elevates breach of contract claims against the state to treaty violations turns on usual tools for interpretation, including the specific language and placement of the umbrella clause. There is fundamental disagreement between arbitral tribunals regarding the proper interpretation of an umbrella clause when the BIT language leaves the matter uncertain. Recently, several tribunals have interpreted the clauses narrowly, concluding that the state should provide clear evidence that it wishes to elevate basic breach of contract claims to treaty violations.[162] For example,

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162. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 153–62 (2008) (providing a chapter discussing tribunal interpretation of umbrella clauses).

in *SGS v. Pakistan*,[163] SGS, a Swiss company, asked an ICSID tribunal to take jurisdiction over its dispute with the Pakistani government resulting from Pakistan's termination of their contract for preshipment inspection services.[164] Under the terms of the Switzerland-Pakistan BIT, both states were obligated to observe all commitments entered into with investors from the other state.[165] The tribunal declined to take jurisdiction over the dispute, stating that because exercising such jurisdiction could have far-reaching impact on the sovereignty of the signing states, a clearer statement of such intent would be needed.[166]

This general interpretive approach, to read the umbrella clause narrowly, has been followed by other tribunals which have concluded that umbrella clauses can cover contracts where the state acts as sovereign, but not mere commercial contracts.[167] Some tribunals have also used a similar interpretive approach in concluding that breach of contract claims are covered under the BIT umbrella clause only when the breach of contract constitutes a significant interference with the investor's rights.[168]

Other tribunals have afforded wider scope to the umbrella clauses. Some have interpreted the umbrella clauses to confer treaty jurisdiction over breach of contract claims.[169] Still others have determined that the umbrella clause even works to undo a forum-selection clause in the investment contract.[170]

From a common sense perspective, it is hard to see what purpose some umbrella clauses serve in BITs if not to further commit a state to comply with its contractual promises or other undertakings.[171] That further commitment presumably becomes meaningful because it determines the governing choice of forum and choice of law for resolution of the breach of contract claim. Put differently, without an advance choice of

163. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, (Aug. 6, 2003), 8 ICSID REP. 307 (2003).

164. *Id.* at 309.

165. *Id.* at 324.

166. *Id.* at 372–73.

167. *See, e.g.*, El Paso Energy Int'l Co. v. Argentine Rep., ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 70 (Apr. 27, 2006), 21 ICSID Rev. 488 (2006); Pan Am. Energy LLC & BP Argentina Exploration Co. v. Argentina, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 115 (July 27, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0616.pdf.

168. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 299 (May 12, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf.

169. *See, e.g.*, Eureko B.V. v. Republic of Poland, ad hoc arbitration, Partial Award, ¶¶ 76–77 (Aug. 19, 2005), http://italaw.com/sites/default/files/case-documents/ita0308_0.pdf; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 62 (Oct. 12, 2005), http://italaw.com/documents/Noble.pdf ; SGS Société Générale de Surveillance SA v. Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 185 (Feb. 12, 2010), http://www/italaw.com/sites/default/files/case-documents/ita1526.pdf.

170. SGS Société Générale de Surveillance SA v. Republic of Paraguay, ICSID Case No. ARB/07/29, Award, ¶ 31 (Feb. 10, 2012), http://www/italaw.com/sites/default/files/case-documents/ita1525.pdf.

171. *See, e.g.*, Eli Lauterpacht, *The Drafting of Treaties for the Protection of Investment*, *in* THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT IN DEVELOPING COUNTRIES 18, 31 (1962); Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT'L 411, 412 (2004); Wong, *supra* note 20, at 144–47.

law or choice of forum, a foreign investor must typically bring its breach of contract claims in a state court with jurisdiction. This likely means that foreign investors would bring investment disputes against the state in the host state's courts where, using the state's conflicts-of-law principles, the state would resolve the dispute under its national law. If state law is weak and/or the courts are biased, then investor rights can only be protected by enabling the investor to opt out of local law and courts. Umbrella clauses can give foreign investors such rights.

