A BIT ON CUSTOM

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I. Introduction

Andreas Lowenfeld, along with others such as former ICJ Judge Stephen Schwebel, has argued that the investment treaty regime is affecting general public international law such that, for example, even states that are not parties to the 3000 or so (mostly bilateral) investment treaties may now be subject to some of the international investment rules emerging in that regime.[1] Lowenfeld's argument is principally descriptive but

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1. *E.g.*, Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 Colum. J. Transnat'l L. 123 (2003); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 Am. Soc'y Int'l L. 27 (2004).

has a normative dimension as well. He attempts to predict what experienced arbitrators, such as himself, would find the law to be, as in an arbitration operating under the rules laid out by the International Convention for the Settlement of Investment Disputes (ICSID), which requires such disputes to be decided by, among other things, "such rules of international law as may be applicable."[2] His argument is strikingly simple: whereas those rules governing investment were indeed unsettled even as recently as 1964, in the decades since, the conclusion of thousands of bilateral investment treaties (BITs), combined with the widespread acceptance of the ICSID and Multilateral Guarantee Agency (MIGA) conventions, has meant a wholesale change in the relevant general law.[3] He concludes that the substantive investment protections contained in BITs have moved "beyond *lex specialis* . . . to the level of customary law effective even for nonsignatories."[4] Lowenfeld acknowledges that his account of what an objective third party would find the law to be today is based on trends in arbitral caselaw and is not wholly in accord with usual definitions of either treaty law (which only binds treaty parties) or customary law (which requires state practice and opinio juris), but he argues that all this means is that the traditional definitions of those sources of law are "incomplete" and no longer reflect the realities of contemporary international law-making.[5]

While Lowenfeld acknowledges that the new "consensus" surrounding many issues in international investment law does not solve many of the problems concerning the relations between Multi-national Enterprises (MNEs) and host states,[6] he generally applauds the change in the law since the days when a majority of states supported the Charter of Economic Rights and Duties of State back in 1974.[7] He suggests that developing

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2. Lowenfeld, *supra* note 1, at 125 (citing Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID]).

3. *Id.* at 125-28.

4. *Id.* at 129.

5. *Id.* at 128-30.

6. *Id.* at 130.

7. *Id.* at 126-127. The Charter, as is well known, attempted to establish a "New International Economic Order" based on the proposition that states were free to treat foreign investors in accordance with their own law freed from the constraints imposed by international law, including customary

countries have shifted their attitudes on such matters as the Hull Rule (requiring prompt, adequate, and effective compensation upon expropriation) or the merits of international arbitration as more of them "came to realize that an attractive investment climate would be needed if they were to advance up the economic ladder through inflow of foreign capital."[8]

Among scholars, if not investor-state arbitrators, Lowenfeld's descriptive and normative conclusions remain controversial. Many traditional public international lawyers resist Lowenfeld's descriptive account, while critics of globalization contend that only diehard neo-con capitalists would applaud, as Lowenfeld does, the proposition that many of the rules in BITs now constitute what Lowenfeld calls "international legislation."[9] Lowenfeld's position is an affront to those who defend the continuing vitality of the traditional positivist Article 38[10] sources of international law that Lowenfeld seems ready to discard as well as to those who see BITs as encouraging a deleterious "race to the bottom" that harms lesser developed countries.[11]

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rules of state responsibility toward aliens. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 491-92 (2d ed. 2008).

8. Lowenfeld, *supra* note 1, at 127.

9. The leading critic of the investment regime, from both a descriptive and normative perspective, is M. Sornarajah. *See, e.g.*, M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 205-08, 213 (2d ed. 2004) ("[T]here is so much divergence in the standards in bilateral investment treaties that it is premature to conclude that they give rise to any significant rule of international law."). For further criticism, see also Peter Muchlinski, *Policy Issues, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3, 17 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) ("Perhaps the key question is what might be gained by elevating treaty-based standards to customary law. In effect, it would bind all countries to what may remain contested international minimum standards of treatment, regardless of whether such countries have signed IIAs [international investment agreements]. This would prevent freedom of choice for countries as to the extent and nature of their commitments. . . . Given the widespread application of otherwise contested standards as treaty-based obligations, it would appear unnecessary to do so and, in this very sensitive policy area, it could produce an unfavourable political response, retarding economic integration and development.").

10. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter Statute of the ICJ].

11. As discussed further *infra* Parts II-III, Andrew Guzman has voiced both of these objections. Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J.

My paper will explain why Lowenfeld is probably right and those who see investment treaties as *lex specialis* unconnected to either customary international law (CIL) or general principles of law are wrong. It concludes that the rumored "demise" of non-treaty sources of international law has been vastly exaggerated[12] and that Lowenfeld has a firmer grasp on the way contemporary international law operates than do critics of his position. It will also suggest that this issue has broader implications—including with respect to on-going debates among public international lawyers concerning the "democratic deficits" of contemporary international law regimes, the implications of the proliferation of treaties ("treatification"), and the resulting risks of "fragmentation."

II. The Foreign Investment Law Regime

As most international lawyers know, the foreign investment regime is largely comprised of some 2600 bilateral investment agreements (BITs) and an additional 300 or so regional agreements to promote economic integration that include both trade and investment provisions (such as the NAFTA and a number of other Free Trade Agreements (FTAs)).[13] The most obvious goals of these investment treaties are to protect foreign investors by affirming substantive protections accorded to them under customary international law, providing additional treaty-based guarantees (such as national and most-favored-nation treatment), and providing an international (arbitral) forum to resolve disputes between investors and their host states.[14] As of the end of 2006, at least 177 countries were

INT'L L. 639 (1998). *But see* Lowenfeld, *supra* note 1, at 126 (rejecting Guzman's arguments as "unconvincing" and "persuasive only if one concludes that attracting multinational corporations is indeed bottom-fishing").

12. *But see, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law,* 40 VA. J. INT'L L. 449 (2000) (arguing that the notion of customary international law, as a source of international law, should be discarded).

13. *See, e.g.*, Persephone Economou, John H. Dunning & Karl P. Sauvant, *Trends and Issues in International Investment, in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009 3, 17 (Karl P. Sauvant ed., 2009) [hereinafter INVESTMENT YEARBOOK] (citing United Nations Conference on Trade and Development (UNCTAD) data on the number of international investment agreements that have been concluded).

14. *See generally* KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 7-22 (1992).

parties to at least one such treaty.[15] International rules governing investment are also contained within other multilateral agreements (such as the Energy Charter Treaty) or exist within international organizations principally designed for other purposes (such as the WTO's TRIMs, GATS, and TRIPs Agreements, the World Bank's ICSID Convention, and the OECD's Code of Capital Movements).[16] BITs and the investment chapters of FTAs typically grant foreign investors from the respective state parties relative rights against discrimination and some absolute minimum guarantees (usually cast as requirements to accord "fair and equitable treatment" (FET), "full protection and security," fair, prompt, and adequate compensation upon expropriation, treatment no less favorable than that required by international law, compensation in case of expropriation in accord with that required by international law, and the right to repatriate profits stemming from the operation of their enterprise).[17] Many of these treaties also rely on what is arguably the most effective set of remedies of any existing international regime: a guarantee that injured investors have direct recourse to binding international arbitration to affirm any of their treaty rights, without, in many cases, any need either to exhaust local remedies in the host state in which they are located or to seek the cooperation of their home state (as under traditional espousal).[18] Unlike the WTO, where states bring complaints against one another, in the investment world foreign investors are effectively private

15. Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 3, 28 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (citing figures from UNCTAD).

16. *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 94-97, 102-07, 115-30, 456-61 (2002).

17. For descriptions of these rights, along with relevant agreements and cases, see generally R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1007-1169 (2005).

18. *See generally id.* at 1391-1514. For an interesting comparison of remedies among international regimes, with a focus on the investment regime, see Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006).

attorneys general charged with enforcing treaty rights directly against their host states.[19]

BITs, along with other aspects of the international investment regime, seek to promote the free flow of capital across borders. Such capital flows are also promoted by international financial institutions, such as the World Bank's International Finance Corporation,[20] the International Monetary Fund,[21] regional organizations such as the OECD,[22] political risk insurers such as the United States' Overseas Private Investment Corporation (OPIC) or the Multilateral Investment Guarantee Agency (MIGA),[23] market players who assess credit-worthiness

19. But the analogy to private attorneys general may be inexact. There is an on-going debate, including among investor-state arbitrators, concerning whether investors under BITs and FTAs are effectively third-party beneficiaries whose rights under these treaties are no longer dependent in any respect on the state parties who negotiated these treaties (and therefore approximate subjects of international law in their own right) or whether they remain mere enforcers of rights subject to sovereign control (including possible waiver of investment protections by the state parties to the underlying treaties). *See, e.g.*, Tillmann Rudolf Braun, *Globalization: The Driving Force in International Investment Law*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michale Waibel, Asha Kaushal, & Kyo-Hwa Chung eds., forthcoming 2010).

20. See, for example, the annual "Doing Business" Reports issued by the World Bank's International Finance Corporation. Doing Business, http://www.doingbusiness.org (ranking countries more highly if their economies, along with their national laws and courts, adhere to certain rule of law values that coincide with many investment guarantees contained in BITs and FTAs).

21. *See, e.g.*, Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 SOC. & LEGAL STUD. 103 (2004) (describing how IMF conditionality constitutes, along with BITs and FTAs, a form of international investment regulatory law).

22. Thus, for example, the OECD Code of Capital Movements imposes liberalization requirements on OECD members that replicate some of those imposed under BITs and FTAs. The latest version of the code can be found online, at http://www.oecd.org/dataoecd/57/47/43387900.pdf.

23. For a description of the MIGA, see LOWENFELD, *supra* note 16, at 488-93. Like BITs and FTAs, political risk insurance schemes such as OPIC or the MIGA attempt to provide foreign investors with assurances against many forms of political risk. For a discussion of how international law regarding compensation for takings of property might be influenced by claims determinations made or arbitrations conducted under political risk insurers such as OPIC and not only by arbitral decisions under BITs and FTAs, see Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475 (2008). For a consideration of how the rulings of political risk insurers may influence compensation de-

or political risk,[24] and, of course, foreign investors themselves who may secure assurances from host states (as through stabilization clauses contained in investment contracts or local law) and attempt to enforce these through other methods, apart from investor-state arbitration under BITs or FTAs.[25] All of these mechanisms which constitute parts of the wider international investment regime enable, as do BITs and FTAs, states to provide better or more credible commitments to foreign investors who might otherwise be leery of submitting themselves and their capital to local law and courts.

With less than 3000 investment protection treaties in place, the investment regime does not cover every possible bilateral pairing of states. At present, there is not, for example, any investment protection treaty in effect between the United States and the BRIC countries (Brazil, Russia, India, or China)—despite the huge capital flows originating from within the BRICs. Moreover, investment treaties may be terminated in accordance with their terms and some states have sought to withdraw from some of these treaties or from ICSID.[26] As all of this suggests, a great number of investors and

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terminations in a number of settings, see MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE (2008).

24. For suggestions that market evaluators of political risk, no less than the willingness of a country to ratify BITs or FTAs, disseminate signals about the openness of a country with respect to its investment regime, see, for example, Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15, at 171.

25. *See, e.g.*, Paul Kuruk, *Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience*, 13 MICH. J. INT'L L. 43 (1991) (case history of one government's rejection of, among other things, stabilization clauses negotiated in investment contracts by a prior regime); LOUIS T. WELLS & RAFIQ AHMED, MAKING FOREIGN INVESTMENT SAFE: PROPERTY RIGHTS AND NATIONAL SOVEREIGNTY (2007) (case histories of investor/host state attempts to negotiate, particularly with respect to promises made in investment contracts). Some BITs and FTAs contain "umbrella" clauses under which foreign investors secure the rights to pursue claims for breaches of their investment contracts with their host state under investor-state dispute settlement. *See generally* BISHOP, CRAWFORD & REISMAN, *supra* note 17, at 1095-1104.

26. *See, e.g.*, Damon Vis-Dunbar, Luke Eric Peterson & Fernando Cabrera Diaz, *Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, bilaterals.org, May 9, 2007, http://www.bilaterals.org/article.php3?id_

states have a stake in knowing whether Lowenfeld is right in contending that non-parties to investment treaties may nonetheless be subject to some of the international investment rules contained in them or that are elaborated in investor-state arbitral decisions.

III. Critiques of Investment Treaties as Sources of General Law

It is certainly not the case that every state that has entered into a BIT has signed onto the same set of obligations. Despite commonalities in general principle, these treaties remain bilateral agreements with textual variations that reflect differences in states' model negotiating texts and differences in relative bargaining leverage between say, Canada, Mexico, and the United States (which negotiated the NAFTA's Chapter Eleven) or the United States and Grenada (which concluded a BIT in 1986 that was virtually identical to the then-U.S. model, scarcely three years after the United States' invasion of that country).[27] Unlike the trade regime, there is no single overarching multilateral treaty on investment; there is not even an accepted "model" for an investment protection or promotion agreement, as compared to bilateral extradition treaties. The last attempt to negotiate a multilateral investment treaty, within the OECD, ended in 1998 after an impressive lobbying campaign by a number of NGOs.[28] Further, the typical BIT is a relatively concise (and perhaps somewhat cryptic) document as compared to the voluminous substantive and procedural details contained in the GATT covered agreements.

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article=8221 (reporting Bolivia's withdrawal from ICSID); International Law Reporter, Ecuador's Notification Pursuant to Art. 25(4) of the ICSID Convention (Dec. 16, 2007), http://ilreports.blogspot.com/2007/12/ecuadors-notification-pursuant-to.html (stating that Ecuador had threatened to revise several of its BITs and would not recognize ICSID jurisdiction over certain disputes).

27. For a description of the evolving models of investment protection agreements used by the United States and China, see José E. Alvarez, *The Evolving BIT*, 6 Transnat'l Disp. Mgmt. (forthcoming 2009).

28. *See* Edward M. Graham, Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises 47-48 (2000) (discussing the controversies generated by the proposed multilateral agreement and the efforts directed against it by NGOs in leading OECD countries).

Consequently, it is not surprising that efforts to draw from the investment regime general rules applicable to non-treaty parties, like Lowenfeld's, encounter serious objection. The following seven are the most salient reasons posited for why Lowenfeld's thesis is wrong, either as a desriptive or normative matter.

(1) Those who see BITs or FTAs as elaborating particularized rules applicable only to specific parties to such treaties start from the fundamental premise that treaties bind only states that consent to them and that therefore even a network of bilateral or regional treaties, by definition, binds only state parties.[29] Accordingly, many scholars, perhaps most, see BITs or FTAs as special deals or *lex specialis* that apply only as between their respective parties. On this view, BITs and FTAs are particular *quid pro quos*—deals that were not intended to and cannot generate general rules of custom or general principles of law.[30]

(2) Related to (1) but conceptually distinct is the claim that investment treaties are more like "contracts" than "legislative" treaties. Unlike, say, the Vienna Convention on the Law of Treaties, which explicitly states its intention to codify and progressively develop the general law,[31] BITs and FTAs say no such thing. They rely on and are grounded in specific reci-

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29. *See* Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("A treaty does not create either obligations or rights for a third state without its consent.").

