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Bilateral Investment Treaties and International Air Transportation: A New Tool for Global Airlines to Redress Market Barriers

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BILATERAL INVESTMENT TREATIES AND INTERNATIONAL AIR TRANSPORTATION: A NEW TOOL FOR GLOBAL AIRLINES TO REDRESS MARKET BARRIERS

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I. INTRODUCTION

ALMOST AS SOON as foreign investment began in earnest, foreign investment disputes arose. In 1910, U.S. Secretary of State Elihu Root observed how “[t]he great accumulation of capital in the money centers of the world [was] far in excess of the opportunities for home investment, [which] led to a great increase of international investment extending over the entire surface of the earth.”¹ But, he went on, such “peaceful interpenetration among the nations of the earth naturally contribute[s] their instances of citizens justly or unjustly dissatisfied with the treatment they receive in foreign countries” at the hands of foreign executives, legislatures, or judiciaries.² At that time, and for many decades to follow, the only means by which such “dissatisfactions” could be adjudicated under international law was in the courts of the host state or by the home state of the investor instituting “diplomatic protection” of its national and taking action against the investment host state.³ Diplomatic protection could take various forms, including the initiation of arbitral or judicial proceedings before an *ad hoc* tribunal or the International Court of Justice. In practice, however, this recourse was limited because it required the home state of an investor to be politically willing to take direct state-to-state action.

Now, this has all changed. Bilateral investment treaties (BITs), which have only become truly relevant in the past fifteen years, eliminate this difficulty by conferring international law rights directly on individual investors and providing a procedural means for them to take legal action directly against the host state in binding arbitration.⁴ The substantive rules of law applicable in such cases derive from the BIT entered into by the host state of the investment and the home state of the investor.⁵ These rules, to a large extent, incorporate and draw upon the more general rules of international law. The purpose of this regime is to provide universal standards in an impartial venue to

¹ Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT’L L. 517, 518 (1910).

² *Id.* at 519.

³ *Id.* at 522.

⁴ Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT’L & COMP. L. REV. 403, 415 (2006).

⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42(1), Mar. 18, 1965, 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], available at <http://www.worldbank.com/icsid/basicdoc/partA-chap01.htm>.

resolve international investment disputes without the direct involvement of the investor's home state.

Airlines and the business of aviation are, in general and by their very nature, designed to extend beyond their home state and spread "over the entire surface of the earth."⁶ Like ships sailing the high seas, however, they are still intrinsically tied to, and highly regulated by, their state of registration. It is no surprise, then, that the legal norms governing international air transport derive from bilateral and multilateral agreements between sovereign states. These agreements provide the substantive rules of air transit for each and every airline, which, in turn, give rise to the treatment that those airlines can expect to receive from foreign sovereigns. Indicative of the era in which they were designed, these agreements also give authority to each carrier's home state to raise, arbitrate, and settle disputes concerning the application of those norms before *ad hoc* arbitral bodies or under the auspices of a specialized United Nations' body, the International Civil Aviation Organization (ICAO).

But airlines, like any other multinational commercial enterprise, are also investors. This article proposes that businesses engaged in international aviation can and should take advantage of bilateral investment treaties to resolve many of the common regulatory disputes that arise in their international operations. Three specific types of cases are discussed. *First*, the web of international laws regarding global air transport may be directly invoked by aviation investors against recalcitrant states under relevant BITs, seeking prospective cessation of national measures that run afoul of international aviation law and retrospective damages for the harm inflicted by the inconsistent measure. This is possible not only where the relevant treaty incorporates international law as the substantive law of decision over an investment dispute, but also where the aviation rule at issue forms a legitimate expectation of the aviation investor, such that it provides the proper interpretive context to discern the scope of "fair and equitable treatment" under the treaty.⁷ *Second*, most, if not all, BITs guarantee national and non-dis-

⁶ M. Christine Boyer, *Aviation and the Aerial View: Le Corbusier's Spatial Transformations in the 1930s and 1940s*, 33.3/4 *DIACRITICS* 93, 110 (2003), available at <http://muse.jhu.edu/journals/diacritics/v033/33.3boyer.html>.