Of course, it is possible that states place umbrella clause language into a BIT without intending the language to be doing any work at all, except to express a general expectation that each state will comply with its preexisting international law and other legal obligations. From that perspective, the BIT should not work to confer jurisdiction on the tribunal to resolve breach of contract claims. This latter view is arguably inconsistent with canons of treaty interpretation, including using a treaty's "plain meaning" to prevent provisions from being construed as mere surplusage,[172] but it remains a plausible explanation of state drafting behavior.

Notwithstanding this latter possibility and the restrictive stance of some tribunals, we think that BITs should be interpreted to confer jurisdiction on investment treaty tribunals to hear the contract claims. This default rule places a thumb on the scale in favor of the law market for foreign investment law because it fosters state efforts to provide broader investor protections, while also fostering the state's ability to fine-tune its obligations through investment contract provisions. Because the interpretive approach would function as a default rule, states not intending to confer such jurisdiction can avoid elevating contract claims by expressly controlling jurisdiction in their BITs.[173] This interpretive rule would operate to construe the umbrella clause in favor of the investor and against the state, which makes sense given that the state authors both the BIT and the investment contract, and is therefore in the best position to reconcile the two. Importantly, this broader BIT interpretation might force a political conversation involving the legislature at the point in time that the BIT is ratified. If so, interest groups opposed to this ceding of sover-

172. *See, e.g.*, Sacirbey v. Guccione, 589 F.3d 52, 66 (2d Cir. 2009) (stating that treaties should be interpreted to avoid surplusage); Pielage v. McConnell, 516 F.3d 1282, 1288 (11th Cir. 2008); Yapp v. Reno, 26 F.3d 1562, 1569 (11th Cir. 1994); *see also* Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (requiring treaties to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"); Freya Baetens, *Enforcement of Arbitration Awards: "To ICSID or Not to ICSID" is Not the Question*, *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW (Todd Weiler & Ian Laird eds., 2013) (discussing the Vienna Convention rules on treaty interpretation with their focus on "object and purpose of a treaty" in investment law); Frank Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1973 (2007) ("A commonly used principle is the rule against surplusage. This presumes [legislators do not use] unnecessary and redundant language . . . . ").

173. Another textual option would be for states to simply avoid providing an umbrella clause in a BIT altogether and expressly excluding the use of an MFN clause to generate umbrella clause rights under other treaties, which should prevent investors from making a umbrella clause claim under the relevant treaty.

eign authority will have the opportunity to pressure the state to narrow or eliminate the BIT umbrella clause.

Regardless of the outcome, our proposed rule of interpretation would encourage competing interest group participation in the determination of whether the state should further cede its authority to external tribunals in order to attempt to attract more foreign investment. When tribunals read the umbrella clauses narrowly, these questions are avoided, and it becomes more difficult for states to use BITs to make strong commitments in favor of investor protections.

Note also that if the umbrella clause expands investor rights, then it must be the case that the BIT includes both an umbrella clause and a strong dispute resolution provision (or, at least stronger than whatever else might be provided to the investors). If the dispute resolution provision is strong (strong enough so that the investor seeks to rely on it), then the state has signaled a willingness to undertake a strong precommitment to the protection of investor rights. It therefore seems reasonable to interpret the umbrella provision broadly, in the manner most consistent with this strong precommitment.

2. *Contracts Can Trump Umbrella Clause*

Although we advocate interpreting umbrella clauses to include breach of contract claims unless clearly excluded, we also think states should retain the ability to minimize or particularize umbrella clause protections in individual investment contracts. Put differently, states might wish to further calibrate investment incentives by either limiting or expanding the jurisdiction of investment treaty tribunals to resolve contract claims, and by altering the choice of law (national or international law) used to resolve those claims. Broad tribunal interpretations may surprise states and impede state sovereign authority, and not all investors will require such drastic measures as a precondition for investing. Individually negotiated investment contracts can act as a valuable corrective mechanism for fine-tuning investment incentives in light of the specific circumstances of an investment at a unique moment in time.

