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Mavluda Sattorova, *Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies?*  
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## INVESTMENT TREATY BREACH AS INTERNATIONALLY PROSCRIBED CONDUCT: SHIFTING SCOPE, EVOLVING OBJECTIVES, RECALIBRATED REMEDIES?

MAVLUDA SATTOROVA \*

*This paper argues that the primacy of monetary relief for investment treaty breaches must be reconsidered in light of the historic shift in the protective scope and objectives of international investment agreements. Over the past few decades international rules on the protection of foreign investment have undergone considerable change, with the notion of property replaced by a broader rubric of investment, and the protection against expropriation supplemented by the arsenal of non-expropriatory standards of treatment, including the guarantees of fair and equitable treatment, non-discrimination, and sanctity of contract. Not only are core investment protection standards liable to a broad interpretation, thus bringing a variety of host state conduct within the purview of investment treaties, but they are also mutually intersubstitutable to the extent that investors are enabled to retroactively redefine the material and jurisdictional scope of the relevant treaty instruments. The notion of internationally proscribed conduct has evolved dramatically, so it is no longer limited to outrageous and egregious incidences of state interference with foreign investment, vastly increasing the exposure of host states to the risk of having to meet claims for monetary loss. The resulting widening in the scope of state responsibility before investors necessitates revisiting the validity of the grand bargain underlying the use of monetary remedies in international investment law.*

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## I. INTRODUCTION

The exponential rise in the number of international investment treaties (IIAs) and investment arbitration awards over the past two decades has generated an increasingly mounting body of scholarship that addresses various aspects of the emerging global investment protection regime. Initially confined to the doctrinal analyses of treaty and arbitration practice, the focus of mainstream international investment law literature has gradually shifted to a critical examination of the field from a variety of functional, comparative, and policy perspectives.<sup>1</sup> One theme that has featured in recent discourse is the function of investment treaty remedies, and in particular, the use of damages as a principal means of redress in investor-state arbitration.<sup>2</sup> As noted in the recent OECD Roundtable on Freedom of

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<sup>1</sup> See Jurgen Kurtz, *The Shifting Landscape of International Investment Law and Its Commentary*, 106 AM. J. INT'L L. 686 (2012); Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR J. INT'L L. 875 (2011).

<sup>2</sup> One of the leading doctrinal works on damages in contemporary international investment law is SERGEY RIPINSKY & KEVIN WILLIAMS, *DAMAGES IN INTERNATIONAL INVESTMENT LAW* (2008) [hereinafter RIPINSKY & WILLIAMS]. A critical and functional

Investment, the prevalence of damages in investment treaty law is puzzling; as monetary redress is rarely available to claimants challenging governmental conduct, and both national legal systems and general international law traditionally favour non-pecuniary forms of relief.<sup>3</sup>

Why damages? Why should a foreign investor be entitled to monetary redress for adverse effects of governmental action? In contrast with other areas of international economic law that also deal with the interaction between states and business actors, the distinctive feature of investment treaty law is that it grants investors the right to claim damages vis-à-vis states.<sup>4</sup> Since its inception in early IIAs, the right to damages has been traditionally justified by reference to broader objectives of international investment protection.<sup>5</sup> Such objectives included the need to lower risks associated with investing in a foreign country and reducing the cost of capital for host states. This, in turn, would accelerate their economic development. In order to achieve such risk reduction, host states would need to commit themselves not to engage in proscribed conduct. This commitment is enforced by granting the investor the right to claim monetary redress against the host state.<sup>6</sup> As long as the host state is confident that it does not want to engage in prohibited behaviour, the availability of the private right to claim damages serves as ‘a relatively inexpensive commitment device’ and as a means of attracting foreign investment.<sup>7</sup> The crucial question is, to what extent do monetary damages

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reappraisal has been heralded by Anne Van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 721 (Stephan W. Schill ed., 2010) and Jonathan Bonnitcha, *Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 128 (C. Brown & K. Miles eds., 2001) [hereinafter Bonnitcha].

<sup>3</sup> Investor-State Dispute Settlement: Summary Reports by Experts at 16th Freedom of Information Roundtable, Organization for Economic Cooperation and Development, Investment Division, (Mar. 20, 2012) available at <http://www.oecd.org/daf/international-investment/investmentpolicy/50241347.pdf>.

<sup>4</sup> See e.g., the 2012 US Model BIT, especially Articles 24 and 34. Although the old generation IIAs did not expressly specify what remedies could be awarded, tribunals consistently favoured compensatory and restitutionary damages as a principal form of remedy. On the use of non-pecuniary remedies in international investment law, see C. Schreuer, *Non-pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT’L 325 (2004).

<sup>5</sup> Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005) [hereinafter Sykes]. See also Nicholas Dimascio & Joost Pauwelyn, *Non-discrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin*, 102 AM. J. INT’L L. 48 (2008) (endorsing Sykes’ analysis) [hereinafter Dimascio & Pauwelyn].

<sup>6</sup> Sykes, *supra* note 5, at 632.

<sup>7</sup> *Id.* at 644.

advance the proclaimed benefit of economic development?

This paper will argue that the primacy of monetary relief for investment treaty breaches must be reconsidered in light of the historic shift in the protective scope and objectives of IIAs. Some of the flagship contributions to the emerging debate on remedies in international investment law have already highlighted the possible negative effects of monetary liability, both on decision-makers in respondent host states and foreign investors.<sup>8</sup> What is still missing in the emerging discourse is an analysis of remedies in the light of the recent transformations in the scope of investment treaty guarantees, the violation of which serves as a trigger to the investor's right to seek redress. This paper intends to fill this gap by advancing an argument that the traditional prioritisation of monetary damages as a principal form of redress must be reconsidered. The notion of internationally proscribed conduct has evolved dramatically and is no longer limited to outrageous and egregious incidences of state interference with foreign investment. The resulting widening in the scope of state responsibility before investors necessitates revisiting the validity of justifications for monetary remedies. In what follows, the paper will elaborate on this argument through a critical evaluation of recent developments in investment treaty practice and arbitration. Part I will show that uncompensated expropriation, as a form of internationally proscribed conduct and one of the primary targets of investment protection guarantees, has evolved into a far-reaching and potentially all-encompassing cause of action. The role of investment treaty formulations and arbitral tests in broadening the protective reach of expropriation clauses and expanding the scope of host state's monetary liability under IIAs will be critically examined. In Part II, attention will be drawn to non-expropriatory standards of treatment, including the fair and equitable treatment standard (FET) and umbrella clauses. Non-expropriatory standards of treatment may at first glance seem to offer a better alternative to the absolutism of the expropriation standard. Ultimately, however, the elasticity of arbitral interpretations of non-expropriatory standards and, more crucially, their intersubstitutable and flexible use is conducive to the broadening of the notion of 'internationally proscribed conduct' thereby increasing the range of situations in which investors may claim monetary redress vis-à-vis host states. Part III will critically evaluate possible ramifications of a flexible, overlapping, and intersubstitutable deployment of investment treaty standards. It will do so, by embedding the discussion of recent developments in arbitral jurisprudence and investment treaty practice into a broader context of evolving objectives of the international investment protection regime. As the perceptions of what constitutes internationally proscribed conduct have considerably changed over time, resulting

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<sup>8</sup> See Bonnitcha, *supra* note 2; See also Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2010-2011) [hereinafter Yackee].

in a greater exposure of states to monetary responsibility under IIAs, the pertinent question is what ends do these changes serve and to what extent do they contribute to the achievement of overarching objectives of the investment treaty regime as regards the economic development? The concluding section argues for a re-appraisal of investment treaty remedies in the light of the recent transformations of the objectives and protective scope of IIAs.

## II. EXPROPRIATION AS INTERNATIONALLY PROSCRIBED CONDUCT: SHOULD ECONOMIC LOSS ALONE FORM A BASIS OF THE CLAIM FOR DAMAGES?

### *A. The Rise and Fall of the Expropriation Standard: Setting the Framework*

In elucidating the role of monetary relief as a principal form of redress available to investors vis-à-vis host governments, it is useful to begin with recalling that, until recently, international investment law was almost synonymous with the protection from expropriation.<sup>9</sup> Expropriation without compensation was perhaps the most important form of governmental conduct proscribed by international law on the protection of foreign investment. It was the postulated primacy of monetary redress—an obligation to pay full, adequate and effective compensation, that was regarded by many as a precondition for the exercise by states of their sovereign right to expropriate—that triggered a historic divide over the content of customary international rules on expropriation.<sup>10</sup> Notwithstanding an overwhelming resistance from capital-importing states, the prohibition of uncompensated expropriation survived and retained its status as an international rule. In spite of landmark resolutions by the UN General Assembly on the permanent sovereignty over natural resources and on the economic rights and duties of states, which intended to strike a fatal blow to the customary status of the obligation to compensate;<sup>11</sup> the prohibition of expropriation re-emerged in bilateral

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<sup>9</sup> C. Schreuer, *Interrelationships of Standards*, in STANDARDS OF INVESTMENT PROTECTION 1 (A. Reinisch ed., 2008) [hereinafter Schreuer].

<sup>10</sup> The standard of prompt, adequate and effective compensation is commonly known as the Hull rule, which originated in a Note from the US Secretary of State, Cordell Hull, to the Mexican Government on 22 August 1938. For a critical discussion of the Hull rule on compensation, see B. Weston & F. Dawson, *Prompt, adequate, and effective?': A Universal Standard of Compensation*, 30 *FORDHAM L. REV.* 727 (1961-1962).

<sup>11</sup> See e.g. U.N. G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (1962) (Dec. 14, 1962); U.N. G.A. Res. 3281 (XXIX), U.N. Doc. A/9631 (1974) (Dec. 12, 1984). For the impact of UN resolutions on the international law of expropriation, see H. W. Baade, *Permanent Sovereignty over Natural Wealth and Resources*, in *ESSAYS ON EXPROPRIATION* (R. S. Miller & R. J. Stanger eds., 1967); B. H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 *AM. J. INT'L L.* 437 (1981); E. Penrose et al., *Nationalisation of*

and multilateral investment treaties in the form of a ubiquitous clause mandating compensation for governmental takings.<sup>12</sup>

Ironically, international investment agreements that had paved the way for the return of the expropriation standard (albeit through the backdoor) into the international arena, have also led to its subsequent demise. Host governments have not ceased to interfere with foreign investment in the exercise of their regulatory functions in what could be regarded as an expropriatory manner—the recent nationalisation of Repsol's shareholding in YPF by the Argentinean government and Philip Morris's challenge to Australian policies on plain tobacco packaging serve as the most pertinent examples.<sup>13</sup> Yet expropriation is no longer a primary cause of action to which investors can resort in challenging host state action. Ever since the first investment treaty dispute was resolved in 1990, the evolution of the investment treaty regime has been largely defined by the rise of non-expropriatory standards of treatment, such as the guarantee of fair and equitable treatment (FET), the prohibition of arbitrary and discriminatory measures, and umbrella clauses. Originally regarded as a principal investment protection standard, the expropriation clause is now accompanied by an arsenal of non-expropriatory standards which enhance the protective reach and strength of IIAs. The shift towards a greater use of non-expropriatory standards of treatment by claimant-investors necessitates that the function of the expropriation standard—and the

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*Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation*, 55 MODERN L. REV. 351 (1992); J. Arechaga, *State Responsibility for Nationalization of Foreign-Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179 (1978). In some sources, the effect of UN Resolutions on the formation of international law was largely dismissed and the full compensation maxim re-asserted as a valid customary norm. See e.g., D. Johnson, *The Effect of the Resolutions of the General Assembly of the UN*, 32 BRIT. Y.B. INT'L L. 97 (1955); R. Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 259 (1982); W. D. Verwey & N. J. Schrijver, *The Taking of Property Under International Law: A New Legal Perspective?*, 15 NETH. Y. B. INT'L L. 3 (1984) [hereinafter Verwey & Schrijver]. See also Arbitrator Dupuy in *Texas Overseas Petroleum Co. & California Asiatic Oil Co v. Libyan Arab Republic* (1978) 17 I.L.M. 1, 24.