⁷ Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law* 2 (Org. for Econ. Co-operation and Dev., Working Papers on International Investment, Paper No. 2004/3, 2004), available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf>.

criminary treatment of foreign investments. Treatment in violation of that basic standard has long been a common complaint from international airlines, and these airlines now have a means and a forum to vindicate their rights below state-to-state negotiations and above local courts. *Third*, and perhaps most broadly, many modern BITs obligate investment-host states to respect and adhere to their contractual commitments with foreign investors, whether those commitments come by way of contract or regulatory expectations.

Because aviation is inherently international, because global airlines cannot operate without investing in foreign states, and because those states hold significant regulatory clout over cross-border aviation operations, investment treaties provide a powerful and necessary tool for aviation businesses to vindicate their legitimate expectations and force state compliance with the web of *supranational* regulations provided by international aviation law.

II. INVESTMENT TREATY ARBITRATION: A BASIC PRIMER

Since the International Centre for the Settlement of Investment Disputes (ICSID) was first established in 1966,⁸ “investment treaty arbitration has moved from a matter of peripheral academic interest to a matter of vital international concern.”⁹ This is partly because most contemporary investment treaties include compulsory clauses for the settlement of disputes between foreign investors and the host state, allowing such investors to bring claims against the host state before international arbitral tribunals. These arbitration clauses operate as consent by the host state signatory to arbitrate any and all disputes, at the investor’s initiative, over the treaty’s meaning and application:

All that is necessary to form an agreement to arbitrate is for one party to be a BIT signatory and the other to consent to arbitration of an investment dispute in accordance with the Treaty’s terms. In effect, [the contracting state’s] accession to the Treaty constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor’s written demand for arbitration com-

⁸ *About ICSID*, INT’L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?RequestType=casesrh&actionval=ShowHome&PageName=AboutICSID_Home (last visited Sept. 8, 2011).

⁹ Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435, 435 (2009).

pletes the “agreement in writing” to submit the dispute to arbitration.¹⁰

Friendship, Commerce and Navigation (FCN) treaties were the forerunners to the modern-day BITs.¹¹ While purporting to guarantee the same sort of fair treatment and due process rights for foreign investors, FCN treaties pre-dated the establishment of the ICSID but only provided for the resolution of state-to-state disputes and thereby gave exclusive standing to the investor’s sovereign to raise claims on behalf of citizen investors against other states.¹² BITs, therefore, wholly transformed the landscape of investment protection. Private companies no longer depend on the discretion of their home states—which will be affected by a host of considerations having little to do with investors’ particular problems—to invoke diplomatic protection in raising a claim against another state.¹³ Investors can bring an international claim against their host sovereign themselves.¹⁴

There are at present some 2,000 bilateral and regional investment treaties that provide for compulsory arbitration of investment disputes between investors and their host state.¹⁵ The first pacts to incorporate state consents to investment arbitration were a handful of BITs signed in the late 1960s; they became more common in the 1970s and 1980s.¹⁶ But “[i]t was only during the 1990s that investment arbitration clearly emerged as an international mechanism of adjudicative review.”¹⁷ “In that dec-

¹⁰ Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 393 (2011).

¹¹ KATE MILES, A POLITICAL JUNCTURE FOR INTERNATIONAL INVESTMENT LAW: BREAKING FROM THE PAST OR REPRODUCING ECONOMIC IMPERIALISM? 3 (2008), available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf>.

¹² *Id.*

¹³ See Karl-Heinz Bockstiegel, *Arbitration of Foreign Investment Disputes—An Introduction*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 125, 125–31 (Albert Jan van den Berg ed., 2005); JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 1–15 (1999); M. SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 61–84 (2000); see also Peter Muchlinski, *The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY—ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 341 (Christina Binder et al. eds., 2009).

¹⁴ Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT’L & COMP. L. REV. 403, 416 (2006).

¹⁵ Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 123 (2006).

¹⁶ See UNITED NATIONS CONFERENCE ON TRADE & DEV., BILATERAL INVESTMENT TREATIES IN THE MID-1990s 8–10 & fig. I.1 (1998).