30. *E.g.*, M. Sornarajah, *State Responsibility and Bilateral Investment Treaties*, 20 J. WORLD TRADE 79, 82 (1986) ("Each treaty is nothing but *lex specialis* between parties designed to create a mutual regime of investment protection. Such *lex specialis* is necessary simply because of the uncertainty in the law on investment protection but such uncertainty cannot be removed on a universal basis by these treaties as they do not consistently support definite principles."); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 2006-07 (2d ed. 2004) ("[T]here is so much divergence in the standards in bilateral investment treaties that it is premature to conclude that they give rise to any significant rule of international law."); Muchlinski, *supra* note 9, at 17 ("[E]levating treaty-based standards to customary law . . . would bind all countries to what may remain contested international minimum standards of treatment. . . ."); Guzman, *supra* note 11, at 684-86 ("The arguments of those who view BITs as evidence of customary law are flawed . . . .").

31. Vienna Convention, *supra* note 29, pmbl. ("Believing that the codification and progressive development of the law of treaties achieved in the present Convention . . . :").

procity for their legitimacy and enforcement, and do not evince common aims to be enforced by common means.[32]

(3) BITs and FTAs are not *mere* contracts. They are more like contracts of adhesion or "unequal treaties" since in the "typical" instance (see, for instance, the U.S.-Grenada BIT noted above) these agreements are imposed by rich capital exporters on poor states desperate for capital and insufficiently prepared to know what they are signing.[33] These countries have, in reality, no shared common intentions, much less one to affect the rules of the game for the planet. Indeed, it is suggested that often the poor state party is so ill-informed that it is frequently distressed after the fact when it discovers, like consumers hoodwinked by an unscrupulous car dealer, that what it actually accomplished through conclusion of a BIT is greater exposure to unexpected financial liabilities, not greater capital flows.[34] According to this view, the fact that a great many LDCs have been lured into adhering to treaties out of a mistaken impression that this is only way to enhance the

32. *See, e.g.*, SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW RECONCILING POLICY AND PRINCIPLE 103 (2008) (describing the "contractual character" of BITs); Guzman, *supra* note 11, at 686 (noting that BITs do not contain any language explicitly acknowledging that their aim is merely to codify customary international law).

33. *See, e.g.*, SORNARAJAH, *supra* note 9, at 207-08 (suggesting that BITs are "unequal treaties" and that coercion might be shown with respect to their conclusion "where the signing of the treaty is made conditional on the granting of aid, loans or trade preferences"). Some might draw a similar conclusion from the author's own descriptions of early U.S. BIT negotiations. *See, e.g.*, José E. Alvarez, *Remarks [on the Proceedings of the 86th Annual Meeting of the American Society of International Law]*, 86 AM. SOC'Y INT'L L. PROC. 550, 552-53 (1992) (contending that countries "turn to the U.S. BIT with the equivalent of an IMF gun pointed at their heads," that for many "a BIT relationship is hardly a voluntary, uncoerced transaction," and that a BIT negotiation is not a discussion among sovereign equals). *But see* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime, in* INVESTMENT YEARBOOK, *supra* note 13, at 379, 473-77 (Karl P. Sauvant ed., 2009) (challenging the contention that the United States-Argentina BIT is a contract of adhesion).

34. *See, e.g.*, SORNARAJAH, *supra* note 9, at 218-19 (stressing the inequality of bargaining power and knowledge between BIT parties). For an empirical effort questioning the extent to which BITs promote an increase in FDI flows, see Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a BIT . . . And They Could Bite, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15, at 349.

credibility of their commitments to foreign investors does not demonstrate the universalist "general practice accepted as law" needed to prove custom.[35]

(4) A distinct but related reason to resist Lowenfeld's conclusion is suggested by the most widely-cited explanation for the origin and spread of BITs, namely Andrew Guzman's game theoretic account of why lesser developed countries (LDCs) turned to BITs even though they were "simultaneously" engaged in resisting the rules contained in such treaties through their efforts at the UN General Assembly.[36] Guzman argues that BITs were concluded by LDCs only *after* that group of states had already demolished the relevant customary rules,[37] through their collective actions to establish the New International Economic Order (NIEO) in the UN General Assembly in the 1970s. By this time, according to Guzman's account, there was no such thing as an international minimum standard to which all alien investors were entitled or the Hull Rule providing prompt, adequate, and effective compensation upon expropriation.[38] On this view, even if some treaties could in principle reflect existing customary law,[39] BITs cannot be said to codify or reflect such rules because the General Assembly had successfully undermined the global consensus in favor of such rules by the time most BITs came into effect.

(5) Even those who might resist Guzman's account of the demise of customary rules in the wake of the NIEO can find in

35. *See, e.g.*, Jason Webb Yackee, Pacta Sunt Servanda *and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1552 (2009) (arguing that BITs do not go beyond recognizing that state promises to investors are presumptively enforceable and that therefore arguments that they constitute a universal, one-size-fits-all customary international law of investment binding on all states are erroneous); Matthew C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT'L ECON. L. 79 (2006) (expressing skepticism that BITs establish a universal common law for investment). .

36. Guzman, *supra* note 11. Guzman has recently updated this work. *See* Andrew T. Guzman, *Explaining the Popularity of Bilateral Investment Treaties, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15, at 73.

37. Guzman, *supra* note 36, at 77, 94-96.

38. *Id.*

39. *C.f.* Vienna Convention, *supra* note 29, art. 38 ("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.")

his history another reason to be skeptical of Lowenfeld's claim: namely, that BITs and FTAs, unlike, for example, certain multilateral conventions which state in the preambles that they intend to codify or progressively develop customary law, have no such intent. Guzman argues that LDCs adhered to BITs for only one reason: they were desperate for capital and had no intention of resuscitating such customary rules (even if this were possible through the conclusion of a treaty).[40] LDCs entered into such treaties, he argues, only to secure the prospect of enhanced FDI flows from the particular BIT partner and certainly not to depart from their established opposition to the traditional protections, like the Hull Rule, that favored investors.[41] To Guzman, each BIT negotiation was merely an attempt by an LDC, as an individual prisoner to defect from the position of the Global South taken at the UN, but without any intention to undermine the common position of LDCs in favor of the NIEO.[42] Far from constituting an attempt to affirm traditional general law, BITs were, on the contrary, concluded precisely because, as Sornarajah argues, "of an absence of a consensus to create multilaterally acceptable norms."[43] Accordingly, the existence of these treaties cannot substitute for (non-existent) multilateral efforts to restore the displaced old CIL.[44] Guzman argues that the only way to reinstate the long-demolished traditional customary rules favoring investors would therefore be to deploy the same methods by which those old rules were demolished: namely through *global* efforts, such as a UN General Assembly resolution repudiating that body's old NIEO resolutions and reaffirming, for example, the Hull Rule.[45]

Another way of stating the same point is simply that adherence to BITs and FTAs do not evince the requisite "*opinio juris*" needed to establish CIL, so that the network of such treaties has no effect on the general law applicable to non-parties.[46]

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40. Guzman, *supra* note 36, at 85-86, 95-96.
41. *Id.* at 95-96.
42. *Id.* at 86-88.
43. SORNARAJAH, *supra* note 9, at 212.
44. Guzman, *supra* note 36, at 84.
45. *Id.*
46. *Id.* at 94-96. *See also* United Parcel Serv. of America v. Canada, Award on Jurisdiction ¶ 97 (NAFTA Arb. Trib. 2002), *available at* http://nafta

(6) Another, simpler reason to resist Lowenfeld's descriptive account rests on the differing contents of BITs and FTAs. The argument is simply that these treaties differ too much in content to produce coherent, generally applicable rules.[47] Not all investment treaties, for example, require states to admit foreign investors on a non-discriminatory basis; most only impose such a rule on post-entry treatment. Only some investment agreements prohibit performance requirements (such as requirements to export). Investment treaties differ on many other points, such as the applicable definition of eligible investor or investments, or the requisites for initiating investor-state arbitration. And even when they purport to accord similar treatment, such as when they guarantee FET, on closer inspection, even these treaty provisions are often cast in different terms or using different language and cannot, therefore, be said to mean the same thing and perforce generate consistent general rules.[48]

(7) Lowenfeld's reliance on the rulings of investor-state arbitral tribunals is also subject to critical scrutiny. To traditional positivist international lawyers, for whom such decisions constitute at best "subsidiary" evidence of international obligations that must still rest on treaty, custom, or general principles,[49] the fact that some arbitrators have appeared to agree with Lowenfeld in the course of deciding particular disputes means nothing.[50] Each of those ad hoc panels of three arbitra-

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claims.com/Disputes/Canada/UPS/UPSAwardOnJurisdiction.pdf ("[W]hile [BITs] 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."); Sedco, Inc. v. Nat'l Iranian Oil Co., 10 Iran-U.S. Cl. Trib. Rep. 180, 184-185 (1986) (comparing BITs to lump sum claims settlements and suggesting that both reflect "bargaining in a context to which 'opinio juris' seems a stranger").

47. For a detailed effort to make this point, see Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327 (1994).

48. For a study of the differing terms of BITs and FTAs with respect to FET, see IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 15-52 (2008) (identifying five main variations of the FET obligation in the treaties).

49. *See* Statute of the ICJ, *supra* note 10, art. 38 (listing the three primary sources of international law and the "subsidiary" sources).

50. Indeed, despite the tendency of investor-state arbitrators to rely on prior decisions, there are many instances in which prior investor-state arbitral decisions, including some directly on point, have been ignored or not

tors is charged, after all, only with interpreting the particular treaty before it and not with pronouncing on the general law. Nor does this regime have a single appellate tribunal or process to reconcile conflicting arbitral interpretations of even the same investment treaty, unlike the WTO. Investor-state arbitral decisions are neither binding precedents on later tribunals nor sources of international obligations themselves.[51] On this view, arbitral decisions, no matter how well reasoned, can never substitute for the real elements of custom—state practice and *opinio juris*—and such decisions do not constitute what most lawyers consider to be relevant sources to determine applicable "general principles of law."[52]

IV. Addressing the Objections

The following section addresses each of the seven objections to Lowenfeld's conclusion in turn, but devotes more attention to the most salient criticism, namely that whatever else BITs and FTAs are, they do not constitute elements of customary international law.

A. *BITs as Lex Specialis*

Contentions that BITs are "*lex specialis*," are not "legislative," or lack common content present artificially constrained

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followed, and no one claims that arbitrators are bound to follow prior decisions as if these constituted binding law. For examples of conflicting decisions, see Todd J. Grierson-Weiler and Ian A. Laird, *Standards of Treatment, in* The Oxford Handbook of International Investment Law, *supra* note 9, at 259.

51. Objections to the alleged precedential value of arbitral decisions are legion. *See, e.g.*, Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 Am. J. Int'l L. 474, 475, 486 (1991) (discussing objections to reliance on arbitral decisions, including those made by a number of dissenting Iranian judges in the U.S.-Iran Claims Tribunal). Notably, even though Norton defends arbitrators' reliance on prior arbitral decisions, he does not claim that these decisions are themselves customary law or general principles of law. *Id.* at 498 (noting that under "approved doctrine" arbitral decisions are subsidiary means for the determination of rules of law).

52. *Compare* C. Brown, *The Protection of Legitimate Expectations as a 'General Principle of Law': Some Preliminary Thoughts*, 6 Transnat'l Disp. Mgmt. (2009), *available at* http://www.transnational-dispute-management.com/members/articles/tdm_detail.asp?key=1303 (looking to comparative law for guidance on "general principles of law").

black/white choices that bear little resemblance to the complexities of the interactions between treaty and non-treaty sources of law or the international legal process. These are not qualities that exist on some kind of on/off switch. There are aspects of BITs that are *lex specialis*—that is, intended to exclude the applicability of any general rules to the contrary. This is the case, for example, with respect to the particular procedural requisites that each of these treaties requires for initiation of investor-state dispute settlement.[53] Some BIT provisions reflect particular quid pro quos—such as a clause in the U.S.-Argentina BIT of 1991 providing that Argentina need not provide U.S. automakers all the benefits that Argentine automakers get.[54] No one is suggesting that all the substantive guarantees contained in BITs and FTAs are now part of CIL or general principles of law. Nor would many contend that the specific procedural requisites reflected in these agreements—such as BIT provisions that enable even minority shareholders to make a claim on behalf of a company—reflect general law.[55] On the other hand, there are many other provisions in such treaties that explicitly or implicitly rely on general international law or reflect an intent by their drafters to affirm traditional principles of state responsibility to aliens.

Thus, the U.S.-Argentina BIT provides, in Article II(2)(a), that "[i]nvestment 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." Secondly, it provides that in cases of ex-

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53. For an interesting effort to delineate when BIT provisions should be treated as *lex specialis* and when they should be interpreted in light of general international law, see Campbell McLachlan, *Investment Treaties and General International Law*, 57 INT'L & COMP L.Q. 361 (2008). *See also* Alvarez & Khamsi, *supra* note 33, at 427-40.

54. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Protocol ¶ 9, Nov. 14, 1991, 31 I.L.M. 124, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf [hereinafter U.S.-Arg. BIT].

55. *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 56-59 (2008) (summarizing disagreements among arbitral and other tribunals over the ability of shareholders to bring such claims); Markus Perkams, *Piercing the Corporate Veil in International Investment Agreements*, *in* INTERNATIONAL INVESTMENT LAW IN CONTEXT 93 (August Reinisch & Christina Knahr eds., 2008) (comparing the law of shareholder claims under customary international law and under investment treaties).

propriation, investors have the right to be treated "in accordance with due process of law and the general principles of treatment provided for in Article II(2)."[56] Thirdly, it states that investors subject to expropriation have the right to prompt review by the appropriate judicial or administrative authorities of the host state which, among other things, shall make sure that any compensation "conforms to the provisions of this Treaty and the principles of international law."[57] Finally, it asserts that the investor is entitled to the better of any treatment accorded under, among other things, "international legal obligations."[58] (Other provisions of that BIT, such as a clause requiring that states do not "impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments,"[59] according investors "effective means of asserting claims" in local fora,[60] or directing states to make "public" all relevant laws,[61] are open-ended invitations to deploy relevant CIL or general principles of law, given, for example, emerging principles to promote due process, transparency, or accountability across a number of regimes, including those involving human rights.[62])

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56. U.S.-Arg. BIT, *supra* note 54, art. IV(1).

57. *Id.* art. IV(2).

58. *Id.* art. X.

59. *Id.* art. II(2)(b). *Cf.* Elettronica Sicula (U.S. v. Italy), Judgment, 1989 I.C.J. 15, 76 (Jul. 20) (defining "arbitrary" in terms comparable to how the *Neer* case defined the international minimum standard, namely as "willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety").

60. U.S.-Arg. BIT, *supra* note 54, art. II(6).

61. *Id.* art. II(7).