The challenge for a state is to use investment contracts to fine-tune, while constraining the Executive from making poor contract decisions. Recall that executive decision making is less likely to internalize noninvestment interests than legislative determination; however, dualist states can mitigate that limitation by empowering the legislature to place limits on permissible investment contract terms. Under our proposed interpretation of umbrella clauses, BITs containing umbrella clauses will be interpreted to elevate contract claims. Given this powerful investor right, in most cases the Executive would consider providing investors with lesser protections in the contract than they receive in the BIT. Executives might be insufficiently motivated to insist on such protections, but presumably when they do, the concern that the Executive will fail to consider noninvestment interests is inapt because those interests will be reflected in the contract. In any event, legislative devices could encourage better executive decisions. For example, a legislature could encourage more careful deliberations by insisting that the Executive provide written justifications for its dispute resolution clauses. The legislature might also prohibit the Executive from expanding tribunal jurisdiction by contract if such expansion would be deemed excessive.

Investors can hardly complain that they were unfairly surprised by the fact that their umbrella clause protections were minimized, because those protections would be available except when an investment contract clearly takes them away. If the contract takes them away, then investors are given notice about the narrowed scope of conferred rights. Moreover, if an investor enters into a contract with the state, then it must derive some benefit in the contract that would not otherwise be provided by governing law, including the relevant BIT, and the contract must provide benefits sufficiently large enough to induce the investor to cede its umbrella clause protections. Finally, any investor who feels disgruntled by a strong-armed denial of umbrella clause protections could make its contract public, which could serve to undermine any reputational benefit that the state enjoyed from incorporating umbrella clauses into the relevant BIT in the first place.

Note also that providing the state with the authority to contract around umbrella clause protections would enable the state to fix, or at least mitigate, potential treaty interpretation problems. If umbrella clauses were interpreted to confer jurisdiction on the tribunal to resolve breach of contract disputes, states might experience difficulty amending BITs drafted before such a treaty interpretation rule was put in place.[174] Even though such an interpretation could threaten to commit a state to more than it originally intended, the state could limit the reach of the interpretation rule by narrowing its contractual commitments, where possible.

Despite the appeal of this solution from a functional perspective, it might seem heretical to international law scholars. First, for those who think about hierarchies of law in a formalist manner, surely treaties are superior to contracts, and that fact implies that a contract should never work to shrink a state's treaty obligations.[175] Furthermore, some scholars focus on the fact that states only are parties to BITs, with investors at best serving as third-party beneficiaries.[176] By so casting the investor, at

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174. Indeed, this difficulty for states might partially explain tribunal reluctance to interpret umbrella clauses broadly. S*ee, e.g.*, SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribonal on Objections to Jurisdiction, ¶¶ 167–68 (Aug. 6, 2003), http://www.italaw.com/sites/default/files/case-document/ita0779.pdf. (noting the broad sweeping implications for states to elevating breach of contract claims to treaty disputes).

175. *See, e.g.*, UNITED NATIONS CONFERENCE ON TRADE AND DEV., INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW 19 (2005), http://unctad.org/en/docs/iteiit20054_en.pdf (noting tribunal concern that contracts not stand in the way of international obligations); Wong, *supra* note 20, at 170–71, 173 (advocating for treaty obligations to take precedence over investment contract obligations).

176. Bjorklund, *Mandatory Rules, supra* note 80, at 189–90.

least one scholar has concluded that investors cannot *ex ante* abrogate the rights bargained by the home state.[177] In the words of one author, "it would be paradoxical for a host state to require that investors waive the dispute settlement protections of the very treaty that their home state negotiated for their protection."[178]

Finally, as a formal matter, BITs impose reciprocal obligations on the signatory states. The states might in fact occupy very different positions, with a "host" state primarily seeking to attract investment and a "home" state primarily seeking to provide positive investment opportunities for its businesses. Nevertheless, BIT language obligates both states to provide investors from the other nation with the same rights, and sometimes the economic trajectories of the two states results in a turning of the tables, where the home state later finds itself to be a host state obligated to comply with the very limits it insisted on when the treaty was drafted.[179] If the umbrella clause is viewed as a provision binding both states to the treaty, then enabling a state to unilaterally water down its obligations through contract seems problematically nonmutual.