¹⁷ Van Harten & Loughlin, *supra* note 15.

ade, roughly 1,500 BITs were concluded, and the inclusion of states' consents to investment arbitration . . . became the norm."¹⁸ This wave of new treaties was not confined to the conventional relationship (typified by disputes over expropriation of assets) between capital-exporting and capital-importing states; developing states, too, began to sign investment treaties among themselves.¹⁹

Cases and controversies soon followed the treaties. "From 1995 to 2004 ICSID registered four times as many claims as in the previous 30 years," and that trend appears to be holding.²⁰ "By July 2005 there were 91 claims pending, more than all of the claims registered at ICSID during its entire history until 2001."²¹ "As the late Professor Thomas Walde once [said], ' . . . the ability to access a tribunal outside the sway of the host state . . . is the principal advantage of a modern investment treaty '"²² In ten short years, the "right and procedural remedy, . . . in practical and effective terms, [have become] one."²³ And, these rights and remedies are not going away anytime soon; most BITs have very long "tails," meaning that even if a state were to withdraw its assent to the treaty, it would still be effective for several years after the official notification of withdrawal.²⁴

¹⁸ *Id.*; see also UNITED NATIONS CONFERENCE ON TRADE AND DEV., *BILATERAL INVESTMENT TREATIES 1959–1999* 1, 4 (2000), available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf> (reporting that the number of BITs quintupled during the 1990s, from 385 in 1989 to 1,857 by 1999, involving 102 countries in 1989 and 173 countries in 1999).

¹⁹ UNITED NATIONS CONFERENCE ON TRADE AND DEV., *TRENDS IN INTERNATIONAL AGREEMENTS: AN OVERVIEW* 33, 34 (1999), available at http://www.unctad.org/en/docs/iteit13_en.pdf. Before the 1990s, nearly all investment treaties were concluded between capital-exporting and capital-importing states, usually based on model BITs adopted by the major capital-exporting countries. *Id.*

²⁰ Van Harten & Loughlin, *supra* note 15, at 124.

²¹ *Id.* This is only a snapshot of the explosion of investment arbitration because ICSID is only one forum for these disputes. Other forums, such as the International Chamber of Commerce's International Court of Arbitration or ad hoc tribunals established under the UNCITRAL Rules, are also available for investor-state disputes, and these fora normally keep cases confidential unless both disputing parties agree otherwise.

²² Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67, 71 (2010).

²³ Thomas Walde, *The "Umbrella" (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 1 TRANSNAT'L DISP. MGMT. 4, 13 (2004).

²⁴ See, e.g., Agreement on the Encouragement and Reciprocal Protection of Investments, China-Ger., art. 15(4), Dec. 1, 2003, available at http://www.unctad.org/sections/dite/ia/docs/bits/china_germany.pdf [hereinafter China-Ger. BIT] (providing that "[w]ith respect to investments made prior to the date of

The elevation of private-sovereign disputes to the international plane and the guarantee of a neutral forum for investors who were once limited to local courts and remedies has for all intents and purposes created the world's first "comprehensive form of global administrative law."²⁵ States have waived their sovereign immunity, agreed to give "arbitrators . . . comprehensive jurisdiction over what are essentially *regulatory* disputes," assented to rules affecting foreign investors, and given authority to review and control their exercise of power to a panel of neutrals.²⁶ By signing these treaties, these states have not only given their own investors a powerful tool against expropriation, nationalization, and other forms of arbitrary or discriminatory regulation by foreign sovereigns, but they have concordantly transferred their own adjudicative authority from national courts to arbitral tribunals for these certain classes of disputes.²⁷ In situations where contracts between an enterprise and a state expressly limit recourse to local dispute settlement options, eligible claimants can even bypass national courts and bring investment claims directly to arbitral tribunals.²⁸ Some commentators have thus noted that investment treaty arbitration is "more tightly analogous to domestic judicial review than other forms of international adjudication."²⁹

The legal norms for reviewing sovereign action appear in each BIT. Some are near-universal. Foreign investors are typically entitled to "fair and equitable treatment," which generally means that the host state assumes an obligation to protect

termination of this Agreement, the [Treaty] shall continue to be effective for a further period of twenty years from such date of termination"); Agreement Concerning the Promotion and Reciprocal Protection of Investments, China-U.K., art. 12, May 15, 1986, [hereinafter China-U.K. BIT], *available at* http://www.unctad.org/sections/dite/ia/docs/bits/uk_china.pdf (providing for continuation of the treaty for fifteen years after the date of withdrawal).

²⁵ Van Harten & Loughlin, *supra* note 15.

²⁶ See Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L.Q. 371, 372 (2007) (emphasis added).

²⁷ See Vadi, *supra* note 22.