62. *See, e.g.*, TUDOR, *supra* note 48, at 154-181 (surveying the many ways the FET standard has been applied, including the overlap with states' obligations to exert due diligence and protection, to provide due process and respect procedural fairness, to respect the parties' legitimate expectations, to avoid coercion and harassment, to offer a stable and predictable legal framework, to avoid unjust enrichment, to proceed with good faith, and to avoid arbitrary and discriminatory treatment). Arbitrators have not been the only ones to relate the "international minimum standard" to human rights principles. *See, e.g.*, SUBEDI, *supra* note 32, at 11 (stating that "[u]nder the evolving principles of international human rights law, every individual, both physical and juridical and whether national or alien, residing within any country, was entitled to their basic human rights, including property rights" and contending that this aspect of the human rights agenda "supplemented and comple-

As these clauses demonstrate, investment agreements are, at least in part, explicit efforts to provide investors with the traditional protections of customary law, including the international minimum standard, full protection and security, and protections against denials of justice.[63] Clauses such as those enumerated above are efforts to include customary protections as part of a BIT's protections, not to *exclude* these ordinarily applicable general legal rules, as does *lex specialis.*[64] This is certainly in accord with what we know of announced intentions of the U.S. BIT program (and presumably the programs of other capital-exporting states that now widely imitate the provisions of U.S. BITs).[65] U.S. BIT negotiators have affirmed in scholarly commentaries, in testimony before Congress, and most importantly in the course of BIT negotiations that these treaties sought to re-affirm, not derogate from, relevant customary law.[66] Further, it is well known that U.S. BITs, like

mented" foreign investment law such that property could not be expropriated without compensation).

63. *See, e.g.*, Noble Ventures, Inc. v. Romania, ICSID (W. Bank) Case No. ARB/01/11, Award ¶ 164 (2005) (equating full protection and security to the general duty to exercise due diligence to protect aliens found in customary international law).

64. It may therefore be a bit misleading to state, as a leading casebook does, that BITs "[a]s a *lex specialis* between the parties . . . supersede any inconsistent customary international law and may embrace or exclude any incipient norms." BISHOP, CRAWFORD & REISMAN, *supra* note 17, at 1007. The language of most BITs welcomes or even requires the residual application of CIL; it is much harder to point to concrete instances where BITs explicitly exclude it. For an analysis of why the residual application of customary law matters in the context of a particular set of disputes, *see* Alvarez & Khamsi, *supra* note 33 (discussing Argentina's defense of necessity in a number of cases).

65. *See generally* VANDEVELDE, *supra* note 14, at 7-22. For an examination of the gradual "Americanization" of the Chinese BIT program, the world's second largest, see Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007).

66. Thus, one of the early negotiators of U.S. BITs and the leading scholar on the U.S. BIT program has stated:

> One of the most important of the absolute standards requires that covered investment enjoy treatment no less favorable than that required by international law. This provision incorporates customary international law into the BIT, so that any violation of customary international law also would violate the BIT. The practical implication is that the BIT disputes mechanisms, which apply to treaty vio-

most modern BITs and FTAs, seek to confer on arbitral forums rights to adjudicate with respect to customary rules that would otherwise depend, for enforcement, on the political intercession of governments (which once led to gunboat diplomacy). To this end, these treaties define "investment disputes" that could be brought to international arbitration as including breaches of any right "*conferred*" by the treaty (that is, where merely the forum is supplied by the treaty but pre-existing rights under CIL apply) and not merely those "created" by the treaty.[67] This alone explains why the references to CIL in such treaties are not superfluous.[68]

B. *BITs as Contracts*

Arbitral decisions interpreting such clauses, at least to the extent they rely on customary law, are not only interpreting a particular treaty-contract between the parties—as is suggested by the second objection to Lowenfeld's thesis noted in section III. This is all the more the case today under the NAFTA which, at least after the state parties issued their first joint interpretation of that treaty, now *equates* the meaning of FET to the customary international minimum standard.[69] At least af-

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> lations, can be used to remedy violations of customary international law.

Kenneth J. Vandevelde, *The BIT Program: A Fifteen-Year Appraisal*, 86 Am. Soc'y Int'l L. Proc. 532, 537 (1992). Vandevelde also attributes the United States' resistance to making concessions regarding the BIT's treatment provisions to the desire to use these treaties to "bolster" CIL. *Id.* at 536, 537. He indicates that, by contrast, since the national treatment and most favored nation provisions were not grounded in CIL, the United States was more ready to make concessions on those provisions (as with respect to derogations from MFN when BIT partners were members of customs unions). *Id.* at 537.

67. U.S.-Arg. BIT, *supra* note 54, art. VII(1) ("breach of any right conferred or created by this Treaty").

68. For more on how BITs sought to "depoliticize" investment disputes, see Subedi, *supra* note 32, at 96-98. It is not plausible to argue, as M. Sornarajah does, that BITs and FTAs refer to CIL *because* of the absence of consensus on such matters as the international minimum standard. Sornarajah, *supra* note 9, at 212, 328-32. If this were the intent, these treaties would have done more than simply rely on rules that Sornarajah (and Guzman) say did not exist; they would have gone on to define such standards, along with fair and equitable treatment.

69. According to the NAFTA Commission Interpretation of July 31, 2001, which is binding on NAFTA investor-state arbitrators:

ter that interpretation, NAFTA arbitral decisions on point are *necessarily* efforts to interpret and apply customary law. It is significant that most of those decisions have been reluctant to accept contentions by at least some of the NAFTA state parties that the international minimum standard remains the same as it was when the U.S.-Mexican Claims Commission decided, in the famous Neer Case in 1927, that the Mexican government had not violated that standard by showing a lack of due diligence in investigating and prosecuting the murder of a U.S. national in its territory.[70] Most investor-state tribunals have refused to adhere to the stringent standard in Neer providing that states can escape liability unless their conduct was "notoriously unjust" or "egregious."[71] Accordingly, arbitral interpretations of the NAFTA's FET standard do exactly what Lowenfeld says they do: they *reflect, and by applying that standard to changing facts, also affect* the on-going interpretation of non-treaty sources of law. The language from the NAFTA Commission interpretation was incorporated into the 2004 U.S. Model

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> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Jul. 31, 2001, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en.

70. Neer v. Mexico, 4 R. Int'l Arb. Awards 60 (U.S.-Mex. Gen. Claims Comm'n 1926). For the most recent attempt by an investor-state tribunal to consider the continued relevance of the *Neer* case to contemporary interpretations of "fair and equitable treatment," see Glamis Gold, Ltd. v. United States, Award ¶¶ 598-617 (NAFTA Arb. Trib. 2009) (concluding that the *Neer* standard—requiring government conduct that is egregious, outrageous, or shocking—continues to apply, but that the international community's views as to the kinds of action that can be so described may have evolved since 1926).

71. *E.g.*, Mondev Int'l, Ltd. v. United States, Award ¶¶ 116, 125 (NAFTA Arb. Trib. 2002). That tribunal noted that the Commission interpretation incorporated international law "whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce." *Id.* ¶ 125. *But see Glamis Gold* ¶¶ 598-617 (finding the *Neer* standard applicable).

BIT and appears in all BITs and FTAs concluded by the United States since 2004. In addition, that model agreement also equates its expropriation guarantees to those provided by customary international law.[72]

More significant for my purposes here is that other investor-state arbitrators, even those operating outside the context of the NAFTA or other investment treaties that explicitly equate treaty standards to those in CIL, have also tended to blur firm distinctions between an investment treaty's FET guarantee and customary law. Most of the arbitral decisions issued to date that are on point explicitly equate the two standards, suggest that the two are to a considerable extent equivalent, or at least indicate that the FET treaty standard needs to be informed by the applicable rules of international law such as the international minimum standard (as would be suggested by the interpretation rules in the Vienna Convention on the Law of Treaties).[73] Accordingly, when those tribunals assert, for example, that both FET and customary international law require certain governmental conduct and that these determinations suggest, as is further discussed below,[74] an ever-rising standard of what investors are entitled to expect from governments adhering to the rule of law, it is difficult to resist the conclusion that customary norms, including contemporary expectations of the international minimum standard, have evolved, along with general human rights expectations for all governments. Thus, the Azurix v. Argentina Award suggested that the question of whether or not FET is intended to be an additional guarantee to the investor may be academic, as in substance the rights accorded by it may now be the same as

72. 2004 U.S. Model BIT annex B(1), *available at* http://www.state.gov/documents/organization/117601.pdf ("Article 6 . . . is intended to reflect customary international law concerning the obligation of States with respect to expropriation.").

73. The outlier cases are those that contrast the rules of investment treaties with those in CIL. *E.g.*, *Glamis Gold* ¶¶ 608-11 (contrasting cases that rely on customary law from those that define an "autonomous standard" under particular BITs). *See also* Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID (W. Bank) Case No. ARB/87/3, Award (1990) (similarly contrasting treaty rules with customary law rules).

74. *See infra* notes 143-144 and accompanying text (regarding the conclusions reached in *Waste Management II* and *TECMED* as to the meaning of FET).

those under customary law.[75] And in Sempra Energy v. Argentina, the arbitrators suggested that the meaning of FET, never precise to begin with, has "evolved over the centuries" and that "[c]ustomary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development."[76] That tribunal further muddied the waters by suggesting that FET, like the international minimum standard, was essentially a gap-filler intended to enable arbitrators to fulfill the "principle of good faith" in the course of case-by-case application.[77] Some scholars have read these and other arbitral decisions as giving "modern expression to a general principle of due process" or even the "minimum requirements of the rule of law," and have

75. This is certainly borne out by a survey of investor-state arbitral decisions applying the FET standard, as such decisions frequently blur firm distinctions between FET as a treaty standard and underlying or related principles of CIL or general principles of law. *See generally* Tudor, *supra* note 48. Some specific examples are: Azurix Corp. v. Argentina, ICSID (W. Bank) Case No. ARB/01/12, Award ¶ 364 (2006) ("The question whether fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and, whichever side of the argument one takes, the answer to the question may in substance be the same."); Siemens A.G. v. Argentina, ICSID (W. Bank) Case No. ARB/02/8, Award ¶¶ 293, 299 (2007) (concluding that customary law has evolved since *Neer* and it is no longer necessary to show bad faith or malicious intention on the part of the host state); Pope & Talbot Inc. v. Canada, Damages Award ¶¶ 59-62 (NAFTA Arb. Trib. 2002) (rejecting the *Neer* standard in interpreting customary international law or FET and suggesting that the more than 1800 BITs are reflective of state practice); MCI Power Group L.C. v. Ecuador, ICSID (W. Bank) Case No. ARB/03/6, Award ¶ 369 (2007) (noting that FET "obliges State parties to the BIT to respect the standards of treatment required by international law" and that the BIT's reference to international law "refers to customary international law"); Saluka Invs. BV (Neth.) v. Czech Republic, Partial Award ¶ 292 (UNCITRAL Arb. 2006), *available at* http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf (noting that the customary international minimum standard is "in any case binding" and that the FET standard "may in fact provide no more than 'minimal' protection").

76. Sempra Energy Int'l v. Argentina, ICSID (W. Bank) Case No. ARB/02/16, Award ¶¶ 296-7 (2007). Indeed, even the decision most resistant to finding evolving notions of customary law embedded in investment agreements, the *Glamis* case, concluded that FET is nonetheless subject to an evolutionary "change in the international view of what is shocking and outrageous." *Glamis Gold* ¶ 613.

77. *Sempra Energy* ¶ 297.

suggested that "some elements of human rights law may furnish a source of general principle from which the obligation of fair and equitable treatment may be given contemporary content."[78] While such efforts to draw from disparate treaties and rules of custom might be attributed to sloppy thinking, these interpretations are hardly surprising given requirements in many BITs or FTAs that investors be accorded the benefit of "treatment in accordance with international law."

C. *BITs as Contracts of Adhesion*

In another essay, I have also tackled the canard that legal consequences emerge from the fact that *some* BIT negotiations, particularly in the early years, were more like training sessions conducted by Western capital exporters than like negotiations among sovereign equals. International law does not affirm that treaties are void or voidable if one of the treaty parties succumbed to economic pressure.[79] The Vienna Convention on the Law of Treaties does not recognize a category

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78. CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION 203-05 (2008); Campbell McLachlan, *Investment Treaties and General International Law, in* INVESTMENT TREATY LAW: CURRENT ISSUES III 105, 143 (Andrea K. Bjorklund, Ian A. Laird & Sergey Ripinsky eds., 2009). *See also* ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARD OF TREATMENT 252 (2003) (arguing that some measures that affect foreign investors may violate international human rights law and that "[w]ith respect to procedural rights, there may be significant overlap between claims of human rights violations on the one hand, and claims of denial of justice and due process on the other"); TUDOR, *supra* note 48, at 154-81 (discussing the overlap between FET and states' other obligations, including to accord due process). Some have suggested that the FET standard also overlaps with the non-discrimination guarantees of BITs and FTAs. *E.g.*, SUBEDI, *supra* note 32, at 57.

79. As is well known, a proposal to include "economic or political pressure" in Article 52 (on coercion) in the Vienna Convention on the Law of Treaties was defeated, but only after a "declaration" to that treaty was appended condemning the threat or use of such pressure to conclude a treaty. *See* Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 532-35 (1970). Most have treated this declaration as a political compromise with no bearing on the traditional law, which states that neither the motive of a state entering into a treaty nor inequality in bargaining power is relevant to determining a treaty's validity. Thus, even M. Sornarajah, who stresses the unequal status of BIT parties, acknowledges that the "better view" is that this does not affect the validity of a treaty. SORNARAJAH, *supra* note 9, at 218. The author is not aware of any BIT party even attempting to raise such a defense to a BIT claim.

of "treaty-contracts of adhesion" subject to distinct rules of interpretation; nor are there are special rules concerning the interplay between treaty and custom for such cases.[80]

D. *BITs as the Product of a Prisoner's Dilemma*

Guzman's description of the rise and spread of BITs, an excellent example of a classic Prisoner's Dilemma, remains just that: an elegant academic exercise bearing little resemblance to the real world. In a separate essay, I have rebutted Guzman's descriptive account of how LDCs ended up, in his words, concluding individually treaties that "hurt them" collectively.[81] Here it is sufficient to contest his claim that the network of investment treaties could not affirm the general law because by the time these treaties were concluded, that law no longer existed. Guzman ignores numerous arbitral decisions that have, consistent with considerable scholarship questioning the normative impact of the relevant General Assembly resolutions, concluded that the traditional customary rules of state responsibility, including the international minimum standard, were not displaced by some LDCs' efforts to establish the NIEO.[82] As a number of arbitrators and scholars have pointed out, the Assembly resolutions on which Guzman relies for his conclusion that the relevant customary law no longer existed were supported only by a segment of the international community and never garnered the support of specially affected states, namely Western capital exporters.[83] There was no demonstrable universal consent to topple the universally applicable rules that were the target of Assembly resolutions such as the Charter of Economic Rights and Duties of States, and few

80. *See, e.g.*, SORNARAJAH, *supra* note 9, at 219 n.36 (recognizing that "[t]reaty law does not go behind the treaty and examine such issues" given the "fiction . . . that states are equal").

81. José E. Alvarez, *The Once and Future Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush Arsanjani et al. eds., forthcoming 2010).

82. *See, e.g.*, Sedco, Inc. v. Nat'l Iranian Oil Co., 10 Iran-U.S. Cl. Trib. Rep. 180 (1986); Texaco Overseas Petroleum Co. v. Libya, 17 I.L.M. 1 (Int'l Arb. Trib. 1978).

83. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 543 (4th ed. 1990) (concluding that if Article 2 of the Charter of the Economic Rights and Duties of States attempts to change the relevant law with respect to compensation for expropriation, states that objected to the resolution would not be bound since they were persistent objectors).

objective observers of these events concluded that these Assembly efforts had this effect. Accordingly, there was also no demonstrable need to formally reject the NIEO resolutions in the Assembly or other multilateral forums, so that the absence of such efforts tells us nothing about the status of the relevant customary norms or the relevance of BITs to those norms.

Nor is Guzman correct that LDCs were "simultaneously" doing different things with respect to BITs and at the UN. The era of using BITs as credible commitment devices (especially through recourse to effective investor-state dispute settlement) came *after* the NIEO was dead, namely with the end of the Cold War. Through the end of the 1970s, the relatively few BITs in existence (less than 400) contained relatively weak investment protections and crucially did not contain comprehensive investor-state dispute settlement clauses encompassing the states' advance consent to arbitration.[84] The modern wave of BITs arrived when countries like the United States initiated relatively strong BITs (in the mid-1980s), later emulated by most other BIT signatories, that were intended precisely to *affirm* the traditional rules of state responsibility to aliens, add additional treaty protections not present in the general law (such as NT and MFN), and assure that both customary and treaty rights could be enforced through binding international arbitration.[85] Guzman's contention that one needs to explain why LDCs were individually adhering to BITs while they were collectively undermining them at the UN is therefore based on a flawed premise. Most LDCs turned to BITs *after* attempting (and failing) to change the traditional rules protecting foreign investors (and aliens generally), at a time when the world was

84. *See* Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 815 fig. 1 (2008) (indicating the number of BITs, subdivided into strong and weak BITs, in force across time).

85. *See, e.g.*, Alvarez, *supra* note 81; Vandevelde, *supra* note 15, at 19-28 (discussing the "global era" of international investment agreements, which began at the end of the 1980s). For an examination of the motivations of those who established the U.S. BIT program, see generally Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. LAW 159 (1993). Note that, as these sources demonstrate, the inclusion of customary norms in BITs was neither superfluous in nature (since inclusion enabled such rules to be enforced through investor-state arbitration) nor evidence that the BIT signatories did not otherwise feel bound by those customary rules.

turning, collectively, towards market-based approaches consistent with BITs and FTAs.[86]

E. *The Intent of BITs*

While Guzman is correct that most BITs do not affirm, in so many words, their intent to codify or progressively develop the general law, many of them do the next best thing: they expressly include the protections extended by customary law and make these subject to investor-state dispute settlement.[87] Guzman is therefore wrong to suggest that the content of BITs does not suggest an intent to affirm customary law.

Guzman is also in all probability wrong to suggest that LDCs (or any BIT party) enter into such a treaty only for "economic" reasons. In most cases states have a multitude of reasons for entering into international obligations—from the political to the highly legalistic. BITs and FTAs are no exception. Guzman's mono-causal view of the reasons states conclude BITs is not supported by the evidence that we have. At least after the end of the Cold War, when the explosion in the conclusion of BITs really began, states had numerous reasons to conclude such treaties. The literature suggests that some LDCs choose to do so to send a general signal that they were now turning over a new leaf with respect to the treatment of all investors, including their own entrepreneurs.[88] Some adhered to strong BITs to send the strongest possible signal that they were willing to build market-friendly domestic institutions, as well as to encourage more aid from BIT partners or to show the IMF their seriousness with respect to satisfying that organization's structural adjustment pre-conditions.[89] Others proba-

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86. *See, e.g.*, Vandevelde, *supra* note 15, at 21 (contending that the modern wave of BITs accompanied and was largely motivated by the post-Cold War "victory of market ideology").

87. *See supra* Part III.A (discussing provisions in the U.S.-Argentina BIT).

88. *See, e.g.*, SORNARAJAH, *supra* note 9, at 215 (explaining the general policy and thought behind BITs). *See generally* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15 (especially chapter 8, Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*; chapter 11, Susan Rose-Ackerman, *The Global BIT Regime and the Domestic Environment for Investment*; and chapter 16, Deborah L. Swenson, *Why Do Developing Countries Sign BITs*).

89. *See, e.g.*, W. Michael Reisman & R. D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 118 (2004) (not-

bly adhered to BITs with one or more particular states to signal a political disposition to align themselves with such states on economic or other issues. And, in some cases, BIT ratifications appear to have responded to domestic pressures, such as political efforts by certain elites to tie future administrations (including the rival party) to the free market/rule of law mast, desires to hold onto existing investments or to respond to threats by some of these to exit the country, and demands by domestic business constituencies for a turn to a strengthened national rule of law.[90] Of course, given other global developments that coincided with the rapid explosion of BITs in the 1990s—such as the disintegration of the Soviet bloc and demise in hope for socialist-led models of development, the debt crisis, the solidification of the trade regime, and the turn away from export substitution models—it should surprise no one if LDCs turned to investment protections treaties out of a sincere desire to liberalize trade and capital flows generally, as is indeed stated explicitly in many of these treaties' preambles, and not merely with respect to discrete BIT partners, BIT by BIT.[91]

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ing that "BITs pursue the macrolegal side of the macroeconomic structural readjustment policies encouraged by multilateral financial institutions"). *See generally* Robert Grosse & Len J. Trevino, *New Institutional Economics and FDI Location in Central and Eastern Europe*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15, at 273 (finding a positive correlation between the conclusion of BITs and institutional changes recommended by international financial institutions).

90. This motivation helps to explain why states, such as Argentina just after the Cold War, entered into multiple BITs, and not only with the United States. Argentina's efforts in the early 1990s to amend its laws, engage in privatization, and conclude a number of BITs are widely interpreted as an attempt to reorient that state more firmly towards the market and not as a tit-for-tat effort to select some BIT partners for special treatment. *See* Alvarez & Khamsi, *supra* note 33, at 408-17 (discussing the object and purpose of the U.S.-Argentina BIT); *see also* SORNARAJAH, *supra* note 9, at 215-17 (mentioning the examples of Argentina and Sri Lanka). For empirical work suggesting that one reason some developing countries sign BITs is to retain existing investments, see Deborah L. Swenson, *Why do Developing Countries Sign BITs?*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15, at 437.

91. Vandevelde, *supra* note 15, at 10-11.

Of course, inquiries into the motivations of states are inherently speculative. And yet, the actions of states, both in anticipation of concluding a BIT and in implementing such treaties, support the conclusion that adherence to such treaties has often been part of a general orientation (or re-orientation) towards open or liberal capital flows, and that BITs were not merely discrete tit-for-tat deals to secure FDI flows originating from particular BIT partners. As is further discussed below, the behavior of BIT signatories, including LDCs, is fully consistent with the proposition that they meant what they said when they concluded them: namely that their national laws and practices would, consistent with their treaty obligations, now welcome and protect foreign investors in general, even if this was not their prior accustomed practice.[92] What we know is that today, nearly all states, including those who still formally adhere to a "communist" system of government, have increasingly reformed their national laws and international commitments to better comport with David Ricardo's theory of comparative advantage. The burden of proof would appear to be squarely on those who apparently contend that somehow LDCs did not genuinely intend to do what their own laws and their treaties indicated they were doing.

But a more fundamental response to the proposition that BITs may have been motivated solely by "economic" reasons is that even if this were so, this does not necessarily undermine the impact the network of such treaties and their application by investor-state tribunals is now having on the general law. That states have or may have had "economic" reasons to conclude a treaty does not exclude other normative effects produced by these treaties' entry into force, subsequent practice under them, or efforts to enforce them. Although rational choice scholars would argue that all rules of international law are grounded in the self-interest, including the economic self-interest, of states, the normative impact of a treaty or a network of them is not delimited once and for all by the original reasons advanced for their conclusion. Nor is the normative impact of an ever-rising tide of investor-state arbitral decisions limited by states' original motivations in establishing such tribunals, in consenting in advance to arbitration, or in con-

92. *See infra* text accompanying notes 118-133 (discussing conforming changes in national laws).

cluding the relevant multilateral treaties that make such arbitrations possible. The "original intent" behind the signing of BITs is, as time passes, increasingly irrelevant—as subsequent events and actions triggered by the ratification of BITs and FTAs, including changes in local law, occur, and as other opportunities for states to demonstrate their views and to react arise. It is these, not the original intention of BITs, which are relevant to determinations of state practice and opinio juris. As is further addressed below, whether or not LDCs or others entered into BITs out of greed, altruism, or other "internal" political considerations tells us nothing about the current state of custom or general principles of law.

F. *Variations Among BITs*

That BITs and FTAs differ in *some* of their content does not tell us what their effects are with respect to those provisions which are identical or similar, such as their generally common reliance on FET, "full" or "constant protection and security," or residual references to "international law." Nor does the difference in content among investment treaties tell us much about the tendency for those interpreting them, especially arbitrators, to attempt to find common general principles underlying many of the treaties' guarantees, as where the arbitrators suggest that FET, like the international minimum standard, ought to be interpreted so as to avoid "unjust enrichment"[93] or to protect the "legitimate expectations" of the state parties or foreign investors even if the ways in which the FET obligation is cast differs in some respects among BITs and FTAs.[94] It is important that the leading effort to deny the impact of BITs on customary international law on this basis was published in 1994,[95] prior to the wave of investor-state decisions to which Lowenfeld's argument responds. That attempt could not take into account the extent to which BITs and FTAs have yielded a harmonious arbitral jurisprudence, at least with

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93. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 13 (2008) (discussing the reliance of the *Lena Goldfields Arbitration* on unjust enrichment).

94. For a thorough discussion of arbitrators' use of "legitimate expectations" for this and other purposes in interpreting investment treaties, see André Von Walter, *The Investor's Expectations in International Investment Arbitration*, *in* INTERNATIONAL INVESTMENT LAW IN CONTEXT, *supra* note 55, at 173.

95. Kishoiyian, *supra* note 47.

respect to some issues, or what the normative implications of that jurisprudence have been.

V. The Authority of Arbitral Decisions

Much of Lowenfeld's argument rests on what investor-state arbitrators have decided. As he points out, a number of arbitral decisions have had no trouble equating some provisions in BITs or FTAs to non-treaty sources of general obligation and, in the course of interpreting such treaties and applying law to fact, thereby influencing that general law.[96] Of course, the mere fact that many arbitrators appear to agree with Lowenfeld does not mean that he is, as an objective matter, correct. It does not mean that the next neutral dispute settler, whether in the course of an ICJ proceeding or in another subsequent investor-state arbitration, will affirm a prior arbitrator's conclusion about the state of the general law.

Lowenfeld is careful not to suggest that arbitral awards either individually or collectively constitute sources of international obligation. At the same time, he does suggest, albeit diplomatically, that the ICJ's Article 38 list of positivist sources, and its suggested equivalence between all judicial decisions and the writings of publicists,[97] may not be the last word on contemporary forms of international law-making.

Lowenfeld is clearly correct that in practice, publicly available arbitral decisions, including those by investor-state arbitrators, are more than just "subsidiary means for the determination of rules of law."

Article 38's suggestion that arbitral decisions are only evidence of legal obligations that must be found elsewhere, in the "real" sources of law, is as misleading a statement of the world of international practice with respect to investor-state decisions as it would be if applied to describe the legal impact of judgments of the ICJ. In today's world, states—and not merely fellow investor-state arbitrators—accord considerable more

96. Lowenfeld, *supra* note 1, at 130 n.24 (quoting from one such case, CMS Gas Transmission Co. v. Argentina, ICSID (W. Bank) Case No. ARB/01/8, Decision on Jurisdiction ¶ 48 (2003)).

97. Statute of the ICJ, *supra* note 10, art. 38(1) ("The Court . . . shall apply . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

deference to the relevant decisions of supra-national dispute settlement bodies than they do to a law review article. We need not give arbitral judgments formal precedential value as if we were in a common law system in order to recognize the extent to which all international law practitioners and diplomats, whether from common law or civil law nations, routinely resort to or rely upon such decisions.[98] Arbitral decisions, like other decisions reached by respected international adjudicative bodies, have acquired such an influence on international law because they are frequently better than the few alternative places we have to look for guidance with respect to what the law is. They are, at the very least, as influential as many kinds of "soft" law standards which critics of the investment regime claim are "hardening" and need to be considered when evaluating the international obligations of MNEs.[99]

As is clear when international lawyers attempt to codify the relevant rules of international law—as did the ILC when it elaborated its Articles of State Responsibility and released their attendant commentaries[100]—arbitral and judicial decisions are often the only credible efforts that are publicly available that may address particular issues, including "gaps" in the law. They do so simply because such bodies necessarily are required to apply law to concrete facts and generally operate within a tradition that discourages findings of "non-liquet."[101]

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98. *See* Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as* Jurisprudence Constante (UC Davis Legal Studies Research Paper No. 158, 2008), *available at* http://ssrn.com/abstract=1319834 (discussing the role for arbitral decisions in establishing a "persisting jurisprudence").

99. For a description of international adjudications, including arbitrations, as "soft law," see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 505-06 (2005); Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515 (2009). Thus, it is ironic that Peter Muchlinski, who denigrates the impact of the foreign investment regime on the general law, simultaneously relies on "soft law" standards for this purpose. Muchlinski, *supra* note 9, at 18-19.

100. *See* U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission to the General Assembly,* 56 U.N. GAOR Supp. (No. 10), U.N. Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

101. *See* Gavan Griffith & Christopher Staker, *The Jurisdiction and Merits Phases Distinguished, in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 59, 76 (Laurence Boisson de Chazournes &

In addition, within the sphere of international investment law, arbitral decisions have always been treated as more relevant to determining the rules of CIL than, for example, lump sum agreements—which tell us only what the last set of states were willing to settle for and not what the law is. They are also more likely to offer useful "neutral" guidance for law interpreters than diplomatic actions by self-interested states. While it is possible for modern interpreters of the law to engage in the kind of historical survey of diplomatic state practice undertaken by, for example, the judges of the U.S. Supreme Court in the famous *Paquete Habana* case, focusing exclusively on the correspondence of states is time-consuming and, given the varied abilities of states to record their views in this fashion, likely to lead to charges that only some states' practices or views of opinio juris are accorded weight.[102] Accordingly, the statements of foreign ministries, included in their digests of practice as cited in the *Paquete Habana*, do not have the "objectivity" comparable to that of a neutral arbiter charged with resolving the same issue.

As this suggests, many alternatives to reliance on arbitral decisions simply have less legitimacy. As Patrick Norton indicates, it is scarcely surprising if those charged with resolving disputes turn to how others have resolved comparable disputes.[103] The well-crafted arbitral decision, like well-crafted judicial decisions issued by any court, national or international, is intended to persuade both the disputants that have entrusted their case to third-party adjudication and the wider

Philippe Sands eds., 1999) (noting that declarations of *non-liquet* are not considered appropriate in contentious cases).

102. Thus, even the widely praised efforts in *The Paquete Habana*, 175 U.S. 677 (1900), have been criticized for that Court's apparent inability to consider the state practices of others apart from the United States and certain European states. For concerns about how traditional ways of finding custom tend to privilege the views and actions of only some states, see Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89 (2001).