<sup>12</sup> Although expropriation seems to be the most commonly used term in treaties, there are examples of different terminology, such as deprivation and dispossession. See UNCTAD, *BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULE-MAKING* 45-6 (2007) [hereinafter TRENDS IN INVESTMENT RULE-MAKING]. See also B. H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation" 16 VA. J. INT'L L. 103, 110 (1975-1976) (criticising international law in this area for imprecise and ambiguous formulations) [hereinafter Weston].

<sup>13</sup> See BBC News, 'Argentina to expropriate Repsol oil subsidiary YPF', available at <http://www.bbc.co.uk/news/business-17732910> (April 17, 2012); Tania Voon & Andrew Mitchell, *Time to Quit? Assessing International Investment Claims against Plain Tobacco Packaging in Australia?*, 14 J. INT'L ECON. L. 515 (2011).

propriety of monetary damages as a principal form of remedy available to the investor against the expropriator-state—is explored in the light of the place expropriation clauses presently occupy among other investment protection guarantees. The following sections will analyse shifting perceptions of expropriation as a form of internationally proscribed conduct. First, the focus will be on the vestiges of the physical notion of property which hold sway over the currently prevailing arbitral interpretations of the expropriation standard, opening up possibilities for harnessing expropriation provisions as a virtually all-encompassing scope guarantee against economic loss. This will be followed by a critical examination of the traditional formulations of the standard in IIAs. It will be argued that the wording of expropriation clauses in the majority of IIAs is conducive to a potentially broad interpretation which expands the range of situations in which monetary redress can be sought and obtained against host states, thus making a case for revisiting the rationales behind monetary remedies in investment treaty law.

*B. Expropriation as Substantial Deprivation: The Breadth of All-Encompassing Definitions*

When examining the role (and propriety) of monetary damages a principal form of redress for an investment treaty breach, it is important to begin with the question: what for? What forms of governmental conduct are considered to be impermissible and give rise to the state's obligation to indemnify the investor for the economic harm caused thereby? In addressing these questions, it is important to situate the discussion into the broader context of the evolution which international investment law has undergone in the past decades and the resulting change in the scope of protection it presently offers. As international investment law has become increasingly 'treatified' in its form and widespread in its global reach, some of the fundamental concepts at the core of the regime have changed dramatically. The notion of 'foreign property', for instance, has been supplanted by a broader and less tangible concept of 'foreign investment'.<sup>14</sup> The traditional focus on protection of foreign investment from direct and physical takings has shifted

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<sup>14</sup> The broadening scope of 'investment' and the resulting change in the protective scope of IIAs can be traced in such cases as *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the application for annulment, (Feb. 28, 2009); *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, (July 28, 2009). See M. Sattorova, *Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond*, 2 *ASIAN J. INT'L L.* 267 (2012) (examining the scope of the notion of investment and its overlap with trade in services and goods); J. D. Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 *HARV. INT'L L. J.* 257 (2010) (analysing the drafting history of the ICSID Convention and arguing that investment can encompass any economic activity).

onto indirect, regulatory interference by host states with various aspects of foreign investment.<sup>15</sup> Investment protection is no longer confined to prohibiting the most egregious forms of governmental misconduct as investors are entitled to redress in cases of unfair and inequitable treatment<sup>16</sup> and ordinary breaches of contract alike.<sup>17</sup>

The evolution of investment treaty law has produced disparate effects on the tests which arbitral tribunals apply in establishing the fact of expropriation. The scope of host states' monetary responsibility has significantly expanded as the doctrine of indirect and regulatory expropriation has come to dominate legal discourse and the reach of expropriation clauses has extended beyond major interferences with large-scale investment projects to what would have been previously regarded as relatively minor investor-state conflicts on a smaller economic scale.<sup>18</sup> Arbitral interpretations, however, have not caught up with these

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<sup>15</sup> See R. Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L. J. 64, 79 (2002); A. Hoffman, *Indirect Expropriation*, in STANDARDS OF INVESTMENT PROTECTION 156 (A. Reinisch ed., 2008) [hereinafter Hoffman]; V. Lowe, *Regulation or Expropriation?*, 55 CURRENT LEGAL PROBLEMS 447 (2002); V. Been & J. Beauvais, *The Global Fifth Amendment? The NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30 (2003). The rise of indirect, regulatory expropriations has led to changes in the wording of expropriation provisions in some of the recent generation IIAs. See e.g. the most recent model IIA of the United States, which contains a proviso that "except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation", available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

<sup>16</sup> See e.g., *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Award, (July 1, 2004) where the government was held responsible for a lack of stability and predictability characterising the investment taxation regime [hereinafter *Occidental Exploration*]. Likewise, in *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Ltd Şirketi v. Turkey*, ICSID Case No. ARB/02/5, Award and Annex, 19, ¶ 250 (Jan. 19, 2007), the government was found liable for 'a roller-coaster effect of the continuing changes in the legislation', including amendments relating to the legal status of the project company and the concession contract.

<sup>17</sup> Two landmark decisions which signalled about the broadening scope of investment treaty protection as regards contractual claims are *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, (Jan. 29 2004) [hereinafter *SGS v. Philippines*] and *SGS Société Générale de Surveillance SA v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, (Aug. 6, 2003).

<sup>18</sup> Following the liberalisation and opening of markets to foreign investment in 1990s, foreign enterprises are no longer limited to large-scale projects in the natural resources

transformations. Despite the shift from the notion of ‘property’ to a more amorphous and intangible concept of ‘investment’ and from ‘taking’ to indirect regulatory intervention, the understanding of expropriation as a taking of tangible assets continues to hold sway over the interpretation of expropriation provisions in the mainstream arbitral practice. This is particularly well illustrated in the test of ‘substantial deprivation’ which is commonly used by arbitral tribunals in analysing claims of indirect and regulatory expropriation.<sup>19</sup>

The substantial deprivation test seems to have been embraced in mainstream jurisprudence so as to provide the investor with a remedy in cases where impugned governmental measures pass a certain threshold, or in other words, where such measures constitute *substantial* deprivation. With its focus on the magnitude of deprivation, the test can be seen as an attempt to reach a compromise between a total exemption of regulatory measures from the compensation requirement and an imposition on the government of an obligation to indemnify the investor every time a regulation interferes with the use and enjoyment of an investment. Hence, a regulation is not deemed expropriatory unless it results in a *substantial* deprivation on the part of an investor. The test is thus, an adaptation of traditional international rules on the protection against expropriation to evolving forms (and varying degrees) of state interference with foreign investment.

Despite the attempts to adapt the expropriation doctrine to the changing reality of investor-state relations, the anachronistic focus on “deprivation” in determining the existence of an internationally proscribed host-state conduct

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sector but include diverse operations of a varied economic magnitude, ranging from services-based projects such as the provision of pre-shipment inspection services and road construction to salvage of historical artefacts.

<sup>19</sup> The substantial deprivation test is also known as the sole effect doctrine and has been applied in many expropriation cases, including *Metalclad Corporation v. Mexico*, ICSID Case No ARB (AF)/97/1, Award, ¶ 103 (Aug. 25, 2000) (the tribunal held that an expropriation would exist whenever the state interference with the use of investment ‘has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property’) [hereinafter *Metalclad*]. The similar approach was adopted in subsequent jurisprudence, including *Pope & Talbot Inc v. Canada*, Interim Award, Ad hoc—UNCITRAL Arbitration Rules, IIC 192 ¶ 102 (June 26, 2000); *Enron Corporation and Ponderosa Assets, LP v. Argentina*, ICSID Case No. ARB/01/3, Award, ¶ 245 (May 22, 2007); *Walter Bau AG v. Thailand*, Ad Hoc—UNCITRAL Arbitration Rules, IIC 429, Award, ¶ 10.16 (July 1, 2009); *BG Group plc v. Argentina*, Ad hoc—UNCITRAL Arbitration Rules, Final Award, ¶¶ 270-271 (Dec. 24, 2008); *Corn Products International Inc v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, ¶ 92 (Jan. 15, 2008); *Nykomb Synergetics Technology Holding AB v. Latvia*, S.C.C. Case No. 118/2001, Award, ¶ 120 (Dec. 16, 2003).

renders the test liable to a potentially very broad interpretation. This, in turn, may result in state being held liable for virtually *any* degree of loss or interference inflicted upon investors by governmental action. At the time when expropriation was predominantly in the form of direct interference with tangible property, the terms ‘deprivation’ and ‘expropriation’ were often used interchangeably.<sup>20</sup> In the age of pervasive regulation, however, the fact of deprivation alone ceases to provide a reliable benchmark for determining the existence of expropriation as a basis of state responsibility. Regulation—and other forms of indirect state interference with foreign investments—may cause varying degrees of deprivation on the part of an investor. Should any extent of deprivation lead to the state’s obligation to pay damages to the affected investor? A deprivation must be substantial, but with respect to what?<sup>21</sup> It has been correctly observed that the meaning of ‘substantial deprivation’ is relative.<sup>22</sup> If the host state withdraws one of an investor’s many licences, would such a withdrawal amount to a substantial deprivation? What if the investor’s licence remains intact but the host government adopts a new regulation significantly reducing the profitability of the investor’s business under that licence? In either case, the investor suffers a certain degree of deprivation. Not only is it unclear when the threshold of substantiality is deemed to be satisfied, but determining the existence of the requisite degree of deprivation is also problematic. Should the existence of a deprivation be ascertained by reference to an investment as a single unit, to an asset that such an investment comprises, or to the value of an investment?

One of the major problems with the magnitude of deprivation benchmark is that it can be easily circumvented, with ensuing possibilities of broadening the scope of the expropriation clause and thus facilitating the investor’s chance to obtain monetary redress for the impugned state interference. The investor can bypass the substantial deprivation test by resorting to so-called “conceptual severance”, whereby an investment is presented as consisting of several components, with each of these components possessing an economic value. Conceptual severance is thus an analytical process where:

[O]ne delineates a property interest consisting of just what the government action has removed from the owner, and then asserts that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually “severs” from the whole bundle

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<sup>20</sup> For an earlier study, see Verwey & Schrijver, *supra* note 11. More recently, similar findings were made by TRENDS IN INVESTMENT RULE-MAKING, *supra* note 12.

<sup>21</sup> See S. MONTE, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 265-6 (2009) [hereinafter MONTE].