One way to confer discretion on the state to contract around umbrella clause protections while addressing these concerns is to enable the states to insert express reservations in the BIT related to the umbrella clause. The reservation could provide that one (or both) of the states to the treaty reserves a right to modify investors' rights regarding breach of contract claims in investment contracts.[180] Excessive reliance on the reservation could become a diplomatic issue, but it should not rise to the level of an *ultra vires* treaty violation.

Such reservations could actually promote a race to the top for states. Contractual flexibility can benefit both states and investors. First, contractual flexibility makes it easier for a tribunal to conclude that it has jurisdiction over contract claims by virtue of the umbrella clause, because states can mitigate the potential costs of such a conclusion. Second, contractual flexibility promotes certainty regarding the parties' rights and responsibilities, which can enable better planning and significantly reduce dispute resolution costs. And, given that the state is made up of domestic interest groups, some of whom might stand to lose from an unduly expansive view of investor rights, enhanced contract flexibility enables the state to adopt a better balance of interests. Overall, a more fine-tuned experimentation makes it easier for states to observe the set of

177. *Id.*

178. Bjorklund, *Private Rights, supra* note 71, at 268.

179. *See* Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape of International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 659–61 (2007); *see also* Franck, *Myths & Realities*, *supra* note 18 (identifying similar trends with data current to 2012); Franck, *Empirically Evaluating Claims*, *supra* note 30, at 27–29 (providing data to indicate where developed countries end up as defendants in investment arbitrations).

180. In theory, other reservations could operate to provide states with further desirable flexibility to fine-tune their obligations. For example, it might also make sense to use similar reservations for the fair and equitable treatment provisions of BITs. We leave consideration of such options for another day.

provisions that work best, given its competing needs. In the end, state responses to perceived excesses are more likely to remain within the investment treaty framework, with the result that international trade and investment could be more effectively preserved.[181]

Under our proposed approach, then, states' umbrella clauses can take one of three forms: (1) a simple umbrella clause, which has the effect of conferring jurisdiction on the investment treaty tribunal to resolve contract disputes; (2) umbrella clauses that clearly articulate that no such jurisdiction is to be conferred; and (3) umbrella clauses that confer jurisdiction but with the caveat that the jurisdiction can be limited, eliminated, or expanded in investment contracts.

3. Other Contractual Mechanisms

Recently states have expressed dissatisfaction with ICSID arbitration as being unfairly one-sided and as expanding states' treaty obligations beyond what they contemplated, thus unreasonably hampering states' abilities to respond to domestic needs.[182] While the one-sided nature of arbitration outcomes is not substantiated in empirical studies,[183] states nevertheless express concern, and a few have signaled a movement away from ICSID arbitration, particular BIT provisions, or both.[184]

Note that investment contract provisions could be used in many ways to mitigate the perceived cost of the treaties, as used and interpreted, without actually conflicting with BIT obligations. Our analysis suggests that states should actively consider such fine-tuning devices. We consider just one possibility here: a contract provision that adopts a one-way fee shifting rule. Attorney, arbitrator, and expert fees and other costs represent a substantial portion of the average investment arbitration award—in some instances, an average of sixty percent of the average award; meanwhile, small states complain that the threat of arbitration

181. Another issue facing tribunals is the question of whether a forum-selection clause in an investment contract works to limit or expand the venues where a breach of contract dispute can be heard. This issue arises after tribunals have determined that the BIT umbrella clause covers at least some breach of contract claims. *See, e.g.*, SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 149–55 (Jan. 29, 2004), http://www.italaw.com/sites/default/files/case-documents/ita0182.pdf. If the clause works to limit jurisdiction, it is read to have the effect of opting out of the umbrella clause for this particular investment. If it works to expand jurisdiction, then the investor can choose either the forum designated in the BIT or the forum designated in the contract for resolution of its breach of contract claim. Of course, contractual clauses can clearly state that the designated jurisdiction is exclusive or permissive, but what should happen when the contract is silent? We save a full analysis of that question for another day. Preliminarily, however, we think that the forum-selection clause should be interpreted as permissive. The BIT umbrella clause signals that the state is offering strong protections, and, although contractual narrowing is possible, such contracting should be explicit. This interpretation furthers sound law market functioning.

