

4-1-2006

The Emergence Of Positive Obligations In Bilateral Investment Treaties

Joshua Robbins

Follow this and additional works at: <https://repository.law.miami.edu/umicl>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Joshua Robbins, *The Emergence Of Positive Obligations In Bilateral Investment Treaties*, 13 U. Miami Int'l & Comp. L. Rev. 403 (2006)

Available at: <https://repository.law.miami.edu/umicl/vol13/iss2/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE EMERGENCE OF POSITIVE OBLIGATIONS IN BILATERAL INVESTMENT TREATIES

*Joshua Robbins**

I.	Introduction	403
II.	Background on International Investment Law.....	406
A.	Definition and Characteristics of Foreign Direct Investment	406
B.	Historical Development of International Investment Law	409
C.	Modern Investment Treaties and Dispute Settlement ..	412
III.	Basic Models of Investment Protection	417
A.	The Negative Obligation Model.....	417
B.	The Positive Obligation Model.....	421
IV.	External Sources of Law in the BITSystem	432
A.	Most Favored Nation Clauses and BIT Networks	432
B.	Minimum Treatment Clauses and Incorporation of “International Law”.....	434
V.	Positive Obligations and Harmonization of Economic Law.....	448
A.	Early Harmonization Measures in the GATT / WTO System.....	449
B.	Intellectual Property.....	450
C.	Potential Future Areas of Harmonization.....	460
VI.	Implications.....	465
VII.	Conclusion.....	472

I. Introduction

International investment law—the set of rules and principles governing how states treat foreign investors and investments within their territories—has experienced remarkable growth over the past two decades. While for much of the 20th century international investment law was so clouded by conflict between developed, capital-exporting states and developing, capital-importing states as to be of little utility in promoting investment,¹ it has more recently been transformed into a

* Attorney, Sidley Austin Brown & Wood LLP, Washington, DC. The author wishes to express his sincere gratitude to Alan Birnbaum, formerly of the United States Department of State, Office of the Legal Adviser, from whose enviable imagination the core premise of this article was derived; Professor Detlev Vagts of Harvard Law School, to whose incomparable judgment the article’s present form and emphasis is owed; and Professor Jeswald Salacuse of the Fletcher

dynamic and evolving area of the law that is beginning to factor into the global strategies of a number of businesses. This emergence from the torrid darkness of theory into the thriving lucidity of practice is due largely to the dramatic proliferation of bilateral investment treaties (BITS). By prescribing and proscribing certain conduct on the part of host states with respect to investors, investment treaties offer an enhanced degree of clarity and specificity to the rules governing foreign investment and enable more accurate calculation of risk, thereby encouraging increased flows of foreign direct investment to developing countries.² Perhaps more importantly, modern investment treaties typically empower foreign investors to enforce their own treaty-generated substantive rights by initiating international arbitral proceedings directly against the host state.³ Such proceedings, though not entirely unprecedented in international law,⁴ have raised the profile of international investment law and ensured that scholars, activists and government officials alike take very seriously the various rights and duties it imposes. The system has also given rise to a growing number of rather creative claims by investors.

One such claim arose in *United Parcel Service of America, Inc (UPS) v. Canada*,⁵ an arbitration brought by a U.S. investor under the North American Free Trade Agreement's (NAFTA's) Chapter 11.⁶ In *UPS*, an American investor claimed that Canada had violated certain treaty-based obligations by failing to enforce its own competition laws

School of Law and Diplomacy, on whose boundless expertise and generosity of time the completion of the article has depended.

¹ See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 8-13 (1994) [hereinafter SORNARAJAH].

² See Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L. J. 469, 488-91 (2000) [hereinafter Vandeveld, *Economics*].

³ See Raul Emilio Vinuesa, *Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience*, 8 L. & BUS. REV. AM. 501 (2002);

⁴ See Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L. J. 531 (2002) (noting similar dispute resolution procedures conducted by, inter alia, the Upper Silesian Arbitral Tribunal, the post-WWII Mixed Arbitral Tribunals hearing claims against Germany, and the U.S.-Iran Claims Tribunal).

⁵ *UPS v. Canada*, ICSID (W. Bank), Award on Jurisdiction (Nov. 22, 2002), available at <http://www.naftaclaims.com>.

⁶ North American Free Trade Agreement, Ch. 11, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296 (1993).

against the Canada Post Corporation, a state-owned mail delivery service.⁷ This somewhat unusual claim differs in an important sense from the typical investor-state dispute in that the investor is complaining not merely about actions taken directly by the state against the investor itself, but rather about the state's *failure* to take action to protect the investor against the conduct of a third party.

The *UPS* case illustrates a little-noted but potentially radical development in the field of international investment law: the shift from negative to positive obligations. As explained in Part II, *infra*, the traditional rules in international investment law have been generally "negative" in character, requiring a host state to *refrain* from certain conduct and disciplining wrongful *acts*. Obligations such as the one suggested in *UPS* are "positive," requiring the state to *act* and prohibiting wrongful *omissions*. Although positive obligations have to some extent been present in international investment law from its very inception, they have rarely been invoked outside of extreme circumstances involving war or violent civil unrest. The positive obligation invoked in *UPS*, however, involved review of the adequacy of a state's domestic regulatory institutions, and a request that the state be sanctioned for failing to constrain a third party's commercial activity. Such positive obligations, if imposed regularly, could have even more significant implications for state sovereignty than their negative counterparts, and could raise a host of concerns involving the administrative capacity of the states involved and the legitimacy of the investor-state dispute resolution mechanism.

Moreover, claims based on this sort of positive obligation are likely to be fueled by an additional trend in international economic law. Both developed and developing states have participated in efforts to harmonize, through multilateral agreements or the drafting of "model laws," domestic law and regulations in a number of economic subject areas. These harmonization efforts, if successful in forming a widespread consensus, can contribute to the development of customary international law. This phenomenon is noteworthy because it is possible that both the customary international norms and the multilateral agreements themselves may be incorporated into BITs through the application of specific, commonly used BIT provisions. This incorporation could thereby alter the content of key provisions of those treaties. Consequently, the combination of these harmonization

⁷ See Amended Statement of Claim (*UPS v. Canada*), ICSID (W. Bank) at 13-14, available at <http://www.naftaclaims.com>.

programs and the BITs' incorporation and enforcement provisions could engender a wave of investor-state arbitrations based on failure to regulate, creating serious and unanticipated consequences for host states and generating renewed controversy over the development of investment protection standards.

This article will examine the legal basis for the development of this positive obligation model and of the claims that investors may bring under it. Part II of this article will provide a short background on the development of international investment law and the basic function of investment treaties. Part III will analyze two basic models of obligation imposed by BITs on host states. A variety of standard BIT provisions will be reviewed, with a particular focus on the "full protection and security" clause, which provides the primary source of positive obligation in most BITs. Part IV will examine the means by which external legal rules can be incorporated into the BIT scheme through the mechanisms of the most-favored-nation clause and the "minimum treatment" clause. Part V will review several areas in which international efforts to harmonize domestic economic regulation may generate standards enforceable against host states through investment treaties as positive obligations. Part VI will consider the potential consequences of such a shift in investment protection standards, as well as measures that can be taken to minimize the potential drawbacks of this development.

II. Background on International Investment Law

A full understanding of the nature and significance of positive obligations will be difficult to attain without at least a short introduction to the field of international investment law. This Part will first define and describe the economic phenomenon of foreign direct investment, which constitutes the primary subject matter of international investment law. It will then briefly recount the origins of the current investment law regime, as well as the regime's essential elements.

A. Definition and Characteristics of Foreign Direct Investment

The legal principles and instruments with which this article is concerned focus on host states' treatment of those who are involved in foreign direct investment ("FDI"). FDI has been generally defined by one prominent commentator as "the transfer of tangible or intangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner

of the assets.”⁸ Typically FDI involves the purchase or development of productive facilities such as factories, mines, drilling platforms, or offices, although it also includes ownership of subsidiary entities based in the host state. In recent years “intangible” forms of FDI such as patent, copyright, and trademark rights have comprised an increasing portion of the value of total FDI flows.⁹ Significantly, FDI can be distinguished from “portfolio” investment, in which the investor does not maintain control over the management or use of the invested assets.¹⁰ Similarly, though more fundamentally, FDI can be distinguished from simple cross-border trade in goods or services, though firms engaged in such trade might elect to engage in FDI by setting up local distributorships.¹¹

The basic FDI arrangement involves two states: the “home” state, where investors maintain their nationality and the “host” state, where the investments are physically located (or, in the case of intangible assets, the state in which the economic value of the assets is realized).¹² A “capital importing country” is one that tends to host more FDI from foreign investors than its own investors send abroad. Accordingly, a “capital exporting country” is a state whose FDI flows move in the opposite direction.¹³ Developing states are generally net importers of FDI, and play the role of “host” in the typical foreign investment

⁸ SORNARAJAH, *supra* note 1, at 4. The International Monetary Fund has offered a similar definition of the term. See INTERNATIONAL MONETARY FUND, BALANCE OF PAYMENTS MANUAL, para. 408, at 136 (4th ed., 1977, reprinted in 1987). See also PAUL E. COMEAUX and N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK xix-xx (1997).

⁹ See SORNARAJAH, *supra* note 1, at 4, n.6; Ingo Selting, *FDI and International Protection of Intellectual Property*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 205-206 (Daniel D. Bradlow and Alfred Escher, eds. 1999).

¹⁰ See Alfred Escher, *Current Developments, Legal Challenges, and Definition of FDI*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 20-21 (Daniel D. Bradlow and Alfred Escher, eds. 1999). Escher classifies ownership of over 10% of the voting rights in a foreign company as foreign direct investment, since such a large voting block indicates an interest in being able to influence the company’s management decisions. Ownership of less than 10% is considered portfolio investment for exactly the converse reason. *Id.* at 21.

¹¹ *Id.* at 21.

¹² See SORNARAJAH, *supra* note 1, at 5.

¹³ See *id.* at 8-20; S.K. Date-Bah, *Facilitating and Regulating Private Investment in a Developing Economy*, 22 PENN. ST. INT’L L. REV. 3, 8-11 (2003).

transaction.¹⁴ Wealthier states have tended to be capital exporters, although as noted *infra* some such states have also drawn huge inflows of FDI and thus experienced firsthand some of the difficulties of host state status.¹⁵

FDI provides both benefits and costs for states.¹⁶ On the benefit side, FDI is both provides an influx of wealth for those local producers supplying goods or services to the investors and creates new local jobs.¹⁷ In addition, investors may contribute to the development of the host state's physical infrastructure, introduce new and superior technology, and provide individuals with valuable training and marketable skills.¹⁸ If profitable, such investors may also enlarge the host state government's tax base, enabling the expansion of public services and enhancing the government's credit rating.¹⁹ On the other hand, FDI potentially engenders corruption, contributes to the degradation of the environment, and overwhelms local competitors.²⁰ Rules requiring the protection of

¹⁴ See SORNARAJAH, *supra* note 1, at 8-20; Date-Bah, *supra* note 13, at 8-11; IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 1-8 (1993).

¹⁵ See SORNARAJAH, *supra* note 1, at 15-19, 87.

¹⁶ See SORNARAJAH, *supra* note 1, at 38-50 (presenting and critiquing the "classical theory" of foreign investment and contrasting it with the "dependency theory").

¹⁷ See SHIHATA at 9-12; SORNARAJAH, *supra* note 1, at 38.

¹⁸ See SHIHATA at 9-12; SORNARAJAH, *supra* note 1, at 38-41.

¹⁹ On the other hand, multinational corporations that engage in foreign direct investment might attempt to circumvent the domestic tax system through the use of transfer pricing. See SORNARAJAH, *supra* note 1, at 46-47.

²⁰ See Vandeveld, *Economics*, *supra* note 2, at 481-87; Robin L. Cowling, *Pics, Pops and the MAI Apocalypse: Our Environmental Future as a Function of Investors' Rights and Chemical Management Initiatives*, 21 HOUS. J. INT'L L. 231, 276-89 (1999); Jan McDonald, *The Multilateral Agreement on Investment: Heyday or Mai-Day For Ecologically Sustainable Development?*, 22 MELBOURNE U. L.R. 617 (1998); Sophie Hsia, *Foreign Direct Investment and the Environment: Are Voluntary Codes of Conduct and Self-Imposed Standards Enough?*, 9 ENVTL. LAW. 673 (2003); Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 411 (2000); Merilee S. Grindle, *Public Policy, Foreign Investment and Implementation Style in Mexico*, in ECONOMIC ISSUES AND POLITICAL CONFLICT: U.S.-LATIN AMERICAN RELATIONS 81 (Jorge I. Dominguez ed., 1982).

FDI may encroach on the host state's sovereignty and to restrict the government's ability to respond to emerging social or economic crises.²¹

B. Historical Development of International Investment Law

The treaty rules governing the protection of foreign investment originated from general international legal principles concerning states' treatment of foreign nationals located within their territory.²² Broadly speaking, an alien who travels within a foreign jurisdiction has always been entitled to certain minimal protections against harm to his or her physical person and property.²³ An injury to the alien was deemed an injury to the home state.²⁴ Often, the imperial powers of the 17th, 18th and 19th centuries enforced these principles with respect to their own nationals through military intervention.²⁵ Over time, as foreign direct investment became an integral component of those powers' economies (particularly those of Great Britain and the United States) the protection of aliens' property rights emerged as a crucial concern.²⁶

As the newly defined capital exporting states gradually lost control over their colonies, they sought to replace military force with robust legal standards as a means of protecting their nationals' investments.²⁷ These capital exporting states insisted that host state governments were obliged to provide a certain minimum level of treatment that was consistent from state to state and not dependent on the

²¹ See Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 491 (1998); Mark Vallianatos, *De-Fanging the MAI*, 31 CORNELL INT'L L.J. 713 (1998); Stuart G. Gross, Note, *Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study*, 24 MICH. J. INT'L L. 893 (2003).

²² See, generally, C.F. AMERISINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1964); Richard B. Lillich, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1983). See also SORNARAJAH, *supra* note 1, at 121.

²³ See AMERISINGHE, *supra* note 22, at 2, 37.

²⁴ SORNARAJAH, *supra* note 1, at 121 (citing Panevezys-Saldutiskis Railway Case [1939] PCIJ Series A/B N 76 at 16).

²⁵ KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 7-8 (1992) [hereinafter Vandeveld, UNITED STATES INVESTMENT TREATIES]; SORNARAJAH, *supra* note 1, at 9-10.

²⁶ See CHARLES LIPSON, STANDING GUARD 137-64 (1985).

²⁷ See VANDEVELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, at 9; SORNARAJAH, *supra* note 1, at 10, 123; LIPSON, *supra* note 26, at 37-43, 54.

host's domestic regulatory or property law regime.²⁸ Among the most crucial of these international standards was a rule requiring compensation for the expropriation of an investment by the state. The basic formula preferred by the United States for such compensation, known as the Hull formula, required that the compensation payment be "prompt, adequate, and effective."²⁹ This formula was ultimately adopted in the Restatement (Third) on the Law of Foreign Relations,³⁰ and has remained a key aspect of United States policy on expropriation.³¹

Not content to rest on the legitimacy of their asserted customary rule, the capital exporting states entered into a series of bilateral commercial treaties intended to reinforce whatever protection was already provided to their investors. These treaties, often denominated "Treaties of Friendship, Commerce and Navigation" (FCN treaties), contained clauses specifically prohibiting uncompensated confiscation of property, as well as imposing more general protective standards such as most favored nation treatment (discussed in Part III, *infra*).³² These treaties were signed not only among the capital exporting states themselves, but also between such states and the relatively undeveloped and newly independent capital importing states.

The poorer capital importing states demonstrated opposition to the putative legal standard for investment protection almost from its inception. Some of the most vehement resistance came from the Latin American states, which broadly adopted what became known as the Calvo doctrine.³³ According to this doctrine, states were required merely to afford aliens (including foreign investors) treatment equivalent to that given to their own nationals; no "objective" international standard was

²⁸ See LIPSON, *supra* note 26, at 8-12.

²⁹ This formula, named after former U.S. Secretary of State Cordell Hull, apparently originated some decades before the 1938 negotiations with Mexico in which Hull invoked it as an obligatory standard for restitution of expropriated U.S. property. See *id.* at 80.

³⁰ See RESTATEMENT (THIRD) ON THE LAW OF FOREIGN RELATIONS § 712 (1998).

³¹ SORNARAJAH, *supra* note 1, at 254.

³² See, e.g., Convention of Peace, Amity, Commerce and Navigation, May 16, 1832, U.S.-Chile, available at <http://www.yale.edu/lawweb/avalon/diplomacy/chile/chile01.htm>.

³³ The doctrine was named after the prominent Latin American jurist Carlos Calvo, one of the earliest and most influential figures to challenge the very existence of an international legal regime of investment protection. See LIPSON, *supra* note 26, at 80.

recognized.³⁴ Moreover, aliens who felt that even this national treatment obligation had been violated could seek redress only in the courts of the host state.³⁵ Some Latin American states took the step of explicitly incorporating the Calvo doctrine into their domestic statutory or constitutional framework, as well as into concession agreements signed directly with certain foreign investors.³⁶

Developing states in other regions were similarly critical of the new investment protection standards, and particularly of the obligation to pay compensation for expropriation of foreign-owned property. For example, the Bolshevik revolution in Russia and the spread of Soviet influence within Eastern Europe and elsewhere inspired challenges to the underlying concepts of private property and capital investment on which investment protection principles are themselves based.³⁷ Additionally, a wave of nationalizations, centered in the oil-producing states of the Middle East, brought host states into direct conflict with capital exporting states and the large multinational corporations based within them.³⁸ Although many of these capital importing states took a less intransigent stance than the Latin American states, conceding that expropriation did trigger some legal responsibility, they tended to reject the Hull formula.³⁹ Instead, they advocated a standard of merely "adequate" compensation.⁴⁰ Eventually, the collective efforts of this broader challenge to strict investment protection law culminated in a series of declarations and resolutions in the United Nations General Assembly, emphasizing the principles of national sovereignty, control of the state over its own natural resources, and freedom to regulate (including the power to expropriate) without incurring excessive monetary liabilities.⁴¹

³⁴ SORNARAJAH, *supra* note 1, at 89, n.25.

³⁵ LIPSON, *supra* note 26, at 18, 74.

³⁶ *Id.* at 80.

³⁷ *Id.* at 66-70, 83-84. Beginning in 1921, the Soviets did recognize a legal obligation to pay foreign claims, but also maintained an standing right to confiscate private property and managed to pit the capital exporting states of the west against one another in negotiating ever more lax terms of restitution. *Id.* at 66-68.

³⁸ SORNARAJAH, *supra* note 1, at 12.