<sup>22</sup> *Id.* at 188.

of rights just those strands that are interfered with by regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.<sup>23</sup>

The multifarious nature of international investment projects and the intricacy of corporate structuring utilised in channelling foreign investment across the globe, provide many opportunities to deploy conceptual severance legitimately and without any analytical strain. Once an investment is conceptually segregated into a number of strands, establishing the existence of the requisite degree of deprivation becomes straightforward as the investor is no longer required to show that the entire project has been substantially affected. This facilitates the investor's chances to successfully recover economic loss caused by governmental action without having to meet the substantiality threshold.

Driven as it would appear by the desire to curtail an uncontrolled expansion of the expropriation doctrine, some tribunals (and scholars) have opposed the use of conceptual severance.<sup>24</sup> Some tribunals, for instance, advocated a parcel-as-a-whole approach which requires that, to establish the existence of expropriation, the entirety of investment must be affected and not just its distinct parts. Hence, protection was denied to deprivations of a smaller magnitude (or the so-called partial expropriations).<sup>25</sup> Others stopped short of excluding partial deprivations from the scope of expropriation provisions, yet argued for limiting the category of partial expropriation to the interferences with assets that have a standalone value and are capable of being exploited independently from other assets.<sup>26</sup> It has been

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<sup>23</sup> M.J. RADIN, REINTERPRETING PROPERTY 127-8 (1993).

<sup>24</sup> See MONTT, *supra* note 21, at 188-91, 265-73; See also A. NEWCOMBE & L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 347-8 (2009) [hereinafter NEWCOMBE & PARADELL].

<sup>25</sup> See *e.g.*, Telenor Mobile Communications AS v. Hungary, ICSID Case No. ARB/04/15, Award, ¶ 67 (June 22, 2006) (holding that the investment ought to be viewed as a whole and, therefore, the proper test should examine whether, viewed as a whole, the investment had suffered substantial erosion of value). For discussion, see U. Kriebaum, *Partial Expropriation*, 8 J. WORLD INV. & TRADE 69, 74-6 (2007) [hereinafter Kriebaum]. Of more recent cases, the tribunal in *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 196 (Dec. 27, 2010) adopted a similar stance when it held that for an expropriation to exist the negative economic negative impact ought to be 'such as to deprive its investment of all or substantially all its value'.

<sup>26</sup> Kriebaum, *supra* note 25, at 83. Montt supports the idea that the common denominator can be found in the capacity of an asset to be exploited independently of the remainder of the investment. As he puts it, in establishing whether a deprivation is substantial only an identifiable *distinct* part of an investment should be used as a reference unit, see MONTT, *supra* note 21, at 270, emphasis original. Thus, a concession contract is a

argued, for example, that unlike the taking of one out of five oilfields and a withdrawal of one out of many licences owned by an investor, the withdrawal of tax rebates should not amount to a partial expropriation because a tax rebate cannot be exploited independently from the principal investment project.<sup>27</sup>

Laudable as they may be from a broader policy perspective, such attempts to confine the scope of expropriation to substantial deprivations are ultimately ineffectual. Beneath the insistence that an investment should not be severed and that expropriation should always involve a deprivation of ‘independently exploitable’ assets, lies an outdated understanding of investment as a single, tangible, and transferable property.<sup>28</sup> Such views betray a preoccupation with physicality of ownership and a failure to acknowledge the increasing importance of intangible assets. If the investor is entitled to recover the loss caused by the formal taking of one of its five mills, the same principle should arguably apply to the investor which suffers a diminution in value of its investment caused by a withdrawal of tax rebates. If a dispossession of one out of many tangible assets (such as an oilfield and a sugar mill) meets the substantial deprivation test<sup>29</sup>—or simply does not call for the application of such a test—then it could be argued that there should similarly be no need for satisfying the substantiality threshold in a case involving the loss of an intangible asset.

Conceptual problems with the outdated focus on physicality of ownership aside it is the presence of other treaty provisions that render the test of substantial deprivation inadequate as a mechanism to distinguish between permissible and impermissible state interferences. In cases involving minor or less than substantial deprivation, investors may rely upon the definition of investment and the fact that it does not distinguish between assets that ‘can be exploited independently’ and those that are ‘subordinate to an overall investment.’ Neither does the definition of investment confine treaty protection to the whole investment. Precisely because the definition of investment in BITs commonly includes ‘claims to money and the

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separate investment that can be individually expropriated, but bundles of rights within that contract are not autonomous and hence cannot be expropriated, *see id.*

<sup>27</sup> Kriebaum, *supra* note 25, at 83-4. *See also* Adam Scherer & Shane Rayman, *Tax Implications of Expropriation*, 56(4) CANADIAN TAX J. 870-92.

<sup>28</sup> As far back as in 1975, Weston criticised the tests of expropriation showing ‘an excessive adherence to the notion of “physicality” and “affirmative intervention.”’ *See* Weston, *supra* note 12, at 103, 118. For a somewhat similar approach, *see* F. Williams, *International Law and the Property of Aliens*, 9 BRIT. Y.B. INT’L L. 1, 25 (1928) (criticising as unsound a distinction between takings of tangibles and takings of intangibles, including a right to carry on a particular trade, and arguing that in both cases the substance remains the same).

<sup>29</sup> As in the hypothetical scenario discussed by Kriebaum at *supra* note 25.

performance under the contract' and 'investment returns', it is clear that not only an overall investment but also its distinct strands and rights arising thereof are entitled to protection.<sup>30</sup>

The wording of treaty provisions defining investment can be said to reflect the understanding that 'the key function of property is less the tangibility of things, but rather the capability of a combination of rights in a commercial and corporate setting and under a regulatory regime to earn a commercial rate of return.'<sup>31</sup> Indeed, if the parcel-as-a-whole approach and the notion of an asset's capacity to be exploited independently were to be accepted, a range of rights and interests arising from an investment would be left unprotected. Trademarks, goodwill, and commercial secrets are frequently included in the definition of investment.<sup>32</sup> Although these interests are subordinate to an overall investment and can hardly be exploited independently, excluding them from the scope of investment treaty protection by reference to the parcel-as-a-whole argument would run contrary to the letter of the relevant treaty instrument and defeat the principle of effective treaty interpretation.

Effectively, then, the substantial deprivation test cannot adequately limit the scope of expropriation clauses to state interferences of a certain magnitude. Just like a generous and elastic definition of investment, the wording of expropriation clauses in IIAs enables investors to use them in claiming redress for *any* degree of economic harm—not just substantial harm—caused by governmental interference. So long as the treaty definition of investment and expropriation clauses remain in their current form, nothing will prevent investors from tactically deploying such provisions in claiming monetary redress for even minor degrees of economic loss caused by host state action, with the resulting expansion in the scope of the treaty beyond the original intentions of state parties.

One can argue that the true reach of expropriation clauses remains little

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<sup>30</sup> The majority of BITs include claims to money and performance having an economic value in the list of covered investments. See the UK Model BIT (2005), the Germany Model BIT (2005) and the 1997 Model BIT of China.

<sup>31</sup> A. Kolo & T. Waelde, *Environmental Regulation, Investment Protection and "Regulatory Takings" in International Law*, 50 INT'L & COMP. L. Q. 811, 835 (2001). See also B. A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 9 (1959), referring to the German legal doctrine whereby the notion of ownership in the context of expropriation was understood to refer to 'every legally protected position of monetary value.' Such understanding of property and ownership is centred not on the object as such but rather on its value.

<sup>32</sup> See e.g., Protocol I of the Algeria—Germany BIT (signed 11 March 1996, entered into force 30 May 2002).

exploited. Yet the likelihood of the relevant provisions being invoked to push the boundaries of state responsibility further cannot be ruled out. Precedents have already been set in cases where monetary relief was granted for what was less than substantial deprivation<sup>33</sup> and where dormant treaty provisions were successfully summoned up to harness investment treaties in novel circumstances, broadening their protective compass.<sup>34</sup> At the time of laying the foundations of the modern investment protection regime, the drafters of early treaty instruments could perhaps only imagine that such instruments would be invoked in cases ranging from disputes over sovereign debt restructuring to mere breaches of contract.<sup>35</sup> The possibility of investors' successfully obtaining damages for *any* degree of economic harm and the resulting exposure of states to monetary liability renders it increasingly questionable whether the existing focus on pecuniary remedies can be justified as a low-cost mechanism to attract foreign investment and promote economic development in respondent states.

*C. Expropriation as Compensation for Loss Caused by Regulatory Conduct: Inadequacy of Traditional Formulations*

The benchmark of substantial deprivation, with its outdated preoccupation with physicality and permanence of ownership, is not the only factor to blame for the potentially very broad and intrusive reach of expropriation clauses and the actual and potential increase in cases where host government action would entail an obligation to pay damages to affected investors. While the currently prevailing arbitral tests on establishing the fact of expropriation are founded upon an easily bypass-able set of criteria, the wording of expropriation clauses is equally conducive to a very far-reaching interpretation of the underlying state commitment. From a broader perspective of the evolution in international investment law and the related need to revisit the rationales behind the investor's entitlement to monetary redress vis-à-vis host governments, the inadequacy of the

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<sup>33</sup> *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award, ¶ 129-134 (June 20, 2009) offers a most pertinent example of how the substantial deprivation test can be modified and circumvented: the tribunal found the respondent liable for an expropriation, even despite having acknowledged that the level of harm inflicted upon the investor did not rise to substantial deprivation [hereinafter *Saipem*].

<sup>34</sup> A recent decision in the *Bondholders* case seems to mark the next step in the expansion of the scope of investment treaty protection: the majority of the tribunal extended the notion of investment to sovereign debt instruments, and found mass challenges of governmental decisions on debt restructuring to be within the purview of the relevant investment treaty instrument. See *Abaclat and Others (formerly: Giovanna A. Beccara and Others) v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 364 (Aug. 4, 2011).

<sup>35</sup> See *supra* note 17, referring to SGS cases which involved ordinary breaches of contract elevated to international claims

expropriation standard and remedies it offers lies in its inability to accommodate an increasingly important role of the state as a regulator.

Indeed, a cursory analysis of the majority of investment treaty instruments reveals that expropriation clauses almost invariably dictate that any government-caused deprivation on the part of the investor be accompanied by the payment of compensation. The fact of uncompensated economic harm is thus sufficient to trigger the host state's international responsibility. A typical treaty clause on expropriation stipulates that:

Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law.<sup>36</sup>

Under the ordinary and effective interpretation of this provision, the state is allowed to expropriate (and such expropriation is considered to be lawful) only if the public purpose, non-discrimination, due process, *and* compensation requirements are duly satisfied. In practical terms, however, compensation is the dominant criterion. The plain meaning of the treaty terms suggests that expropriation becomes illegal unless accompanied by the payment of compensation.<sup>37</sup> For example, an expropriation can meet the public purpose, non-

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<sup>36</sup> The 2012 US Model BIT, available at <http://italaw.com/sites/default/files/archive/ita1028.pdf>.