103. Norton, *supra* note 51, at 499-501. It may be, as was stated by the arbitrators in one case, that investor-state arbitrators rely on prior cases because they believe they have "a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law." Saipem S.p.A v. Bangladesh, ICSID (W. Bank) Case No. ARB/05/07, Decision on Jurisdiction ¶ 67 (2007).

community to which the third party adjudicators owe their legitimacy.[104] It is rare to find the kind of detailed reasoning and explication of how law relates to fact found in adjudicative efforts. Moreover, the kinds of explications of the law found in arbitral decisions are most persuasive to relevant stakeholders precisely when arbitrators write opinions as if they "have a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors toward certainty of the rule of law."[105] As Norton points out, reliance on a string of comparable adjudicative decisions is also compelling to arbitrators since this deflects the charge that they are engaged in judicial legislation.[106] Powerful cultural and sociological reasons therefore explain the "preference for precedents" in this and other international legal regimes.[107]

Lowenfeld's position has the merit of underlining these truths without necessarily disparaging the concomitant search for other forms of state practice and opinio juris. To that inquiry we next turn.[108]

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104. *See, e.g.*, Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, in* 50 YEARS OF THE NEW YORK CONVENTION, ICCA CONGRESS SERIES NO. 14 (Albert Jan Van Den Berg ed., forthcoming 2009). *See generally* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

105. *Saipem S.p.A* ¶ 67.

106. Norton, *supra* note 51, at 500. *See generally* Shapiro, *supra* note 104.

107. Norton, *supra* note 51, at 497-99.

108. As Lowenfeld and others have suggested, the harder question may be not whether the investment regime has affected general public international law but to what extent the changes have occurred or are occurring through evolving rules of custom, through the oft-ignored category of general principles, or through some other process unique to the investment regime. Lowenfeld, *supra* note 1, at 129-30; Tudor, *supra* note 48, at 53-104. Tudor surveys the many ways that the interpretation of the FET standard in BITs appear to have relied upon general principles of law. *Id.* at 85-104. Since in some respects, it is easier to see the connections between a BIT standard like FET and general principles of law, such as the principle of good faith, I tackle the more difficult task here of considering the possible connection between these treaties and CIL. In a concrete case applying the FET standard, it may be difficult, as Tudor suggests, to disentangle the extent to which arbitrators are relying on CIL as opposed to general principles of law. *Id.*

A. *State Practice*

What about the claim that neither a network of bilateral treaties nor a slew of arbitral decisions, even decisions which purport to interpret customary law, establish the requisite general state practice needed to form CIL?

The U.S. Restatement on Foreign Relations, for which Lowenfeld was one of only three associate reporters, sets out the relevant inquiry. It states:

> A wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law. If an international agreement is declaratory of, or contributes to, customary law, its termination by the parties does not of itself affect the continuing force of those rules as international law.[109]

If the question is the state of relevant customary law at a particular moment in time, we need to examine what states are actually doing and not merely their rhetoric. The fact is that today nearly all countries in the world have entered into at least one BIT. Today more countries have entered into at least one investment protection agreement than have joined the WTO or have adhered to most human rights conventions.[110] BITs and FTAs are no longer about protecting capital from the West as it goes to the rest. Today's investment regime approaches universal participation. It now includes countries that once adhered to the Calvo doctrine and resisted basic propositions now affirmed in investment treaties, such as the international minimum standard or recourse to international dispute settlement in lieu of national courts. Today, when 27 percent of the BITs in existence are between developing coun-

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109. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(i) (1987).

110. *See* U.N. Conference on Trade & Dev. [UNCTAD], *The Development Dimension of International Investment Agreements*, ¶ 6, U.N. Doc. TD/B/C.II/MEM.3/2 (Dec. 2, 2008) (noting that as of June 2008, there were 179 countries parties to BITs). Thus, two of the instruments widely considered to be essential to the international bill of rights, the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 (165 parties), and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (160 parties), have fewer state parties than the number of states that participate in at least one BIT.

tries[111] and a considerable portion of capital flows goes to the West as well as comes from the East, investment agreements cannot be explained simply as variations of the one-sided capitulation agreements once concluded between colonial powers and the periphery.

While model investment agreements from Europe and the United States have served as the template for the world's network of some 3000 investment agreements, those entering them today are a cosmopolitan lot. The second largest BIT signatory, after Germany, is China—hardly an exemplar of Western capitalism and yet a state whose most recent investment treaties appear increasingly inspired by U.S. models.[112] Apart from China, prominent BIT signers include countries such as Egypt and Cuba. Indeed, Cuba—whose revolution was once defined by its opposition to the rights of foreign investors[113]—now has concluded about as many investment protection agreements as has the United States (62).[114] And Cuba's BITs are not very different from the highly investor-protective U.S. Model BIT of 1984.[115]

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111. Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15, at xxvii, xxxiv.

112. *See generally* Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007).

113. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (addressing claims arising from the expropriation of foreign-owned property occurring after the Cuban revolution).

114. La Industria Cubana, http://www.cubaindustria.cu/webs/acuerdos_protec_inver.htm (last visited Oct. 22, 2009).

115. The Cuba-Cambodia BIT of 2001, for example, includes a very expansive definition of protected investment (including all forms of property, stocks, any claims to money or performance under contract, and intellectual property rights). Agreement between the Government of the Kingdom of Cambodia and the Government of the Republic of Cuba Concerning the Promotion and Protection of Investments, Cambodia-Cuba, art. I(1), May 28, 2001, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/cuba_cambodia.pdf. It protects investors as well as their returns; accords fair and equitable treatment and full protection and security; and contains most-favored-nation provisions. *Id.* arts. II, III. It even includes a provision on expropriation that affirms, as do U.S. BITs, the need to extend "prompt, adequate, and effective compensation." *Id.* art. IV.

As Cuba's and China's investment protection treaties suggest, the desire to use law (both national and international) to enable the free movement of capital is now widely shared, as is recognition of the theory of comparative advantage, including among states that have adhered to few BITs. Participation in BITs and FTAs now include governments that do not identify themselves as capitalist. It is untenable to describe the network of BITs and FTAs as an enterprise that excludes the Global South as willing participants.[116] Whatever it once was, investment law is not *now* a set of one-sided tools for the imposition of Western power. Leading players of the regime, such as China and the United States, which are often capital exporters as well as capital importers, adhere to such agreements as much to protect their own foreign investors as to protect aliens in their territories. This regime cannot be attributed to and does not serve only a segment of specialized states.

It is increasingly difficult to point to any state, even among the few that have not adhered to BITs, that is a credible example of a persistent objector with respect to some of the basic legal principles affirmed in investment protection treaties, such as the proposition that international law, and not merely national law, governs the compensation that is due a foreign investor should its property be expropriated.[117] This is so because, in the age of economic globalization, no country is immune from transnational capital flows and it would appear that none, not even those which formally adhere to non-capitalist economies, desire such isolation. All countries participate de facto in the international investment regime, and all are therefore interested in what the last investor-state arbitral body determined international law requires in terms, for example, of compensation upon expropriation—even if some of them (such as Brazil) have not adhered to a single BIT. In contrast to the NIEO—which drew the ire of a number of states—participation in the contemporary investment regime, including the underlying rules of custom and general princi-

116. For a more detailed rebuttal of the contention that the investment regime remains mired in a North/South paradigm, see José E. Alvarez, *The Contemporary International Investment Regime: An "Empire of Law" or the "Law of Empire"?*, 60 ALA. L. REV. 943 (2009).

117. As declared in General Assembly Resolution 1803, which is widely considered today to affirm customary law. G.A. Res. 1803, ¶ 4, GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962).

ples of law, approaches genuine universality, since states have no choice but to evince support for (or persistently object to) rules governing the transnational flow of capital, including the legality of recourse to international arbitration in cases of disputes with foreign investors.

Moreover, unlike in 1974 when many states voiced support for those NIEO General Assembly resolutions hostile to the traditional rules protecting foreign investors, the later wave of BIT ratifications in the 1990s has generally been accompanied by considerable state practice apart from the mere conclusion of BITs and FTAs. The extensive investment treaty network does not exist in a vacuum.

As studies of the 1977-87 period suggest, a general liberalizing trend in favor of freer capital flows and away from planned economies and import substitution policies among LDCs preceded the explosion of BIT negotiations.[118] Although some of these changes in national law and practice preceded states' ratifications of BITs, they were not unrelated to the network of investment protection agreements. As veteran U.S. BIT negotiator Kenneth Vandevelde has noted, many BIT negotiations between Western states and LDCs formally concluded only after BIT negotiators were convinced that the LDC in question had "decided as a matter of internal policy to treat foreign investment in the manner required by the BITs."[119] He confirms that U.S. BIT negotiators, at least, tended to engage in serious negotiations only with countries whose laws or reform plans would enable them to live up to the BIT's terms.[120] He explains that to have done otherwise would only have led to disappointed foreign investors and a tide of disruptive investor-state arbitral claims.[121] What this

118. *See* Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 523 n.99 (1998) (indicating the findings of such a study, citing RICHARD E. CAVES, MULTINATIONAL ENTERPRISE AND ECONOMIC ANALYSIS 220 (2d ed. 1996)).

119. Vandevelde, *supra* note 118, at 523.

120. Vandevelde, *supra* note 14, at 31.

121. "[O]ne could argue," Vandevelde writes, "that no capital exporting state ever should enter into a BIT with a capital importing state, if the conclusion of a BIT is necessary to ensure that the capital importing state will take the actions required by a BIT. If a host state is providing security for foreign investment only because a BIT so requires, then the host state does not have the favorable investment climate that the BIT is intended to reflect

means is that investor-protective reforms in many states' laws, even when they preceded BIT ratifications, were undertaken in anticipation of the assumption of relevant international commitments, the better to abide by them and avoid predictable investor-state disputes. Such changes in national laws and practices may be attributable to the unusually effective enforcement mechanisms contained in most modern investment treaties. Unlike the case with respect to the ratification of multilateral human rights convention that are subject only to mobilization of shame enforcement mechanisms, ratification of most investment treaties requires a strong commitment to hard enforcement. Those negotiating BITs and FTAs cannot afford to ratify these treaties hypocritically, as some suggest occurs with respect to human rights conventions.[122]

For these reasons, the well-documented wave of reforms of relevant laws and practices that have accompanied BIT or FTA ratifications is necessarily part of the contemporary international investment regime and is an essential backdrop to Lowenfeld's conclusions about the regime's impact on the general law.[123] Thus, according to UNCTAD, of 2533 changes in national FDI laws from 1991 to 2006, 91 percent of the changes were in the direction of making the investment climate more welcoming to FDI.[124] These changes in law, intended or anticipated by the conclusion of investment treaties, are often now enforced through the investor-state dispute

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and the capital exporting state may be well advised not to conclude a BIT with that host state." Vandevelde, *supra* note 118, at 523. Vandevelde contends that the principal contribution of a BIT is simply to convert the favorable treatment already in place as a matter of internal law into an international obligation, thereby stabilizing "the favorable investment climate that exists as a matter of policy in the host state at the time the host state enters into the BIT." *Id.*

122. *See generally* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

123. This is so whether the changes occurred in the wake of a state's concluding a BIT or whether the conforming changes to national law were in anticipation of the conclusion of such treaties by the host state, or even by another state in which foreign investors would otherwise be tempted to invest. *See generally* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS, *supra* note 15.

124. Sachs & Sauvant, *supra* note 111, at xlix, l tbl.3.

mechanisms of BITs.[125] Indeed, under relevant choice of law provisions, it often makes no difference to investor-state arbitrators whether relevant investor rights are respected pursuant to national or international law, and sometimes these decisions consider both types of law in turn.[126] Given that the treatment due foreign investors assured by national law is now increasingly incorporated into an international obligation that can be subject to international enforcement, it is difficult to deny that BIT-conforming changes in national laws and practices, embracing administrative practices as well as actions by the executive branch, are part of the "state practice" that needs to be examined with respect to relevant customary law and/or general principles of law.[127] Indeed, the increasingly evident interplay between the international obligations contained in BITs, the "judicial review" actions taken by investor-state arbitrators to enforce these obligations, and national law enforcers and regulators who necessarily must respond and possibly change their practices in the shadow of the threat of investor-state arbitration, has led some commentators to de-

125. Indeed, some investor-state arbitral decisions rely on the application of both a state's national law and its international obligations, as is anticipated by the choice of law provision in the ICSID Convention. *E.g.*, CMS Gas Transmission Co. v. Argentina, ICSID (W. Bank) Case No. ARB/01/8, Award (2005). In some cases, changes to national laws and practices were among the objects of those seeking BIT ratification. For a specific example of the use of BITs as a device to improve conditions for all investors, national and foreign, see Schill, *supra* note 112, at 92-93 (discussing Chinese efforts to use its BITs to redress local rule of law shortcomings).

126. *See, e.g.*, *CMS Gas Transmission* ¶¶ 200-46 (considering, inter alia, applicable Argentinean law with respect to that state's plea of necessity).

127. Turning to relevant state law for this purpose is, of course, sanctioned by long-standing practice. *See, e.g.*, IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS 141 (1998) (quoting Hull's response to the Mexican Foreign Minister in their famous debate over expropriation as follows: "clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principles in the law of nations."). Indeed, those who established the U.S. BIT program did so precisely because they "believed that a network of treaties embracing this principle [the Hull rule] would be one highly visible way of building state practice in support of that traditional position." Vandevelde, *supra* note 66, at 534.

scribe the investment regime as a leading exemplar of "global governance" or "global administrative law."[128]

There is no evidence that either the texts of these laws or the intentions behind them were directed exclusively at benefiting only foreign investors from designated BIT partners, as would be suggested by Guzman's account. While foreign investors are sometimes accorded special benefits (such as tax havens) under local law, these special benefits are usually not barred by BITs and FTAs, and in practice it is rare, impracticable, and often politically unacceptable to extend many of the guarantees that are contained in BITs (such as rights to nondiscriminatory treatment or FET) *only* to foreign investors (or only to investors from particular countries). Of course, the MFN guarantees of BITs and FTAs also help ensure that uniform high standards prevail at least among foreign investors, and make attempts to discriminate among foreign investors difficult.

In addition, as it is increasingly true that, under BITs and FTAs, investment guarantees extend not only to foreign companies registered in one of the contracting parties but to majority or even minority shareholders, it is not possible to predict which companies or individuals are eligible for treaty protection. As Bart Legum, a former U.S. BIT negotiator, suggests, this sets up a dynamic whereby

> the only way to comply with the treaty is for the host state to assume that *all* investors—all companies—are covered by the highest standards of any BIT in force for the State. The reality that foreign capital is highly fungible and the breadth of the definitions of investors and investment thus combine to effectively transform the facially bilateral obligations of the BIT into an obligation that the host State must consider potentially applicable to all investors.[129]

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128. *E.g.*, Kingsbury & Schill, *supra* note 104; Van Harten & Loughlin, *supra* note 18.

129. SUBEDI, *supra* note 32, at 92 (quoting Barton Legum, *Defining Investment and Investor: Who Is Entitled to Claim?* 4-5 (Presentation at Paris Symposium Organized by ICSID, OECD & UNCTAD, Dec. 12, 2005), *available at* http://www.oecd.org/dataoecd/51/10/36370461.pdf).