³⁹ *Id.* at 402.

⁴⁰ *Id.*

⁴¹ These official actions commenced in 1952 with the resolution on Permanent Sovereignty over Natural Resources, which declared the state's basic rights to nationalize and to freely exploit its national resources. A 1962 resolution of the

C. Modern Investment Treaties and Dispute Settlement

In the latter decades of the 20th century, the capital exporting states began to emphasize BITs as more focused and potentially less controversial means of protecting their nationals' investments. By incorporating clauses prohibiting specific types of objectionable host-state conduct, states hoped that these treaties would provide more predictability to investors than did the vague, contested "universal" standards.⁴² The treaties' basic function was simply "investment protection."⁴³ From the capital importing states' standpoint, the treaties helped to create a more attractive and (at least superficially) stable investment climate, thus increasing inbound FDI with its attendant economic benefits.⁴⁴ This has been termed the treaties' "investment promotion" function.⁴⁵ At the same time, the use of bilateral treaties

same name adopted the "appropriate compensation" term rather than the Hull formula, while a 1972 resolution moved even further towards the Latin American view of domestic legal control over expropriation disputes and national treatment as the only requisite standard. Finally, in 1974 the General Assembly passed the Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No.31, at 50, U.N. Doc. A/9631 (1974), which passed by a vote of 120-6 with ten abstentions. The Charter not only endorsed host states' rights to freely regulate foreign investment, but also listed a set of standards to which capital exporting states and their investors were putatively obligated to conform. See LIPSON, *supra* note 26, at 87-89.

⁴² Several standard substantive BIT provisions are discussed in Part III, *infra*.

⁴³ Professor Vandevelde prefers the terms "investment security" and "stabilization." See Kenneth J. Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnat'l L. 501, 506-10, 522-25 (1998) [hereinafter Vandevelde, *Investment Liberalization*]; Kenneth J. Vandevelde, The Political Economy of a Bilateral Investment Treaty, 92 AM. J. INT'L L. 621, 631-32 (1998) [hereinafter Vandevelde, *Political Economy*].

⁴⁴ Vandevelde, *Economics*, *supra* note 2, at 488-91.

⁴⁵ *Id.* Professor Vandevelde notes that BITs typically do not contain provisions that cover initial establishment of investment. Host states thus remain free to ban inward foreign investment entirely or selectively, or else to negotiate individual terms of entry that negate some of the investment protections afforded by the treaties. According to Vandevelde, this gap prevents BITs from thoroughly liberalizing developing states' investment policies and enables excessive and counter-productive political intervention in those states' economies. See Vandevelde, *Investment Liberalization*, *supra* note 43, at 513-19.

enabled the capital importing states that entered into them to maintain their stated opposition to a more generally applicable international legal standard.⁴⁶

The spread of BITs has intensified dramatically over the past two decades. Whereas some 309 such treaties had been concluded by the end of 1988,⁴⁷ by the end of 2001 the countries of the world had concluded 2099.⁴⁸ The United States has signed 45 BITs, 20 of which were concluded within the past 10 years. The majority of BITs worldwide, however, are between European and developing countries.⁴⁹ Germany alone is party to some 132 investment treaties.⁵⁰ At the same time, the bilateral treaties' basic content and structure is beginning to be incorporated into multilateral agreements involving more than two parties. This phenomenon has primarily taken place at the regional level, most famously in the North American Free Trade Agreement (NAFTA),⁵¹ of which Chapter 11 closely parallels the basic United States-negotiated BIT.⁵² Similar investment provisions are included in a multilateral treaty among the ASEAN members⁵³ and are among the key elements of the proposed Free Trade Area of the Americas⁵⁴ (FTAA) and the recently negotiated Central American Free Trade Agreement

⁴⁶ SORNARAJAH, *supra* note 1, at 14.

⁴⁷ See Athena J. Pappas, *References on Bilateral Investment Treaties*, 4 ICSID REV. FOREIGN INVEST. L. J. 189, 194-203 (1989).

⁴⁸ U.N. CONF. ON TRADE AND DEV. (UNCTAD), WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS at 8, U.N. Sales No. E.02.II.D.4 (2002).

⁴⁹ U.N. CONF. ON TRADE AND DEV., TOTAL NUMBER OF BILATERAL INVESTMENT TREATIES CONCLUDED, 1 JAN. 2003, available at http://unctad.org/sections/dite_pccb/docs/bits_germany_en.pdf (last modified, Nov. 4, 2002).

⁵⁰ *Id.*

⁵¹ North American Free Trade Agreement, Chapter 11, Dec. 17, 1992, 32 I.L.M. 296 (1993) & 32 I.L.M. 605 (1993).

⁵² See, e.g. *Id.*

⁵³ ASEAN Investment Protection Agreement, Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, entered into force Dec. 14-15, 1987, art. X(2), reprinted in 27 I.L.M. 596 (1988).

⁵⁴ See Free Trade Area of the Americas (FTAA): Draft Agreement, November 21, 2003, available at http://www.ftaa-alca.org/ftaadrafts_e.asp (last visited Feb. 19, 2005).

(CAFTA)⁵⁵. With the notable exception of the European Energy Charter Treaty,⁵⁶ which provides BIT-like protection for investments in the energy sector, attempts to expand investment protection agreements even further to a more global level have thus far proven largely unsuccessful – most notably in the case of the Organization of Economic Cooperation and Development's failed Multilateral Agreement on Investment (MAI).⁵⁷ Such efforts, however, remain part of the World Trade Organization's stated agenda.⁵⁸

One of the most important components of modern investment protection law in general and of BITs in particular is a somewhat novel mechanism created to remove investment-related disputes from the political realm and “legalize” the process of their resolution via arbitration. Historically, since international legal personality was limited to sovereigns, and any harm to an investor was considered harm to the home state,⁵⁹ investment disputes were conducted on a state to state level.⁶⁰ Dispute resolution was achieved through diplomatic means, often involving the negotiation of a lump sum payment to the home state, who might then make the funds available to the injured investor.⁶¹ If

⁵⁵ Central American Free Trade Agreement (CAFTA), Aug. 5, 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/DR-CAFTA/DR-CAFTA_Final_Texts/Section_Index.html (last visited Feb. 30, 2005).

⁵⁶ Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 (1995).

⁵⁷ See Stephen J. Canner, *Exceptions and Conditions: The Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 657 (1998); Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275 (2000-2001); Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731 (1998); Stumberg, *supra* note 21.

⁵⁸ See Eric M. Burt, Note and Comment: *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U.J. INT'L L. & POL'Y 1015 (1997); Kevin C. Kennedy, Symposium: *Global Trade Issues in the New Millennium: Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 585 (2000-2001).

⁵⁹ See AMERISINGHE at 56-61.

⁶⁰ COMEAUX & KINSELLA, *supra* note 8, at 217-222; Legum, *supra* note 4, at 535.

⁶¹ See MALCOM N. SHAW, INTERNATIONAL LAW 526-27 (3rd ed. 1991); RICHARD B. LILICH, BURNS H. WESTON ET AL., INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (1999).

legal proceedings were instituted, either before the International Court of Justice⁶² or through an ad hoc arbitration,⁶³ it was the home state that instituted the claim, conducted the litigation and appeared before the presiding tribunal.⁶⁴

The modern investor-state dispute resolution system takes a dramatically different approach. Virtually every BIT contains a section allowing investors who feel their treaty-based rights have been violated to institute arbitration against the host state.⁶⁵ Such arbitrations are frequently to be administered by the International Center for the Settlement of Investment Disputes (ICSID), an institution within the World Bank Group formed in 1966 to conduct and promote investor-state dispute resolution. States that are parties to the International Convention on the Settlement of Investment Disputes (the ICSID Convention)⁶⁶ are bound to comply with any award issued against them by an ICSID arbitral tribunal, and to enforce such awards made against other host states.⁶⁷ Even states that are not parties to the ICSID Convention include provisions within their BITs that refer disputes to ICSID-administered arbitration, although the legal basis for enforcement of awards in such cases is less clear.⁶⁸ So far, ICSID has administered 89 disputes.⁶⁹ Another 72 cases are currently pending.⁷⁰

⁶² See VANDEVELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, at 161-62; COMEAUX & KINSELLA, *supra* note 8, at 221-22.

⁶³ See Legum, *supra* note 4, at 534-35 (citing John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (Washington Gov't Printing Office, 1898)).

⁶⁴ See *id.*

⁶⁵ See Vandeveld, *Political Economy*, *supra* note 42, at 632; UNITED NATIONS CENTRE ON TRANSNATIONAL CORP'S, BILATERAL INVESTMENT TREATIES 88 (1988).

⁶⁶ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 27, 1965, 17 U.S.T. 1270 575 U.N.T.S. 159.

⁶⁷ See *id.*, art. 54.

⁶⁸ If either the host state or home state in a given investment dispute is not a party to the ICSID Convention, the arbitration will be governed by the ICSID Additional Facility procedural rules, rather than the standard Arbitration Rules. See *ICSID Additional Facility Rules*, ICSID website, available at <http://www.worldbank.org/icsid/facility.htm> (last visited Feb. 20, 2005).

⁶⁹ International Convention on the Settlement of Investment Disputes (ICSID), *List of Concluded Cases*, at www.worldbank.org/icsid/cases (last visited Feb. 20, 2005)..

Binding investor-state arbitration tends to augment both the negative and positive features of investment protection and promotion. For example, the most crucial (and obvious) effect of the dispute resolution clause is to give investors a direct role in defending their interests and ensuring that violations of their rights are remedied. This ensures that home states will not sacrifice the investors' claim for the sake of cooperative relations between the host and home states or for concessions on unrelated matters. Binding investor-state arbitration also tends to augment both the negative and positive features of investment promotion and protection. By giving investors a voice in their own fate, the dispute resolution scheme further mitigates the anticipated risks of FDI and thus, once again, increases investment flows.⁷¹ At the same time, the home state's loss of regulatory freedom (or "sovereignty", in the view of the investment treaties' critics) is made more acutely evident with every award rendered against a host state. Although ICSID tribunals have no power to issue injunctive decrees or other equitable relief compelling state compliance, the monetary value of many of the claims filed by investors so far has been of such magnitude as effectively to force poorer host states to reduce their regulations.⁷² Indeed, even the United States has felt the potential weight of the investor-state arbitration procedure; the size of several claims filed by Canadian investors under NAFTA Chapter 11 is likely responsible for much of that treaty's notoriety.⁷³

⁷⁰ International Convention on the Settlement of Investment Disputes (ICSID), *List of Pending Cases*, at www.worldbank.org/icsid/cases/pending.htm (last visited Feb. 20, 2005).

⁷¹ See COMEAUX & KINSELLA, *supra* note 8, at 217-22.

⁷² See Gross, *supra* note 21, at 899 (noting that "regulatory chill" is an issue where "just the threat of such liability will lead countries to forego needed environmental and social legislation that might negatively affect the value of foreign investment, rather than risk potential liability....").

⁷³ See Dana Krueger, *The Combat Zone: Mondev International, Ltd. v. United States and the Backlash Against NAFTA Chapter 11*, 21 B.U. Int'l L.J. 399. The investors in *Loewen Group, Inc. v. United States* and *Methanex Corp. v. United States*, both discussed *infra*, claimed some \$725 million and \$972 million, respectively. Statement of Claim (*Loewen Group, Inc. v. United States*), ICSID (W. Bank) Case No. ARB(AF)/98/3 (October 30, 1998), at 67, available at <http://www.naftaclaims.com>; Statement of Claim (*Methanex Corp. v. United States*), ICSID (W. Bank) (Dec. 3, 1999), at 13, available at <http://www.naftaclaims.com>.

III. Basic Models of Investment Protection

The substantive rules of the modern international investment law system create two basic models of investment protection: negative obligations and positive obligations. The negative obligation model has been the more historically visible, it having been frequently discussed and repeatedly invoked by investors. In contrast, the positive obligation model, which is the primary subject of this article, has an equally long lineage but has enjoyed a somewhat lower profile over the years. This Part will discuss both models and identify the various substantive BIT provisions that characterize each model in turn. The first subpart deals with negative obligations, of which the most recognizable examples are those provisions prohibiting expropriation, limits on currency conversion, and “performance requirements.” The subpart on positive obligations will first note the historical basis for the imposition of positive obligations in general international law and then will turn to currently recognized positive obligations in international investment law. Particular attention will be paid to the “full protection and security” clause that is common to many BITs and most clearly illustrates the positive obligation model.

A. The Negative Obligation Model

The classical role of international investment law has been that of restricting host states from taking certain actions likely to cause harm to foreign investors or to their ability to compete within the local market. This model is traditionally associated with the principle of investment *protection*,⁷⁴ and it encompasses the bulk of the obligations imposed by a standard BIT. Under this model, the government’s primary duty is negative: a duty *not* to act.

1. Expropriation and Compensation

There are several common negative obligation provisions that appear in most BIT agreements. For example, states commonly include a negative obligation in their BITs that prohibits host states’

⁷⁴ Investment protection can be distinguished from investment promotion, which involves the incentivization of initial entry into a host state. See Kenneth J. Vandeveld, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT’L TAX & BUS. LAW. 159, 162 (1993).

expropriation and “measures tantamount to expropriation.”⁷⁵ This common ‘expropriation and compensation provision’ restricts the host government’s ability to directly harm investors by confiscating their assets, by transferring those assets to a third party, or by imposing upon investors regulatory requirements so burdensome as to deprive them of all or a substantial part of the value of the investment.⁷⁶ For instance, suppose Poland nationalizes all private chemical-production operations within its territory, including equipment and manufacturing facilities owned by a private U.S. firm, this would be considered an expropriation under the terms of the BIT in place between the United States and Poland.⁷⁷ Regardless whether it lets the equipment lie idle, takes over operation of the facilities itself, or turns the assets over to a third party, under the terms of the Poland-United States BIT, Poland will *still* have committed expropriation.⁷⁸

A trickier case would be presented if the Polish environmental ministry passed a regulation prohibiting a given piece of real estate – on which a U.S. company had already built a factory – from being used to process the type of substances which the U.S. firm produces. This action would fall under the somewhat more amorphous and contentious category of “measures tantamount to expropriation” (sometimes referred to as “regulatory expropriation” or “creeping expropriation”). An even more difficult case would involve the passage of a statute requiring that all chemicals firms be at least 25% owned by nationals of Poland, which could force the U.S. firm to sell a number of its (or its Polish subsidiaries’) shares at a substantial discount and to give up valuable management control. Arguably, this would also constitute a “measure tantamount to expropriation” under the BIT.⁷⁹ If the Polish government

⁷⁵ See, e.g., NAFTA, *supra* note 6, art. 1110; Treaty Concerning Business and Economic Relations, March 21, 1990, U.S.-Poland, S. TREATY DOC NO. 18 101st Cong. 2d Sess. art. 7 (1990) [hereinafter U.S.-Poland Treaty].

⁷⁶ VANDEVELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, at 117-125.

⁷⁷ See U.S.-Poland Treaty, Art. 7; SORNARAJAH, *supra* note 1, at 277-321.

⁷⁸ *Id.*

⁷⁹ ALLAHYAR MOURI, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL 66, 88 (1994). See *Eastman Kodak Company, et al. v. Islamic Republic of Iran, et al.*, Partial Award No. 329-227/12384-3, p.61 (1987), *reprinted in* 17 Iran-U.S. CTR 181 (1987) (concurring and dissenting opinion of Judge Brower)(indicating that “expropriation can occur not only when the state itself has acquired the benefit of the foreign investor’s property, but also if the state has acquired nothing of

took either action, the BIT may require it to provide to the investor the familiar “prompt, adequate and effective compensation.”⁸⁰

In each of these hypothetical scenarios, it is clear that the harm experienced by the investor (loss of productive assets, diminished revenue and profits, fall in share price) would be derived primarily from the conduct of the state, which has actively utilized its sovereign power to place the investor in a worse position than it had enjoyed before the state’s action. Although other private actors may be the beneficiaries of such state action, their role is largely secondary and passive.⁸¹ The obligation created by the treaty’s anti-expropriation provision acts as a negative right because it prevents or restricts the exercise of that sovereign power. In this sense, such provisions resemble the broader field of international human rights law, since both focus on protecting the individual from the state.⁸² Moreover, it also accords with the WTO’s standard mode of operation, which involves the gradual whittling away of member states’ freedom to restrict private economic activity.⁸³

2. No Restrictions on Currency Conversions

Another frequently cited example of negative obligation is the typical BIT provision prohibiting restrictions on currency conversions. In the past, host states concerned about maintaining the strength of both their foreign exchange reserves and their local currencies often imposed limitations or outright prohibitions on the sale of local currency in

value, but “at least has been the instrument of its redistribution”); *S.D. Myers, Inc. v. Canada*, ICSID (W. Bank) Final Award, (Nov. 13, 2000), para.280, reprinted in 40 I.L.M. 1408 (2001), available at <http://www.naftaclaims.com> (stating that “the term ‘expropriation’ carries with it the connotation of a ‘taking’ by a governmental-type authority of a person’s ‘property’ with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the ‘taking.’”).

⁸⁰ See, e.g., U.S.-Poland Treaty, *supra* note 78, art. 7.

⁸¹ Of course, such private actors may well have a great deal of influence over the state’s behavior, particularly in host states in which corruption is widespread and transparent democracy is not well developed. Even in such cases, however, the basic model holds – the parties inflicting the harm have chosen to act through the machinery of the state, rather than in their individual capacities.

⁸² See SORNARAJAH, *supra* note 1, at 130-31.

⁸³ See generally, http://www.okstate.edu/ind-engr/step/WEBFILES/Papers/Global_Harm_body.htm (last visited May 14, 2005).

exchange for hard currency.⁸⁴ As a result, investors were restricted in their ability to enjoy the benefits of their risks and efforts within their home states, or indeed anywhere other than within the host state itself.⁸⁵ To eliminate such restrictions and thus enable sufficient incentive for investment promotion, states adopted a standard treaty provision that prevents the government from intervening to stop such currency transfers.⁸⁶ Again, the threatened harm to investors from restrictions on currency conversions comes from the exercise of sovereign power to limit the actions of private investors in a manner that reduces the profitability and attractiveness of the investment below the level that would be attained without such state action. The applicable BIT provision acts to restrict the exercise of such power.

3. No Performance Requirements

BITs also frequently contain negative obligations that bar the host government from imposing upon investors certain "performance requirements." For example, the government may not require investors to use locally produced materials, to hire local labor in the production process, or to export a certain percentage of goods produced.⁸⁷ Host states sometimes adopt such performance requirements as a means of improving domestic sales figures, increasing employment levels, or improving the state's current account position.⁸⁸ Again, the exercise of sovereign power in performance requirements may hurt foreign investors by increasing the cost or decreasing the quality of the inputs they must use (particularly as local producers and workers are likely to charge more for their goods and services in a compulsory regulatory environment), or by preventing the use of the investor's manufactured products for profitable non-export purposes. The relevant BIT obligations again play a restrictive or negative function vis-à-vis the state.