<sup>37</sup> See e.g., *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award and Separate Opinion, ¶¶ 349-352 (Feb. 6, 2007) and *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/97/3, Award, ¶ 7.5.21 (Aug. 20, 2007). The *Vivendi* tribunal expressly held that non-payment of compensation would amount to a violation of the treaty. This view may be at odds with the approach taken by earlier international awards which found that non-payment of compensation ought not to render expropriation unlawful. For instance, the *Aminoil* award and some of the awards handed down by the Iran-United States Claims Tribunal, including *INA*, *Sedco*, *American International Group*, and *Starrett Housing* found that non-payment of compensation did not render an expropriation unlawful. These awards were rendered prior to the rise of investment treaties and at a time when customary international law on expropriation was in the state of flux. Under international investment treaties, however, the situation is different because such treaties expressly mandate compensation. See RIPINSKY & WILLIAMS, *supra* note 2, at 69 (observing that '[c]ases of indirect expropriation would, almost by definition, fall within the scenario of unlawful expropriation, because the expropriating State does not usually acknowledge the very fact of expropriation, and consequently does not provide for

discrimination and due process requirements, yet in accordance with the traditional view—supported by a treaty text and contradicted only by a handful of decisions—the non-payment of compensation may nevertheless, render such an expropriation illegal and give rise to the host state’s responsibility in international law.<sup>38</sup> As a result, the requirements of public purpose, non-discrimination and due process become almost irrelevant at the stage of determining a breach. Instead, they can merely affect the quantum of compensation payable to the investor for its expropriated investment.<sup>39</sup> Owing to the pivotal role of compensation in determining the very existence of expropriatory action, the traditional expropriation maxim translates into a rule that any deprivation caused by a governmental measure must always be accompanied by monetary redress.<sup>40</sup>

In contrast with the traditional views on expropriation, more recent approaches reveal an emerging tendency to focus on the character of a disputed governmental action and to assess its legality by reference to the non-discrimination, non-arbitrariness, and due process requirements. The nascent shift from the deprivation or compensation focused approaches towards recognition that economic loss alone should not form a basis of state responsibility can be discerned in a number of high-profile arbitrations.<sup>41</sup> Such a shift was particularly

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payment of any compensation.) Indeed, the ordinary reading of the expropriation standard in most BITs commands the finding of an illegal expropriation unless compensation has been provisioned.

<sup>38</sup> The finding of an international delict, here an uncompensated expropriation, would usually trigger the application of the Chorzow Factory principle of reparation: “...reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would ... have existed if that act had not been committed.” See *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

<sup>39</sup> See e.g., *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, ¶ 476 (Oct. 2, 2006). For a distinction between lawful and unlawful expropriation, see e.g., A. REINISCH, *Legality of Expropriations, in STANDARDS OF INVESTMENT PROTECTION* (2008); A. Sheppard, *The Distinction between Lawful and Unlawful Expropriation, in INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY* 170 (C. Ribeiro ed., 2006).

<sup>40</sup> If a governmental measure is discriminatory or violates due process, then the investor may be entitled to a higher compensation. See RIPINSKY & WILLIAMS, *supra* note 2, at 65-6; P. M. Norton, *Back to the Future: Expropriation and the Energy Charter Treaty, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE* 374 (T. Walde ed., 1996) (noting that non-discrimination, public purpose and due process are considered ‘...primarily as adding an additional sense of grievance in cases where the host state has, in the first instance, failed to pay the investor “prompt, adequate, and effective compensation.” Perhaps most significantly, that sense of grievance could affect an arbitral tribunal’s determination of an investment’s fair market value’).

<sup>41</sup> See *Methanex Corporation v. United States*, Ad hoc—UNCITRAL Arbitration Rules, Final Award on Jurisdiction and Merits, IIC 167, ¶ 7 (Aug. 3, 2005) [hereinafter

prominent in *Methanex Corporation v United States*, where the tribunal held that ‘a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process ... is not deemed expropriatory and compensable.’<sup>42</sup> A similar move can be traced in some of the recent IIAs, including the latest US and Canadian treaties, which expressly clarify that some instances of regulatory or otherwise indirect governmental interference with investment should not be considered an expropriation.<sup>43</sup> Unlike the deprivation-focused traditional formula, the emerging test of expropriation is based on the understanding that a mere fact of economic harm or other form of deprivation is not sufficient to justify the imposition of monetary liability on the host state and that a disputed conduct must also be tainted by discrimination, arbitrariness, or lack of due process.

It is worth noting that the mere fact of loss and deprivation will not suffice to establish a breach of non-expropriatory standards of treatment such as FET and the prohibition of arbitrary and discriminatory measures. In contrast with expropriation, which is traditionally deemed as internationally wrongful merely because something of value has been taken without compensation, international wrongfulness of most non-expropriatory breaches<sup>44</sup> hinges on the character of a disputed governmental action, i.e. the presence of discrimination, arbitrariness, and a breach of due process. This emergent theory of state responsibility for an investment treaty breach is premised on the idea that host governments should exercise their regulatory functions subject to the restraints of international law, including the principles of non-discrimination, non-arbitrariness, and due process of law. The difference in the legal bases of state responsibility under the traditional

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*Methanex*]; *Saluka Investments BV v. Czech Republic*, PCA—UNCITRAL Arbitration Rules, Partial Award, ¶ 255 (March 17, 2006) (the latter holding that [i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare) [hereinafter *Saluka*].

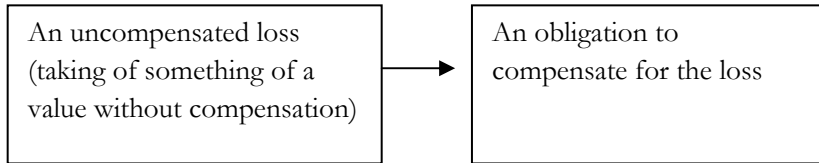
<sup>42</sup> *Methanex*, *supra* note 41, ¶ 255. Other cases adopted a similar approach: *Link-Trading Joint Stock Company v. Moldova*, Ad hoc—UNCITRAL Arbitration Rules, Final Award, ¶ 64 (April 18, 2002); *Middle East Cement Shipping and Handling Co Sa v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 153 (April 12, 2002). For a critique, see U. Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 J. WORLD INV. & TRADE 717 (2007) [hereinafter Kriebaum, *Regulatory Takings*].

<sup>43</sup> New model treaties of the US and Canada contain an express proviso that ‘Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.’

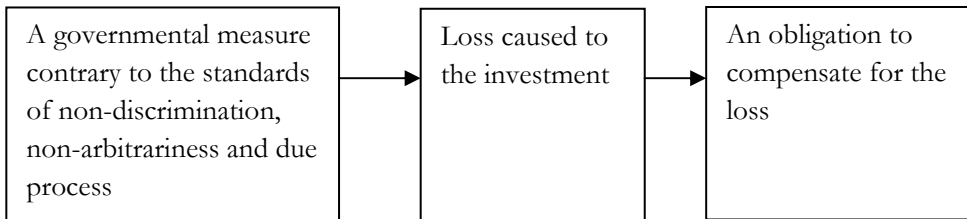
<sup>44</sup> Except for umbrella clauses, which can lead to the host state liability for an ordinary breach of contract, even where the disputed breach involves no arbitrariness, discrimination or lack of due process on the part of the state.

expropriation clauses and the more emergent theory of investment treaty breach can be illustrated as follows:

*The traditional expropriation standard*



*The emerging expropriation model and non-expropriatory standards of treatment such as FET*



It is clear that the ultimate purpose of the investor claims under both expropriation and non-expropriatory standards is to recover economic loss. Yet there is asymmetry in the foundation of state responsibility for expropriation and that for non-expropriatory breaches of treaty. This asymmetry is created by the fact that the notion of economic loss dominates the expropriation analysis, the character of a government's conduct remaining largely irrelevant. Furthermore, under the traditional expropriation clauses, monetary redress is both a condition of legality ("expropriation is illegal unless compensated for") and a remedy ("an uncompensated expropriation must be remedied by the payment of compensation").<sup>45</sup> In contrast, for the host state to be held liable under the more recent expropriation clauses—and under the FET standard—the existence of an uncompensated economic loss alone will not suffice and further evidence of arbitrariness, discrimination, or lack of due process will be required.

A principal disadvantage of the traditional expropriation model—which continues to dominate in investment treaty texts even after recent US and

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<sup>45</sup> There is disagreement as to whether an illegal expropriation should attract a different remedy, i.e. higher damages. For discussion, see RIPINSKY & WILLIAMS, *supra* note 2, at 65-6.

Canadian IIAs embraced a new model—is that it does not account for the fact that an economic loss can be incurred due to the interplay of market forces and individual risk. In a modern global economy, this interplay is largely informed by the interventionist role of a state. Regardless of whether one supports, or opposes, state intervention in economic affairs, it is hardly possible to deny that regulation has become a prominent characteristic of governance.<sup>46</sup> Governments frequently adjust the outcome of market processes by ‘taxing here, subsidizing there, regulating everywhere.’<sup>47</sup> Such is the depth and breadth of regulation in a contemporary state that it can justly be regarded as an inalienable element of *any* business environment. With the rise of regulatory state, a risk that investment may be affected by regulation can be seen as part of a normal business risk which the investor needs to take into account and, if necessary, insure against. Foreign investors, like their domestic counterparts, are not insulated from the effects of omnipresent regulation. It is therefore unreasonable for investors to expect that the state will always bear the cost of regulation by paying compensation every time regulatory action affects the value of investments. Arbitral tribunals and scholars have frequently stressed the fact that investment treaties are not insurance policies against business risks.<sup>48</sup> It is commonly acknowledged that investment treaties are not intended to insulate investors from risks inherent in conducting business abroad; rather, they guarantee against treatment that is contrary to the basic principles of international law, such as non-discrimination, non-arbitrariness and due process of law. As regulation has become an inalienable part of a business environment, investors must not be able to claim compensation every time a governmental decision negatively affects the value of their investment. Herein lies the inadequacy of the traditional expropriation clauses. Once it is recognised that *any* regulation can entail negative change in the value of an investment,<sup>49</sup> the

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<sup>46</sup> See generally B. A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) [hereinafter ACKERMAN]. See further P. Muchlinski, ‘Caveat Investor?’ *The Relevance of the Conduct of the Investor Under The Fair and Fair Equitable Treatment Standard*, 55 INT’L & COMP. L.Q. 527-28 (2006) (noting that ‘administrative action is a highly complex, and virtually indispensable, part of the modern governance’) [hereinafter Muchlinski].

<sup>47</sup> ACKERMAN, *supra* note 46, at 1.

<sup>48</sup> J. E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 46 (2008) (arguing that ‘normally, free market advocates view markets as more efficient than government in providing insurance. Is there a rationale, in this case, to rely on publicly provided insurance?’). See *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000) (holding that BITs ‘are not insurance policies against bad business judgments’); See also Muchlinski, *supra* note 46, at 542.

<sup>49</sup> A. Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. –FOREIGN INV. L. J. 46 (2005) (observing that ‘many regulations result in some form of wealth deprivation’ and arguing that deprivation alone does not provide a sound policy

existence of the economic loss alone ceases to form a justifiable basis for an obligation to compensate.<sup>50</sup> The expropriation standard, with its emphasis on the fact of deprivation as a dominant criterion, translates into a duty not to regulate unless compensation is provided for. By disregarding the evolving role of state as a regulator, the requirement of monetary redress for any government-caused deprivation transforms investment treaties into insurance policies against a regulatory risk. The notion of ‘internationally proscribed conduct’ from which states are expected to refrain becomes so broad that it nullifies the benefits of foreign investment and the prospects of economic development.