²⁸ Several recent ICSID cases upheld jurisdiction to hear treaty claims, notwithstanding the fact that the foreign investor was party to a contract specifying that contract claims would be the exclusive province of a given domestic court. See CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Objections to Jurisdiction, ¶ 131 (July 17, 2003), 42 I.L.M. 788, 808 (2003); *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 14–15 (Nov. 21, 2000), 16 ICSID Rev.-FILJ 641 (2001).

²⁹ Van Harten & Loughlin, *supra* note 15.

the investors' "legitimate and reasonable expectations" to treatment above the minimum standard of international law.³⁰ Foreign investments are also typically entitled to "full protection and security," which is "wider than 'physical' protection and security"³¹ and requires an investment host state to take "all measures of precaution to protect the [foreign] investments . . . on its territory."³² BITs also usually forbid states from expropriating foreign investments without due compensation and from enacting discriminatory and arbitrary legislation.³³ Some BITs have even more general provisions. So-called "umbrella clauses" allow foreign investors to bring ordinary contract claims before an international arbitral tribunal in the first instance rather than the courts of the host state.³⁴ Other BITs broadly incorporate the substantive rules of international law to assess the legality (under the treaty) of state action taken against a foreign investor.³⁵

While the advent of investment treaty arbitration to resolve regulatory disputes is novel, the system for dispute resolution itself is familiar and well worn. Investment treaty arbitration shares most of the key attributes of typical international commercial arbitration. Central to both is the right to choose an arbitrator, often considered the very essence of arbitration.³⁶ Although the treaties will specify which rules apply (ICSID or UNICTRAL), the parties to an investment dispute can deter-

³⁰ *Saluka Invs. B.V. (Neth.) v. Czech Republic*, Partial Award, ¶ 302, UNCTRAL Arbitration (Mar. 17, 2006); *see also id.* ¶¶ 285–309 (discussing the FET standard as protecting an investor's legitimate expectations).

³¹ *Siemens A.G. v. Argentina Republic*, ICSID Case No. ARB/02/8, Award, ¶ 303 (Feb. 6, 2007).

³² *Am. Mfg. & Trading, Inc. v. Zaire*, ICSID Case No. ARB/93/1, Award, ¶ 6.05 (Feb. 21, 1997), 5 ICSID Rep. 14 (2002).

³³ Luke Eric Peterson & Nick Gallus, *International Investment Treaty Protection of Not-for-Profit Organizations*, 10 INT'L J. NOT-FOR-PROFIT L. 1, 56, 60–63 (2007), available at http://www.icnl.org/knowledge/ijnl/vol110iss1/ijnl_vol110iss1.pdf.

³⁴ *See, e.g.*, Treaty with Romania Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Rom., art. II(2)(c), May 28, 1992, S. TREATY Doc. No. 102-36 (1994), available at <http://www.state.gov/documents/organization/43584.pdf> ("[e]ach Party shall observe any obligation it may have entered into with regard to investments.").

³⁵ *See, e.g.*, *CME Czech Republic B.V. v. Czech Republic*, Partial Award, ¶¶ 162, 164, UNCTRAL Arbitration (Sept. 13, 2001), available at <http://italaw.com/documents/CME-2001PartialAward.pdf>.

³⁶ Pierre Lalive, *Conclusions, in THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS* 119, 123 (1991).

mine the composition of the arbitral tribunal.³⁷ Confidentiality is another feature of the arbitral process.³⁸ Hearings are often held *in camera*,³⁹ and the final award may not be published, depending on the parties' will.⁴⁰ Even the names of the parties and the details of the dispute are not always disclosed.⁴¹ Finally, and perhaps most importantly, awards rendered against host states are not only binding under the relevant BIT but are also readily enforceable against host-state property worldwide, a result of the widespread adoption of the New York and Washington (ICSID) Conventions.⁴² The decisions have only limited avenues for revision and cannot be amended by the domestic

³⁷ See G.A. Res. 31/98, art. 5, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) [hereinafter UNCITRAL Rules]; ICSID Convention, *supra* note 5, art. 37.

³⁸ See UNCITRAL Rules, *supra* note 37, art. 25(4).

³⁹ *Id.*

⁴⁰ International Centre for Settlement of Investment Disputes [ICSID], Rules of Procedure for Arbitration Proceedings, at Rule 48(4), ICSID/15 (April 2006) [hereinafter ICSID Arbitration Rules]; UNCITRAL Rules, *supra* note 37, art. 32(5).