4. National Treatment and Most Favored Nation Treatment

Finally, another common set of BIT provisions that impose negative obligations are those requiring national treatment and most favored nation treatment. Each of these provisions requires that the host

⁸⁴ See VANDELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, at 139-144.

⁸⁵ See *id.*

⁸⁶ *Id.*

⁸⁷ See, e.g., U.S.-Poland Treaty, *supra* note 78, art. 2.

⁸⁸ See SORNARAJAH, *supra* note 1, at 109, 113.

state treat foreign investors from the other treaty party no less favorably than it treats some other class of investors.⁸⁹ In the case of national treatment, the “other classes” include similarly situated nationals of the host state, while under most favored nation treatment, the comparison is with similarly situated investors who are nationals of a third state.⁹⁰ Returning to the previous hypothetical, if Poland gives a special tax exemption to domestic chemical companies, but not to U.S. chemical companies doing business in Poland, a firm from the U.S. group can claim a violation of the United States-Poland BIT’s national treatment clause.⁹¹ If Poland extends the exemption to German chemical companies doing business in Poland, the U.S. firm can claim that Poland has violated the most favored nation clause.⁹² In either case, it could be argued that the state is exercising its sovereign power so as to leave the U.S. firm at a competitive disadvantage, and thus the relevant treaty terms constraining such conduct constitute negative obligations.

B. The Positive Obligation Model

Although most common BIT provisions reflect the predominant model of negative obligation, several less frequently invoked terms suggest an alternative role for BITs and for international investment law more generally. In this positive-obligation model, governments are required not to abstain from exercising their sovereign power, but rather affirmatively to exercise such power. In other words, the obligation is not to refrain from acting, but to act. The threat or hardship in this context comes from a source other than the government, and the latter is under a duty to act to defend the investor from that threat or hardship.

The positive obligation paradigm is hardly novel within the sphere of general international law. Authorities on state responsibility have long recognized the principle of international legal liability for omissions as well as actions.⁹³ Article 3 of the International Law

⁸⁹ See VANDELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, at 71-76.

⁹⁰ See *id.*

⁹¹ See U.S.-Poland Treaty, *supra* note 78, art. 2(1).

⁹² See *id.*

⁹³ See AMERISINGHE, *supra* note 22, at 38 (“Both positive acts and omissions by individuals are covered by the international law notion of an act. This point is too obvious to require developing.”); WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 64-65 (A. Pearce Higgins ed., 8th ed. 2001) (1924) (“A state must not only itself obey the law, but it must take reasonable care that

Commission's Draft Articles on State Responsibility define an internationally wrongful act of a state as including "conduct consisting of an action *or omission* [that] is attributable to the state under international law."⁹⁴ In the oft-cited *Corfu Channel* case,⁹⁵ Albania was held responsible for failing to prevent damage to foreign ships and loss of human life that resulted from mines laid in its territorial waters with its constructive or actual knowledge.⁹⁶ The concept of positive obligations in general international law is evident today as well. For example, Article 2 of the International Law Commission's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, defines an internationally wrongful act of a state "when conduct consisting of an action *or omission* is attributable to the state under international law; and constitutes a breach of an international obligation of the State."⁹⁷

One of the primary criticisms of legal rules imposing positive obligations is the potentially greater impact such rules have on sovereignty (or the perception of sovereignty) as compared with rules imposing mere negative obligations. Whereas the latter merely draw boundaries around the foreign national that the state may not cross, the former effectively tell the state how to do its job. Taken far enough, positive obligations could compel the construction of entirely new state institutions or the dramatic expansion of existing ones, so as to meet all the protective requirements imposed and to address the proliferation of threats from malevolent private actors and other forces. This could in turn have significant, if not grievous, fiscal implications. Interestingly,

illegal acts are not done within its dominions...[h]ence it becomes necessary to provide by municipal law, to a reasonable extent, against the commission by private persons of acts which are injurious to the rights of other states, and to use reasonable vigour in the administration of the law so provided.") See also SHAW, *supra* note 62, at 482-83.

⁹⁴ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 2, in *Report of the International Law Commission on the work of its Fifty-third Session*, International Law Commission (ILC), 53rd Sess., Supp. No.10, U.N. Doc. A/56/10 (2001), available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (emphasis added).

⁹⁵ *Corfu Channel* (UK v. Alb.), Merits, 1949 I.C.J. 4, 23 (Apr. 9).

⁹⁶ See also *Spanish Zone of Morocco Claims Case* (U.K. v. Spain), 2 R.I.A.A. 643 (1924) (arbitrator Max Huber emphasizes the equivalence of responsibility for inaction with responsibility for action).

⁹⁷ *Supra*, note 95.

similar concerns have arisen in the context of U.S. constitutional law, in particular with regard to the doctrine of standing.⁹⁸

1. National Treatment and Most Favored Nation Treatment

As to specific examples of current positive obligations in the investment law context, national treatment and most favored nation treatment can be read to create a positive obligation in some situations. For example, if a host government provided postal service to all domestic businesses, but refused to extend such service to foreign investors, such discriminatory treatment would arguably violate the national treatment obligation under any applicable BIT. Such a violation would be particularly evident if there were no private courier services available in the host state as an alternative, due either to market conditions or to prohibition by the government. In order to provide national treatment, the government would either have to eliminate postal service to all domestic investors in “like circumstances” with the foreign investor, or

⁹⁸ While some jurists have supported the extension - to intended or potential beneficiaries of government regulation - of the right to sue the government to compel such enforcement, (*see* *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) (Breyer, J.)) others have stressed that such expansive standing would upend the government’s traditional regulatory prerogative and impose an enormous strain on the government’s resources. *See id.* at 36-37 (Scalia, J., dissenting). *See also* *Professional Pilots Federation v. F.A.A.*, 118 F.3d 758, 763-64 (D.C. Cir. 1997)(holding that agency decisions not to institute rulemaking proceedings are subject to an exceptionally deferential standard of review). Similar concerns have been raised in the context of institutional reform litigation, in which courts are asked to (and often agree to) use their injunctive powers to compel and oversee reforms to such public facilities as schools and prisons. *See, e.g.*, Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999); Malcolm M. Feeley and Edward L. Rubin, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). A recent example of this phenomenon and resultant debate can be seen in *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003), in which the New York Court of Appeals ordered the state to calculate and provide the funds necessary to provide New York public school students with a “sound basic education”. Such a duty falls clearly within the definition of “positive obligation”, and raises a number of questions concerning the court’s legitimacy and the state’s capacity to perform as directed.

¹⁰⁰ *See* discussion, *supra* that the same provisions can be viewed as imposing a negative obligation .

else to provide it to the foreign investor. Although the government in theory has a choice, a widespread denial of services would clearly be the less viable option, and thus national treatment creates a de facto positive obligation. This example defies to some extent the distinction between negative and positive obligations drawn earlier because the harm does not derive from a private, non-state actor. However, the state is compelled to offer a particular service or benefit rather than merely to stay out of the investor's way, thus associating the applicable legal rules more closely with the positive obligation model.

2. Denial of Justice

A more straightforward illustration of a positive obligation is found in the "denial of justice" doctrine long recognized as customary international law,⁹⁹ and therefore (as discussed *infra*) incorporated into many modern BITs. This doctrine guarantees to foreign parties "[f]air courts, readily open to aliens, administering justice honestly, impartially, without bias or political control."¹⁰⁰ Under the doctrine, a host government is required to address, through criminal or civil legal proceedings, a wrong done to a foreign party, or else to afford that party an adequate opportunity to initiate legal proceedings to vindicate its own rights.¹⁰¹ While it is unclear just how far the government must go in pursuing the alleged wrongdoers, and just what sort of procedures must be available to the foreign party, the doctrine imposes two unmistakably affirmative duties on the host government: the duty to establish certain legal institutions and the duty to utilize those institutions in certain circumstances.¹⁰²

⁹⁹ See HALL, *supra* note 94, at 59; Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, Recueil de Cours de l'Academie de la Haye (General Course in Public International Law, The Hague, 1978) at 59-61.

¹⁰⁰ Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445, 460 (1940); see also Robert Azinian, et al. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/97/2 (1999) Award at paras. 102-3 (Nov. 1, 1999), reprinted in 391 I.L.M. 556, available at <http://www.naftaclaims.com>. (noting that denial of justice can arise when a state's domestic courts 1) refuse to entertain a suit; 2) subject a suit to undue delay; 3) administer justice in a "seriously inadequate way"; or 4) "clearly and maliciously" misinterpret the law).

¹⁰¹ See C.F. AMERASINGHE, *supra* note 22, at 50-51, 98-99 (1967).

¹⁰² See HALL, *supra* note 94, at 59; Robert Azinian, et al. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/97/2, Award at paras. 102-3 (Nov. 1, 1999), reprinted in 391 I.L.M. 556, available at <http://www.naftaclaims.com>. To be

For example, suppose the U.S. chemical company in the above example employs a Polish national as a local manager. The company, upon learning that the manager has embezzled substantial company funds and engaged in fraudulent transactions intended to transfer company resources to firms owned by the manager's relatives, seeks to bring a civil claim for restitution and breach of fiduciary duty, and requests that the Polish government bring criminal charges against the manager. If the Polish government and Polish courts refuse to grant any such procedural redress, or demonstrate so much bias against the company in the conduct of the proceedings that the potential for remedy is effectively nullified, the U.S. company may be able to claim a denial of justice. As explained at greater length in Part IV, this may in turn give rise to a violation of the BIT in force between the two countries. The relevant legal obligations here are positive because they require the Polish state to awaken and exercise its power to address harm inflicted upon the U.S. investor by a private individual unaffiliated with the state.

Some of the more recent investment treaties have begun to include provisions specifically requiring host states to provide "effective means" or "effective facilities" for the enforcement of investors' rights, including access to court and administrative proceedings and the right to appoint qualified counsel in such proceedings.¹⁰³ Such provisions would appear to codify explicitly the "denial of justice" principle, and thus create an additional textual source of positive obligation. No claims based on such provisions have yet been decided.

sure, the doctrine also imposes a negative obligation to refrain from undertaking or facilitating "manifestly unjust" legal proceedings against a foreign party. *See* L. Sohn and R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens, Art. 8, at 96 (1961) (providing for violation of international law through unreasonable, discriminatory, or otherwise improper judgments by tribunals against aliens); E. BÖRCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 340 (1916) (noting that a "grossly unfair or notoriously unjust decision" may violate international law).

¹⁰³ *See* Agreement for the Encouragement and Protection of Investments, Art. 3(3), May 21, 2001, Jordan-Kuwait, available at <http://www.agreements.jedco.gov.jo/main/doc/Kuwaitipci01e.htm>]; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-El Salvador, Art 2(4), March 10, 1999, available at http://www.sice.oas.org/bits/usasal_e.asp (last visited Feb. 18, 2005).

3. Full Protection and Security

The clearest example of a positive obligation under international investment law is the “full protection and security” requirement contained in many BITs.¹⁰⁴ Similarly-worded provisions were included in BIT predecessors such as the Jay Treaty¹⁰⁵ and the various FCN treaties,¹⁰⁶ which more commonly referred to “the most constant protection and security”;¹⁰⁷ the phrases are generally considered indistinguishable in practice.¹⁰⁸ In the model United States BIT, the clause imposing this obligation suggests that it is rooted in a more general standard of investment protection under traditional international law: “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security, and shall in no case be accorded treatment less than that required by international law.”¹⁰⁹ As discussed *infra*, there has been some debate over whether this language creates a duty equivalent to the customary international standard or whether it imposes some special, heightened requirement.¹¹⁰

¹⁰⁴ See, e.g., Netherlands Revised Model Agreement on Encouragement and Reciprocal Protection of Investments, art. 3, in BILATERAL INVESTMENT TREATIES 117 (United Nations Centre on Transnational Corporations 1988).

¹⁰⁵ Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. 14, 8 Stat. 116.

¹⁰⁶ See, e.g., Treaty of Friendship, Commerce and Navigation, July 27, 1853, U.S.-Arg., art. 2, 10 Stat. 1005, T.S. No. 4.

¹⁰⁷ See, e.g., Treaty of Friendship, Commerce and Consular Rights, Dec. 23, 1925, U.S.-Estonia, art. 1, 44 Stat. 2379, T.S. No. 736; Treaty of Friendship, Commerce and Consular Rights, Feb. 22, 1926, U.S.-El Salvador, Art. 1, 46 Stat. 2817, T.S. No. 827. Other FCN treaties referred to “special protection” or to “full and perfect protection.” See VANDELDELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, at 15.

¹⁰⁸ VANDELDELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, at 77. Investment treaties involving other countries often include similarly-worded clauses. See, e.g., Agreement on the Mutual Promotion and Protection of Investments, Art. 2(2), March 30, 2000, Jordan-Sudan, available at <http://www.agreements.jedco.gov.jo/main/doc/Sudani00e.html>.

¹⁰⁹ Draft Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment, art. 3, reprinted in VANDELDELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, Appendix A-4, 28 (giving an example of the boilerplate model BIT that the United States favors).

¹¹⁰ Compare S.D. Myers v. Canada, ICSID (W. Bank) Partial Award, (Nov. 13, 2000), at paras. 262-64, with Metalclad Corp. v. Mexico, ICDSID (W. Bank) ARB(AF)/91/1, Award, (Aug. 30, 2000) at para. 74, with Pope & Talbot v.

Although the latter issue remains unresolved, tribunals considering alleged violations of full protection and security have tended to interpret the phrase as requiring the host state to adhere to a single standard of “due diligence” in actively protecting foreign investors from harm. This standard is to be distinguished from the “strict” or “absolute” liability interpretation suggested by some investors. In *Asian Agricultural Products, Ltd. v. Sri Lanka*,¹¹¹ a shrimp farm located in Sri Lanka and owned by a British investor was destroyed by Sri Lankan security forces after they had received reports that the facility was being used by local rebels.¹¹² The investor argued before the ICSID Tribunal that these events constituted a violation of Article 2(2) of the applicable Sri Lanka-United Kingdom BIT,¹¹³ which obligated the host state to provide “full protection and security.”¹¹⁴ Rejecting the investor’s argument that Article 2(2) created a “strict liability” standard,¹¹⁵ the tribunal discussed at length the more appropriate “due diligence” test stating that: “[d]ue diligence’ is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.”¹¹⁶ The Tribunal found that this standard had been violated by the government’s failure to simply instruct the farm management to exclude certain suspect individuals from the farm’s staff, which would have minimized the need to exercise force in “securing” the facilities.¹¹⁷ “[S]uch measures,” the Tribunal explained, “fall within the normal exercise of governmental inherent powers...”¹¹⁸ The International Court of Justice applied a similar due diligence standard to a positive obligation in *Case Concerning Elettronica Sicula S.P.A.*

Canada, ICSID (W. Bank) Award on the Merits of Phase 2 (April 10, 2001) at paras. 110-18, *available at* <http://www.naftaclaims.com>.

¹¹¹ *Asian Agricultural Products, Ltd. v. Sri Lanka*, ICSID (W. Bank) Case No. ARB/87/3, Final Award (June 21, 1990), *reprinted in* 30 I.L.M. 577 (1991).

¹¹² *Id.* at 580.

¹¹³ Agreement between the Government of the United Kingdom of Great Britain and Northern-Ireland and the Government of Sri Lanka for the Promotion and Protection of Investments of February 13, 1980, 19 I.L.M. 886 (1980).

¹¹⁴ *Id.*, art. 2.

¹¹⁵ *Asian Agricultural Products*, *supra* note 113, at 599-602.

¹¹⁶ *Id.* at 612 (citing Alwyn V. Freeman, RESPONSIBILITY OF STATES FOR UNLAWFUL ACTS OF THEIR ARMED FORCES 15 (1957). *See also* SHAW, *supra* note 62, at 492 (noting the applicability of the “due diligence” test).

¹¹⁷ *Asian Agricultural Products*, *supra* note 113, at 616.

¹¹⁸ *Id.*

(ELSI).¹¹⁹ The *ELSI* Court held that Italy's government had not violated the "constant protection and security" requirement contained in a United States-Italy FCN treaty when it failed to prevent workers from temporarily overtaking a factory owned by the investor.¹²⁰ Indeed, as the Court pointed out, the Italian authorities were able to ensure to some extent that the factory continued to operate, thereby avoiding a waste of resources.¹²¹

Although it is difficult to pin down the precise degree of affirmative protection a state must afford in order to meet the "due diligence" test, the *Asian Agricultural* tribunal suggested two basic, alternative approaches. The first is an "objective" approach, which treats all host states equally and requires the degree of protection that can be "legitimately expected" from a "reasonably well organized modern state."¹²² Under this approach, a developing state such as Indonesia would apparently be held to the same standard as the United States in protecting foreign investors from harm by non-state actors. The second approach, which the tribunal indicated was becoming increasingly disfavored, is a "subjective" approach that takes into account the "relatively limited existing possibilities of local authorities in a given context."¹²³ In other words, this latter approach treats every case as different, and considers, *inter alia*, the limited financial or operational capacity of a particular host government to provide the needed protection.

A second unresolved question concerns the scope of the "full protection and security" clause: is the host government required to protect the investor from purely economic harm? This issue was contested in *The Loewen Group, Inc. v. United States*,¹²⁴ in which the

¹¹⁹ *Eletronica Sicula S.P.A. (United States v. Italy)*, 1989 I.C.J. 15 (July 20).

¹²⁰ *Id.* at 54 (stating that the "provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.").

¹²¹ *Id.* For another international tribunal decision finding an affirmative duty to protect foreign investors under international law, see *Janes (USA) v. United Mexican States*, 4 R.I.A.A. 82, 91 (1921) ("International law imposes on a nation the obligation to take appropriate steps to prevent the infliction of wrongs upon aliens").

¹²² *Asian Agricultural Products*, *supra* note 113, at 612.