Understanding the role of regulation in economic relations both globally and at the national level, however, does not mean the exemption of states from responsibility to investors. It has been rightly observed that a ‘blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation.’<sup>51</sup> Long before the rise of BITs and proliferation of investor-state arbitration, late Professor Brownlie observed that ‘whatever risks the alien investor may be expected to reckon with, it is arguable that he cannot be expected to accept “a distorted and unforeseeable manipulation” of the legal procedures of the host state.’<sup>52</sup> What is (and should be) prohibited under international law—any regulatory measures entailing a diminution in the investment’s value or arbitrary, abusive and discriminatory measures causing an economic loss? Unlike the traditional effect-orientated expropriation analysis, the emerging concept of investment treaty breach focuses on the nature, or character, of a host government’s conduct and thus does not aim to exempt all regulatory measures from state responsibility. Rather, this concept seems to be based on the understanding that investors need to be protected against acts and omissions that are discriminatory, arbitrary, or contrary to due process of law, or which in other words reflect a ‘distorted and unforeseeable manipulation’ of the legal order by the host government.

Yet as long as investment treaties continue to include traditional expropriation

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rationale for providing compensation).

<sup>50</sup> D. SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE 33 (2008) (pointing out that ‘the takings rule potentially poses a significant barrier for the ability of states to intervene in the marketplace’)[hereinafter SCHNEIDERMAN].

<sup>51</sup> *Pope & Talbot Inc v. Canada*, Ad hoc—UNCITRAL Arbitration Rules, Interim Award, ¶ 99 (June 26, 2000).

<sup>52</sup> Ian Brownlie, *Treatment of Aliens: Assumption of Risk and the International Standard*, in INTERNATIONAL LAW AND ECONOMIC ORDER: ESSAYS IN HONOUR OF F.A. MANN 319 (W. Flume *et al.* eds., 1977), referring to the Separate Opinion of Judge Gros in the *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 4, 274 (July 24) (emphasis added).

clauses—with uncompensated economic harm featuring as a principal trigger for state responsibility—nothing will preclude investors from deploying such provisions to obtain redress for losses occasioned by virtually *any* form of governmental activity. With their exclusive focus on the fact of uncompensated deprivation as the basis of a host state's monetary liability, expropriation provisions may lay dormant for a while but ultimately remain a potent device in the hands of investors and arbitral tribunals. From a broader policy perspective, the inability of the traditional expropriation clauses to serve as a reliable normative basis for distinguishing between internationally proscribed governmental conduct and permissible regulatory intervention, casts doubt on existing justifications behind the right to claim damages as a principal investment treaty remedy. Indeed, if expropriation can potentially embrace a very broad range of governmental conduct, exposing host states to the risk of monetary liability for the correspondingly broad range of regulatory activities, can investment treaties and their remedial mechanisms still be regarded as a relatively inexpensive commitment device and an instrument to promote economic development?

### III. OVERLAP AND INTER-SUBSTITUTABILITY OF EXPROPRIATION AND NON-EXPROPRIATORY STANDARDS: RESHAPING THE LIMITS OF TREATY PROTECTION BY NON-STATE PARTIES?

Whilst failing to offer an adequate mechanism for distinguishing between proscribed governmental conduct and permissible interference with foreign investment—and in spite of a rise in the recourse to non-expropriatory standards of treatment—expropriation provisions continue to be seen as a key investment protection guarantee. This resilience of expropriation clauses can indeed be the result of 'a reluctance to give up a paradigm of law that was developed in the context of direct expropriations, despite the fact that their legal form has meanwhile undergone a change.'<sup>53</sup> This reluctance, however, entails a number of conceptual and practical problems, including the growing disparity between investment treaty remedies and justifications on which they have traditionally been premised. In particular, the co-existence of expropriation and non-expropriatory standards of treatment considerably increases the investor's chances of obtaining a monetary damages award for detrimental economic impact of governmental conduct.

Even though expropriation clauses could alone be relied upon in challenging practically any form of state interference, non-expropriatory standards usually offer an even more attractive and potent means of redress. First, establishing a breach of

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<sup>53</sup> Hoffman, *supra* note 15, at 152.

a non-expropriatory standard of treatment, such as FET, does not involve the need to satisfy the substantial deprivation test (or the need to persuade arbitrators that the test is both conceptually and practically ill-conceived). Tribunals too, seem to regard expropriation as a serious international wrong and prefer to hold the state responsible on alternative grounds,<sup>54</sup> even where the amount of damages awarded to the investor is substantial and thus invites the finding of expropriation.<sup>55</sup> Yet, notwithstanding the relative decline in the number of successful expropriation claims, investors continue to routinely raise allegations of expropriation, and it is unlikely that the standard will ever be completely supplanted by non-expropriatory standards of treatment. It has been suggested that the resilience of expropriation and its ubiquitous presence in investment treaty texts is a “by-product of intended redundancy on the part of over-cautious treaty drafters”.<sup>56</sup> One consequence of this intended redundancy and overcautious drafting is that expropriation may be deployed as a “contingency” avenue of redress, in cases where other customarily used possibilities are foreclosed by the restrictive wording of relevant treaty provisions. Despite the rise of non-expropriatory standards of treatment as a convenient route to obtaining redress against a host government, the continuing relevance of expropriation clauses is not limited to occurrences of nationalisation<sup>57</sup> which are rare by now; but also lies in its ability to supply investors with a means

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<sup>54</sup> Unless recourse to alternative grounds is foreclosed by the restrictive dispute settlement clause such as in IIAs where expropriation is the only cause of action available to a claimant-investor. *See infra* note 56.

<sup>55</sup> In *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, ¶ 410 (May 12, 2005) the tribunal rejected a claim of expropriation as the degree of loss incurred by the claimant did not rise to the level of a substantial deprivation. Nevertheless, Argentina was held responsible for the violation of the FET standard, including a failure to ensure clarity and predictability of the investment framework. Although the degree of deprivation incurred by the investor did not amount to an expropriation, the tribunal awarded compensation in the amount corresponding to the fair market value of the investment – a traditional expropriation remedy. It held that ‘while this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses’.

<sup>56</sup> T.J. Grierson-Weiler & I.A. Laird, *Standards of Treatment*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 269 (P. Muchlinski et al. eds., 2008).

<sup>57</sup> Despite a relative decline in the number of expropriations, the last decade witnessed incidences of nationalisation, including in the UK banking sector and more recently, the taking by Argentine of YPF SA, an oil company in which Spanish shareholders had a significant stake. *See* C. Ruano & J. Stempel, *Repsol sues Argentina over giant YPF seizure*, available at <http://www.reuters.com/article/2012/05/15/us-repsol-ypf-idUSBRE84E1KC20120515> (May 15, 2012). For the British bank nationalisation, *see* N. J. Calamita, *The British Bank Nationalizations: An International Law Perspective*, 58 *INT'L & COMP. L.Q.* 119 (2009).

of bypassing certain limitations expressly agreed to between contracting state parties.

One such limitation is a restricted access to investor-state arbitration. Investment treaties may follow the traditional drafting patterns and contain the usual arsenal of safeguards, yet their provisions on dispute settlement may limit the availability of investor-state arbitration only to a very narrow category of disputes. For instance, there are IIAs that allow investor-state arbitration only in relation to expropriation disputes<sup>58</sup> or disputes where the compensation for an expropriation is at issue. IIAs also may contain carve-out provisions for taxation measures so that the investor can litigate a dispute arising from a tax measure, only if that measure constitutes an expropriation.<sup>59</sup> This means that, despite being included in the treaty text, FET, non-discrimination and non-arbitrariness provisions cannot be invoked by the investor in arbitration against the host state. Since such treaties preclude the recourse to non-expropriatory standards of treatment in investor-state arbitration, a claim of expropriation provides the sole ground on which the investor can seek redress for losses caused by host government conduct. Thus, the otherwise declining and dormant expropriation provisions can be invoked to overcome the limited consent to arbitration, even where a disputed governmental conduct falls short of constituting an expropriation in the traditional sense (i.e. the degree of deprivation sustained by an investor is not substantial and no physical transfer of assets has occurred).

*Saipem v. Bangladesh* offers the most pertinent example of how expropriation provisions can be deployed to overcome the limits of treaty protection and thus

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<sup>58</sup> For an example of the restrictive dispute settlement clause limiting arbitration to disputes arising from expropriation, to the exclusion of disputes that may stem from a breach of other substantive guarantees, see *China – Australia BIT (1988)*, Article 12 (2) (a). See also U. Kriebaum, *Regulatory takings*, *supra* note 42, at 717-9 (noting that notwithstanding a drop in the number of expropriation awards, the standard of expropriation retains its importance as some IIAs provide no binding dispute settlement for breaches other than expropriation). A similar problem may arise in a situation where an investor seeks indemnification under an insurance policy, including the OPIC and MIGA schemes, and the finding of an expropriation is instrumental.

<sup>59</sup> See e.g. *EnCana Corporation v. the Republic of Ecuador*, LCIA Case No. UN 3481, Award, (Feb. 3, 2006). See also *Fireman's Fund Insurance Company v. Mexico*, ICSID Case No ARB(AF)/02/01, Award, ¶ 203 (July 17, 2006) where a dispute arose in connection with the provision of financial services and the tribunal was competent to decide only claims of expropriation. Although the disputed conduct did not amount to an expropriation, the tribunal noted that it could give rise to a claim of discrimination under Articles 1102, 1105, and 1405 NAFTA. However, these provisions fell outside the tribunal's competence.

enable investors to obtain redress even in cases where contracting states agreed to be outside the scope of the relevant IIA.<sup>60</sup> At the heart of the dispute was interference by the Bangladeshi courts in commercial arbitration between the investor and the national oil company, Petrobangla. After having failed to obtain redress through the arbitration proceedings, Saipem initiated investor-state arbitration directly against Bangladesh, contending that the interference with its arbitration rights amounted to various breaches of the Italy-Bangladesh BIT. Under that treaty, expropriation was the only ground on which the investor could initiate arbitration vis-à-vis the host state. Although the conduct of the Bangladeshi courts was a straightforward case of denial of justice and a breach of FET, the ICSID tribunal preferred to classify it as a judicial expropriation. Had it not done so, the investor's claim would have to be dismissed. The need to circumvent the limited consent to arbitration and other constraints<sup>61</sup> rendered recourse to the expropriation clause not only highly desirable but necessary as a condition for obtaining redress against the host state. The *Saipem* award thus epitomises the role of expropriation in the emerging taxonomy of investment treaty protections. Avoided in the cases where FET and other standards are more convenient due to their breadth and the elasticity of applicable tests, the expropriation clause can be deployed to fill the gaps in investment protection, even where such gaps have been expressly agreed to by contracting state parties in the relevant treaty instruments.

The possibility of a tactical deployment of the expropriation standard in lieu of non-expropriatory standards of treatment and vice-versa, renders the notion of 'internationally proscribed conduct' increasingly elastic and broad. Expropriation is not only open to a liberal and far-reaching interpretation in its own right, but its capacity to substitute non-expropriatory standards also furnishes investors with a contingency route to ensure almost uninhibited access to investment treaty arbitration and its remedial mechanisms. This interchangeability and complementarity of expropriation and non-expropriatory standards of treatment considerably enhances investors' opportunities to obtain monetary relief against host states and ultimately casts doubt on the validity of the existing justifications for the right to claim damages. As expropriation provisions are deployed to trample the expressly agreed limits of treaty protection, the boundaries of what is considered as 'internationally proscribed conduct' are being pushed further, resulting in a greater exposure of host states to monetary responsibility. Monetary relief may be an adequate means of enforcing state commitments towards

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<sup>60</sup> *Saipem*, *supra* note 33.