That states generally, and not merely BIT signatories,[130] have changed their practices to permit greater respect for the rights of domestic and foreign private entrepreneurs, including foreign investors, is also a testament to other significant global events, such as the establishment of the WTO in 1994, along with its complementary rules for reducing states' reliance on trade-related investment measures (TRIMs), protecting trade in services (GATS), and protecting intellectual property rights (TRIPs). The TRIMs Agreement has helped to encourage the inclusion of comparable restrictions on trade-distorting performance requirements within investment agreements, and there is significant overlap with the goals sought to be achieved through the TRIPs and GATS agreements as well.[131] In addition, other players in the broader international investment regime—such as the international financial institutions—also encourage generally favorable and non-discriminatory treatment of all investors, national and foreign, as part of "rule of law" reforms or "good governance" indicators deployed by, for example, IMF conditionality.[132] Some of the changes to national law and practices that parallel or complement guarantees in investment agreements may also have been encouraged or supported by private market players such as political risk and credit evaluators—just as other transnational actors serve as de facto enforcers of international human rights regimes.[133] Of course, that these harmonizing state practices have been encouraged, induced, or even enforced by other actors, and not just inspired by the entry into force of BITs or FTAs, is irrelevant insofar as such harmonizing state practice exists. Such practice, whatever its underlying causes, supports Lowenfeld's principal conclusion, namely that truly global investment law exists and that it increasingly

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130. Thus, the fact that as of August 2009 there is no investment protection treaty in place between such leading capital exporters (and importers) as the United States and any of the BRICs (Brazil, Russia, India, and China) has not reduced the commitment of any of these countries to the underlying investment guarantees contained in BITs.

131. For discussion of the impact of these developments, see generally Vandevelde, *supra* note 15, at 19-28.

132. *See generally* Kalderimis, *supra* note 21; Doing Business, *supra* note 20.

133. *See generally* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) (describing the advocacy networks that enforce human rights).

resembles the substantive protections accorded under BITs and FTAs. What it means is that some of the treatment that investors are entitled to receive under investment treaties is increasingly the kind of treatment that all entrepreneurs are at least formally entitled to under national laws and practices. It is difficult to see why these national laws and practices are not relevant state practice for determining CIL (or for determining applicable general principles of law).

B. *Opinio Juris*

Of course, the relevant changes to national law in the direction of a liberal investment regime could support an argument on the basis of general principles of law, but CIL typically requires an additional element: proof of *opinio juris,* that is, some evidence that what states are doing results from a sense that they are adhering to or following a legal obligation. One easy response to the contention that investment treaties lack the requisite *opinio juris* relevant to *making* CIL is merely to point out the extent to which BITs or FTAs simply rely on *existing* CIL, as is argued above.[134] If one agrees that, contrary to Guzman's contentions, the *opinio juris* establishing basic propositions of international investment law (as with respect to the international minimum standard or the general proposition that compensation after an expropriation is regulated by international and not only national law) was left undisturbed by the Assembly's NIEO efforts, the network of subsequent BITs and FTAs affirming such rules only provides additional evidence of opinio juris and hardly detracts from it. On this view, Lowenfeld's central thesis is correct to the extent the network of investment treaties and investor-state arbitrations apply (and necessarily develops as all adjudication does) the old rules of custom and relevant general principles.

Another, more complex response is to recognize that in the real world, evidence of *opinio juris* is usually drawn from

134. Of course, even if BITs and FTAs were seen as merely codifying preexisting customary rules, this would not preclude the law-making aspects that necessarily accompany investor-state arbitration, and indeed are inherent to all forms of adjudication. As Martin Shapiro, among others, has persuasively argued, all adjudicative efforts to apply law to concrete fact result in some evolution of the law, that is, some (usually unacknowledged) judicial law-making. *See generally* SHAPIRO, *supra* note 104.

the actual practice of states, at least where those practices would otherwise be difficult to explain, and that it is the rare case where distinct or explicit evidence of the subjective intentions behind a state's actions is available apart from what can be inferred from the state's actions.[135] Indeed, most have assumed that evidence of *opinio juris* usually needs to be gleaned from state practice itself (including the inference that a state would not have undertaken the particular action in question but for an implicit assumption that it was required to do so).[136] Sometimes, evidence of opinio juris is found in the silent acquiescence of states in response to another's actions, since in the typical case, states have no incentive to make proclamations on their views of the existing law (unless they are attempting to persistently object to an emerging norm, which all acknowledge is an extremely rare occurrence). These were among the inferences drawn in the International Law Association's expert group on the formation of CIL, which concluded, in 2000, that it was often "difficult or even impossible to disentangle"[137] the objective element of custom (state practice) from the subjective element (*opinio juris*), and that it is

135. Indeed, it is more common to find examples where a state has gone out of its way to indicate that it is taking action which ought not be treated as evidence of custom because it was done *ex gratia*. *See, e.g.*, Harold G. Maier, Ex Gratia *Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L. L. 325 (1989) (detailing efforts by the United States to pay victims of its bombing of an Iranian airline without establishing a duty under customary law to do so). As that example indicates, the United States government apparently believed that making such payments absent any expression removing the implication of *opinio juris* would be taken as indicating that the United States believed that it was legally obligated to make such payments under international law. The implication is clear: states do not normally pay out money to another absent an obligation to do so; this is one kind of state action that (absent a clear statement to the contrary by the state taking the action) can be presumed to involve *opinio juris*.

136. *See* COMM. ON FORMULATION OF CUSTOMARY INT'L LAW, INT'L LAW ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 34 (2000), *available at* http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376 (noting that the criterion of *opinio juris* is most useful in order to distinguish state actions that ought to count as precedents in the formation of a rule of custom from those that do not).

137. *Id.* at 7.

rare for either international tribunals or states to examine distinct evidence of the latter.[138]

In this instance the fact that states are choosing or are compelled by external circumstances (from the force of the market to the injunctions of the IMF) to take national and international actions to encourage and protect free capital flows, and that these actions are affirmed by both their national and international legal commitments (as under BITs), provides, in itself, evidence of both state practice and *opinio juris*—no less than, for example, State A's undertaking to pay State B compensation for damage that state A caused, at least in the absence of a statement that such compensation is *ex gratia* and not undertaken because of a sense of legal obligation.[139] We ought to presume that when states routinely acquiesce in arbitral decisions that conclude that they owe damages for the violation of a BIT and a customary international legal obligation that such acquiescence itself constitutes evidence of *opinio juris.*[140]

This is *not* an argument that the complex number of actions that states undertake pursuant to or that are attributed to the "Washington Consensus" are, in their entirety, CIL or supported by *opinio juris.*[141] It is a contention, however, that as

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138. *Id.* at 31-34. For these reasons, that Committee's definition of CIL omits reference to *opinio juris* altogether. It states that "a rule of customary international law is one which is created and sustained by the constant and uniform practice of State and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future." *Id.* at 8. For similar conclusions within the field of international investment, see TUDOR, *supra* note 48, at 80-83.

139. *See generally* Maier, *supra* note 135 (discussing, in the context of payments to victims of an airline tragedy, how statements indicating that compensation is *ex gratia* serve to distinguish such action from that made out of a sense of legal obligation).

140. The contention that if states felt that they were already bound by CIL they would not conclude BITs, and that therefore BITs lack *opinio juris*, is a non-sequitur. As noted, BITs include a mix of customary and treaty-based rights. Both are included for at least one reason: to ensure enforcement through authorized dispute settlement and to displace alternative modes of enforcement, such as diplomatic espousal. Including CIL or general principles of law in a BIT is, for that reason alone, not a superfluous act and says nothing about the lack of *opinio juris.*

141. For a delineation of changes in "mainstream" development thinking, both before the rise of the "Washington Consensus" and thereafter, see

Lowenfeld suggests, *some* rights now affirmed in BITs and FTAs have this quality. Consider as a thought experiment whether it is likely that any state in the world today would affirm that it has a legal right, under international law and irrespective of whether it is a party to a relevant BIT, to treat investors "unfairly and inequitably." While, as we know, states (along with arbitrators) debate forcefully what FET means, it is highly unlikely that any state would affirm the legal right under international law to deny such treatment to a foreign investor—as opposed to denying that in fact it has engaged in such treatment. If few (if any) states would affirm the right to treat foreign investors unfairly and inequitably, how different is that from making the case that national laws affirming the illegality of torture evince *opinio juris*? While states may sometimes violate both their torture laws and their laws affirming the due process rights of investors, once such obligations are codified in both national and international law (as both the ban on torture and the international minimum standard now are), objective adjudicators are entitled to take such formal pronouncements at face value and accept that deviations from the conduct to which states have committed themselves are not constitutive of the law, but rather breaches that tell us nothing about whether either the right to due process (for national or alien investors) or the right to be free from torture are backed by the requisite *opinio juris*.[142]

Nor, as noted, is there evidence, as would be implied by Guzman's "economic" rationale for LDCs' conclusion of BITs, that the vast amount of changes to national laws and practices in favor of the market—the relevant state practice—have sought to benefit only select investors from specific BIT partners. As noted above, the evidence that we have suggests, on the contrary, that most of these changes in national laws have been in the direction of benefitting investors generally and share a common intention to act in a non-discriminatory fashion (as is now required by most investment treaties).

David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 95 (David M. Trubek & Alvaro Santos eds., 2006).

142. *Cf.* Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980) (affirming that laws in force and agreements barring torture are more determinative of the existence of CIL than the routine breaches of those laws).

VI. Appraising the Effect of BITs on CIL

If investor-state arbitral decisions are to be believed, it would appear that Lowenfeld is clearly correct to suggest that the spread of investment treaties, arbitral decisions, and changes in state laws and practices have not left the state of general public international law unchanged. But what Lowenfeld does not address is how exactly the network of BITs and FTAs and resulting investor-state decisions have affected the substance of investment law. A preliminary appraisal of the effects of the treaty regime on the general law would appear important if only because some of the resistance to Lowenfeld's conclusions stems from fear about what that impact may be. Concerns about Lowenfeld's thesis may reflect concerns about what investor-state arbitrators are saying the "general" law is.

Concerns that the contemporary investment regime sometimes may demand too much from host states are not unjustified. Consider the two summaries of FET now being cited most often by investor-state tribunals around the world.

From *Waste Management II*:

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[143]

And in *Tecmed v. Mexico*, the arbitrators declared that FET requires a state:

> to provide to international investments treatment that does not affect the basic expectations that were

143. Waste Management, Inc. v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/00/3, Award ¶ 98 (2004).

> taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[144]

One does not have to agree with every aspect of these extensive enumerations of what apparently FET *and* CIL now require to acknowledge that even if some of these requisites are now widely expected of governments, general public international law has shifted a great deal indeed since the *Neer* case recognized only the barest minimum requirements of states. It would appear, based on the available FET arbitral decisions, that today a state need not have taken concrete action in bad faith to be guilty of a violation of that standard—or of the underlying international minimum standard. Today, a state's failure to act, particularly to provide a remedy of a breach of

144. Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID (W. Bank) Case No. ARB(AF)/00/2, Award ¶ 154 (May 29, 2003).

the state's own representations to an investor, could ground a violation of general international law.[145]

As is suggested by the FET caselaw, textual differences among BITs and FTAs do not detract from their possible impact on general public international law. This is also the case with respect to other substantive investment rights contained in these treaties. It has been clear for some time, for example, that international arbitrators charged with applying international law relevant to expropriation have not always clearly explained whether their notions of "property" are based on customary law or particular treaty provisions; one result is that today most assume that customary law regarding expropriation protects against some governmental interferences with "acquired" or "vested" contractual rights, and not only rights pertaining to tangible real property.[146]

It would also appear that, notwithstanding some differences among these treaties with respect to exactly what kind of compensation the investor is entitled to expect upon expropriation (since not all BITs or FTAs explicitly state that investors are entitled to "prompt, adequate and effective compensa-

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145. *See, e.g.*, Wena Hotels Ltd. v. Egypt, ICSID (W. Bank) Case No. ARB/98/4, Award ¶ 85 (2000) (noting that "[e]ven if Egypt did not instigate or participate in the seizure of the two hotels . . . there is sufficient evidence to find that Egypt . . . took no actions to prevent the seizures or to immediately restore Wena's control over the hotels"); LOWENFELD, *supra* note 7, at 558-59 (describing the result of *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID (W. Bank) Case No. ARB/87/3, Award (1990), which found that Sri Lanka had failed to take appropriate precautionary measures to protect the interests of a British company injured in the course of fighting between the government and rebel forces). There are parallels here with the growing depth of state commitments with respect to human rights. *See* Velásquez-Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 29-33 (interpreting states' duties to "ensure" the exercise of human rights in the American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S. T.S. No. 36, and finding that duty requires states to investigate atrocities committed by private militias). Note that the emphasis in many FET cases on the need to respect the investor's "legitimate expectations," particularly when they are based on specific promises made by the state to the investor, may suggest that even BITs which do not have an "umbrella clause" protecting the investors' contracts may serve as a vehicle to protect such contracts under an FET clause or even under a residual provision protecting the investor "under international law." *See, e.g.*, TUDOR, *supra* note 48, at 193-200.

146. August Reinisch, *Expropriation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 9, at 407, 411.

tion"), there may be a growing consensus with respect to the kind and quality of the *process* investors (and others) are entitled to expect when governments attempt to take their property.[147] There may also be growing commonalities with respect to such once-contested matters as whether a formal decree of nationalization or expropriation is necessary, and even with respect to applicable principles for the calculation of "full" value for expropriated property.[148] Despite differences on such matters as whether and when to award expected streams of profits, there is growing agreement that expropriated investors are entitled to an amount that approximates the "fair market value" of what they lost and that this measure usually requires going beyond the "book value" of the investment.[149] Of course, the tendency for arbitral decisions interpreting the expropriation guarantees of a BIT or an FTA to equate these rights to those secured under CIL is all the

147. Indeed, both the investment regime and human rights regimes share common due process concerns over such matters. *See, e.g.*, Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 E.C.R. I-0000 (deciding that counter-terrorism sanctions originally imposed by the Security Council and enforced through European Union law violated individuals' due process right to property); *see also* SUBEDI, *supra* note 32, at 75 ("Taking without due process of law would entail a taking in contravention of the principle of equality before the law, fair hearing and other principles of natural justice generally recognised by the world's principal legal systems.").

148. *See* Reisman and Sloan, *supra* note 89, at 121 (suggesting that what matters is the functional effect of the government's conduct and not the existence of a formal expropriation decree); SUBEDI, *supra* note 32, at 125-29 (summarizing arbitral caselaw concerning when the full value of expropriated property is due); *see also* S.D. Myers, Inc. v. Canada, Partial Award ch. XI (NAFTA Arb. Trib. 2000) (discussing the principles of compensation).

149. *See* SUBEDI, *supra* note 32, at 126 (discussing book value and the other factors generally considered in determining the size of an award). At a minimum, the prevalence of BITs and FTAs with comparable expropriation provisions makes it much less tenable to suggest, as some states did at one time, that the question of compensation in such cases is purely a matter of national law not governed by international law. *See, e.g.*, CME Czech Republic B.V. v. Czech Republic, Final Award ¶¶ 497-98 (UNCITRAL Arb. 2003), *available at* http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf ("The possibility of payment of compensation determined by the law of the host State . . . has disappeared from contemporary international law as it is expressed in investment treaties in such extraordinary numbers, and with such concordant provisions, as to have reshaped the body of customary international law itself.").

greater when the particular treaty explicitly equates the two (as do post-2004 U.S. investment treaties).[150]

At least some of these conclusions suggest that the investment regime has generally expanded the rights of investors at the expense of the "policy space" accorded to host states. To the extent this is the case, it is no surprise if some seek to contain the damage by attempting to cabin BITs and FTAs as purely *lex specialis.* But there is another side to the story.