¹²³ *Id.*

¹²⁴ *Loewen Group, Inc. v. United States*, ICSID (W. Bank) Case. No. ARB(AF)/98/3, Award (June 26, 2003), *reprinted in* 42 I.L.M. 850 (2003),

investor, a Canadian funeral services company that had lost a \$500 million dollar verdict in a state court jury trial, claimed that the state of Mississippi (for whose conduct the United States was liable) had breached its full protection and security obligation by failing to prevent the plaintiffs' attorney from successfully appealing to nationalist sentiment in the jury.¹²⁵ The United States argued for the application of a two prong test under which full protection and security required only "reasonable police protection against acts of a criminal nature that physically invade[] the person or property of an alien."¹²⁶

Although the tribunal ultimately did not address this issue directly,¹²⁷ the validity of such an explicit limitation is dubious. The first prong of the U.S. test, requiring protection only against criminal acts, appears somewhat arbitrary. To allow the government to stand by while a private party accidentally starts a fire near an investor's factory, while requiring that government to act when the fire is lit intentionally, would serve little practical purpose.¹²⁸ Moreover, as there is no objective,

available at <http://www.state.gov/documents/organization/22094.pdf>. Loewen also invoked the "denial of justice" doctrine, discussed *supra. Id.*

¹²⁵ See Joint Reply of Claimants The Loewen Group, Inc. and Raymond L. Loewen To the Counter-Memorial of the United States (Loewen Group, Inc. v. U. S.), ICSID (W. Bank) Case No. ARB(AF)/98/3, at 96-97 (June 8, 2001), *available at* <http://www.naftaclaims.com>.

¹²⁶ See Counter Memorial of the United States of America (Loewen Group, Inc. v. U.S.), ICSID (W. Bank) Case No. ARB(AF)/98/3, at 176 (Mar. 30, 2001), *available at* <http://www.naftaclaims.com>.

¹²⁷ The tribunal did note that the duty to provide full protection and security "must extend to the protection of foreign investors from private parties when they act through the judicial organs of the state." Loewen Group, Inc. v. U.S., ICSID (W. Bank) Case No. ARB(AF)/98/3, Award on Jurisdiction, at para. 58 (Jan. 5, 2001), *available at* <http://www.naftaclaims.com>. Presumably, few such actions performed through judicial organs would qualify as either "criminal" or "physically invasive."

¹²⁸ For a discussion of the tenuous distinction between tort and crime in U.S. domestic law, *see, e.g.*, John C. Coffee, Jr., Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193 (1991). It might be argued that the deterrence benefits of *punishing* intentionally harmful conduct would surpass that of punishing merely negligent conduct, and thus that the full protection and security obligation could be limited in at least this regard. Even if accepted, however, this argument does not support the United States position that the clause requires *no* government response to acts of a non-criminal nature. Moreover, given the overlap between standards of liability for criminal and civil negligence in at least some domestic

internationally recognized basis for distinguishing between injurious conduct that is criminal and injurious conduct that is merely tortuous, the determination of criminality will depend on the domestic law of the country in question.¹²⁹ Thus, under the U.S. approach, the extent of a host state's "full protection and security" obligation would be directly correlated with the breadth of its criminal law; the broader the law's coverage, the greater the protection. Arbitrariness aside, this would create a perverse incentive for a host state to weaken its criminal laws.¹³⁰

The second prong of the U.S. test, focusing on "physical invasion," seems inconsistent with the inclusion of intangible property (e.g. copyrights) within the definition of "investment" in NAFTA Chapter 11¹³¹ and many BITs;¹³² such property by definition cannot be physically invaded or harmed.¹³³ Moreover, a number of BITs include

legal systems, there would seem to be few policy benefits in distinguishing between the two legal categories of conduct.

¹²⁹ Presumably, the U.S. was not going so far as to limit full protection and security to cases involving crimes under *international* law, a rather rare and controversial form of offense. See, e.g., *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 251, 256-59 (1998) (discussing the controversy surrounding the concept of international criminal liability).

¹³⁰ *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID (W. Bank) Case No. ARB/93/1, Award (Feb. 21, 1997), *reprinted in* 36 I.L.M. 1531, 1548 (1997), (discussing a full protection and security provision, stated that the host state "should not be permitted to invoke its own legislation to detract from any such obligation.").

¹³¹ NAFTA, *supra* note 6, art. 1138.

¹³² See, e.g., U.S.-Poland Treaty, *supra* note 78, art. 1.

¹³³ See Vandevelde, *Investment Liberalization*, *supra* note 43, at 501, 510 n.28 (discussing that ["Full protection and security"] certainly is broad enough to permit an interpretation that it requires protection of investment (which includes intellectual property rights in most BITs) against injury by private parties in the form of misappropriation."). Of course, it could be argued that investors owning intangible property are still entitled to all of the other protections provided in the BITs, such as national treatment and freedom from uncompensated expropriation, thus mitigating the inconsistency created by the physical invasion test. In the absence of explicit language to the contrary, however, one must presume that the full panoply of BIT rights are available to all investors from contracting Parties, including those whose property is exclusively intangible. See United Nations Vienna Convention on the Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331 (establishing that the primary means of treaty

separate provisions requiring the host government to take certain actions in the case of war or civil unrest;¹³⁴ such provisions would appear to subsume much of the role imputed to the full protection and security clause under the U.S. view. In any case, the United States based its argument on the fact that Loewen Group, Inc. had identified no previous decision in which a tribunal had found a full protection and security violation based on purely economic harm.¹³⁵ Nothing in the case excerpts cited by the United States actually articulated such a limitation, and future tribunals are presumably free to take a more expansive view. Indeed, the tribunals in two recent ICSID cases, though rejecting claims of violations of full protection and security arising from non-physical, non-criminal acts, did so on the basis that the respective investors had been contributorily negligent, rather than that such claims were categorically invalid.¹³⁶

IV. External Sources of Law in the BIT System

One of the interesting characteristics of BITs is that their provisions can be defined and altered by the legal obligations created in

interpretation is to be the “ordinary meaning” of the “terms of the treaty in their context.”).

¹³⁴ See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Dec. 6, 1983, U.S.- Sen., S. TREATY DOC. NO. 15, 99th Cong., 2d Sess. art. 4 (entered into force Oct. 25, 1990).

¹³⁵ See Counter Memorial of the United States of America, *Loewen*, United States Merits Brief, at 176-80, available at www.naftaclaims.com (citing *Asian Agricultural Products*, *supra*, note 113; *American Manufacturing* (involving failure to prevent looting and destruction of property); *United States Diplomatic Consular Staff in Iran* (U.S. v. Iran), 1980 I.C.J. 3 (involving failure to prevent taking of foreign nationals as hostages); *Chapman v. United Mexican States* (U.S. v. Mex.), 4 R.I.A.A. (Mex-U.S. Gen. Claims Comm’n 1930) (involving failure to prevent shooting and wounding of foreign national); *Biens Britanniques au Maroc Espagnol* (Reclamation 53 de Malilla – Ziat, Ben Kiran) (Spain v. G.B.), 2 R.I.A.A. 729 (1925) (involving failure to prevent mob from destroying foreigner’s store)).

¹³⁶ See *Genin v. Estonia*, ICSID (W. Bank) Case No. ARB/99/2, Final Award (June 25, 2001), available at www.worldbank.org/icsid (last visited Feb. 24, 2005) (arbitrating a claim based on failure to prevent misrepresentations in financial statements of private bank purchased by investor); *Olguín v. Paraguay*, ICSID (W. Bank) Case No. ARB/98/5, Final Award (July 26, 2001), available at <http://www.worldbank.org/icsid> (last visited Feb. 24, 2005) (arbitrating a claim based on failure to supervise financial institution that ultimately became insolvent and unable to repay investor’s deposits).

separate treaties and other sources of international or domestic law. BITs are not unique in this regard; multilateral trade agreements such as the General Agreement on Tariffs and Trade (GATT)¹³⁷ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹³⁸ also incorporate external sources of law into their own internal schema.¹³⁹ However, BITs go somewhat further than the other treaty types by combining multiple incorporating devices and by making a direct and general reference to “international law” as a source of binding obligations. As a result, BITs are subject to effective amendment without the explicit assent of the contracting parties themselves. Often, parties entering into standard BIT arrangements may not fully appreciate the potential for such amendments.

A. Most Favored Nation Clauses and BIT Networks

One example of a BIT provision that incorporates external law into the BIT is the most favored nation (MFN) provision. Like trade agreements, BITs typically include a MFN provision, which in this context requires the host state to treat foreign investors no less favorably than that provided to investors from a third state.¹⁴⁰ Essentially, MFN provisions have a twofold effect. First, they prohibit the host state from engaging in *de facto* discrimination that would result if the host states favored particular investors by reducing regulatory burdens on only those

¹³⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3 (pts. 5 & 6), T.I.A.S. 1700, 55 U.N.T.S. 188, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf [hereinafter GATT].

¹³⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994), *available at* www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS].

¹³⁹ *See, e.g., id.* art. 9 (incorporating the Berne Convention); Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 27 (1994), *available at* www.wto.org/english/docs_e/legal_e/15-sps.pdf. [hereinafter SPS Agreement] (incorporating “international standards” developed by organizations such as the International Office of Epizootics); GATT, *supra* note 139, art. 7(1)(4)(a) (incorporating currency valuation standards established in the Articles of Agreement of the International Monetary Fund).

¹⁴⁰ *See* VENDEVELDE, UNITED STATES INVESTMENT TREATIES, *supra* note 25, 71-76.

investors or providing those investors with favorable tax treatment.¹⁴¹ Second, MFN provisions incorporate external law by requiring the host state to provide to investors from the other contracting state the same or better treatment that is guaranteed by separate BITs entered into with third parties.¹⁴² Although there are limits, BITs incorporate external law even where third-party BITs offer better treatment. Thus, if State A enters into a BIT with State B omitting the prohibition of certain performance requirements, but then State A enters into a BIT with State C containing such a prohibition, the prohibition is thereby incorporated into the BIT with State B.

The scope of a typical BIT's MFN provision appears wide enough to incorporate all of the positive obligations from third-party BITs described earlier. For instance, in *Emilio Augustín Maffezini v. Spain*,¹⁴³ an ICSID Tribunal considered whether a clause in an Argentina-Spain BIT extending MFN treatment to "all matters covered in this Agreement" required the host state (Spain) to extend to an Argentinian investor the right to initiate investor-state arbitration, as contained in a separate Chile-Spain BIT.¹⁴⁴ Observing that such dispute resolution was "inextricably related to the protection of foreign investors," the Tribunal concluded that any similar dispute resolution provisions contained in separate BITs between either Argentina or Spain and a third country could be incorporated into the Argentina-Spain BIT.¹⁴⁵ On these facts, it is likely that the Tribunal's application of the MFN provision in *Maffezini* to an arbitration provision would also apply to other third-party BIT provisions such as the full protection and security clauses, which are substantive rather than procedural, and thus "inextricably related to the protection of foreign investors" like the provision in question in *Maffezini*.¹⁴⁶

¹⁴¹ See *id.*

¹⁴² See *id.* at 34.

¹⁴³ *Emilio Augustín Maffezini v. Spain*, ICSID (W. Bank) Case No. Arb/97/7, Award on Jurisdiction, (Jan. 25, 2000) available at <http://www.naftaclaims.com>.

¹⁴⁴ *Id.* at 14-25.

¹⁴⁵ *Id.* at 21.

¹⁴⁶ See *id.* (discussing that MFN considerations only apply to other third-party BITs that relate to the same subject matter as the basic treaty).

[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most

For that reason, perhaps the standard MFN statement that treatment of parties to BITS should be no less favorable than that “provided” to other states should be interpreted as meaning the treatment should be no less favorable than that “*actually* provided” to other states. Under this interpretation, the MFN provision would refer only to the prohibition of *de facto* discrimination, and would not require that external third-party BIT provisions be incorporated into the BIT. On the other hand, this interpretation of MFN provisions fails to take into account the importance of *de jure* guarantees in helping investors plan their initial entry into the market. To return to the previous hypothetical, if no State C investors have yet entered the host state, State B investors under the *de facto* approach will have no way of knowing whether performance requirements will be lawfully imposed, whereas State C investors will be confident that they will face no such requirements upon entry. The State C investors will thus have a competitive advantage in terms of *ex ante* investment strategy.

B. Minimum Treatment Clauses and Incorporation of “International Law”

Under either interpretation of the MFN clause described above, the host state remains capable of exercising control over the content of its BIT obligations, simply by refusing to enter into additional BITS with standards stricter than those already entered into. However, there is another standard BIT provision that potentially removes the host state’s control over incorporation of external law into the BIT. The minimum treatment provision, sometimes included in a larger section on “treatment of investment,”¹⁴⁷ generally tracks the language in the model U.S. BIT, quoted *supra* at Part III(c). As is evident in that example, this is the point at which the language of “full protection and security,” also discussed *supra*, is often inserted. The incorporation of “international law,” without further definition, invites tribunals applying such a provision to search beyond the four corners of the treaty for the source and content of the minimum standard itself. Depending on the outcome of that search and the ongoing development of international law, the tribunals could impose obligations on the treaty parties that may deviate in scope and character from those originally envisioned by the drafters.

favored nation clause as they are fully compatible with the *ejusdem generis* principle.

Id.

¹⁴⁷ See, e.g., U.S.-Poland Treaty, *supra* note 78, art. 2(6).

1. Incorporation of external treaties?

A debate, alluded to earlier, has arisen in at least one context as to whether the standard minimum treatment clause language incorporates all sources of international law, including treaties and “general principles,”¹⁴⁸ or merely customary international law. In *Methanex Corp. v. United States*,¹⁴⁹ a NAFTA Chapter 11 dispute, a Canadian investor (Methanex) challenged California’s ban of the gasoline additive MTBE. Methanex argued that NAFTA Article 1105 – that treaty’s version of the minimum treatment clause¹⁵⁰ – required treatment in accordance with, among other sources, the WTO’s Agreements on Technical Barriers to Trade (“TBT”)¹⁵¹ and on Sanitary and Phytosanitary Measures (“SPS Agreement”).¹⁵² As part of the Uruguay Round of trade negotiations, the original members of the World Trade Organization (WTO) negotiated and entered into both of these treaties in 1994.¹⁵³ Methanex asserted that the MTBE ban fell within the scope of the TBT agreement, though not the SPS agreement.¹⁵⁴ However, Methanex further contended that California was obligated to comply with several basic principles of *both* agreements, such as the TBT’s requirement of a “legitimate regulatory objective” and the SPS’s requirement of the “least trade restrictive” measure available.¹⁵⁵ Thus, in Methanex’s view, the minimum treatment

¹⁴⁸ See Statute of the International Court of Justice, art. 34, cl. 1, June 26, 1945; 59 Stat. 1055, T.I.A.S. No. 993 [hereinafter I.C.J. Statute].

¹⁴⁹ Amended Statement of Claim (*Methanex Corp. v. U.S.*), ICSID (W. Bank) (Feb. 12, 2001) available at <http://www.naftaclaims.com>.

¹⁵⁰ NAFTA, *supra* note 6, art. 1105. Article 1105(1) states that Article 1105(1) states that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” *Id.*

¹⁵¹ Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments –Results of the Uruguay Round vol. 27 (1994), available at www.wto.org/english/docs_e/legal_e/17-tbt.pdf.

¹⁵² See SPS Agreement, *supra* note 141; Amended Statement of Claim (*Methanex v. U.S.*), ICSID (W. Bank), at 58-65 (Feb. 12, 2001), available at <http://www.naftaclaims.com>.

¹⁵³ See WTO Agreement, Annex 1A, *supra* note 141.

¹⁵⁴ See Amended Statement of Claim (*Methanex Corp. v. U.S.*), ICSID (W. Bank), at 58-65 (Feb. 12, 2001), available at <http://www.naftaclaims.com>.

¹⁵⁵ See *id.* Other principles invoked included the TBT’s prohibition on “unnecessary obstacles” to trade, *id.* at 59, and the SPS’s requirement that

clause in Article 1105 incorporated not only the obligations contained in an external multilateral treaty applicable by its own terms, but also the principles contained in a similar treaty *not* directly applicable in the instant case. It is not clear whether Methanex would have limited this incorporation effect to only those treaties to which all three NAFTA states were parties, or to major multilateral treaties such as those administered by the WTO, or even to trade and investment agreements generally. Presumably, there would be no need for states to incorporate the obligations of other BITs to which the NAFTA parties were members, since this would be accomplished through the MFN clause in Article 1103.¹⁵⁶

Nevertheless, the U.S. position – that Article 1105 incorporated only *customary* international law rather than external treaties – has ultimately prevailed in other NAFTA disputes due to the adoption by the NAFTA Free Trade Commission,¹⁵⁷ on July 31, 2001, of an official interpretation of Article 1105 endorsing the same view.¹⁵⁸ This interpretation, however, is only binding on tribunals adjudicating NAFTA Chapter 11 disputes,¹⁵⁹ and leaves open the possibility that tribunals interpreting other BITs will adopt the broader interpretation urged by Methanex. Indeed, the tribunal in *UPS*, while recognizing the Free Trade Commission interpretation as binding upon it, noted of Article 1105 that:

The reference is to the basic protection conferred on foreign interests by the general body of international law, at least. We say “at least” since the unrestricted reference to “international law” in article 1105 would

government actions be based on “sufficient scientific evidence” and not constitute “disguised restrictions” on trade. *Id.* at 61-62.

¹⁵⁶ See VANDEVELDE, *supra* note 25, at 34.

¹⁵⁷ See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, Part B, *reprinted in* 13 WORLD TRADE & ARBITRATION MATERIALS 139 (Dec. 2001).

¹⁵⁸ See, e.g., *Loewen Group, Inc. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/98/3, Final Award, at 36 (June 26, 2003), *reprinted in* 42 I.L.M. 811 (2003), available at <http://www.state.gov/documents/organization/22094.pdf>.

¹⁵⁹ See NAFTA, *supra* note 6, art. 1131(2).

suggest, as UPS says, that treaty obligations may also contribute to the protection afforded by that article.¹⁶⁰

Thus, under at least one view of the minimum treatment clause, the obligations contained in treaties other than the BIT itself could become part of the BIT and apply directly to each of the parties when acting as host states. The importance of this phenomenon becomes particularly striking if such external treaties are taken to include treaties entered into subsequent to the adoption of the BIT; the importance becomes even more striking if taken to include treaties to which one of the BIT parties has not itself acceded. For example, if TRIPS is considered to be incorporated into a BIT between States A and B, then even if State A is not a party to TRIPS itself it could be required to provide investors from State B with various measures of copyright and patent protection.¹⁶¹ Thus, a series of specific positive obligations would be imported into the BIT and enforced by investors through the specified arbitration procedure. Additionally, if TRIPS were amended to require even more stringent intellectual property protection, the BIT standard could arguably be augmented as well.

2. Incorporation of customary law—as formed by treaties

Accordingly, if the Free Trade Commission's interpretation that BIT minimum treatment clauses held to incorporate only customary international law is adopted broadly, the analysis becomes somewhat more complicated. It is more difficult for states to define a precise standard of conduct, particularly a standard involving positive obligation of the state to act, through customary international law than through a convention.¹⁶² Traditionally, in order to identify a rule of customary international law, states had to point to established state practice and demonstrate that such practice reflects states' *opinio juris*—the

¹⁶⁰ UPS v. Canada, ICSID (W. Bank), Award on Jurisdiction, at 26 (Nov. 22, 2002) available at www.naftaclaims.com. In UPS, the investor argued that the protections afforded by a separate BIT were incorporated into Article 1105.