⁴¹ See, e.g., Arb. Inst. of the Stockholm Chamber of Commerce, Arb. Rules, art. 46 (Jan. 1, 2010), available at http://www.sccinstitute.com/skilje_domsregler-4.aspx. In recent years, however, some efforts to make investment arbitration more transparent have been undertaken in different fora. In response to calls from civil society groups, the three parties to the North American Free Trade Agreement (NAFTA)—the United States, Canada, and Mexico—have pledged to disclose all NAFTA arbitrations and open future arbitration hearings to the public. Joint Statement, Pierre S. Pettigren, Minister for Int'l Trade (Ca.), Fernando Canales, Sec. of Econ. (Mex.), Robert B. Zoellick, Trade Rep. (U.S.), Celebrating NAFTA at Ten (Oct. 7, 2003), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/State-ment.aspx?lang=eng>. Increasingly, investment arbitration tribunals have allowed public interest groups to present amicus curiae briefs or have access to the arbitral process. These important moves, however, involve the conduct of the proceedings of a limited number of investment disputes. Indeed, the vast majority of existing treaties do not mandate such transparency, which means that most of the proceedings are resolved behind closed doors.

⁴² See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Arg., art. VII(5)–(6), Nov. 14, 1991, 31 I.L.M. 124 (entered into force Oct. 20, 1994) [hereinafter U.S.-Arg. BIT], available at http://www.unctad.org/sections/dite/iaa/docs/bits/argentina_us.pdf (specifying that arbitral awards rendered by virtue of the treaty shall be “final and binding on the parties to the dispute”); see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (providing that “[e]ach contracting state shall recognize an award rendered pursuant to this convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state”); Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter N.Y. Convention].

legal system.⁴³ Arbitration under the ICSID rules is wholly exempted from the supervision of local courts, with awards subject only to an internal annulment process.⁴⁴

The system has drawn its fair share of criticism precisely because it works to level the playing field between investors and sovereigns. After being repeatedly sued and held liable under BIT obligations, some developing countries have sent formal notices to ICSID declaring their withdrawal from the ICSID Convention and their intention to pursue revisions to their BITs in order to direct investors' claims solely to domestic fora.⁴⁵ Politics certainly explain some of this mistrust of the system but so does leverage and cost; the once "David-Goliath" relationship between private investors facing sovereign states and their home-town advantage has been replaced, at least procedurally, by a neutral forum. And in some circumstances, private claimants and large multinational companies may have more resources available than a small state acting as a respondent.

Developed states have levied criticism, too. The European Commission raised concerns over the opportunities for forum shopping that investment arbitration provides and expressed its desire to abolish BITs signed by European Union (EU) member states to eliminate the potential legal "uncertainty" that could result from matters of EU law being decided by a panel of international arbitrators, rather than the European Court of Justice (CJEU).⁴⁶ The European Commission considered requiring

⁴³ Van Harten & Loughlin, *supra* note 15, at 134–35.

⁴⁴ *Id.* The ICSID annulment process provides for a very limited review. ICSID annulment committees only have the ability to annul awards and send them back to the tribunal or to a new tribunal for a new decision but cannot replace the decision with their own. ICSID Arbitration Rules, *supra* note 40, at Rules 50–55. The grounds for annulment are very narrow and concern due process issues such as the following: the tribunal was not properly constituted, it manifestly exceeded its powers, there was corruption on the part of a member, there was a fundamental and serious departure from a procedural rule, or the award did not state the reasons on which it was based.

⁴⁵ See, e.g., Press Release, Int'l Ctr. for Settlement of Inv. Disputes, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH>; Press Release, Int'l Ctr. for Settlement of Inv. Disputes, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=Open-Page&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>.

⁴⁶ Damon Vis-Dumbar, *EU Member States Reject the Call to Terminate Intra-EU Bilateral Investment Treaties*, INV. TREATY NEWS (Feb. 10, 2009), <http://www.investmenttreatynews.org/cms/news/archive/2009/02/10/eu-member-states-reject->

clauses in future BITs “to prevent the watering down of social and environmental laws” because, in its view, the current mechanisms at investors’ disposal “pose a threat to European democracy.”⁴⁷ Similarly, Australia has been uneasy with the idea of compulsory and binding investment-related arbitrations, and, consequently, the investment chapter of the U.S.-Australia Free Trade Agreement leaves out provisions on investor-state dispute resolution.⁴⁸

III. APPLYING INVESTMENT TREATIES TO CROSS-BORDER AVIATION DISPUTES

Effective ways of resolving disputes with foreign sovereigns in international air transportation have long eluded the private sector. To date, airlines have largely been at the mercy of their own governments, as explained below. That may change as these firms come to realize that the possibility of investment arbitration exists in parallel with the less than satisfactory alternative measures.