182. Franck, *Myths & Realities*, *supra* note 18.

183. *Id.*; *see also* Franck, *Empirically Evaluating Claims, supra* note 30, at 55.

184. *See supra* notes 18–19, 152–543 and accompanying text; *infra* notes 191–92 and accompanying text. That said, many nations continue to sign strong BITs. UNCTAD, *WIR 2013*, *supra* note 39, at xix–xx; UNCTAD, *WIR 2012*, *supra* note 43, at 84–86. *But see supra* note 29 (indicating that Canada ratified the ICSID Convention in late 2013).

alone creates problems for them.[185] A state experiencing these difficulties could attempt to renegotiate BIT substantive provisions, dispute resolution provisions, or both, to address the problem. Often such renegotiations are not possible, and in any event, they might prove to be more drastic steps than are necessary to mitigate the state's cost concerns.

An alternative solution could be investment contract provisions that provide that if the investor loses, then it must pay the state's legal fees, but if the state loses, the investor must still pay its own costs. This solution could mitigate the costs of unmeritorious lawsuits, thereby removing investors' ability to influence domestic policies with litigation threats, while at the same time still holding states to their foreign investment commitments. Moreover, this solution does not require one to buy into a regime where contracts can reduce BIT obligations, because it does not appear that any currently existing BIT treaty provisions would prevent a one-way fee shifting clause.[186] Such a contract provision might not provide a workable solution for all states or all investors, but the point here is that the contracts can serve an underappreciated fine-tuning role.

Some states find themselves in need of resurrecting their reputations as a result of poor past investor treatment, and these states might wish to provide even greater investor protection in their contracts than what is provided in its prior BITs. Here, too, contractual language can be used to enhance investor protections. As mentioned earlier, in appropriate circumstances, legislatures in dualist governments might wish to pass legislation constraining contractual provisions. Overall, however, the contracts can play an important supporting role with BITs, even without BIT reservation clauses.

Finally, if investment contracts can narrow rights provided in a BIT, with or without a reservation clause, then the contractual solution can become a method for disgruntled states to experiment with narrowing BIT provisions before attempting broad-scale treaty renegotiations. After all, BIT modifications can have potentially large or unintended consequences that could have the effect of chilling them despite complaint. Overly specific definitions or overly broad tribunal constraints could create absurd results or unduly hamper an arbitral tribunal's ability to render flexible and/or equitable decisions, and some restrictive moves could negatively affect foreign investments. Experimentation with narrowing investor rights and/or tribunal discretion through contract thus offers a unique opportunity to create feedback mechanisms that offer valuable information to both investors and states.

States might wish to experiment with a variety of contractual provisions. For states concerned that BITs unduly limit their regulatory authority, contracts could make clear that the state retains discretion over

185. Franck, *Myths and Realities*, *supra* note 18.

186. Bjorklund argues that investors cannot abrogate their BIT rights regarding consents to jurisdiction, but concludes that investors are free to change the procedural devices that might apply to dispute resolution. Bjorklund, *Mandatory Rules, supra* note 80, at 189.

particular matters, such as environmental protection or tax policy. States might want to limit the forum where investors can bring contractual disputes. On a smaller scale, states worried about significant damages awards could mandate that arbitrators engage in a limited form of damage calculations or exclude the possibility that investors make claims for moral damages. Meanwhile, those concerned about the costs of arbitration could introduce mediation as a prerequisite to the investor filing a demand for arbitration.

4. Most Favored Nation Provisions—Preliminary Thoughts

Recently, investment treaty tribunals have addressed the appropriate scope of MFN clauses, which are commonly found in BITs. In the investment treaty context, MFNs help an active competitor to precommit to offering state-of-the-art investor protections. MFNs can also help passive competitors who provide minimal necessary protections, because a later determination that a protection is necessary to protect foreign investment will apply backward to fix holes in prior BITs.