¹⁶¹ See TRIPS, *supra* note 140, art. 9. Under Article 9, as under various other TRIPS provisions, State A would, in fact, be required to comply with the obligations of yet further treaties, such as the Berne Convention. Other aspects of TRIPS will be discussed in Part V, *infra*.

¹⁶² See WILLIAM E. HALL, INTERNATIONAL LAW 9, 11-12 (8th ed. 2001).

recognition that the practice is driven by a sense of legal obligation.¹⁶³ Relevant state practice can include statements of government officials or acts and omissions of state agents or organs.¹⁶⁴ The *opinio juris* requirement, meanwhile, does not mean that all states must explicitly (or even tacitly) consent to a rule for it to become binding international custom. A crucial difference between custom and treaty is that the former can eventually become binding on a state even without its consent, once the applicable rule is sufficiently definite and widespread.¹⁶⁵

As indicated in Part II, the historical practice of states thus far has left substantial gaps in the customary international law of investment protection. Indeed, it is this indeterminacy that necessitated the development and adoption of BITs and similar treaties in the first place. Such treaties, however, have the potential to serve not only as alternatives to customary rules, but as *sources* of such rules. There has been some debate over the possibility that treaties can form customary international law.¹⁶⁶ Commentators have pointed to a fundamental difference between the two types of sources of international law: while treaties involve a degree of reciprocity or *quid pro quo*, customary law reflects a recognition of the "common will" and that a given principle is binding on all (including the recognizing party) as a preexisting

¹⁶³ S.S. Lotus, (Fr. v. Turk.), 1928 PCIJ (ser. A) No. 9, at 25 et seq. (Sept. 7); North Sea Continental Shelf (F.R.G. v. Den.) 1969 ICJ 3, 41 (Feb. 20); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 47-52 (1997) [hereinafter VILLIGER]; SHAW, *supra* note 62, at 71-76. ICJ Statute Art. 38 requires that customary international law, in order to be binding, must be "accepted as law." I.C.J. Statute, art. 38(1) June 26, 1945, 59 Stat. 1055, T.I.A.S. No. 993.

¹⁶⁴ See VILLIGER, *supra* note 165, at 16-26.

¹⁶⁵ North Sea Continental Shelf, 1969 I.C.J. at 38-39, 41. This issue has engendered substantial debate among scholars, see, e.g., IBRAHIM F.I. SHIHATA, *The Treaty as a Law-Declaring and Custom Making Instrument*, 22 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 51 (1966) (arguing that custom binds even unwilling states); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 311 (Robert W. Tucker ed., 2nd ed. 1952) (arguing that custom manifests state consent).

¹⁶⁶ See Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327 (1994); VILLIGER, *supra* note 165, at 173-75.

normative matter.¹⁶⁷ In fact, one expert has suggested that the *opinio juris* required for customary law is formed only by the recognition of an obligation derived from custom, rather than a convention's contractually-derived duty.¹⁶⁸

Moreover, states may enter into treaties for reasons other than a sense of normative obligation, such as immediate economic self-interest or a desire to gain concessions in unrelated areas. For example, a developing state with limited foreign exchange reserves and a historically restrictive monetary policy might agree to an investment treaty term prohibiting currency controls not because it believes that such a prohibition is or should be a general rule, but rather because its developed counterpart has promised to provide loans or other measures to support the developing state's currency. Treaties may at times be used to *abrogate* or object to prior customary law.¹⁶⁹ Thus, a state's accession to a treaty may be simply a matter of convenience or denial, rather than evidence of *opinio juris*.

Finally, one could argue that *opinio juris* requires distinct awareness of a putatively binding legal rule. If a state accedes to a particularly long, complex and technical treaty, it is unlikely that it intends thereby to acknowledge that each provision contained in the treaty is a generally binding legal norm.¹⁷⁰ Customary international law involves recognition of and compliance with rules or principles, rather than written instruments themselves. It is perhaps for this reason that even observers less hostile to the notion of custom derived from treaty acknowledge that the notion of "automatic" or *ipso facto* generation of customary law through treaty accession would take the process a step too far.¹⁷¹

The predominant view has ultimately been that customary international law *can* result from the formation of treaties and other international agreements.¹⁷² The primary argument in favor of such a process centers on the relative clarity and determinacy of treaties. While

¹⁶⁷ See SHAW, *supra* note 62, at 81; Kishoiyian, *supra* note 168, at 333-38; RESTATEMENT § 102, cmt. (f).

¹⁶⁸ See VILLIGER, *supra* note 165, at 27.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See SHAW, *supra* note 62, at 82.

¹⁷² See *id.* at 81-82; VILLIGER, *supra* note 165, at 173; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12-13 (5th Ed.1998); RESTATEMENT § 102, cmt. (f).

it is often extraordinarily difficult to identify and document the state practice and *opinio juris* needed to form a customary rule, treaties can potentially provide clear evidence of both.¹⁷³ This view is espoused in the widely cited *North Sea Continental Shelf* opinion, in which the I.C.J. noted that “there is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed,” while cautioning that “[a]t the same time, this result is not lightly to be regarded as having been attained.”¹⁷⁴ Article 38 of the Vienna Convention on the Law of Treaties¹⁷⁵ states, somewhat less forcefully, that “nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”¹⁷⁶

There are several ways a treaty could lead to the formation or recognition of customary international law. First, a treaty can codify a preexisting customary rule, thereby rendering it easier to identify and enforce (though not actually contributing to its legally binding character).¹⁷⁷ Alternatively, a treaty can generate a customary rule by catalyzing the requisite state practice and *opinio juris*. The resultant customary rule would be binding even on those countries not parties to the treaty itself.¹⁷⁸ Finally, a treaty can crystallize a rule that had previously been a mere trend or general practice, by providing the missing element of *opinio juris*.¹⁷⁹ Regardless of which method is responsible for creating customary law out of a treaty, only a single rule at a time, rather than the entire content of a convention, is being treated as customary law through recognition and compliance.¹⁸⁰

¹⁷³ See VILLIGER, *supra* note 165, at 173-75. As noted earlier, one might question whether a treaty can ever reflect the necessary sort of *opinio juris*. However, the same sort of criticisms—particularly the possibility that the state’s action was taken for a self-interested motive other than a sense of legal obligation—could be leveled against most of the sorts of acts offered as evidence of a customary rule.

¹⁷⁴ *North Sea Continental Shelf* (F.R.G. v. Den.) 1969 I.C.J. 3, 41 (Feb. 20).

¹⁷⁵ May 23, 1969, art. 18, 1155 U.N.T.S. 331.

¹⁷⁶ *North Sea Continental Shelf* (F.R.G. v. Den.) 1969 I.C.J. 3, 41 (Feb. 20).

¹⁷⁷ See VILLIGER, *supra* note 165, at 117-46.

¹⁷⁸ See *id.* at 167-91; BROWNLIE, *supra* note 174, at 12.

¹⁷⁹ See *North Sea Continental Shelf*, 1968 I.C.J. at 39.

¹⁸⁰ The Vienna Convention itself would appear to be an exception to this principle; it is often considered binding customary law in its entirety. See Jack

North Sea Continental Shelf lays out several tests that a treaty must meet before it can contribute to the formation of customary international law. First, a treaty-based rule must be so widely accepted that its eventual universal application can be justified; a single, *sui generis* bilateral treaty can hardly be invoked to establish a norm binding the entire international community.¹⁸¹ It is unclear exactly how many states would be needed to satisfy such a “numerosity” requirement (if it can be so characterized), but it is generally accepted that absolute universality is not required.¹⁸² Second, even if the number of parties to a treaty is overwhelming, the treaty might not form a customary rule unless the parties include representatives of all (or at least most) concerned factions of states.¹⁸³ The composition of such factions varies with the subject matter of the treaty. In the context of international investment law, a multilateral convention that did not include a sufficient contingent of both developed and developing (or, perhaps, capital-importing and capital-exporting) countries would be of dubious value in establishing a customary rule. Thus, the OECD’s ill-fated attempt to negotiate a Multilateral Agreement on Investment, even if it had been successful, would clearly have had no binding effect on the developing states whose conduct has been the primary concern of international investment law, as there was not adequate representation of these developing countries.¹⁸⁴ Similarly, though more debatably, a multilateral investment convention that did not include parties from a particular geographic region (e.g. Latin America) or from a particular legal tradition (e.g. Islamic law) might be a poor candidate for transformation into customary international law.¹⁸⁵

L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113, 129 (2003-2004).

¹⁸¹ *North Sea Continental Shelf*, 1968 I.C.J. at 42. See also VILLIGER, *supra* note 165 at 177-187.

¹⁸² Neither the *North Sea Continental Shelf* opinion nor the various commentators on the issue have suggested any formula for determining the minimum number of participants needed to enable a multilateral treaty to generate customary international law.

¹⁸³ *North Sea Continental Shelf*, 1968 I.C.J., at 42.

¹⁸⁴ See, e.g., Rainer Geiger, *Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment*, 11 N.Y.U. ENVTL. L.J. 94 (2002).

¹⁸⁵ An additional time-period or “longevity” factor—granting customary international law status only when a treaty has been in force for a certain length of time—has garnered some support but is not considered applicable in all

Although the prior two requirements appear to be related to the traditional state practice element of customary international law, the *North Sea Continental Shelf* opinion referred to a third test more reflective of the *opinio juris* requirement. A treaty-based rule must be of a "fundamentally norm-creating character" in order to create a customary rule.¹⁸⁶ The theoretical basis of this requirement is the distinction between those treaties that operate essentially as contracts under private law between sovereigns and those that are intended to establish a regime governing the broader community of nations under a public law function.¹⁸⁷ Unlike private contract agreements among states, public lawmaking agreements that realize the identical aims of many parties are the result of the "common will," and are meant to create recognition of common "norms" of future conduct.¹⁸⁸ Villiger has interpreted this norm-creating character requirement as entailing two sub-factors. First, a rule must be "general," *i.e.* intended to apply to an indefinite and potentially unlimited number of states, rather than to particular, specified subjects (as is usually true of bilateral agreements).¹⁸⁹ Second, a rule must be "abstract," in the sense that it is prospective and applicable to an indefinite number of future cases, rather than retrospective and intended to resolve a particular dispute or matter.¹⁹⁰

Thus, international economic agreements could potentially lead to the development of a customary international rule that states could be incorporated into standard BITs through the minimum treatment clause. A series of BITs could codify or generate customary rules governing particular issues. For example, if prohibition of local content requirements became a universal element of all BITs over a period of time, and if enough BITs were adopted by a sufficiently diverse set of countries, such a prohibition might be viewed as a rule of customary

situations. See *North Sea Continental Shelf*, 1968 I.C.J. at 42-43; VILLIGER, *supra* note 157, at 184-85. This would be particularly true when, for example, the rule concerned a new or emergent technology as to which all or most states had agreed to a common governing rule but which has not existed for the otherwise necessary time period.

¹⁸⁶ *North Sea Continental Shelf*, 1968 I.C.J., at 42.

¹⁸⁷ See Kishoiyan, *supra* note 168 at 333-35.

¹⁸⁸ *Id.*

¹⁸⁹ See VILLIGER, *supra* note 165, at 177-78. This factor was identified explicitly in *North Sea Continental Shelf*, 1968 I.C.J., at 41-42. The term "erga omnes" could be used as an alternative to "general."

¹⁹⁰ See VILLIGER, *supra* note 165, at 179.

international law, rather than merely a common treaty provision. Even subsequent BITs lacking such a provision might be viewed as adopting the same prohibition by requiring treatment in accordance with customary international law. It is true that were such a customary rule to exist, states would be legally bound by it regardless of whether they had entered into any BITs at all, let alone BITs involving minimum treatment clauses. However, if investors wanted to enforce their rights through compulsory arbitration, the customary rule would have had to be incorporated into their BIT. Whether BITs can feasibly establish customary international rules is clearly debatable, however, because many developing states refuse to accept many of the developed world's preferred standards as generally binding; this is what compels the current "BIT-by-BIT" approach in the first place.¹⁹¹ The *UPS* tribunal noted that "the many bilateral treaties for the protection of investment...vary in their substantive obligations; while they are large in number their coverage is limited; and...in terms of *opinio juris* there is no indication that they reflect a general sense of obligation."¹⁹² On the other hand, the tribunal in *Mondev v. United States*¹⁹³ reached an opposite conclusion, observing that:

Investment treaties run between North and South, and East and West, and between states in these spheres *inter se*. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal's view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law.¹⁹⁴

If the *Mondev* view is widely adopted, states that conclude BITs completely unrelated to a given dispute could thus collectively shape the content of the minimum treatment provision.

¹⁹¹ See Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655 (1990); see also, generally, Kishoiyian, *supra* note 168.

¹⁹² *UPS v. Canada*, ICSID (W. Bank), Award on Jurisdiction, at 31-32 (Nov. 22, 2002), available at www.naftaclaims.com.

¹⁹³ *Mondev v. United State*, ICSID (W. Bank) Case No. ARB(AF)/99/2 Final Award, at 58 (Oct. 21, 2002), available at www.naftaclaims.com.

¹⁹⁴ *Id.* Final Award at 40-41.

Other international agreements, particularly multilateral agreements such as those negotiated in the WTO, may be even more likely to create binding customary rules. Typically, well over a hundred countries from every region enter into WTO agreements, including many dozens of developing countries. Those states that are not yet members of the WTO and its various agreements almost invariably strive to join, a tendency that concededly reflects economic self-interest rather than a sense of legal duty. Nonetheless, these countries' interest in joining at least indicates a willingness to treat the established trade rules as universally binding.¹⁹⁵ The universality requirement thus would be addressed in a more coordinated manner for multilateral agreements than BITs, and a form of *opinio juris* could derive from the organization's prominence and legitimacy.

Several tribunal decisions appear implicitly to support the treatment of multilateral economic agreements as a source of customary international law. The *UPS* tribunal, in rejecting the notion of a customary international law requiring controls on anticompetitive behavior, expressly noted that the WTO members had not yet reached consensus on a set of rules mandating such controls.¹⁹⁶ Although it is unclear whether the tribunal would have treated the completion of a WTO-sponsored Agreement on Competition Law as dispositive, one must assume from the Tribunal's reference to the matter that such a treaty would have merited at least close consideration. Considering another claimant's interpretation of the minimum treatment provision, the tribunal in *ADF Group, Inc. v. United States*¹⁹⁷ also noted, albeit in a footnote, the efforts to develop a multilateral investment agreement within the framework of the WTO's Doha Round.¹⁹⁸ In *S.D. Myers v. Canada*,¹⁹⁹ a third NAFTA Chapter 11 Tribunal explicitly relied on the language of the WTO agreements and on WTO dispute resolution panels' interpretation of that language in determining the meaning of

¹⁹⁵ *Welcome to the Club: Cambodia and the WTO*, THE ECONOMIST, Sep. 13, 2003; *Knock Knock, World Trade*, THE ECONOMIST, Jan. 13, 1996.

¹⁹⁶ *UPS v. Canada*, ICSID (W. Bank), Award on Jurisdiction, at 29-30 (Nov. 22, 2002), available at <http://www.naftaclaims.com>.

¹⁹⁷ *ADF Group, Inc. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/00/1, Final Award, at 89 n.174 (Jan. 9, 2003), available at www.naftaclaims.com.

¹⁹⁸ *Id.* at 89, n. 174.

¹⁹⁹ *S.D. Myers v. Canada*, ICSID (W. Bank), (Nov. 13, 2000), available at <http://www.naftaclaims.com>.

“like circumstances” for the purposes of Article 1102’s national treatment clause.²⁰⁰ The Tribunal also used the WTO language in considering whether a single state action could simultaneously be governed by both Chapter 3 and Chapter 11 of NAFTA.²⁰¹ Although it could be argued that reference to WTO panel decisions is merely an interpretive device, and not the recognition of a customary rule, the value of such a device derives from the WTO agreements’ broad membership and authoritative status in international trade law.

3. Incorporation of customary law created by international organizations

In addition to facilitating the conclusion of multilateral treaties, public and private international organizations may be able to generate customary international law through programs aimed at “harmonizing” various states’ domestic laws. This process can be distinguished from the treaty-formation process in that it does not aim to produce an instrument to which sovereign states can be reciprocally bound, and may not even involve the direct participation of state representatives at all.²⁰² Instead, the groups involved in harmonization efforts collectively seek to distill various states’ jurists and scholars’ pronouncements regarding particular legal subjects into a single, coherent set of model rules. Often, these efforts take on a prescriptive character, with participants including new or amended rules within the model set in an attempt to clarify and improve on established precedent.²⁰³ Organizations may offer the codes ultimately drafted as bases for future multilateral treaty negotiations, as guides for states seeking to reform their own domestic laws, or as interpretive tools for international or domestic tribunals.

²⁰⁰ *Id.* Final Award, at 60-61, 72-73.

²⁰¹ *Id.*

²⁰² For a more expansive review of the role and characteristics of harmonizing “codes” and U.N. resolutions vis-à-vis treaties or “conventions,” see VILLIGER, *supra* note 165, at 119-148; BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 146 (3rd ed. 1999).

²⁰³ See Statute of the International Law Commission, Art. 15, G.A. Res. 174(II), U.N. Doc. A/519 (1947) [hereinafter ILC Statute]. The function of proposing new international law is often referred to as “progressive development” of the law, and distinguished from the “codification” process. See Statute of the International Law Commission, Art. 15, G.A. Res. 174(II), U.N. Doc. A/519 (1947) [hereinafter ILC Statute].

Many of the most influential harmonization programs have taken place under the auspices of the United Nations and affiliated institutions. The International Law Commission (ILC), established by the U.N. General Assembly in 1947,²⁰⁴ is a body composed of persons of "recognized competence in international law"²⁰⁵ who act in their individual capacity rather than as representatives of states,²⁰⁶ and has been active in efforts to harmonize the rules governing, *inter alia*, state responsibility, state succession, and international criminal law.²⁰⁷

The United Nations Commission on International Trade Law (UNCITRAL) has played a key role in the development of common principles of economic and commercial law. These principles are often applied as supplementary "gap-filling" rules in transnational contract disputes governed by international conventions such as the Convention on the International Sale of Goods (CISG)²⁰⁸ or by choice-of-law clauses referring generally to "international law."²⁰⁹ UNCITRAL has also done extensive work in the areas of international arbitration procedure and transnational insolvency.²¹⁰ Like the ILC, UNCITRAL was formed by the U.N. General Assembly as a standing body within the U.N. framework, with a similar mandate of codification and progressive development of law, though in a narrower range of subjects. Other specialized U.N. committees, operating on an ad hoc basis, have led harmonization programs on such matters as terrorism and human cloning, often with the express goal of producing a draft convention.²¹¹

²⁰⁴ VILLIGER, *supra* note 165, at 75.