The prospect that the investment treaty regime now affects and reflects the general law is *not* a one-way ratchet in favor of investors. A number of recent arbitral decisions stand for the proposition that the BITs' substantive guarantees, including the international minimum standard or FET, assurances of non-discrimination or national treatment, and the duty to compensate for indirect expropriations, must all be interpreted so as to not interfere with states' continuing ability to regulate in the public interest in a non-discriminatory fashion; notably, this exception has been applied even when no such exception explicitly exists in an investment treaty.[151] If this "general" rule exists, it is one that we owe at least in part to investor-state arbitral decisions as well as the provisions in

150. 2004 U.S. Model BIT, *supra* note 72, annex B(1) ("Article 6 . . . is intended to reflect customary international law concerning the obligation of States with respect to expropriation.").

151. *E.g.*, *S.D. Myers*, *Partial Award* ¶ 261 (finding the international minimum standard is not a license to "second-guess government decision-making"); Saluka Invs. BV (Neth.) v. Czech Republic, Partial Award ¶¶ 305-06 (UNCITRAL Arb. 2006), *available at* http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf (noting that legitimate expectations concept requires weighing the investor's "legitimate and reasonable expectations" against the state's "legitimate regulatory interest"); Methanex Corp. v. United States, Final Award on Jurisdiction and Merits, pt. 4, ch. D, ¶ 7 (NAFTA Arb. Trib. 2005), *available at* http://www.state.gov/documents/organization/51052.pdf, (citing customary international law for the principle that economic injury caused by bona fide regulation within the police powers of a state does not require compensation); Feldman v. Mexico, ICSID (W. Bank) Case No. ARB(AF)/99/1, Award ¶ 103 (2002) (stating that customary international law recognizes that "governments must be free to act in broader public interest" and must be able to undertake "[r]easonable governmental regulation"); *see also* SUBEDI, *supra* note 32, at 173-75 (contending that the FET standard requires arbitrators to "balance" the competing rights of states and investors).

some BITs and FTAs[152]—and to recognition by arbitrators that the interpretation of these treaties needs to take account of the general law because it is part of that general law. When either BITs or arbitrators connect or equate certain treaty guarantees to those existing in CIL or general principles, both investors and states may face evolving conceptions of what the state parties (as well as the investors) might have assumed to be within the legitimate "national policy space" or within the sovereign's "right to regulate."[153] Some investor-state tribunals are applying (and discovering) notions of "transnational public policy" or general principles of law to render inadmissible investor claims "not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system."[154] In yet other cases, it would appear that the recourse to CIL to interpret some BIT provisions, such as a treaty requirement to extend "full protection and security," may serve to limit the scope of states' duties.[155] Moreover, in-

152. *E.g.*, 2004 U.S. Model BIT, *supra* note 72, annex B(4)(b) ("Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.").

153. Muchlinski, *supra* note 9, at 14. For a description of the evolving nature and ideology of the U.S. Model BIT over time, see Alvarez, *supra* note 81.

154. World Duty Free Co. v. Kenya, ICSID (W. Bank) Case No. ARB/00/7, Award (2006) (refusing to enforce a contract procured through a bribe since this would violate transnational public policy); Phoenix Action, Ltd. v. Czech Republic, ICSID (W. Bank) Case No. ARB/06/5, Award ¶ 100 (2009) (noting that the purpose of BITs is to protect "bona fide" investments). For other investor-state arbitral cases relying on the principle of good faith, see Von Walter, *supra* note 94, at 195-97. While investor-state arbitral decisions refusing to enforce investments procured through fraud or corruption are sometimes grounded in specific BIT provisions that limit the treaty's coverage to investments made "in accordance with" the host state's law, even those cases may resort to general principles such as the need for the parties to act in "good faith" or the Latin maxim *nemo auditur propriam turpitudinem allegans* (no one can benefit from their own wrong) to come to this conclusion. *See, e.g.*, Inceysa Vallisoletana, S.L. v. El Salvador, ICSID (W. Bank) Case No. ARB/03/26, Award ¶¶ 231-32, 242-43 (2006) (relying on good faith and the maxim); *see also id.* ¶ 246 (relying on international public policy); *id.* at ¶¶ 254-57 (relying on unjust enrichment).

155. *See, e.g.*, Noble Ventures, Inc. v. Romania, ICSID (W. Bank) Case No. ARB/01/11, Award ¶ 164 (2005) (using customary international law to in-

terpretative principles drawn from either CIL or general principles of law, such as reliance on "legitimate expectations" or the "duty to mitigate risk" may also prove beneficial to respondent states when it comes to the calculation of damages.[156]

Moreover, examination of the arbitral decisions issued to date under the investment regime reveals that the normative impact of that regime may extend beyond matters of interest only to investment lawyers, and ought to be appraised on grounds apart from those now considered in debates over the relative rights of foreign investors and their host states. Like all treaties, BITs and FTAs contain numerous gaps, and adjudicators interpreting them need to have recourse to "relevant rules of international law" to fill them, in accordance with the VCT, article 31(3)(c). This rule of "systemic integration" means, for example, that investor-state arbitrations are becoming a prominent forum—perhaps the most frequent—for ever more nuanced interpretations of such general public international law rules as those contained in the ILC's Articles of State Responsibility, including rules of state attribution, the meaning of remedies such as "reparation" or "restitution," and the scope for excuses from wrongful action, such as the defense of

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terpret full protection and security and finding, consistent with custom, that this standard only imposes a duty of due diligence and not strict liability).

156. For consideration of how the concept of "legitimate expectations" may affect compensation determinations, *see, e.g.*, Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages, and Valuation*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 9, at 1049, 1088-89. For cases where the liability of the host state appears to have been affected by equitable considerations, see Von Walter, *supra* note 94, at 188-91 (discussing Am. Mfg. & Trading, Inc. v. Zaire, ICSID (W. Bank) Case No. ARB/93/1, Award (1999), a decision that suggested that an investor had willingly assumed the risk when investing in Zaire during unstable times); Alvarez & Khamsi, *supra* note 33, at 404-07 (discussing the damages determinations in some of the Argentina cases). Arbitrators have not been clear on whether the interpretative principle of "legitimate expectations," often deployed in aid of interpreting such standards as FET, is based on specific language in BITs (such as a reference in a preamble to a "stable" legal environment) or is grounded in custom, general principles of law, or all of these. For discussion of the possibility that arbitrators may rediscover other "compensation-reducing elements" once deployed prior to the rise of BITs, such as abuse of rights, see Wälde and Sabahi, *supra* note 156, at 1095-99, 1103-05.

necessity.[157] Like most international adjudicative forums, investor-state arbitrations are also venues for interpreting or elaborating upon much else in public international law, including general principles such as the duty to mitigate damages and equitable doctrines such as estoppel, acquiescence, unclean hands, and abuse of rights.[158] Investor-state arbitrations are also venues where the need to conduct orderly proceedings using rudimentary procedural rules (such as those under ICSID or UNCITRAL) sometimes requires its arbitrators to rely on "common rules of international procedure" used by other international tribunals, yet another form of non-treaty law.[159]

For all these reasons, it is risky to attempt to anticipate (or forestall) the normative impact of the investment regime on the general law. Since most investor-state decisions have emerged in the past five years, the investment regime is still young, and it is premature to anticipate its evolution, including with respect to its impact on all relevant rules of general international law. It is equally premature to suggest that only a diehard neo-conservative, inordinately enamored with protecting foreign investors at all costs, would endorse the proposition that investor-state arbitrators apply and affect general public international law in the course of applying BITs and FTAs.

157. *See generally* Alvarez & Khamsi, *supra* note 34, at 427-449 (discussing the role of the customary rule of necessity in some of the cases against Argentina).

158. *See* Grierson-Weiler & Laird, *supra* note 50, at 272-87 (discussing arbitrators' resort to the principle of good faith, detrimental reliance, regulatory fairness, and abuse of authority); Christina Knahr, *Investments 'in Accordance with Host State Law', in* INTERNATIONAL INVESTMENT LAW IN CONTEXT, *supra* note 55, at 27, 32-34 (discussing the tribunal's resort to good faith, *nemo auditur propriam turpitudinem allegans*, public policy, and unjust enrichment in *Inceysa Vallisoletana*).

159. Investor-state arbitrators are not unusual in relying on, and therefore affecting, general international law, including with respect to procedure. *See* ALVAREZ, *supra* note 99, at 485-502 (surveying how other international adjudicators rely on and affect public international law).

VII. The Broader Consequences of Lowenfeld's Position

The view that at least some of the rules in BITs and FTAs may affect and reflect the general law has consequences not only for those who litigate investment disputes. As suggested below, Lowenfeld's conclusions about the likely impact of the investment regime also have broader implications for those debating whether international law suffers from a "democratic" deficit, is improving through "treatification," or is undermining its legitimacy through undue fragmentation. Lowenfeld's arguments within the context of the investment regime complicate matters for those who would conclude, simplistically, that contemporary international treaty regimes are more "democratic," more "precise," more "coherent," or more "legitimate" than old-fashioned customary law.

A. *Democratic Deficit*

Numerous critics, almost always in the United States, have argued that non-treaty sources of international law are simply undemocratic and ought to be rejected on that ground alone. Thus, John McGinnis has argued that CIL is undemocratic because (1) nations do not assent affirmatively to it but might be deemed to have consented by failing to object; (2) undemocratic, even totalitarian, nations have an equal say in its formation; (3) such rules are merely empty promises that are routinely flouted since there are no or only weak mechanisms to enforce these informal sources, unlike rules that are approved by Congress and codified into domestic law; (4) the content and even the existence of these rules are unclear; and (5) these sources are untransparent and even unknown to average Americans.[160]

McGinnis's contentions are not borne out in the investment regime—where, as we have noted, treaty, CIL, and general principles are inexorably intertwined and, with respect to some questions (such as FET), hard to disentangle. Given the entanglements suggested above among treaties, non-treaty sources of international obligation, and national laws and practices, it would be decidedly misleading to suggest that the

160. John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 Harv. J. L. & Pub. Pol'y 7, 9-11 (2006).

relevant principles of custom applied in investment disputes have not been subject to consent, have not been scrutinized by legislatures or parliaments, are less legitimate because totalitarian societies have participated in their formation, or are found only in rhetorical UN General Assembly resolutions. And if the treaty standards of FET or the customary international minimum standard are unclear, both are increasingly less so as they are given concrete effect through investor-state arbitral decisions. In any case, these standards, whether found in custom or treaty, are no more uncertain (or "undemocratic") than are concepts such as "due process" under national laws or constitutions, which also achieve precision largely as a matter of application, case by case.[161] McGinnis is right that international law rules are not transparent, but the entanglement of treaty and custom makes drawing distinctions between these two sources on this ground a dubious exercise—at least in this regime. In any case, the relevant rules (and arbitral decisions) governing the international investment regime are increasingly subject to public scrutiny, not only by members of Congress but by a battery of representatives of civil society.

Exploring, as Lowenfeld does, the interconnections between BITs and custom is a useful exercise for those who think rigid lines can be put between treaties and other "less democratic" sources of international obligation. As the U.S. government has recently learned from global reactions to its "war on terror," allegedly "vague" customary norms prohibiting the ill-treatment of aliens may have as much or even greater legitimacy and power than do treaty obligations, and these non-treaty norms exist alongside textual commitments that have been subject to more explicit forms of "democratic" approval, such as those in the Geneva Conventions or the Convention Against Torture.

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161. *See, e.g.*, Prosper Weil, *The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a* Ménage À Trois, 15 ICSID REV.: FOREIGN INV. L.J. 401, 415 (2000) ("The standard of fair and equitable treatment is certainly no less operative than was the standard of 'due process of law,' and it will be for future practice, jurisprudence, and commentary to impart specific intent to it.").

B. *Treatification*

International law, including most especially international investment law, is undoubtedly becoming ever more "treatified." Whereas, as recently as 1970, the International Court of Justice was moved to comment on the "surprising" fact that international investment law had not yet crystallized despite the growth in FDI,[162] few would suggest that today, with nearly 3000 treaties in place. Most, like McGinnis, think this is a good thing since the "move to treaties" makes the law more complete (e.g., by clarifying the right to transfer profits out of the host state), clarifies when the law takes effect (namely on ratification), renders the rules more legitimate, makes their content more certain, precise, and less subject to varying interpretation, and avoids many of the uncertainties associated with custom (such as determining whether *opinio juris* matters and what, if anything, that is).[163] Of course, treatification is an evident improvement over CIL to the extent it is accompanied by an effective enforcement mechanism, as it is with respect to most BITs and FTAs. Treaty-making is, after all, a discrete, clearly identifiable law-making effort that is readily distinguishable from what, to many, are less legitimate efforts to establish law for the world, involving far more subjective attempts to distill CIL from the practices of states or to derive general principles of law from comparative law exercises.[164] For others, treatification is the best hope of truly influencing the behavior of states since, to quote two leading critics of international law, "CIL as an independent normative force has little if any effect on national behavior."[165]

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162. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 46-47 (Feb. 5).

163. *See, e.g.*, Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 LAW & BUS. REV. AM. 155, at 157-58 (2007) (noting that the treaty regimes have "imposed a discipline on host country treatment of foreign investors" and have allowed injured parties to seek reparations in a predictable manner); Kelly, *supra* note 12, at 451 (CIL "cannot function as a legitimate source of substantive legal norms in a decentralized world of nations without a broad base of shared values."); McGinnis, *supra* note 160, at 10, 13 (noting the greater certainty provided by international agreements as compared to customary international law).

164. *See* Kelly, *supra* note 12 (discussing the problems of distilling CIL).

165. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 641 (1999).

A contrary view is that, as Wolfgang Friedman suggested long ago in his Hague lectures, treaty and non-treaty sources of international law obligations are inseparable and lie atop one another in a dense web, particularly as applied in the transnational legal process.[166] This is suggested by the canon of interpretation deployed by international tribunals that, unless treaty parties are explicit, treaty interpreters should not presume that a treaty dispenses with the application of fundamental rules of customary international law, such as the principle requiring exhaustion of local remedies.[167] The unavoidable interplay between treaties and custom casts doubt on some of the superficial conclusions drawn from the "move to treaties." Lowenfeld's contentions support Friedman's more complex view of the interplay between treaties and non-treaty sources of international obligation and provide reasons to be skeptical about the alleged benefits of treatification.

A mordant wit once suggested that a treaty is a disagreement reduced to writing. While that may go too far with respect to investment agreements, the turn to BITs and FTAs, as

166. WOLFGANG FRIEDMAN, GENERAL COURSE IN PUBLIC INTERNATIONAL LAW 131-36 (1969); *see also* PHILIP C. JESSUP, TRANSNATIONAL LAW (1956) (arguing that human relations are governed by increasingly complex networks of "transnational" law).