That said, however, in the BIT context, MFNs have potentially broad-sweeping implications for a state's ability to fine-tune investment incentives. Presumably the terms in a BIT have much to do with the benefits the signatory states believe that they can garner from foreign investment, and that potential benefit can vary depending on the magnitude and types of investment that might come from the counterparty state. In addition, states' need to bolster their reputations for protecting investments can vary over time. For these and other reasons, a state might well wish to meaningfully vary the investment rights and dispute resolution options in different treaties. MFN provisions can substantially hinder this differentiation. In fact, they could work to significantly limit the rights granted in an individual BIT.

MFN clauses position states as active competitors because they represent a commitment to likely future expansion of investor rights. But for passive competitors, who do not want to lose foreign investment opportunities but also wish to minimize ceding more investor rights than absolutely necessary, MFNs can prove problematic.[187] MFN's operate to create substantive rights in previously negotiated BITs, and if those rights were not considered necessary to that BIT when originally negotiated, conferring them *ex post* might force the state to incur unnecessary sovereignty costs.

In addition, MFNs can work to expand rights in wholly unanticipated ways. In particular, tribunals have recently struggled with the question of whether the MFN can also work to expand the BIT dispute resolution clauses. Whereas the rights tend to be vague and often signal

187. Schill, *Multilateralization*, *supra* note 100, does not focus on this distinction when he argues for broad use of MFN clauses on the grounds that they further the purposes of the BITs by extending rights to investors as broadly as possible. Surely the states who sign BITs often face significant tradeoffs, which the pro-competition stance ignores.

more general commitments, tribunals constituted *ex post* must adjudicate claims to give a particularized meaning to investment commitments. Given the outsourcing of the interpretive function, the choice of venue for dispute resolution can be a critically important determinant of the shape of the state's commitments. In other words, without knowing in advance what specific content will be given to the general rights provisions, the state's legal fate often turns on the choice of venue for dispute resolution. When that choice, provided in one BIT, is expanded to others, it can have across-the-board repercussions for the state that are impossible to fully forecast. Although it is not clear that one dispute resolution forum (let alone differences among arbitration forums) is systematically more or less biased than another,[188] states might nevertheless find this potential lack of control troublesome.

The risk of unintended expansion of investor rights over time fuels the current dissatisfaction of some states with their BIT regimes. In addition to withdrawing from the ICSID Convention, some states have announced an unwillingness to sign new BITs. South Africa has indicated its refusal to sign new BITs and has let prior BITs expire or otherwise given notice to terminate its BITs.[189] The Czech Republic has explored canceling its BIT with the United States,[190] and Ecuador and Venezuela have provided notice that they also are cancelling their BITs.[191] Rather than walking away from BITs or ICSID arbitration, unhappy states could think about narrowing their substantive rights provisions. For those states, the MFN clause might well be a good place to start.

IV. CONCLUSION

Larry Ribstein's scholarship contains multiple insights, and we attempt to honor his memory here by extending his work on jurisdictional

188. *See* Susan D. Franck, *The ICSID Effect?: Considering Potential Variations in Arbitration Awards*, VA. J. INT'L L. 825, 898 (2011) (failing to identify any meaningful statistical differences in outcomes for investment treaty awards rendered at ICSID, the Stockholm Chamber of Commerce, or through ad hoc arbitration).

189. Franck, *Myths and Realities*, *supra* note 18; *see* Robert Hunter, *South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland*, ROBIN HUNTER: INT'L ARB. & INV. L., http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/ (last visited July 14, 2014); *supra* note 152–53 and accompanying text.

190. Martin Shabu, *Czechs Face Uphill Battle to Cancel US Investment Treaty*, CZECHPOSITION.COM, Apr. 7, 2011, http://www.ceskapozice.cz/en/news/politics-policy/czechs-face-uphill-battle-cancel-us-investment-treaty.