²⁰⁵ ILC Statute art. 2, para. 1.

²⁰⁶ See VILLIGER, *supra* note 165, at 75.

²⁰⁷ See *id.* at 77; International Law Commission website, available at <http://www.un.org/law/ilc/index.htm>.

²⁰⁸ Final Act of the U.N. Conference on Contracts for the International Sale of Goods, Official Records, Annex I at 230 (Apr. 10, 1980), U.N. Doc. A/ Conf.9 7/18 reprinted in 19 I.L.M. 668 (1980).

²⁰⁹ See Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PENN. J. INT'L EC. L. 33 (1996) ("[T]he *lex mercatoria* may be viewed as a body of customary international law applied by states and arbitral tribunals to relations among private persons...").

²¹⁰ See UNCITRAL Model Law on International Commercial Arbitration (1985); UNCITRAL Model Law on Cross-Border Insolvency (1997), available at <http://untreaty.un.org/ola-internet/cod.htm> (last visited Feb. 2, 2005).

²¹¹ U.N. Office of Legal Affairs, Codification Division web site, available at www.un.org/law/index/htm.

Other public and private organizations, though of somewhat more limited prominence and influence, have played a similar role in the harmonization of international law. The Inter-American Juridical Committee of the Organization of American States, whose function is analogous to that of the ILC, tends to maintain a more regional focus than its U.N. counterpart,²¹² as does the European Committee on Legal Cooperation, founded by the Council of Europe.²¹³ As in the U.N. system, specialized bodies such as the World Intellectual Property Organization (WIPO) undertake more specific harmonization programs. Predating all of these organizations, and indeed the ILC itself, are two private organizations founded and largely comprised by prominent international lawyers of both scholarly and professional castes: The Institut de Droit International and the International Law Association.²¹⁴

Harmonization programs instituted by such organizations can result and have resulted in the formation of customary international law. The capacity of any given program to generate such binding rules depends to some extent on the breadth or participation in the program and in the sponsoring organization. Widespread membership or involvement may be viewed as state practice sufficient to meet the numerosity and representation requirements of *North Sea Continental Shelf*.²¹⁵ Should the participants at a harmonization program reach a consensus as to a rule or set of rules, the requisite *opinio juris* may also be inferred, although this point might be more dubious given the explicitly non-binding nature of draft texts. It is more likely that such agreed texts will attain customary international law status over a period of time, as states slowly and unilaterally move into voluntary compliance. This process can be seen at work in the case of the Vienna Convention, a product of the ILC-U.N. system that the United States

²¹² Jo M. Pasqualucci, 38 STAN. J. INT'L L. 241, 257 (2002) (citing Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Doc. OEA/Ser.L.V/I.4 rev. 8, 2 (May 22, 2001), available at <http://www.cidh.oas.org/document.htm>).

²¹³ VILLIGER, *supra* note 165, at 73-74; European Committee on Legal Cooperation web site, available at www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Steering_Committees/CDCJ/General

²¹⁴ See Restatement, § 103, reporters' note 1. The Restatement's drafters clearly viewed these organizations as capable of issuing quasi-authoritative statements on the content of international law.

²¹⁵ See generally *North Sea Continental Shelf* (F.R.G. v. Den.) 1969 I.C.J. 3, 41 (Feb. 20).

government and its courts have long accepted as a codification of customary international law.²¹⁶ In any case, such developments are substantially more plausible when the harmonization program in question is one initiated by a public international organization; it would require a markedly greater leap of faith to infer broad state recognition of a draft proposed by a set of private "authorities," regardless of their degree of prominence.

Norms created through harmonization programs in the investment law context could contribute significantly to the development of positive obligations under the minimum treatment provision and the full protection and security doctrine. A standard domestic regulatory model could be identified, against which a host state's own programs could be measured. This seems most likely to result from the work of one of the organizations specializing in the harmonization of economic law, such as UNCITRAL and WIPO.

Alternatively, if a harmonization program was ultimately successful in shaping the domestic laws of a substantial number of states, the uniform rules could be accepted as "general principles of law" within the meaning of Article 38 of the ICJ Statute.²¹⁷ Similarly, the rules could be viewed as "teachings of the most highly qualified publicists"; this would provide the private harmonizing organizations a more direct route to influence rulemaking, but the rule ultimately formed would be of only subsidiary legal effect under Article 38. Again, an interpretation of the minimum treatment provision that allowed for incorporation of only customary international law would make these points purely academic from an investor's standpoint. However, if the broader interpretation preferred by the investor in *Methanex*, discussed *supra*, were adopted, such general principles and even scholarly pronouncements could become directly applicable to the host state as part of the larger body of international law.

V. Regulatory Harmonization and External Sources of Positive Obligations in BITs

The previous Part attempted to demonstrate the potential for developments in international law external to a given BIT to alter the content of that BIT, and more specifically, to give rise to privately enforceable positive obligations. This Part will examine certain recent

²¹⁶ See, e.g., *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000); Sec'y of State Rep., 65 Dep't State Bull. 684, 685 (Oct. 18, 1971).

²¹⁷ I.C.J. Statute, *supra* note 151.

developments in the WTO and in multilateral treaties likely to generate such external obligations and thereby to bolster the viability of claims analogous to those rejected in *UPS*. These obligations, once identified and established, could be incorporated into a BIT by arbitral tribunals under any of the theories discussed in Part IV(B) -- and, consequently, into all other BITs in a "network," as discussed in Part IV(A).

A. Early harmonization measures in the GATT / WTO system

Well before the advent of the WTO, the GATT system had played a direct role in shaping the internal laws of member states. For example, the GATT 1967 Antidumping Code,²¹⁸ the Tokyo Round Antidumping Code,²¹⁹ the Uruguay Round's Antidumping Agreement,²²⁰ and certain provisions of the Uruguay Round's Subsidies Agreement²²¹ were entered into to stop GATT members from abusing antidumping and countervailing duty proceedings in order to impose otherwise-prohibited tariffs. These treaties each contain detailed rules governing the substance and procedure of domestic antidumping and countervailing duty law, including such basic elements as the calculation of applicable tariffs and access to judicial review. Similarly, the Uruguay Round Agreement on Rules of Origin²²² addressed the distortion of trade flows through conflicting customs laws by requiring member states to adopt a standardized set of such laws. The Agreement on Government Procurement, which was first concluded in the Tokyo Round in 1979²²³

²¹⁸ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, Anti-dumping Code, 651 U.N.T.S. 320, GATT B.I.S.D. (15th Supp.) at 24 (1968).

²¹⁹ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, Anti-dumping Code, GATT B.I.S.D. (26th Supp.) at 171 (1980).

²²⁰ Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS – THE LEGAL TEXTS 168 (1995).

²²¹ Agreement on Subsidies and Countervailing Measures, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 264, 278 (1995).

²²² Agreement on Rules of Origin, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 241 (1995).

²²³ See Agreement on Government Procurement, THE GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TEXTS OF THE TOKYO ROUND AGREEMENTS at 27 (1986).

and then expanded in the Uruguay Round,²²⁴ provides a third example. These treaties were intended to prevent protectionism in government purchases of goods and services, and in doing so, require member states to adopt specified procedures for soliciting and evaluating contractors' bids.

All three sets of agreements in a sense impose positive obligations on the member states by requiring them to take certain actions with respect to foreign goods or actors; merely leaving the concerned private parties alone would be insufficient. In the case of antidumping or government procurement, the state must provide foreign actors with specific procedural protections against unfair competition from rivals. If privately enforceable, such positive obligations could prove a genuine burden to states inexperienced in the administration of such elaborate procedural schemes and lacking the resources to develop the necessary institutions.

However, the obligations imposed by these treaties have negative elements as well, since the harms the treaties are respectively aimed at preventing derive in part from the conduct of the state itself. It is the state that enables the antidumping proceeding, imposes the tariff, awards the contract, or classifies the good; a state could always avoid treaty violations by eliminating its antidumping laws altogether, by actively favoring foreign contractors, or by dropping the import regulations and restrictions that give customs rules practical effect. While none of these options seem politically feasible, their theoretical availability highlights the fact that the aforementioned treaties require the government both to actively protect private actors and to refrain from harming those actors.

B. Intellectual property

Intellectual property protection provides an important example of a more purely positive obligation that could be imposed through the WTO system and other multilateral harmonization programs. Intellectual property law almost by definition tends to involve the use of the state's sovereign power to protect owners of property from harm caused by private actors (through those actors' costless capitalization on

²²⁴ Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4B, LEGAL INSTRUMENTS-EMBODYING THE RESULTS OF THE URUGUAY ROUND, vol. 31 (1994), available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf (last visited March 16, 2005).

the owner's investment of time, money, and thought into the production of the protected asset).²²⁵ This basic role of a state in international intellectual property law, under the above definition, is an entirely "positive" role. On the other hand, one employing a more Hohfeldian line of analysis may suggest that in acting to protect certain exclusive "rights" over a given property item, the state is simultaneously *denying* associated rights to others within the state's territory, and thus playing a more "negative" role. Indeed, intellectual property law typically does not convey the right to use a given item of intellectual property, but rather the "negative" right to prevent others from using such item.²²⁶ This complementary negative role, of course, is true of any action taken by the state to protect an individual from the conduct of others. Moreover, intellectual property is explicitly included within the definition of "investment" in many modern investment treaties,²²⁷ further strengthening the presumption that certain private actors *can* be singled out as having a valid claim to protection. This in itself, however, does not ensure the incorporation of specific positive obligations other than those that may derive from the treaties' national treatment and most

²²⁵ Such protection, at the most basic level, consists of the implementation in the domestic law—either through legislation or through the provision of direct effect to international law—of substantive rules prohibiting the infringement of private intellectual property rights. An additional element of such protection frequently involves granting intellectual property owners access to courts for the prosecution of infringement claims. A somewhat less common mechanism for protection is direct action by state law enforcement officials against those who infringe on others' intellectual property rights. See GRAEME B. DINWOODIE, ET AL, INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 1067-68 (2001) [hereinafter Dinwoodie]. Each of these forms of protection involves action by the state to guard against harm inflicted by one private actor upon another.

²²⁶ See FREDERICK ABBOTT, ET AL, THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM 22 (1999). As an illustration of this "negative" quality of the intellectual property *right* itself, the mere acquisition of a U.S. patent right to a particular drug does not ensure the right to produce and market the drug within the United States. Such affirmative use rights are granted only upon application to the Food and Drug Administration, which typically bases its approval upon the provision of substantial empirical evidence of the drug's safety and efficacy. See Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 355 (2002).

²²⁷ See, e.g., Foreign Investment Protection Agreement, Oct. 3, 1991, Can.-Hung., 1993 Can. T.S. No. 14.

avored nation treatment provisions.²²⁸ In order to give definitive substantive content to the “minimum standard” and “full protection and security” provisions as applied to intellectual property, it is important to look at binding treaty or customary rules in sources external to the investment treaty.

Efforts to harmonize intellectual property law have resulted in the enactment of a wide range of multilateral treaties, the drafting of complementary model rules and the creation of new international institutions to assist in the implementation of certain related obligations. For much of the 20th century, the most significant intellectual property treaties were the Paris Convention for the Protection of Industrial Property²²⁹ and the Berne Convention for the Protection of Literary and Artistic Works.²³⁰ Each of these treaties imposed upon their signatories limited standards of protection for certain types of intellectual property: patents, trademarks and related rights in the Paris Convention, and copyrights in the Berne Convention. Moreover, the Paris Convention established rudimentary procedural rules for state recognition of patents and trademarks registered elsewhere.²³¹ In conjunction with these treaties, two organizations—the Paris Union and the Berne Union—were

²²⁸ The treaties' common provisions on expropriation, which might act to prohibit a state from terminating particular intellectual property rights held by foreigners, would not seem to require affirmative enforcement of such rights. An argument could be made that termination and failure to enforce are functionally equivalent, and that failure to enforce thus falls within the definition of “measures tantamount to expropriation.” This, however, would require a fundamental revision to the basic understanding of expropriation as an act of inference by the state in private affairs. For a discussion of the treatment of intellectual property rights under NAFTA Chapter 11, see Allen Z. Hertz, *Shaping the Trident: Intellectual Property Under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 298-303 (1997).

²²⁹ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 13 U.S.T. 2, 828 U.N.T.S. 107, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 303 [hereinafter Paris Convention].

²³⁰ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

²³¹ See Paris Convention, *supra* note 231, arts. 4, 6.

formed to administer the development and application of the respective treaties.²³²

Another important contribution to the development of international intellectual property law was the formation in 1967 of the World Intellectual Property Organization (WIPO). Set up as a successor to the Bureaux for the Protection of Intellectual Property, WIPO was charged with the broad mission of “promoting the protection of intellectual property throughout the world.”²³³ In addition to taking over the administrative functions of the Paris and Berne Unions (as well as those of some 21 additional multilateral treaties), WIPO has worked to harmonize intellectual property laws both by providing a forum for the drafting, revision and conclusion of new intellectual property treaties and by facilitating the adoption of resolutions and the formation of model domestic laws.²³⁴ WIPO currently includes 182 member states.²³⁵

In 1994, the TRIPS Agreement was enacted as part of the package of Uruguay Round instruments created what is probably the most robust, important, and controversial set of rules governing the protection of intellectual property to date.²³⁶ TRIPS, which is enforceable via the WTO’s dispute settlement process, both incorporated several substantive provisions of the Paris and Berne Conventions (as well as the Washington Treaty on Intellectual Property in Respect of Integrated Circuits)²³⁷ and introduced a number of new obligations, most of them advocated primarily by the more technologically advanced

²³² DINWOODIE, *supra* note 227, at 44. Each union is governed by an Assembly made of representatives of the treaty member states, and by an Executive Committee. *Id.*

²³³ Convention Establishing the World Intellectual Property Organization, July 14, 1967, art. 3(i) (amended on Sept. 28 1979), *available at* http://www.ipo.int/treaties/en/convention/trtdocs_wo029.html (last visited Feb. 29, 2005).

²³⁴ See DINWOODIE, *supra* note 227 at 44; About WIPO, The World Intellectual Property Organization (WIPO), *available at* <http://www.wipo.int/about-wipo/en/overview.html> [hereinafter WIPO website].

²³⁵ WIPO website, *Id.*

²³⁶ TRIPS, *supra* note 140. See DINWOODIE, *supra* note 227, at 45; Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 U. CIN. L. REV. 1283, 1286 (1998); Peter Drahos & John Braithwaite, *Intellectual Property, Corporate Strategy, Globalisation: TRIPS in Context*, 20 WIS. INT’L L.J. 451 (2002).

²³⁷ World Intellectual Property Organization: Treaty on Intellectual Property In Respect of Integrated Circuits, May 26, 1989, 28 I.L.M 1477 (1989).

developed countries.²³⁸ TRIPS also provided for the creation of a Council, composed of representatives from all member states, one of whose primary purposes is to monitor the implementation of TRIPS-created mandatory norms and standards within the domestic law of each member state.²³⁹

Though international intellectual property law initially focused on relative standards such as national treatment and on the procedural prerequisites for the acquisition and recognition of intellectual property rights,²⁴⁰ there has been a marked trend towards the development of uniform substantive standards governing the scope, content and enforcement of these rights. The treaty provisions implementing these standards often impose positive obligations, requiring the government to protect or to provide means of protecting the defined property rights. For example, Article 2 of the Berne Convention both defines the term "literary and artistic works" (listing a number of items specifically included within this category) and provides that all such works are to receive protection in all countries within the Berne Union.²⁴¹ Article 16 provides that infringing copies of a protected work shall be liable to seizure in any country in the Union where the work receives legal protection.²⁴² In addition, Article 7 establishes a minimum time period for the duration of protection of rights under the Berne Convention.²⁴³

Several provisions of the Paris Convention similarly may require affirmative standards and measures of protection for particular items. Article 6*bis* states that the member states of the Paris Union "undertake" to prohibit the use of trademarks that are liable to create confusion with

²³⁸ See, e.g., Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 112 (1995) (discussing TRIPS as a means of "passive coercion" of developing states); Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 608 (2001) [hereinafter Okediji, *Sources*]; Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 614 (1996).

²³⁹ See DINWOODIE, *supra* note 227, at 46.

²⁴⁰ Gana, *supra* note 240, at 137-38.

²⁴¹ See Berne Convention, *supra* note 232, arts. 2(1), 2(6).

²⁴² *Id.* art. 16.

²⁴³ *Id.* art. 7.

marks that are already “well known” within those respective states.²⁴⁴ Some have interpreted this as creating a self-executing right and thus giving the owner of the well-known mark a direct remedy within each member state in which such confusion is threatened.²⁴⁵ Similarly, Article 10*bis* requires that member states “assure” to nationals of other member states “effective protection against unfair competition,” including “any act of competition contrary to honest practices in industrial or commercial matters,”²⁴⁶ as well as a list of several more specifically prohibited actions, including trade libel and confusion of consumers with respect to the nature or identification of particular goods, is provided.²⁴⁷ However, there has been some disagreement as to whether this Article creates a self-executing right; U.S. courts, for example, have been divided on the issue.²⁴⁸ Moreover, Articles 9 (requiring seizure of imports bearing unlawful trademarks) and 10*ter* (requiring member states to provide “appropriate legal remedies effectively to repress” conduct referred to in Articles 9, 10 and 10*bis*) involve elements of positive obligation.

For its part, TRIPS has been both heralded and reviled as greatly expanding the scope and content of these minimum standards of intellectual property protection.²⁴⁹ Indeed, TRIPS has been described as

²⁴⁴ It should be noted, however, that the determination of whether a particular mark is well-known is to be made by the domestic authorities of the country in which protection is sought. See Paris Convention, *supra* note 231, art. 6*bis*.

²⁴⁵ See G.H.C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 87-88 (1968).

²⁴⁶ Paris Convention, *supra* note 219, art. 10*bis*.

²⁴⁷ WIPO has developed a set of Model Provisions on Protection Against Unfair Competition, which is intended to give more detailed content to the unfair competition standard. See DINWOODIE, *supra* note 227, at 158.

²⁴⁸ Contrast *Vanity Fair Mill, Inc. v. T. Eaton Co.*, 234 F.2d 633, 640-41 (2d Cir. 1956) (holding that the Paris Convention itself creates no private right of action under U.S. law) with *Davidoff Extension S.A. v. Davidoff Int'l, Inc.*, 612 F.Supp. 4, 8 (S.D. Fla. 1984) (noting the court's view that the Paris Convention is self-executing and listing several benefits it provides under U.S. law, including protection from unfair competition). See also Bodenhausen, *supra* note 247, at 143 (arguing that paragraphs (2) and (3) of the Paris Convention are unquestionably self-executing and directly applicable under the domestic law of member states).