<sup>61</sup> *Id.* The admissibility of a denial of justice claim—in line with arbitral caselaw—was conditional upon the exhaustion of local remedies. For the investor's claim to succeed, a sympathetic tribunal would be compelled either to disagree expressly with existing arbitral practice on denial of justice or to couch its finding of a breach in terms of expropriation which did not require the exhaustion of local remedies.

investors, yet the way in which such commitments can be retrospectively redefined to accommodate investors' monetary claims is questionable.

#### IV. BROAD, OVERLAPPING AND INTER-SUBSTITUTABLE: NON-EXPROPRIATORY STANDARDS OF TREATMENT AND THE EXPANDING SCOPE OF STATE RESPONSIBILITY IN INVESTMENT TREATY LAW

When discussing the emergent theory of investment treaty breach, which seems to lie beneath the novel approaches to formulating expropriation clauses, it was noted above that non-expropriatory standards of treatment too, offer a better alternative to the absolutism of the traditional deprivation-focused concept of expropriation.<sup>62</sup> Indeed, most non-expropriatory standards, including FET and the prohibition of arbitrary and discriminatory measures, are by definition focused on the character of governmental conduct, rather than on the resulting economic loss. A broader analysis produces a different picture. Compared with traditional expropriation clauses, the non-expropriatory standards of treatment are just as malleable, mutually intersubstitutable, and capable of offering a means of overcoming the expressly fixed limits of investment treaty protection. This enables investors to benefit from monetary relief in situations not envisaged by contracting states parties. In the following sections, the open-ended nature and exceptionally elastic use of key non-expropriatory standards will be analysed to show a dramatic change in the terms of a grand bargain on which investment treaty law and its remedies have been founded. The principal argument is that non-expropriatory standards of treatment have evolved into far-reaching guarantees, thus widening the scope of state responsibility in international law. The interpretation of non-expropriatory standards of treatment in arbitral jurisprudence points to the evolution in judicial perceptions of what constitutes 'internationally proscribed conduct' for which host states should be held responsible. This evolution is inextricably linked to shifting perceptions of investment treaty objectives, which provides another vantage point for questioning the validity of rationales underpinning the right to damages that investors enjoy under IIAs.

##### *A. FET: From an International Minimum to a Promise of Good Governance*

With its track record of leapfrogging from a contentious international minimum standard to an individually enforceable guarantee of stable, transparent, and consistent policymaking; the fair and equitable treatment (FET) standard captures the zeitgeist of recent transformations in international investment law. Open-ended, multifaceted, and overarching, FET is an epitome of private ordering

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<sup>62</sup> See *supra* notes 37-40 and accompanying text.

in international law on a hitherto unprecedented scale. While the protection of investment under traditional international law was for a long time practically synonymous with the protection against uncompensated expropriation,<sup>63</sup> FET has become the leading non-expropriatory standard of treatment to such an extent that ‘not to invoke FET where it is available under an applicable treaty would probably have to be considered as amounting to malpractice.’<sup>64</sup> This unparalleled reach of the FET standard has already generated a vast body of discussion among academics and practitioners.<sup>65</sup> Originally conceived as the politically most acceptable branding alternative to the international minimum standard—and as a means of alleviating the opposition to the latter from various groups of states—FET came to encompass much more than customary international guarantees against denial of justice, arbitrariness, and discrimination. Arbitral tribunals have construed the standard (1) to require protecting investors against state conduct that displays ‘a relatively lower degree of inappropriateness’ in comparison with the higher threshold required in establishing a violation of customary international law;<sup>66</sup> and (2) to elevate good governance standards, such as transparency, predictability, consistency, and even-handedness, into enforceable international obligations, the violation of which would form the basis of the investor’s claim for damages.<sup>67</sup> On one hand, the breadth of the notions of fairness and equity renders

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<sup>63</sup> Schreuer, *supra* note 9.

<sup>64</sup> *Id.* at 2. See also S. Fietta, *Expropriation and the “Fair and Equitable” Standard: The Developing Role of Investors’ “Expectations” in International Investment Arbitrations*, 23 J. INT’L ARB. 375, 399 (2006) (noting that where doubts exist as to whether the expropriation threshold can be satisfied ‘the investor would be advised to construct its investment treaty complaint around a self-standing claim of violation of the fair and equitable standard’).

<sup>65</sup> For some of the leading contributions, see R. Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT’L L. 87 (2005); S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT’L L. 99 (1999); C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INV. & TRADE 357 (2005); B. Choudhury, *Evolution or Devolution: Defining Fair and Equitable Treatment in International Investment Law*, 6 J. WORLD INV. & TRADE 297 (2005); A. Orakhelashvili, *The Normative Basis of “Fair and Equitable Treatment”: General International Law on Foreign Investment*, 46 Archiv des Völkerrechts 74 (2008).

<sup>66</sup> See *Saluka*, *supra* note 41, ¶ 293 (stating that FET ought to be construed as a guarantee protecting investors against state conduct that displays ‘a relatively lower degree of inappropriateness’ in comparison with the higher threshold required in establishing a violation of customary international law’).

<sup>67</sup> Transparency, stability, predictability, consistency have been construed as elements of FET in a number of arbitral cases. See *Metalclad* *supra* note 19, ¶¶ 71-99; *Técnicas Medioambientales Tecmed SA v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 154-164 (May 29, 2003) 10 ICSID Rep. 130; *Occidental Exploration*, *supra* note 16, ¶¶ 184-191 (July 1, 2004). For a critique, see MONTI, *supra* note 21 (stressing that an autonomous theory of FET ‘does not qualify as a system of objective and accessible commands, commands which can be seen to flow from collective agreement rather than from exercise

the standard open to very liberal interpretation, widening the scope of host government actions to international arbitral review and to monetary liability. On the other hand, owing to its wide remit, FET has indeed become ‘a short-hand formula for the combined legal effects of all other standards of treatment’ as it can be effectively invoked in lieu of expropriation, non-arbitrariness, non-discrimination, and even sanctity of contract or umbrella provisions.<sup>68</sup>

The notions of fairness and equity being broad and flexible enough to protect investors from *any* degree and form of interference by the host state, FET can in principle “supplant”<sup>69</sup> the prohibition of expropriation and render other non-expropriatory standards largely redundant. Yet, if retained as it is alongside the expropriation clauses (and other standards) as opposed to supplanting them, FET offers an unparalleled degree of protection of foreign investment from economic harm that governmental interference may occasion. Indeed, the standard is readily available to challenge actions of the executive, legislature and the judiciary.<sup>70</sup> The types of conduct that can be condemned as unfair and inequitable range from a gross denial of due process to a failure to ensure good governance standards.<sup>71</sup> In cases where the otherwise unfettered reach of FET is circumscribed by the restrictive wording of certain treaty provisions or arbitral tests (such as narrow dispute settlement clauses and the exhaustion of local remedies requirement), it can in most cases be substituted by the expropriation standard to plug the relevant hole in the investment protection regime.

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of discretion or preferences by those persons who happen to be in position of authority’). See also Z. Douglas, *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko, and Methanex*, 22 ARB. INT’L 27, 28 (2006) (observing that ‘transparency ‘is actually not a standard at all; it is rather a description of a perfect public regulation in a perfect public world, to which all states should aspire, but very few (if any) will ever attain’).

<sup>68</sup> For instance, some tribunals suggested that a breach of contractual undertakings can be within the scope of the FET provision. See *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6, Objections to Jurisdiction, ¶ 162 (Jan. 29, 2004) 8 ICSID Rep 518 (2005); *Noble Ventures Inc v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 182 (Oct. 5, 2005).

<sup>69</sup> The term is borrowed from SCHNEIDERMAN, *supra* note 50, at 33.

<sup>70</sup> See e.g. *AMTO LLC v. Ukraine*, Final Award, SCC Case No. 080/2005, (March 26, 2008) (illustrating the use of FET in challenging legislative action); *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, (April 30, 2004) (exemplifying the application of FET to judicial conduct); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, (July 29, 2008) (FET invoked in claiming redress for the acts of the executive bodies).

<sup>71</sup> See e.g., *Occidental Exploration*, *supra* note 16; *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, (June 26, 2003).

It was prior to the boom of investment arbitration cases that Judge Higgins observed in her opinion in the *Oil Platforms* case that “the key terms “fair and equitable treatment to nationals and companies”... are legal terms of art well known in the field of overseas investment protection.”<sup>72</sup> However, the precise import of these terms was yet to be uncovered in the course of subsequent proliferation of investor-state arbitrations. Many an arbitral panel has agreed, that the threshold of illegality that needs to be shown to establish a breach of the FET standard is no longer as high as it used to be before the dawn of investment treaty law and arbitration.<sup>73</sup> Owing to its evolved and staggeringly broad compass, flexibility, and its ability to substitute (and be substituted by) other standards of treatment, FET pushes the boundaries of states’ international responsibility before private business actors. Such expansion in turn generates a welter of questions; including whether and to what extent the investor’s right to claim damages against host states is still justified, given that the objectives of investment protection regimes have dramatically evolved and the notion of ‘internationally proscribed conduct’ has come to encompass a host state’s failure to ensure compliance with good governance standards.

*B. Sanctity of Investor-State Contracts: Ordinary Breaches of Contract as ‘Internationally Proscribed Conduct’*

Although the combination of expropriation clauses and the FET standard already renders the protective scope of investment treaties very broad and flexible, these provisions are usually accompanied by stand-alone umbrella clauses, also known as sanctity of contract guarantees. Despite their deceptively narrow remit, umbrella clauses may considerably expand the protective scope of investment treaties, widen the scope of their dispute settlement provisions, and increase the range of situations where host states may be held to pay damages to investors. Indeed, the existing varieties of umbrella clauses include those that transform a mere breach of investor-state contract into an international delict, and those that go a step further and make it internationally wrongful for a host state to fail to ‘create and maintain in its territory a legal framework apt to guarantee to investors

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<sup>72</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, 1996 I.C.J. 803, 858 (Separate Opinion of J. Higgins).

<sup>73</sup> *LFH Neer & Pauline v. United Mexican States* (1926), 21 AM. J. INT’L L. 555 (1927) is well known as an early customary international law authority which required that a high threshold ought to be satisfied before a breach of the international minimum standard could be established. A number of tribunals, including *Mondev International Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 116 (Oct. 11, 2002), as well as scholars held that the content of the minimum standard has since evolved and no longer requires showing outrageousness and other extreme forms of illegality in the state behaviour as a pre-condition for establishing a breach of FET.

the continuity of legal treatment'.<sup>74</sup> In this sense, umbrella clauses provide the most apt illustration of the increasingly changing contours of the notion of 'internationally wrongful conduct' for which states would have to compensate foreign investors.