191. Mercedes Alvaro, *Ecuador Plans to Audit Bilateral Investment Treaties*, WALL ST. J., Mar. 11, 2013, http://online.wsj.com/article/BT-CO-20130311-708469.html; Luke Eric Peterson, *Venezuela Surprises the Netherlands with Termination Notice for BIT; Treaty has Been Used by Many to "Route" Investments into Venezuela*, INV. ARB. REP. (May 16, 2008), http://www.iareporter.com/articles/20091001_93; *see also* U.S. DEPT. OF STATE, 2011 INVESTMENT CLIMATE STATEMENT - ECUADOR (2011), *available at* http://www.state.gov/e/eb/rls/othr/ics/2011/157270.htm (describing July 2009 action by Ecuador to withdraw from ICSID and September 2009 request to terminate thirteen BITs). Of note, however, Latin American states have suggested that—as an alternative to ICSID—a regional Latin American body should be created to settle investment related disputes. *Latin American States Form Alliance to Tackle Investment Treaties*, THIRD WORLD NETWORK (Apr. 30, 2013), http://www.twnside.org.sg/title2/FTAs/info.service/2013/fta.info.247.htm.

competition to the market for the law of foreign investment. Not only is foreign investment law driven by state efforts to attract foreign assets—fueling the supply side of the law market—but these laws enhance asset mobility more generally, which works to motivate states to provide attractive commercial laws more generally.

Instead of casting jurisdictional competition as a normative good (justifying expansive investor rights) or as a normative bad (justifying state retreat from its investment commitments), we adopt Larry's more positive stance toward jurisdictional competition. Specifically, jurisdictional competition for international investment simply *is*; the competition exists because exit-affected interest groups within a state recognize that they will benefit if the state successfully attracts assets, business activities, know-how, and revenues from abroad. Jurisdictional competition for foreign investment stokes controversy, however, because competing groups' interests are hindered when the state cedes its sovereign authority in an attempt to attract the investments. There is no objective way to know the *ex ante* optimal balance between these competing interests for all situations, but presumably the foreign investment law decisions of individual states can be enhanced if those decisions are housed within the state to encourage the broadest possible interest group participation. In addition, enhanced interest group participation can help bolster the legitimacy of the states' decisions.

In this Article, we focused on the fact that states make commitments to investors in both BITs and investment contracts, and the two devices carry differing strengths and limitations. BITs are vaguely-worded, publicly accessible documents providing investment rights to all investors from another nation, and in dualist countries both legislatures and executives play a role in BIT ratification. Investment contracts are privately negotiated agreements that the state, through its Executive, enters into with individual investors. Relative to BITs, investment contracts can be more specifically worded, and they can more effectively be used to fine-tune investment incentives. On the other hand, the contracts are subject to investor capture and even the possibility of corruption, and they likely are less effective as reputation-enhancing devices.

We argue that investment commitments should use the strengths of both of these documents while mitigating their limitations. General commitments can be stated in BITs, with more fine-tuned commitments provided in investment contracts. To facilitate the market for investment law, while encouraging competing interest group participation and clearer BIT statements, we advocate that BIT umbrella clauses be interpreted to elevate contract disputes to treaty disputes, giving the treaty tribunal jurisdiction over them, unless the BIT provides otherwise.

In addition, we argue that international investment law principles incorporate the notion that investment contracts can narrow a state's BIT obligations, at least for purposes of resolving investor-state disputes. By empowering the state's ability to fine-tune investment incentives in contracts, the state can more effectively economize on sovereignty costs while still encouraging international investment. This latter principle could be Pareto-improving because investors who find their rights narrowed in the contract presumably get some offsetting benefit from entering the contract in the first place. In dualist countries, the legislature can impose procedural or substantive limitations on executive contract negotiations in order to either make public the contracts and/or to limit executive authority to interfere with important competing domestic interests. We also argue that, more generally, states should consider using investment contract terms to help mitigate the perceived costs of BITs, rather than rejecting BITs or ICSID arbitration altogether.

Finally, we raise the question of whether MFNs serve the interests of states that do not wish to be active competitors in the investment law market. The ubiquity of MFN and other strong BIT provisions could be evidence that states are active competitors regardless of the marginal costs to state sovereignty. Where domestic interests are strong enough to focus a state on economizing on the sovereignty costs of attracting investment, however, MFNs can prove counterproductive to both the state's interests and their willingness to experiment with broader investor protections in the future.