167. *See, e.g.*, Sempra Energy Int'l v. Argentina, ICSID (W. Bank) Case No. ARB/02/16, Award ¶ 378 (2007) ("Nor does the Tribunal believe that because [the treaty] did not make an express reference to customary law, this source of rights and obligations becomes inapplicable."); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 47 (June 21) ("The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded."); Loewen Group, Inc. v. United States, ICSID (W. Bank) Case No. ARB (AF)/98/3, Award ¶ 160 (2003) ("An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence" of a plain statement to that effect); *see also* GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 248 (3d ed. 1957) ("Even if the standard of national treatment is laid down in a treaty, the presumption is that it has been the intention of the parties to secure to their nationals in this manner additional advantages, but not to deprive them of such rights as, in any case, they would be entitled to enjoy under international customary law or the general principles of law recognised by civilised nations.").

is suggested here, does not *necessarily* entail a move to more precise or textually more determinate rules. This is certainly not the case to the extent these treaties merely affirm that investors are entitled to "FET" or are entitled to compensation when they have been subjected to an "indirect" taking, without defining either term. While some BIT guarantees—such as NT—might be regarded as relatively precise in content, a provision in a BIT providing for FET without indicating, for example, what compensation might be due for any resulting harm, is not, in itself, a move to textual clarity.

Those who focus on "treatification"—and its alleged superiority over the customary international law-making process—risk fixating on the sources of obligation at the expense of overlooking the process of dispute settlement and treaty interpretation. As Lowenfeld's emphasis on the work of arbitral tribunals implies, the textual clarity (or lack thereof) of BIT or FTA guarantees (or of CIL contained in them) is less significant if there exists a legitimate process for resolving ambiguities as they arise. The investment regime does not support the proposition that treatification in and of itself constitutes undeniable progress in international law or that states are only likely to abide by what they specifically agree to do in a treaty. Whether this is true with respect to the investment regime is still up for grabs and may depend on whether the evolving interpretations of the law rendered by investor-state tribunals continue to be seen as legitimate and to elicit compliance.[168] It may be that the lack of clarity with respect to some BIT and FTA guarantees is actually a good thing, especially if the ambiguity permits treaty interpreters to avoid the excesses that some associate with market liberalism.[169] What is clear from the interpretations issued by those tribunals to date is that, as

168. The investment regime is showing signs of political backlash. *See* Karl P. Sauvant, *A Backlash Against Foreign Investment?*, *in* WORLD INVESTMENT PROSPECTS TO 2010: BOOM OR BACKLASH? 71 (Laza Kekic & Karl P. Sauvant eds., 2006), *available at* http://graphics.eiu.com/files/ad_pdfs/wip_2006.pdf (noting some signs of a political backlash to foreign direct investment).

169. *C.f.* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944) (arguing that an excessive focus on correcting government imperfections generates an inevitable countermovement to restore the proper role of government intervention in a market economy).

Lowenfeld claims, the move to investment treaties does not displace resort to CIL or general principles.

Lowenfeld shows us that treatification, at least in this regime, does not, contrary to the expectations of at least one commentator, demonstrate the "twilight of customary international law."[170] Indeed, debates over the content of customary international law are now livelier than ever before, despite treatification.[171] And, despite the suggestions of certain international law skeptics, there is no evidence that states are distinguishing, in terms of their readiness to comply with arbitral rulings, between those based on treaty or non-treaty sources of law.[172] Indeed the relative lack of resistance to such rulings underlies the wider normative implications of the network of BITs and FTAs.

If the investment regime is any indication, the touted benefits of treatification have been somewhat exaggerated. Treaties are not necessarily "complete," less vague or uncertain, or subject to perfect enforcement. Even when the move to trea-

170. The same scholar, J. Patrick Kelly, advocates that CIL should be "eliminated as a source of international law in the modern era." Kelly, *supra* note 12, at 540.

171. This is demonstrated by the recent effort of one scholar, Ioana Tudor, to canvass the emerging arbitral case law on the meaning of FET. That study necessarily spends considerable time exploring the extent to which FET now reproduces and has changed CIL or relevant general principles of law. TUDOR, *supra* note 48.

172. Although some states resist paying arbitral awards rendered against them and compliance may sometimes take some time (as it occasionally does with respect to the WTO), investor-state arbitral awards generally achieve routine compliance. Indeed, the relative efficacy of the regime's enforcement scheme is one of its unique characteristics. *See* Van Harten & Loughlin, *supra* note 18 (noting the unique remedial features of the investor-state arbitration). By comparison, Goldsmith and Posner rely on rational choice theory to contend that compliance with CIL as such does not exist. Goldsmith & Posner, *supra* note 165, at 661-63. They write that "CIL is the label that we attach to certain behavioral regularities that result from nations pursuing their self-interest; it does not cause or constrain anything." *Id.* at 662. Although Goldsmith and Posner acknowledge that government officials use the language of CIL, they contend that this is merely "cheap talk" that "serves an important coordinating function that can facilitate cooperation." *Id.* at 663. Their contention—that when nations pursue goals in pursuit of power and national interest, CIL as "independent normative force," *id.*, drops out of the picture—seems inconsistent with the argument here that even if states conclude BITs for "economic reasons," the network of BITs influences CIL and serves to enforce that law.

ties is accompanied by a move to treaty-based adjudication, interpretations delegated to ad hoc tribunals of arbitrators may not cohere and may leave the content of the law contested—as it still is with respect to even the heavily litigated FET standard in BITs, despite a growing emphasis on *jurisprudence constante*. Moreover, despite the impressive enforcement mechanisms of BITs and FTAs, the on-going struggles to enforce investor-state arbitral awards against some recalcitrant respondent states (such as Argentina)[173] remind us that this particular Achilles' Heel of international law regimes has not been entirely overcome.

C. *Fragmentation*

International lawyers are now debating whether our proliferating legal regimes are producing disjunctures or inconsistencies that threaten the coherence of international law. Fragmentation is generally seen as the "dark side" of treatification. The ILC's study on fragmentation highlights a number of ways that the risks of fragmentation might be alleviated.[174] The ILC suggests that these risks are lessened to the extent international law is seen as a legal system and not as a set of "self-contained" sub-specialties. Specifically, the ILC's Report recommends that in applying and interpreting treaties, it would be useful to apply the harmonizing principle suggested by such rules as article 31(3)(c) of the Vienna Convention on the Law of Treaties (requiring residual application in the course of interpretation of "relevant rules of international law"); that the rule of *lex specialis* be given a "contextual" interpretation, particularly since its application "does not normally extinguish the relevant general law"; that the general law be used to fill gaps even with respect to "special" regimes; and that this last is

173. *See, e.g.*, Sempra Energy Int'l v. Argentina, ICSID (W. Bank) Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award ¶¶ 105, 112-13 (2009) (deciding that a continued stay on enforcement of the underlying award would be contingent on Argentina's paying a security deposit into an escrow account to assure payment will be made if the award is not annulled).

174. Int'l Law Comm'n [ILC], *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

especially appropriate when the relevant treaty rules are "unclear" or "open-textured."[175]

Lowenfeld's conclusions about the likely impact of the investment regime on the general law draw on all of the ILC's recommendations, whether implicitly or explicitly. His contention that interpretations of BITs and FTAs often reflect general public international principles, including rules of custom and general principles of law, recognizes: that arbitrators' interpretations of such treaties need to take into account the relevant rules of international law; that it is too simple to conclude, in the absence of careful interpretation attentive to context, that such treaties are *lex specialis*; that the investment regime is not self-contained but contains gaps that need to be filled by the general law; and that vague provisions in these treaties (such as FET) have an open texture that requires resort to the general law. Those who say that Lowenfeld is wrong, by contrast, would forego the ILC's anti-fragmentation recommendations in order to promote a view of BITs and FTAs as a self-contained or *lex specialis* regime unconnected to the general law and that would be of little interest to anyone other than the parties to the particular investment treaties being interpreted in specific cases. Those who take this position need to tell us why treating the world of BITs and FTAs as a specialized domain unconnected to other parts of public international law (from human rights to other principles of state responsibility), a posture that surely contributes to the fragmentation of international law, would be more desirable in the context of this regime than it would be in any other.[176]

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175. *Id.* pt. C. Some investor-state arbitrators have not been reticent about relying on such systemic integration devices as article 31(3)(c) of the Vienna Convention on the Law of Treaties. *See, e.g.*, Saluka Invs. BV (Neth.) v. Czech Republic, Partial Award ¶ 254 (UNCITRAL Arb. 2006), *available at* http://www.pca-cpa.org/upload/files/SAL-CZ%20Partial%20Award%20170306.pdf ("In interpreting a treaty, account has to be taken of 'any relevant rules of international law applicable in the relations between the parties . . . .'" (quoting Vienna Convention, *supra* note 29, art. 31(3)(c))); McLachlan, *supra* note 53 (discussing the role of art. 31(3)(c) as a tool of systemic integration).

176. *See generally* Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006) (critiquing arguments in favor of "self-contained regimes").

VIII. Conclusion

In taking a position on the impact of the investment regime on non-state parties to BITs and FTAs, Lowenfeld wisely avoided drawing definitive conclusions about whether this impact occurs as a result of CIL, general principles of law, or some unique features of the investment regime. This essay attempts, perhaps unwisely, to make the best case for the first proposition, namely that the investment regime reflects and affects CIL. That case is made on the basis of the traditional features of CIL, namely state practice and *opinio juris*—on the premise that these two elements of custom are demonstrated by the conclusion of investment treaties by the full diversity of nations, by the enactment of national laws (including many promulgated with the obligations of BITs and FTAs in mind), and by the practice of states in both defending investor-state disputes and generally acquiescing in arbitral outcomes which not infrequently rely on both treaty and non-treaty sources of law.

At the same time, as this essay acknowledges, much of Lowenfeld's argument rests on the authority and power of investor-state arbitral decisions. This essay attempts to explain why such awards tend to be persuasive to those who are called upon to determine objectively what the law is, especially fellow investor-state arbitrators. At the same time, it must be acknowledged that to the extent investor-state arbitral decisions address the issue of relevant sources, they are frequently unclear as to whether they are relying on CIL, general principles, or merely prior arbitral decisions on point. Arbitrators could do a better job of explaining the basis for their reasoning, including the basis for any conclusions about why the treaty or treaty provision being interpreted does in fact reflect evolving notions of customary law or general principles of law. Nonetheless, in some cases, there is good reason for ambiguity. It is not entirely clear, for example, whether the principle of good faith is a principle of CIL or a general principle of law. It may indeed be both. At other times, particularly with respect to the application of FET, arbitrators appear to be applying what they call a "standard" as opposed to a "rule"; they are applying a rule of law which itself requires the application of equitable principles and is more susceptible to case-by-case application than *a priori* articulation. This is not to suggest that arbitrators are using FET to exercise an unauthorized warrant to decide disputes *ex aequo et bono*. As André von Walter has suggested, there is a difference between applying equity as a matter of abstract justice and applying a standard (like FET) that relies on equitable principles like legitimate expectations, good faith, or unclean hands.[177]

Nor is there anything inherently wrong with applying a case-by-case FET standard.[178] FET is no less legitimate a principle than is due process under U.S. Constitutional law. That FET is imprecise is no condemnation of the investment regime; but it is a reminder of why investor-state interpreters feel a need to have recourse to supplemental principles, from CIL or general principles (especially when these have been used by prior arbitrators), to give FET's application greater coherence and legitimacy. The same is true of other BIT and FTA guarantees that are less than precise, such as the concept of "full protection and security" or of an "indirect" taking.

Lowenfeld's conclusion as to the general legal impact of the investment regime should not be seen, as it sometimes is, as a triumph of the Global North over the South or of the interests of investors over those of host states. As noted, the BIT and FTA regime is too universal in scope and includes too many prominent first movers from the "Global South" to continue to be seen in such terms, despite its origins.[179] Moreover, as this essay suggests, it is hazardous to predict when the treaties' or the arbitrators' reliance on CIL or general principles will redound to the benefit of investors or host states. In principle, the use of non-treaty sources of law is open to all participants in the regime, from host states (from the North and South) facing investor-state claims to NGOs allowed to participate as amici, and from arbitrators appointed by the state in these disputes to states issuing joint interpretations of their treaty (as can be done under the NAFTA). Given the fact that most investor-state disputes and awards are of recent vintage, it seems premature to draw conclusions about who is

177. Von Walter, *supra* note 94, at 194-95.

178. *But see* Kingsbury & Schill, *supra* note 104 (criticizing the "I know it when I see it" approach to the FET obligation).

179. *See generally* José E. Alvarez, *supra* note 116 (arguing that the proliferation of BITs, including many South-South agreements, belies any notion that BITs are a modern-day equivalent of capitulation agreements).

likely to benefit from the regime's reliance on non-treaty sources.

Neither Lowenfeld's conclusion nor the more precise arguments made here should be seen as suggestions that the proliferation of BITs have legalized the overly rigid demarcation of "good governance" embedded in the so-called "Washington Consensus." The arbitrators who are using (and developing) CIL and general principles to issue interpretations of BITs and FTAs that are more "harmonious" with the "legitimate expectations" of the international community probably do not believe that they are merely engaged in enforcing the Washington Consensus.[180] Nor is this the motivation driving NGOs that are urging states to modify their BITs to include, consistent with the pleas of the ILC in their fragmentation project, greater references to customary principles of human rights or environmental protection, or urging arbitrators to do the same in the course of deciding disputes. This is also not what governments as different as those of China and the United States probably have in mind when they negotiate investment treaties that equate FET to CIL. All of these developments are likely intended to make these treaties more, not less, sensitive to the diverse regulatory needs of states.

As for those who criticize Lowenfeld's conclusion not because of its accuracy as a description of what arbitrators are doing or are likely to do but because they believe that it is normatively undesirable, one question that must surely be answered is: what are the realistic alternatives to the contemporary international investment regime? The ideal some would urge in lieu of the status quo—the will-o-the-wisp of a multilateral investment treaty coupled with a single investment court[181]—is politically difficult in a world that has repeatedly failed in prior comparable efforts.[182] Moreover, such a single multilateral regime would achieve more harmonious rules at the expense of flexibility. Whatever else it may be, the hodgepodge of BITs and FTAs—subject as it is to changing

180. *Cf.* Saipem S.p.A v. Bangladesh, ICSID (W. Bank) Case No. ARB/05/07, Decision on Jurisdiction ¶ 67 (2007).

181. *See, e.g.*, GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 180-84 (2007) (describing an international investment court).

182. *But see* Pierre Sauvé, *Multilateral Rules on Investment: Is Forward Movement Possible?*, 9 J. INT'L ECON. L. 325 (2006) (suggesting possible ways forward to encourage multilateral investment negotiations).

treaty texts over time as well as to termination of existing commitments, and, in some cases, to state-authorized interpretations of existing treaties—is easier to adapt in response to the diverse needs of claimants and host states than any single multilateral regime, however well-conceived. The current regime, for all its flaws and risks of internal fragmentation, enables the law—of both evolving BITs and FTAs, along with the arbitral case law—to constantly adapt to the needs of all the constituencies that it affects. The absence of a single WTO text or institution for investment enables greater exit and voice. And the current investment regime is certainly more accommodating of the rights of LDCs than what preceded it—a time when investment protections were subject to customary rules developed before most LDCs achieved independence, when the few rules that existed tended to be enforced unilaterally by great powers, and where few neutral adjudicative mechanisms existed to permit change over time.