A typical umbrella clause requires that each contracting party observe any obligation it may have entered into with regard to an investment of an investor of another contracting party.<sup>75</sup> In its original design, the primary objective of umbrella clauses was to protect against expropriation of contractual rights and to ensure that the same remedy as in the case of expropriation—full compensation—was available to foreign investors in the event of a state reneging on its contractual promises.<sup>76</sup> Traditionally, a breach of contract *per se* was not sufficient to give rise to an international wrong for which the state could be held responsible. Customary international law was long characterised by states being reluctant to intervene in cases involving an alleged breach of contract with the host state.<sup>77</sup> Despite some schools of thought postulating the internationalisation of investor-state contracts, the prevailing view was that a breach by a host state of a contract with a foreign investor would not amount to a breach of international law.<sup>78</sup> Rather, something

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<sup>74</sup> See Article 2 (4) of the Italy–Jordan BIT, discussed in *Salini Costruttori SpA and Italstrade SpA v. Jordan*, ICSID Case No. ARB/02/13, Objections to Jurisdiction, ¶ 126 (Nov. 15, 2004).

<sup>75</sup> See 2005 UK Model BIT, Article 2(2); 1997 Netherlands Model BIT, Article (3)4; 2005 Germany Model BIT, Article 7(2).

<sup>76</sup> See T. Walde, *The 'Umbrella' (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 1(4) TRANSNAT'L DISP. MGMT. 115-6 (2004) (noting that an umbrella clause was a reaction to nationalisations and expropriations of concession rights and was devised to counter unilateral breaches of concession contracts) [hereinafter Walde].

<sup>77</sup> See E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 284 (1915); M. WHITEMAN, *DAMAGES IN INTERNATIONAL LAW* 1558 (1943); C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 47- 48 (1928); K. S. Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260, 267 (1958); F. A. Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 577 (1960); R. Jennings, *State Contracts in International Law*, 37 BRIT. Y.B. INT'L L. 156, 159 (1961).

<sup>78</sup> J. CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 96 (2002); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 523-4 (6th ed. 2003); C. F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 107-141 (2nd ed. 2004); STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* 111 (1987). For the UK position on a breach of state contracts, see D. W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT. Y.B. INT'L L. 49, 58 (1988). Compare Memorial of United Kingdom, *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1951 I.C.J. Pleadings 86-93 (July 22, 1952).

more than a mere breach of contract (such as an arbitrary termination or confiscation of the contractual rights, or the denial of justice) was required to give rise to the state's international responsibility.<sup>79</sup>

It was precisely because neither earlier treaties nor customary international law had provided for the state's international responsibility for a mere breach of contract without something more, that drafters of prototype IIAs resorted to the concept of umbrella clauses. By enabling an investor to arbitrate its contract claims directly against a host state, international investment treaties effectively bring contract claims within the ambit of international law. Thus, umbrella provisions offer an additional layer of protection by affording an investor a remedy for breach of contract which may not readily be characterised as an expropriation or other international delict. In other words, umbrella clauses provide investors with an internationally enforceable means of redress for an ordinary contractual breach even if there is no violation of substantive treaty provisions. This adds yet another facet to the concept of 'international proscribed conduct' for which host states may be held responsible.

Although umbrella clauses were devised as a safeguard against an uncompensated expropriation of contractual rights, modern investment treaty practice exhibits that, in many cases, the idea of umbrella protection has outgrown the original intentions of its creators. While the 1959 German-Pakistan BIT contained a 'sanctity of contract' clause binding the contracting state parties to observe obligations in contracts concluded with foreign investors,<sup>80</sup> some of the more recent investment treaties tend to ascribe a wider meaning to umbrella clauses by imposing an obligation to observe undertakings entered into by third parties.<sup>81</sup> There are also treaties where an umbrella provision transmutes into a state obligation to 'create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.'<sup>82</sup>

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<sup>79</sup> See L. B. Sohn & R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 554, 566-7 (1961); STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF STEPHEN M. SCHWEBEL 425-35 (1994); C. F. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 79-84 (1967).

<sup>80</sup> An umbrella clause in the 1959 German-Pakistan BIT read as follows: 'Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party.'

<sup>81</sup> For instance, the Czech Republic-Singapore BIT provides that '[e]ach Contracting Party shall not interfere with any commitments, additional to those specified in this Agreement, entered into by nationals or companies with the nationals or companies of the other Contracting Party as regards their investment.'

<sup>82</sup> See Walde, *supra* note 76.

As tribunals have stressed the importance of textual formulations in interpreting umbrella clauses,<sup>83</sup> the possibility of a further expansion of state responsibility to cover a state's failure to 'create and maintain a legal framework' to ensure the observation of contractual undertakings cannot be completely ruled out.<sup>84</sup> Given the diversity of formulations and their breadth; umbrella clauses indeed go beyond the traditional international safeguards by guaranteeing protection 'against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of whether or not such interference amounts to expropriation.'<sup>85</sup>

Even in the cases where the wording of an umbrella clause follows the original model contained in the 1959 German–Pakistan BIT, it still opens the door to investment claims going beyond the traditional remit of international law on the protection of foreign interests abroad. By enabling investors to bring contractual claims against host states in the absence of a breach of international law, umbrella clauses rise above the level of protection offered by non-expropriatory standards of treatment. The FET and non-discrimination provisions too entitle the investor to a remedy for state interference with contractual rights. However, due to their capacity to transform a mere failure to observe contractual commitments into an internationally enforceable treaty obligation, umbrella clauses go even further than these standards.

Akin to the declining expropriation standard that has been used as a contingency route to overcome restrictive dispute settlement clauses and to avoid the exhaustion of local remedies, umbrella clauses can be deployed to expand the scope of the otherwise narrow consent to arbitration. For example, where treaties limit investor-state arbitration to breaches of substantive treaty provisions (as opposed to extending a promise of investor-state arbitration to *any disputes* arising

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<sup>83</sup> Noble Ventures Inc v. Romania, ICSID Case No. ARB/01/11, Award, ¶ 182 (Oct. 5, 2005). See also J. Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351, 355 (2008) (emphasising that each umbrella clause must be interpreted in its own right).

<sup>84</sup> There is also an unresolved tension about whether an umbrella clause protects contracts concluded with sub-entities, as opposed to contracts concluded with host states, and whether the protection extends to contracts entered into with investors' subsidiaries. For a recent analysis of the problem, see N. Gallus, *An Umbrella just for Two? BIT Obligations Observance Clauses and the Parties to a Contract*, 24 ARB. INT'L 157 (2008). See also NEWCOMBE & PARADELL *supra* note 24, at 457-9 (arguing that beyond contracts, promises contained in a regulatory framework would also fall within the protective scope of umbrella clauses, providing that there is a legally significant connection between an investment and a unilateral undertaking by the host state).

<sup>85</sup> F. A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 246 (1981).

*in connection* with investment), the restrictive consent can be bypassed through recourse to an umbrella clause.<sup>86</sup> The umbrella clause may transform a contractual dispute from “any dispute in connection with investment” into “a dispute arising from the violation by the state of its obligation to observe contractual undertakings”.<sup>87</sup> In this sense, umbrella clauses bear resemblance to the expropriation standard in that both provisions may seem redundant in the presence of all-encompassing and overarching guarantee of FET but, both play an important role as a “foot in the door provision” and as a means of overcoming barriers on the way to investment arbitration and the enforcement of monetary claims against host governments. Likewise, umbrella clauses share the absolutist nature of expropriation standards: it transforms ordinary contractual breaches into international claims without necessitating that the former are accompanied by some form of illegality other than the adverse economic effect of disputed governmental action on the investor’s project. Again, the resulting expansion of the scope of state liability before private economic actors is questionable from a broader remedial perspective; just as questionable is the extent to which holding host states to monetary responsibility for breach of contract contributes to the economic development in the host state.

It is noteworthy that some of the more recent IIAs do not contain umbrella clauses. There is no umbrella clause in the NAFTA, and the recent US and Canada Model BITs. Neither does the 2006 UK–Mexico BIT contain umbrella provisions. It is all the more remarkable that the very same treaties feature the new generation of expropriation clauses which expressly clarify that regulatory and indirect state interference with foreign investment should not automatically be considered as expropriatory.<sup>88</sup> These treaties seem to favor a moderate theory of ‘investment treaty breach’ also by limiting the thrust of their FET clauses to what is proscribed by the customary international minimum.<sup>89</sup> This, however, is in stark contrast with

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<sup>86</sup> For instance, under Article XIII of the 1996 Canada–Ecuador BIT, the promise of investor-state is extended to any dispute relating to a claim by an investor that a measure taken or not taken by the host state is in breach of the treaty, and that the investor has incurred loss or damage by reason of, or arising out of, that breach. In practical terms, dispute settlement provisions of this kind allow the arbitration of contractual claims only if such claims violate substantive provisions of a BIT.

<sup>87</sup> See *eg.*, *SGS v. Philippines*, *supra* note 17, ¶ 128 (the tribunal concluded that the effect of the umbrella clause was to make it a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments).

<sup>88</sup> See *supra* note 43 (referring to the recent IIAs of the US and Canada).

<sup>89</sup> Article 5(2) of the Canadian Model FIPA contains a clarification that ‘the concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary

the recently revised models of Germany, Switzerland, the Netherlands, and the United Kingdom<sup>90</sup> which continue to offer umbrella protection to their investors (and contain the traditional type of expropriation clauses, and do not confine their FET clauses to the customary minimum standard). This variable geometry of IIAs, as manifested in the uneven development of investment treaty practice and the emergence of different treaty models, points to the absence of common agreement in international perceptions of what should be viewed as internationally wrongful conduct for which investors can claim monetary damages. While there is an emerging trend to temper the scope of private ordering in some of the recent model treaties, the majority of IIAs continue to support an open-ended and far-reaching concept of investment treaty breach, with no plausible justification offered to support the increasing exposure of states to monetary claims from disgruntled investors.

#### V. MULTIPLICITY, OVERLAP AND INTER-SUBSTITUTABILITY OF INVESTMENT PROTECTION STANDARDS: DEFEATING EXCEPTION CLAUSES AND REDEFINING THE SCOPE OF TREATY PROTECTION

The foregoing sections aimed to show how open-ended and interchangeable investment protection standards amalgamate into a potent and far-reaching mechanism, to ensure an unencumbered access of foreign investors to arbitration as a means of obtaining monetary redress against host governments in a variety of settings. The strength and elasticity of investment treaty protection are both accompanied by, and have their source in, uncertainty and ambiguity of the relevant treaty norms. It is true that uncertainty may be considered as a necessary device enabling international law to accommodate for conflicting interests and change.<sup>91</sup> However, the utmost flexibility and breadth of investment treaty protections have the potential to be exploited—and adapted, often retroactively—in the interests of investors more than any other group of stakeholders. Virtuous as they may be from an investor perspective, the overlap and intersubstitutability of investment protection standards may significantly undermine the role of states in shaping international norms that will govern their conduct. States may commit themselves to refrain from certain forms of behaviour vis-à-vis foreign investors, but these commitments are traditionally subject to reservations through which states expressly identify areas that, for various reasons relating to national interests,

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international law minimum standard of treatment of aliens'. A similar drafting solution has been favoured in the US model IIA post-2004.

<sup>90</sup> UK BITs, which have invariably included an umbrella clause since the launch of the British bilateral treaty programme in the 1970s.