²⁴⁹ See e.g. Gana, *supra* note 240, at 121; Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright*, 49 J. COPYRIGHT SOC. U.S.A. 585, 608 (2001) [hereinafter *Okediji Sources*]; See Marci A. Hamilton,

the *only* WTO agreement establishing positive standards for the conduct of domestic policies.²⁵⁰ In addition to incorporating the provisions of Articles 1-21 of the Berne Convention and Articles 1-12 and 19 of the Paris Convention, TRIPS identifies with far more specificity than earlier treaties the types of items to be protected as patents, trademarks and copyrights, as well as the rights to be accorded owners of such items. For example, Article 15 requires that eligibility for trademark registration extend to “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings,” and in particular to “words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs.”²⁵¹ Article 16 provides that owners of registered trademarks shall have the right to prevent others from using the same mark on similar goods when such use is likely to create confusion among consumers.²⁵² Articles 27 and 28, respectively, play parallel roles within the context of patent rights.²⁵³ As to copyrights, in addition to re-introducing the Berne Convention’s substantive standards, Articles 10, 11 and 14 require the extension of additional specific rights such as the right to prohibit commercial rental of originals or copies of copyrighted works.²⁵⁴ Other provisions require similar protections for items such as geographical indications, industrial designs, designs of integrated circuits, and certain undisclosed information.

Perhaps even more notably, Articles 41-49 impose an extensive and detailed set of obligations concerning enforcement of the treaty’s substantive rights provisions, including “expeditious remedies” to prevent and deter infringement (Article 41(1)), decisions in writing (Article 41(3)), judicial review (Article 41(4)), private rights of action

The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 VAND. J. TRANSNAT’L L. 613, 614 (1996). See also Ruth L. Gana, *supra* note 240, at 112 (1995) (discussing TRIPS as a means of “passive coercion” of developing states).

²⁵⁰ See Hertz, *supra* note 230, at 266 (citing Frieder Rossler, *Diverging Domestic Policies and Multilateral Trade Integration in 2 FAIR TRADE AND HARMONIZATION*

(Jagdish Bhagwati & Robert E. Hudec, eds., 1996).

²⁵¹ TRIPS, *supra* note 140, art. 15.

²⁵² TRIPS, *supra* note 140, art. 16.

²⁵³ TRIPS, *supra* note 140, arts. 27, 28.

²⁵⁴ TRIPS, *supra* note 140, arts. 10, 11, 14.

(Article 42(1)), and the availability of both injunctive and monetary relief (Articles 44 and 45).²⁵⁵ Member states are thus explicitly required not only to amend their own domestic substantive law to prohibit certain conduct, but also to make available judicial and administrative mechanisms for ensuring that such substantive law is applied to individual cases.

Although there is substantial and justifiable doubt as to whether these treaty-based harmonization efforts have thus far generated binding norms of customary international law,²⁵⁶ the requisite *Continental Shelf* elements are evident that future tribunals may eventually recognize the establishment of such norms. The requirement that for treaty law to become international customary law it needs widespread and representative membership present little difficulty; the Paris Convention counts 166 states as contracting parties, while the Berne Convention has 152 and TRIPS has 146.²⁵⁷ Included among the contracting parties to each treaty are both developed and developing states from every geographic region of the world, representing every major form of domestic legal tradition. Moreover, the treaties clearly demonstrate a “fundamentally norm-creating character”: they are intended in principle to apply to a potentially unlimited number of parties, they are prospective in effect and of indefinite duration, and they speak largely in terms of the creation of universal standards.

However, the developing states’ ardent resistance to the enactment of strengthened substantive and procedural obligations in the TRIPS negotiating process, as well as those states’ subsequent expressions of frustration and disappointment over the impact of the established TRIPS regime on their domestic economic, cultural and health care policies,²⁵⁸ indicates that the developing states viewed TRIPS

²⁵⁵ TRIPS, *supra* note 140, arts. 41-49.

²⁵⁶ See Thomas Cottier, *The Impact of New Technologies on Multilateral Trade Regulation and Governance*, 72 CHI-KENT L.R. 415, 418 (1996) (“A comparison of standards and rules of protecting investment and real property abroad and IPR [intellectual property right] protection reveals a complete absence of the latter in the body of customary international law.”); Ari Afilalo, *Constitutionalization Through the Back Door: A European Perspective on NAFTA’s Investment Chapter*, 34 N.Y.U. J. INT. L. & POL. 1, n.121 (2001) (“...TRIPS...is unlikely to amount to customary international law.”).

²⁵⁷ See *Treaties and Contracting Parties*, WIPO website, *supra* note 236 (last visited Feb. 29, 2005).

²⁵⁸ See *The Right to Good Ideas: How Patents Help the Poor*, *The Economist* (London), June 23, 2001, at 21.

as binding only in a quasi-contractual sense, and not as a codification or crystallization of universal customary norms. Thus, the requisite form of *opinio juris* would arguably be lacking. Another reason *opinio juris* might be lacking is that there are significant fundamental tensions between traditional conceptions of property in many developing state societies and the natural rights views held in much of the West.²⁵⁹ Even if this argument were accepted, however, the process of “generation” in BITs (discussed in Part IV, *supra*) could eventually operate to cure the *opinion juris* defect and establish the multilateral treaties (or at least certain of their provisions) as evidence of emergent customary norms. Again, this would require that the various member states refrain from conduct that could be characterized as “persistent objection” to the putative customary norms, and that they continue to obey the mandates of the treaties in implementing the new universal standards in their domestic legal systems.²⁶⁰ Given a sufficient period of relative accord and cooperation, and particularly given evidence of conformity by remaining *non-member* states to the treaty-based standards, the transition from conventional to customary law could be perfected.²⁶¹

²⁵⁹ See Gana, *supra* note 240, at 132-37.

²⁶⁰ See Okediji *Sources, supra* note 151, at 605 (“[T]he process of implementing TRIPs principles in domestic copyright legislation of WTO Member countries will, eventually, provide a potential source of international copyright law so long as there is a discernible level of coherence and consistency in TRIPs interpretation.”) William E. Denham IV, *No More than Lanham, No Less than Paris? A Federal Law of Unfair Competition*, 36 TEX. INT. L.J. 795, 818 n.233 (2001) (“Article 10bis(2) would play at least a significant role in determining customary international law, besides explicitly attempting to guide Union members’ legislation.”); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 419 n.177 (2000) (“Other provisions of [the] Berne [Convention], which do not so directly clash with U.S. law, while not directly applicable, may nevertheless provide some guidance on customary international law.”). See also Patricia I. Hansen, Note, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of 1974*, 96 YALE L.J. 1122, 1145 (1987) (discussing, prior to the completion of TRIPS, a “growing international consensus that intellectual property is property, and as such, entitles its owners to some form of compensation”).

²⁶¹ For a more skeptical view of the potential for such lasting consensus, see Okediji *Sources, supra* note 151, at 598 (“[T]he prospect of a “supranational” copyright law emerging from the numerous multilateral treaties and TRIPs dispute settlement decisions is perhaps more unlikely today than ever before.”).

Additionally, evidence of emergent customary norms may arguably be found in the proliferation of parallel harmonization efforts at the regional level. Although the previously noted objection regarding the *opinio juris* value of treaty formation and accession could again be raised, the recurrent use of common provisions, principles, and language within the various instruments implies a growing consensus on at least the form, if not the justification, for intellectual property protection.²⁶² Chapter 17 of NAFTA contains a set of intellectual property provisions clearly derivative of the TRIPS Agreement, though permitting state-to-state enforcement through the NAFTA Article 20 dispute resolution process rather than through the WTO system.²⁶³ The EU has gone even further, implementing a series of harmonization directives as well as more advanced measures such as its Database Directive, which establishes uniform rules governing the protection of non-copyrightable compilations of information.²⁶⁴ A similar, though less well-developed program focusing specifically on patent protection has recently been established among a number of the states comprising the former Soviet Union.²⁶⁵ This program, codified in the Eurasian Patent Convention, incorporates a number of the international standards previously established by the Paris Convention and TRIPS; for example, the standard for patentability focusing on novelty, inventive step, and industrial applicability, as well as a patent term of 20 years.²⁶⁶ In Africa, two regional organizations—the African Intellectual Property Organization (OAPI) and the African Regional Industrial Property Organization (ARIPO) have been formed to encourage the harmonization of domestic intellectual property law within the continent.²⁶⁷ Among other goals, ARIPO aims to provide for a single, centralized regional

²⁶² *Id.* at 598 (“The increased density of normative harmonization witnessed in TRIPs and European Union (EU) Directives, as well as recent WTO decisions in TRIPs disputes, undoubtedly hint at a progressive development of international copyright norms leading to a uniform international copyright law.”).

²⁶³ NAFTA, *supra* note 6, ch. 17.

²⁶⁴ Council Directive 96/9 on the Legal Protection of Databases, art. 7, Mar. 11, 1996 O.J. (L 77) 20, 25-26 (1996).

²⁶⁵ See John Richards, *Recent Patent Law Developments in Asia*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 605-609 (1997).

²⁶⁶ See *id.* Identical standards can be found in, respectively, TRIPS Articles 27(1) and 33. TRIPS, *supra* note 140, arts. 27, 33.

²⁶⁷ See Tshimanga Kongolo, *The African Intellectual Property Organizations: The Necessity of Adopting One Uniform System for All Africa*, 3 J. WORLD INT. PROP. 265 (2000).

patent application process, while OAPI (via Annex 1 to its formative treaty) adopts the familiar TRIPS-modeled patentability standards and provides for the conferral of exclusive and “negative” rights similar to those enumerated in TRIPS Article 28. In Latin America, harmonization has proceeded along similar, though less conclusive and less substantively extensive, lines via such developments as the Central American Convention for the Protection of Industrial Property, the Andean Pact countries’ Decision No. 344, and the ongoing negotiations over the proposed Free Trade Area of the Americas.²⁶⁸ In addition, a wide array of recently-negotiated bilateral trade agreements include provisions on intellectual property protection somewhat reflective of the TRIPS scheme.²⁶⁹

C. Potential future areas of harmonization

Although situated further out on the horizon of international economic law, a number of other traditionally domestic regulatory fields could be viewed as eventual candidates for harmonization through multilateral agreements and eventually through customary international law. Many of these harmonized schemes, moreover, may include positive obligations at their core. For example, competition law concerns the prevention of certain types of conduct by private economic actors; a conventional or customary rule creating harmonized standards in this area would impose upon states an obligation to intervene in the market to combat such activity and protect both consumers and competitors. The concept of an international standard for competition law, though unsuccessfully invoked in *UPS*, has drawn a great deal of attention from scholars and trade negotiators alike.²⁷⁰ Competition law (along with investment, government procurement and “trade facilitation”) constitutes

²⁶⁸ See DINWOODIE, *supra* note 227, at 1031-33.

²⁶⁹ See, e.g., U.S.-Sing. Free Trade Agreement, May 6, 2003, 42 ILM 1026.

²⁷⁰ See, e.g., Kevin C. Kennedy, COMPETITION LAW AND THE WORLD TRADE ORGANISATION: THE LIMITS OF MULTILATERALISM (2001); Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998); Eleanor M. Fox, *Competition Law and the Agenda For the WTO: Forging the Links of Competition and Trade*, 4 PAC. RIM L. & POL’Y J. 1 (1995); Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277 (1992); Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW J. INT’L L. & BUS. 233 (2000); Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/2 (August 12, 1998), available at www.wto.org.

one of the so-called "Singapore issues" that have been part of the developed countries' agenda for the Doha Round of trade negotiations.²⁷¹ Private restraints on trade can have just as distorting an effect on trade flows and economic efficiency as state-imposed tariff- and non-tariff barriers; indeed, one rationale used to justify anti-dumping penalties resembles that used to condemn predatory pricing by monopolists.²⁷² Moreover, divergences among the substantive and procedural elements of those competition laws already in existence increase costs and decrease predictability for both businesses and regulators.²⁷³ Although some observers are skeptical of the prospects for a coordinated multilateral solution to the problem,²⁷⁴ developing states' desire to liberalize trade in the agricultural and textile sectors may affect their flexibility on this issue.²⁷⁵

In terms of mechanics, a multilateral competition agreement would likely operate similarly to TRIPS, requiring member states to establish domestic competition authorities and to enact substantive competition laws modeled largely after those of the United States and Europe, which have the greatest depth of experience in administering such a system. A treaty or harmonization program could start with such basic principles as the prohibition of price-setting cartels,²⁷⁶ and possibly progress over time to cover more complicated issues such as merger

²⁷¹ See, e.g., Naomi Koppel, *Developing Nations Want to Drop Issues from Trade Talks*, WASH. POST, August 16, 2003).

²⁷² See PETER B. KENEN, *THE INTERNATIONAL ECONOMY* 247 (3rd ed. 1994). The comparison between dumping and predatory pricing, however, has been criticized as misguided. See Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491, 553 (1993).

²⁷³ See Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model*, 15 EM. INT. L. REV. 467, 484-85 (2001)

²⁷⁴ See Guzman, *supra* note 272. Guzman argues that countries that are net exporters of imperfectly competitive (i.e. monopolistically-produced) goods will prefer laxer competition law standards, while countries that are net importers of such goods will prefer stricter standards. See *id.* at 1152.

²⁷⁵ See Foster, *supra* note 275, at 516-17 (arguing that a customary international law of competition, based on the EU's competition law scheme, may eventually act to compel states to act against private restraints to trade).

²⁷⁶ See *id.* at 485 (emphasizing the difficulty of combating transnational cartels through domestic enforcement proceedings bound by the limits of territorial jurisdiction).

review procedures and anti-“tying” rules.²⁷⁷ One interesting issue in such a harmonization process would be the court-driven nature of substantive antitrust law in the United States; drafters of a multilateral treaty would have to determine how much autonomy to grant the courts in filling in textual ambiguities, determining violations and crafting proper remedies.²⁷⁸

In any case, were a WTO-sponsored standard to be established, and uniform rules to be widely accepted at any level of specificity, the potential for private enforcement by aggrieved investors through BITs would be explosive even if the individual states were required to or agreed to allow for private enforcement actions within domestic courts. Litigation and adjudication of antitrust cases is notoriously complex and labor-intensive, and ironically the very institutional incapacity that would cause many states to fail to meet their enforcement obligations would inspire foreign investors to reject such states’ proffered procedural remedies in favor of suing the state itself.

On a somewhat more speculative note, the rapid integration of financial markets suggests the utility of harmonizing securities regulation and corporation law, a development that could have a dramatic impact on the minimum treatment standard in international investment law. The International Organization of Securities Commissioners (IOSCO), an international, non-profit association of government securities regulators and private-sector observers formed in 1983, has led efforts to develop global standards with regard to disclosure by issuers.²⁷⁹ One of the IOSCO’s key projects has been the formation of a core set of disclosure standards for nonfinancial statement portions of a proposed international offering document.²⁸⁰ This project has met with approval in both the United States and the EU: the U.S. Securities and Exchange Commission in 1999 adopted the IOSCO disclosure requirements for foreign issuers

²⁷⁷ See *id.* at 484 (noting the advantages in predictability and in reduced transaction costs that would result from harmonized or centralized merger clearance).

²⁷⁸ See Spencer Weber Waller, *An International Common Law of Antitrust*, 34 NEW ENG. L. REV. 163, 165-67 (1999).

²⁷⁹ See A.A. Sommer, Jr., *IOSCO: Its Mission and Achievement*, 17 NW. J. INT’L L. & BUS. 15 (1996).

²⁸⁰ See J. William Hicks, *Harmonization of Disclosure Standards for Cross-Border Share Offerings: Approaching an “International Passport” to Capital Markets?*, 9 IND. J. GLOBAL LEGAL STUD. 361, 367-68 (2002).

as part of the U.S. federal securities laws,²⁸¹ while in Europe, the Forum of European Securities Commissioners has sought to replicate the IOSCO standards on a regional basis.²⁸² The OECD, whose members include the states with the most sophisticated financial markets of any in the world, has been working on the development of model Principles of Corporate Governance, which include provisions on disclosure, shareholder rights, and board duties, and which call on the OECD member states to make such provisions transparent and enforceable.²⁸³

The recent wave of corporate scandals on both sides of the Atlantic,²⁸⁴ and the resultant demand by shareholders for greater executive accountability and more rigorous government enforcement measures, have spread to other economies less traditionally protective of shareholder rights.²⁸⁵ An international standard for securities regulation might therefore focus on corporate governance issues (perhaps borrowing from the Sarbanes-Oxley Act of 2002)²⁸⁶ and disclosure requirements (possibly modeled after those contained in the Securities Act of 1933),²⁸⁷ as well as mandating monitoring and enforcement activity by domestic regulatory agencies.

On the other hand, the SEC's recent woes may end up having a chilling effect on harmonization efforts in this area, since it has become apparent that even a highly developed state can at times fall short of its own basic standards, and a uniform international rule could thus have some genuine bite. Given the extent of capital inflows into the U.S. and other major Western economies, and the extremely wide range of foreign investors holding equity or debt issued by those countries' firms, the idea of enforcement either through private arbitration or a WTO-like

²⁸¹ International Disclosure Standards, Sec. Act Release No. 7745 [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86208 (Sept. 28, 1999).

²⁸² See Hicks, *supra* note 282, at 369-70.

²⁸³ See OECD Website, available at <http://www.oecd.org/home>.

²⁸⁴ See, e.g., *Sox It To Them: Sarbanes-Oxley, One Year On*, THE ECONOMIST, August 2, 2003; Leaders: *Open the Club; Changing Corporate Governance*, THE ECONOMIST, April 19, 2003; *Breach of Trust: German Executives in the Dock*, THE ECONOMIST, Feb. 22, 2003; Dan Bilefsky, *CEOs in Europe Try to Regain Trust*, WALL ST. J., Nov. 24, 2003, at A10.

²⁸⁵ See, e.g., *Corporate, Maybe: but Governance?: Patching Up Asian Corporate Governance*, THE ECONOMIST, June 21, 2003; Hae Won Choi, *Foreigners Face Friction in Seoul*, WALL ST. J., June 4, 2003; Matt Pottinger, *China Moves to Improve its Markets*, WALL ST. J., Jan. 23, 2003.

²⁸⁶ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

²⁸⁷ Securities Act of 1933, 15 U.S.C. §§ 77 (1933).

proceeding might well prove too progressive a concept. Even leaving the enforcement issue aside, developed states are less likely to make a collective push for harmonized securities regulation even in principle when it is apparent that the burden may not fall primarily on their developing counterparts.