<sup>91</sup> MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 591 (2005).

need to be insulated from the intrusive reach of treaty standards and from the exposure to monetary liability. The overlap and intersubstitutability of investment protection standards detracts from the strength of such reservations and, in some cases, may render them entirely ineffectual. Consequently, a contracting state party may find itself under an obligation to pay damages in connection with governmental activities which were deliberately shielded from the reach of investment protection guarantees. The aim of this section is to examine how the multiplicity of investment standards can be harnessed to reshape the original grand bargain and the effect this may have on the increase in state exposure to monetary responsibility.

Whilst most investment treaties—unlike multilateral trade agreements—do not contain exception clauses, in some of the more recent agreements such provisions occupy an increasingly prominent place.<sup>92</sup> One category of exception clauses are the carve-outs. These exceptions usually render national treatment and MFN clauses inapplicable with the aim of insulating governmental measures in certain sectors of the economy, such as banking and insurance, and to avoid a host state's liability for certain policies and measures, such as procurement and subsidies.<sup>93</sup> Yet the effectiveness of such insulation may be compromised by the intersubstitutability of investment treaty standards. Consider a hypothetical case where a governmental measure on the allocation of state aid is challenged as being discriminatory. The prohibition of discrimination is usually subsumed under a number of provisions, including the national treatment standard, FET and the prohibition of arbitrary and/or discriminatory conduct. While carve-out clauses do preclude challenges under the national treatment and MFN provisions,<sup>94</sup> they leave open the possibility of the disputed state measures being challenged as arbitrary and discriminatory treatment and as a breach of FET (especially given that the latter has been construed as an overarching standard). Thus, where an investment treaty contains the traditional arsenal of standards, the carve-out provisions may be circumvented leaving discriminatory measures open to challenge under the FET and arbitrariness standards. It is clear that 'the intended redundancy'—the inclusion of multiple and overlapping provisions in an investment treaty text—may render carve-out provisions futile and thereby expose contracting state parties to liability for measures that were otherwise intended to be outside the scope of a treaty.

Carve-out clauses aside, the vast majority of most recent IIAs now contain

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<sup>92</sup> See e.g. Northern American Free Trade Agreement art. 1108, (entered into force January 1994, Can.-Mex.-US) 32 I.L.M. 605 (1992). The recent generation of US and Canadian model IIAs also contains detailed carve-out clauses.

<sup>93</sup> See e.g. 2004 Canadian FIPA, Article 9(5).

<sup>94</sup> See US-Uruguay BIT, Article 14 (5); Canada-Czech Republic BIT, Article IV (1) (b).

security exceptions.<sup>95</sup> Once again, the formulation of security exceptions in IIAs often detracts from their strength and capacity to serve as a defence against investor claims for damages, inflicted by governmental measures in pursuit of public security objectives. This is because, the scope of exception clauses is frequently limited to only selected investment protection standards. For instance, Article 7 of the 2005 United Kingdom Model BIT mandates that national security measures be exempt from the application of the national treatment and MFN provisions only.<sup>96</sup> Since FET, indirect expropriation, and the prohibition of arbitrary treatment are not expressly mentioned in the exception clause, they offer an alternative route to challenging contentious security measures. Even if a disputed security measure were to qualify as a measure necessary to protect national security, public security or public order and thus be insulated from the effect of treaty provisions; the investor can still challenge the very same measure under the FET and non-arbitrary measures clause.

Though it may be beneficial to investors, the availability of multiple, overlapping, and intersubstitutable standards is likely to increase the host state's exposure to arbitral scrutiny and liability for a wide range of governmental decisions. Both carve-out clauses and exceptions are usually designed with the aim of reconciling various conflicting interests. They also mark the boundaries of responsibility states assume under the relevant treaty instrument, in return for the benefits of increased investment flows and economic development. The intersubstitutability of standards, however, renders futile any exercise in demarcating the areas protected by investment treaty standards and those areas which state parties have expressly agreed to exclude from treaty protection (and from the obligation to compensate for the economic loss occasioned by state intervention). Not only does intersubstitutability deprive the system of the "certainty of a uniform solution"<sup>97</sup> but it also raises the question about the direction in which investment treaty law is evolving, and to what extent the current state of affairs accommodates the equally evolving interests of its primary stakeholders. If seen as part of the whole regime—in conjunction with the remedial mechanism of investment arbitration—the utmost elasticity of treaty standards raises the question about broader objectives of investment treaty

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<sup>95</sup> Again, the US and Canada are in the vanguard; while the UK model BIT does include a security exception clause, most of existing UK BITs do not offer any possibilities to derogate on public security and public order grounds.

<sup>96</sup> See the Draft Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [Country] for the Promotion and Protection of Investments (2005, with 2006 Amendments).

<sup>97</sup> Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT'L DISP. SETTLEMENT 97, 99 (2011).

protection. What ends do these elastic and all-encompassing protections serve and does monetary redress provide adequate means to achieve those ends?

#### VI. PROMOTING ECONOMIC DEVELOPMENT AND GOOD GOVERNANCE?: EVOLVING TREATY OBJECTIVES, RECALIBRATED REMEDIES?

In evaluating the role played by monetary remedies in achieving the evolving aims of the emerging global investment treaty regime, it is useful to situate the recent transformations in the scope of IIAs within the broader context of dispute settlement in international economic law. Does a widening scope of the notion of ‘internationally proscribed’ conduct—and the corresponding change in the degree of host state exposure to private action for damages—serve investment treaty objectives? If so, what are these objectives? It is often argued that the right to damages in international investment law is founded upon its unique objectives and functions.<sup>98</sup> Indeed, the prevailing remedy in WTO law is specific performance and injunctive relief, whereby member states found in violation of WTO rule(s) are required to bring their measures into compliance within a reasonable period of time.<sup>99</sup> The complaining state may resort to other possibilities if the offending state fails to ensure compliance with WTO norms, including the negotiation of compensation and retaliatory suspension of trade concessions (countermeasures).<sup>100</sup> The absence of an automatic right of an individual to bring and enforce claims for monetary relief directly against the offending government is said to be rooted in the key objectives of the WTO, such as attaining economic liberalisation and greater economic efficiency by removing trade barriers. By contrast, international investment law is said to be centred on the microeconomic arena of private investors seeking to reduce the risk of investing abroad.<sup>101</sup> A private right of action for compensatory damages is thus seen as the most effective way to achieve such reduction of risk.<sup>102</sup> Yet the divergent objectives of international trade and investment regimes should not overshadow the fact that on a macro-economical level, the creation of the investor’s right to damages and the establishment of avenues for its enforcement are justified by the same objectives of economic development, welfare, and increased private opportunities in capital-importing states. Indeed, reducing the risk of investing is not an end in itself but is rather a means of reducing the cost of capital, the latter being instrumental in

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<sup>98</sup> Dimascio & Pauwelyn, *supra* note 5; *See also* Sykes, *supra* note 5, at 631, 644.

<sup>99</sup> *See* PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 218 (2nd ed. 2008); *See also* P. Grane, *Remedies Under WTO Law*, 4(4) *J. INT’L ECON. L.* 755 (2001).

<sup>100</sup> *See* CHAD P. BOWN & JOOST PAUWELYN, *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* (2010).

<sup>101</sup> Dimascio & Pauwelyn, *supra* note 5, at 55.

<sup>102</sup> *Id.*; *See also* Sykes, *supra* note 5, at 632.

promoting the economic development in host states. Since both the international trade and international investment regimes are driven by the overarching objective of achieving greater economic prosperity, the uniqueness of investment treaty objectives do not offer a convincing justification for the existence—and primacy—of the private right to damages in the investment treaty context.<sup>103</sup>

Even if we set aside the convergence and divergence between the multilateral trade and investment protection regimes, it is questionable whether and to what extent the payment of damages to aggrieved foreign investors is capable of promoting the economic development in host states, especially in light of the changes the concept of investment treaty breach has undergone. The economic development rationale at the heart of investment treaty protection “does not innately extend to a willingness to attract any kind of foreign capital, at all costs”.<sup>104</sup> If investment treaties are aimed at ensuring security of investment as a vehicle for attracting low-cost capital for development, this objective appears to be countered by the extent of the host states’ actual and potential exposure to damages awards. The impact of IIAs on flows of foreign investment has already been doubted, and so has been the role of IIAs in motivating business to invest.<sup>105</sup> It is all the more difficult to see how the broadening scope of IIAs and the growing exposure of host states to private claims for damages might facilitate their economic development. The private right to claim monetary redress may have been an appropriately cheap commitment device at the time the foundations of the modern investment treaty regime were laid by the drafters of early bilateral investment treaties. However, the adequacy of the current preoccupation with damages as a

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<sup>103</sup> The fact that both trade and investment instruments can be simultaneously used to challenge governmental measures also detracts from the strength of the argument that monetary remedies are justified by the uniqueness of investment treaty law. There is a substantial material overlap between the trade and investment regime as evidenced by the Mexican sweeteners sage: Mexican taxes on soft drinks were disputed at different fora, as both investment and trade disputes. See Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) (adopted Mar. 24, 2006); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc., v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, (Nov. 21, 2007); *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, (Sept. 18 2009); *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Award, (Jan. 15, 2008).

<sup>104</sup> Omar E. García-Bolívar, *Economic Development at the Core of the International Investment Regime*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 587 (C. Brown et al. eds., 2001).

<sup>105</sup> K. P. SAUVANT AND L. E. SACHS, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (2009); Yackee, *supra* note 8.

principal form of remedy for an investment treaty breach should be reconsidered in the light of changes the regime has undergone. Investment treaty law has evolved to accommodate higher expectations on the part of foreign investors, as reflected in the changing notions of illegality and the fact that even economic harm caused by a relatively low degree of inappropriateness in governmental conduct can now be successfully claimed and recovered by the investor. The disparity between the extent of host state exposure to monetary claims back in the 1960s and now necessitates rethinking the underpinnings of pecuniary remedies and the role they should play in facilitating the achievement of overarching objectives of investment treaty protection.

## VII. CONCLUSION

Over the past few decades international rules on the protection of foreign investment have undergone considerable change, with the notion of property replaced by a broader rubric of investment, and the protection against expropriation supplemented by the arsenal of non-expropriatory standards of treatment, including the guarantees of fair and equitable treatment, non-discrimination, and sanctity of contract. Not only are core investment protection standards liable to a broad interpretation, thus bringing a variety of host state conduct within the scope of investment treaties, but they are also mutually intersubstitutable — to the extent that investors are enabled to retroactively redefine the material and jurisdictional scope of the relevant treaty instruments. The amalgamation of treaty standards into a broad and elastic protective net, transforms the modern investment regime into one in which the mere fact of adverse economic impact of governmental conduct on the investment may suffice to find the host state monetarily responsible before the investor. The promise of monetary redress for state interference with foreign investment may have been justified at the time when the notion of internationally wrongful conduct was primarily confined to capricious and outright interventions with foreign investment. Now, that investors are allowed to claim damages for governmental conduct which exhibits a lower degree of inappropriateness, it seems the time is ripe to re-evaluate the scope of key investment protection guarantees, their overarching objectives, and the role of monetary redress in achieving those objectives. International investment law has also evolved to embrace new functions, such as inducing states to comply with good governance standards — but the extent to which holding states to monetary responsibility would facilitate transparency, stability, and even-handedness in domestic practices remains questionable. The evolution of investment treaty law and the change in the scope of host state responsibility towards foreign investors render it imperative to recalibrate investment treaty remedies.