Other related fields potentially involving state protection of foreign investors could be similarly subject to harmonization. Foreign creditors confronting insolvent borrowers would stand to benefit from a standardized approach to bankruptcy law obligating the debtor's government to initiate or enable asset recovery proceedings. UNCITRAL has attempted to respond to this and related problems by developing a model cross-border insolvency law,²⁸⁸ while similar harmonization projects have been undertaken in both Europe²⁸⁹ and the United States.²⁹⁰ Just as Italian officials' administration of bankruptcy proceedings led the investor-debtor in *ELSI* to allege expropriatory action, so might a failure to conduct such proceedings trigger claims by investor-creditors of violation of positive obligations under this scheme.²⁹¹ Similarly, states requiring banking regulators to adequately monitor the capitalization levels and lending activities of banks would protect foreign investors from undue risk of bank failure. The Basle process provides some precedent for harmonization efforts in this field.²⁹² In the cases of both banking and insolvency, uniform substantive rules could be readily adaptable to the minimum treatment provision and the BIT enforcement scheme.

Government procurement, mentioned briefly above, presents another area of regulated economic activity that might conceivably benefit from further international harmonization. Indeed, increased

²⁸⁸ United Nations Model Law on Cross-Border Insolvency, U.N. Commission on International Trade Law, G.A. Res. 52/158, U.N. GAOR, 30th Sess., Supp. No. 17, U.N. Doc. A/52/17 (1997).

²⁸⁹ See European Union Regulation on Insolvency Proceedings, Official Journal of European Communities 160 (June 30, 2000), available at <http://Europa.eu.int/eur-lex>.

²⁹⁰ See Jay Lawrence Westbrook, *The Transnational Insolvency Project of the American Law Institute*, 17 CONN. J. INT'L L. 99 (2001).

²⁹¹ Although commercial loans and bank deposits are not ordinarily characterized as foreign direct investment, they are typically included within the definition of "investments" covered by modern BITs. See, e.g., U.S.-Poland Treaty, *supra* note 78, art. 1(b).

²⁹² See, e.g., Hal S. Scott, *The Competitive Implications of the Basle Capital Accord*, 39 ST. LOUIS U. L.J. 885 (1995).

transparency in procurement proceedings, like competition law, constitutes one of the WTO's Singapore Issues.²⁹³ To the extent that governments are required under prospective harmonized transparency rules to provide information to potential bidders, such rules could be viewed as creating positive obligations, and could presumably be invoked by those bidders on a state contract who have invested financial or other resources within that state in pursuit of the contract. To take the concept a step further, a provision could be added obligating the procuring state to impose civil or criminal sanctions on prospective contractors who engage in fraud or other unfairly competitive behavior in the bidding process. A losing bidder could argue that its investment in the bidding process would be harmed by such fraud, either through the government's acceptance of the defrauding party's bid or by forcing the first bidder to expend further resources in pursuit of the contract. A harmonized enforcement rule would thus appear to fit within the protective obligation paradigm of the subjects discussed above.

VI. Implications

The interaction of investment treaty provisions on minimum treatment and on dispute resolution with the progress of harmonization programs raises the possibility of a wave of new treaty-based claims by investors alleging insufficient government intervention into private economic activity. Under this scenario, states, responding to continued cross-border economic integration and seeking the perceived mutual benefits of legal harmonization, will arrive at varying degrees of consensus as to uniform regulatory "best practices." TRIPS Articles 27 and 28, creating basic standards for patent protection, could be cited as an example of this step. Subsequently, a foreign investor could conclude that a host state in which it had established an investment has failed adequately to implement the uniform substantive standard, *e.g.* by refusing to grant a patent for an item ostensibly meeting the required elements or by failing to enforce the exclusive rights conferred by a granted patent. The foreign investor could bring a claim under an applicable BIT, alleging that the state failed to provide the minimum treatment required by international law, as embodied either directly in the treaty itself (TRIPS) or in a customary norm (or even "general principle") generated by the treaty. The investor further alleges, in addition or in the alternative, a failure to provide "full protection and

²⁹³ Jeffrey Schott, *Unlocking the Benefits of World Trade*, THE ECONOMIST, Nov. 1, 2003.

security” to the investment in the patent, again drawing on the uniform standard as a baseline for measuring the state’s protective obligations. Under some of the newer investment treaties, the investor might also allege a failure to enable enforcement of the investor’s rights through court or administrative proceedings.

One open question in such a scenario is whether, assuming that the arbitral tribunal recognizes the cited treaty or codification statement as capable of being incorporated into the investment treaty, the applicable “minimum standard” must be one guaranteeing a remedy or merely creating an underlying right. For example, although TRIPS Articles 41-47 (as well as Article 61) obligate member states to provide for civil, administrative and criminal sanctions for infringement of various intellectual property rights, the Paris Convention merely defined several substantive rights themselves without including any separate terms concerning enforcement. One could, of course, point to language in such provisions as Paris Convention Article 6*bis* (“the countries of the Union undertake...to prohibit the use...”) and 10*bis* (“[t]he countries of the Union are bound to assure...effective protection against unfair competition”) as sufficiently indicative of a positive obligation that the protective standards of the investment treaty’s minimum treatment provision are triggered. Indeed, one would have to adopt a fairly narrow reading of the term “minimum treatment” in order to conclude that the creation of a positive obligation requires enforcement provisions as explicit and elaborate as those contained in TRIPS. It seems at least as reasonable to view the mere creation of a universally standardized substantive right (e.g. the right to prevent others from selling items identical to one’s invention), combined with the state’s failure to give such a right practical effect, as amounting to a violation of BIT obligations.

Whether or not an explicit provision on state enforcement is needed to enable incorporation of a harmonization device into an investment treaty, the effect of the incorporation process outlined above (and in Part IV) will be to transform a series of inter-state agreements regarding positive regulatory obligations into a source of private claims against host states. States’ engagement in such harmonization programs could thus engender significant legal, financial and political consequences beyond those contemplated in the course of harmonization negotiations. As the gradual proliferation of NAFTA claims against the

United States²⁹⁴ and the numerous recent criticisms of SEC oversight of corporate disclosure and investment management²⁹⁵ make clear, developed states may be among those subjected to such unforeseen liability.²⁹⁶ The state-to-state implementation, monitoring, and enforcement procedures arranged by participants in harmonization programs will be paralleled—some might say overshadowed—by a system of ICSID-administered arbitral proceedings.

The net effect of such a development may be primarily positive. If harmonization of domestic economic laws and policies is considered generally desirable, then the investment treaties' and arbitral panels' role in augmenting enforcement of and inducing compliance with uniform standards can accelerate the process and enhance the corresponding benefits. Investors, enabled to participate directly in the creation of a more attractive investment climate within the host state, will increase the number and variety of their FDI projects, thus furthering the host state's development goals (at least under a charitable view of the effects of foreign investment). Meanwhile, governments eager to undertake reform but worried about potential political fallout will have a degree of legal cover behind which to operate. Moreover, the inherent limitations faced by state-to-state monitoring and enforcement regimes such as the TRIPS council and WTO dispute resolution process—including the financial burden of maintaining and operating such regimes—will be partially addressed by effectively “privatizing” the enforcement function.

On the other hand, the incorporation of positive obligations into investment treaties will generate a number of largely negative effects as well. The first of these, reduction in state flexibility, is in some sense an inevitable (and indeed, desired) result of the creation of any enforcement regime under international law. States subject to the WTO's dispute settlement system, for example, clearly have fewer options for resolving emerging economic concerns than they would in the absence of such a system. In the investment treaty context, however, flexibility is lost along another dimension. In a state-state system, governmental counterparts may be able to resolve disputes concerning a given positive obligation by negotiating concessions in related or unrelated areas or by

²⁹⁴ See Krueger, *supra* note 74.

²⁹⁵ See, e.g., Kathleen Day, *Pitt Seeks Higher Standards*, WASH. POST, May 22, 2002; Jackie Spinner, *SEC Seeks to Improve Financial Disclosure*, WASH. POST, Feb. 14, 2002; Jeffrey Krasner & Andrew Caffrey, *SEC Eyes New Rules on Mutual Funds*, BOSTON GLOBE, Dec. 3, 2003.

²⁹⁶ See Legum, *supra* note 4, at 537-38.

simply granting the violating state a measure of leeway. Under an investment treaty, however, a host state regulatory action or omission technically in violation of a treaty provision but vitally important for public policy reasons and unobjectionable to the home state government will nevertheless face an arbitral challenge often beyond the control of the home state. The investor, with few interests other than protection of its investment and thus little appetite for concessions on unrelated matters, will generally be willing to negotiate only in terms of the disputed state action or omission itself. The range of options for acceptable compromise will correspondingly be narrowed, and resolution through adjudication becomes more likely.

The impact of this reduction in state flexibility may become particularly acute when positive obligations are created, since such obligations often impose greater financial burdens on the state than do negative obligations. For example, an obligation to create a workable and efficient system of competition law review and enforcement may prove beyond the means of many developing countries, or might require the diversion of public resources from areas of more crucial importance to development.²⁹⁷ This tension can be dealt with in the WTO scheme through the negotiation of transition periods and by developed countries' waiver of claims of violation. Were such an obligation to form the basis for successful private claims under an investment treaty, however, a developing host state would have few choices other than implementing the required administrative apparatus, paying a series of potentially large arbitral awards, or simply abandoning the investment treaty altogether.²⁹⁸

Another negative effect of incorporation, similarly shared with other systems of international adjudication, is the potential for tension between private enforcement of positive obligations on the one hand and democratic norms on the other. The enforcement of positive obligations through investor-state arbitration places private arbitrators and private foreign investors in the role of public policy-makers, replacing state

²⁹⁷ As to intellectual property law, it has been estimated that the cost of creating the minimal infrastructure needed to implement TRIPS would cost a developing country from \$1.5 million to \$2 million. See *The Right to Good Ideas*, *supra* note 260.

²⁹⁸ See Sydney M. Cone, III - Moderator, Jose E. Alvarez, James L. Gunmderson, John R. MacArthur, Steven R. Ratner, *Symposium: The Multinational Enterprise as Global Corporate Citizen*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 1, 7-11 (2001) (arguing that creative, high-profile claims such as that in *Loewen* might sabotage support for investment treaties).

authorities' prosecutorial and regulatory discretion with their own notions of what constitutes a minimal standard of good governance. As noted in Part III, U.S. courts have disfavored such private compulsion of government action even within an entirely domestic context.²⁹⁹ When the private policy-makers involved are foreign multinationals and (as is typical of investor-state arbitrators) foreign lawyers, and when the relevant decisions involve not only the operation of state machinery but the very creation of such machinery, challenges to the legitimacy of the process are likely to become more aggressive. Should a finding of violation of a positive obligation coincide with a large monetary award against a state already in severe financial straits, the option of withdrawal from either the harmonization process or the investment treaty framework may prove extremely tempting to the state.

Many of these difficulties could be avoided if arbitrators remain cautious when interpreting investment treaties and identifying uniform international standards of regulatory and economic policy. Tribunals need not adopt as strict a view as that favored by the United States in *Loewen*, limiting positive obligations to physical protection against mob violence and the like. However, in interpreting and applying the terms "treatment in accordance with international law" and "full protection and security," tribunals could factor the policy concerns discussed earlier in this Part into their analysis of the "object and purpose" of applicable investment treaties. This could be accomplished through a rebuttable presumption that minimum treatment clauses are meant to incorporate customary international law rather than external treaties, or at least that such treaties can be incorporated only when they have been entered into with a view toward potential private enforcement. It would be plausible for tribunals to presume that states that accede to a treaty (e.g. TRIPS) with a discrete, comprehensive enforcement regime do not intend to enable circumvention of that regime when they enter into subsequent bilateral agreements such as BITs. Additionally, tribunals could apply a somewhat heightened standard for the identification of customary international law imposing positive obligations—perhaps requiring an explicit statement by signatories to a harmonization treaty indicating their view that such a treaty codifies or generates a customary rule. Finally, tribunals could adopt the "subjective approach" to full protection and security described by the *Asian Agricultural* tribunal, as discussed in Part III(C), finding that the extent of the obligation varies according to

²⁹⁹ See Akins, *supra* note 99; Professional Pilots Association, *supra* note 99.

the administrative and financial resources of the state. Such "subjectivity" could be extended to obligations beyond those of full protection and security, including newly emergent treaty-based or customary norms. Measured doctrinal approaches of this sort would enable states to continue with their current approaches to investment treaty negotiation and regulatory harmonization without fear of opening the floodgates to unexpected arbitral claims.

Absent evidence of such a circumspect approach by tribunals, however, states would be well advised to take the investment treaties' positive obligation features into account when participating in harmonization efforts or when negotiating the BITs themselves. One possible approach would involve states adding language to the BIT's minimum treatment clause restricting the definition of the term "international law" to include only "customary international law" (a la NAFTA Art. 1105), or even more specifically, including only that customary international law established as of the time of the treaty's signing. The "full protection and security" term, meanwhile, could be defined to cover only protection from physical harm. A drawback to both of these solutions might require the retroactive amendment of *all* of a given state's BITs, lest the broader positive obligation be re-injected into the BIT via the MFN clause and a separate, unaltered BIT.³⁰⁰ Alternatively, an entirely separate provision could be added to the BIT, stating that none of the obligations contained therein is to be interpreted as compelling either party to undertake or enforce any affirmative regulation of private economic activity. Reopening such a large volume of economic agreements to renewed negotiation might well prove awkward and even counterproductive, since parties (particularly developed states with less to gain from such amendments) might be tempted to hold out for offsetting concessions and thus paralyze the investment protection regime.

A third approach states could use to avoid enforcement of positive obligations incorporated into BITs would focus on the harmonization process; states involved in such a process would either be sure to clarify that no rule of customary international law was being created, or else to include within the resulting treaty or codified set of rules a provision to the effect that the given document should not be considered to alter the parties' rights or obligations under any existing or future treaty, absent consent of the parties to the latter treaty. The

³⁰⁰ Hertz, *supra* note 252 at 303-307.

effectiveness of any such solution based on an incorporated treaty or norm itself would depend on tribunals' views as to the relationship between such treaty or norm and the intent of the parties to the investment treaty. If a member of TRIPS, for example, were to sign off on such a TRIPS amendment, that state's intent could be viewed as altering (or at least "clarifying") the meaning of its previously adopted investment agreements and as guiding interpretation of its future investment agreements. On the other hand, this retroactive approach to the construction of intent could backfire, since conduct or statements occurring subsequent to the TRIPS amendment could in theory be interpreted by a tribunal as reversing or negating such a state's intent as concerns its investment treaties. Moreover, the situation becomes more complicated when the rule incorporated is a customary rule based on a treaty or codification process in which the host state concerned was not a direct participant. It would be somewhat more difficult to argue that the intent of the parties to a TRIPS amendment operates to alter the meaning of an investment treaty entered into by a non-member of TRIPS; if an original TRIPS-inspired customary rule incorporated positive obligations into that investment treaty, there is no assurance that a tribunal would view such a rule as dissolved through amendment.

Finally, host states could attempt to work around the problem by utilizing concession agreements with investors. Investment agreements typically focus on treatment of investors once allowed to enter a host state, but often lack any provisions guaranteeing such admission in the first place.³⁰¹ This enables a host state to establish a domestic licensing regime under which explicit government permission is required before any foreign direct investment can be established. The host state can make a grant of such a license contingent upon waiver of certain rights, including rights under international law, through "concession" contracts.³⁰² Abuse of such a scheme, as by making waiver of all

³⁰¹ See Vandeveld, *supra* note 135, at 511. Many investment agreements do provide for national treatment and MFN treatment with respect to establishment of investments, though often with exception for specifically listed industries. See, e.g., U.S.-Sen. Treaty, *supra* note 136, art. 2(1).

³⁰² See COMEAUX & KINSELLA, *supra* note 8, at 133-49. Article 42(1) of the ICSID Convention provides that ICSID proceedings are to apply such governing law as agreed to by the parties to the dispute; the provision does not specify whether such rules are to be contained in treaties or investor-state contracts. U.S. BITs typically include disputes over the interpretation of investor-state

investment treaty claims, might discourage any foreign investment and thus defeat the very purpose of entering into such a treaty. However, a narrower sort of waiver, limited to the disavowal of claims based on violation of external treaties or of failure to meet positive obligations, would conceivably be acceptable to prospective investors—particularly since the novelty of positive obligation claims means that investors cannot thus far have come to rely upon their availability.

VII. Conclusion

This article has attempted to demonstrate the means by which modern international investment law can impose positive obligations on states as well as negative obligations. Such positive obligations have the effect not of limiting the state's governance function, but of compelling the state to be both more vigilant and more proactive. In so doing, these obligations may not only offend the sovereign sensibilities of both government actors and citizens, but may also impose an administrative and financial burden that the state is unprepared to assume. A developing state, even if willing, may simply not be able to take the steps needed to implement uniform international standards of intellectual property protection, competition law enforcement, or other aspect of economic regulation.³⁰³ The resulting strain may ultimately generate a backlash against international investment law that could undermine much of what the various BIT programs have been able to accomplish.³⁰⁴

Thus, in signing on to investment treaties and then acting to harmonize domestic economic laws, whether through treaties such as TRIPS or through quasi-public codification programs, governments may be tying—or rather, forcing—their own hands to a greater extent than they realize. It is one thing for states to agree among themselves to regulate their domestic affairs in a given uniform manner. It is quite another to empower foreign private parties to sue states who fail to govern accordingly.

agreements and host state investment authorizations within the scope of the dispute resolution clause. *See, e.g.,* U.S.-Sen. Treaty, *supra* note 136, art. 7.

³⁰³ Such was apparently the case in Report of the Appellate Body, India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, WTO Doc. WT/DS50/AB/R (Dec. 19, 1997).

³⁰⁴ Indeed, some view high-profile NAFTA Chapter 11 cases such as *Loewen* as contributing to the widespread opposition to and ultimate failure of the MAI negotiations. *See* Cone, *supra* note 300.

These points are by no means intended as a general critique of international investment law or as a call for the dismantling of the modern investment treaty regime. The augmentation of standards both in the treatment of foreign investment and in domestic economic regulation will very likely prove beneficial to developed and developing states in the long run. Indeed, states that are genuinely committed to the harmonization processes described earlier may welcome the prospect of a private enforcement mechanism for such positive obligations. What is important is that states at least be aware of the potential consequences of these simultaneous trends, and conduct their economic diplomacy accordingly. Failure to do so could lead to political miscalculation, and in turn to widespread opposition and even rollback of many of the system's recent advances. For those encouraged by the field's current forward trajectory, a cautious approach to positive obligations would seem to be well worth its limited price.