“Transportation has [always] been perceived as an industry imbued with a particular public interest,” and air transportation may represent the apex of this interest.⁴⁹ “The foundations of aviation law and regulation were created by common law, statutes, and governmental institutions that regulated the modes of transportation that predated aviation” But from its inception, the airline industry has been special. Because aviation has erased geopolitical borders like no other form of transportation in history, it has been rightly perceived as a unique catalyst for global economic growth and an essential means for facilitating cross-border travel, communications, and national defense. For the same reasons, however, its true potential can only be realized through close cooperation between states and the industry

the-call-to-terminate-intra-eu-bilateral-investment-treaties.aspx. The European Commission expressed its fears that such parallel regimes may create legal uncertainty and forum shopping in favor of arbitration. *Id.* The EU member states, however, have resisted this push because they believe that their investors are better protected under the BITs than under EU law alone. *Id.*

⁴⁷ Daan Bauwens, *Europe: Investment Treaties Undemocratic*, GLOBAL ISSUES (May 19, 2011), <http://www.globalissues.org/news/2011/05/19/9716>.

⁴⁸ Australia-United States Free Trade Agreement, U.S.-Austl., ch. 11, May 14, 2004, 118 Stat. (entered into force Jan. 1, 2005), available at <http://www.dfat.gov.au/fta/ausfta/final-text/index.html>.

⁴⁹ Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L. J. 235, 241 (2003).

they each seek to regulate. Thus, aviation is—and has always been—highly regulated everywhere in the world.

Toward the end of World War II, the Allied Powers began working toward creating “conditions of stability and well-being [that] are necessary for peaceful and friendly relations among nations.”⁵⁰ At the Bretton Woods Conference in 1944, the architects of this new international legal order laid the groundwork for the creation of specialized UN institutions to address international economic objectives (specifically, the International Monetary Fund and the World Bank).⁵¹ Aviation was seen as a key component to economic growth and stability, so in November of that year, delegates from fifty-two states met in Chicago to plan the “future development of international civil aviation” to “help . . . create and preserve friendship and understanding among the nations and peoples of the world.”⁵² The resulting Chicago Convention established “certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.”⁵³ By virtue of signing the Chicago Convention, “[e]ach contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.”⁵⁴

The Chicago Convention placed international interests above those that are purely regional. It recognized that international civil aviation had to develop in the context of pre-existing customary international law.⁵⁵ At the heart of the Chicago Convention is respect for the principle of customary international law that each “State has complete and exclusive sovereignty over the

⁵⁰ UN Charter art. 55.

⁵¹ Robert L. McGeorge, *An Introduction and Commentary: Revisiting the Role of Liberal Trade Policy in Promoting Idealistic Objectives of the International Legal Order*, 14 N. ILL. U. L. REV. 305, 309–10 (1994).

⁵² Convention on International Civil Aviation, pmbl., *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

⁵³ *Id.*

⁵⁴ *Id.* art. 37.

⁵⁵ Andrew Macintosh, *Overcoming the Barriers to International Aviation Greenhouse Gas Emissions Abatement*, 6 (Australian Nat’l Univ., Ctr. for Climate Law & Policy Working Paper Series 2008/2, 2008).

airspace above its territory.”⁵⁶ This principle is reflected in other substantive provisions throughout the Chicago Convention, too. For instance, Article 11 limits the application of any contracting state’s laws to aircraft only upon “admission to or departure from its territory . . . , or to the operation and navigation of such aircraft while within its territory.”⁵⁷ Article 12 supplements this rule by providing that “[o]ver the high seas, the rules in force shall be those established under this Convention,” and not any particular national law of a contracting state.⁵⁸ To fill the void of limiting national law, the Chicago Convention also created the ICAO as a specialized U.N. institution to “adopt . . . international standards and recommended practices and procedures . . . and such other matters concerned with the safety, regularity, and efficiency of air navigation.”⁵⁹

The architects of the Chicago Convention also recognized that they had to give contracting states an opportunity to determine some aspects of international airline operations through bilateral negotiations.⁶⁰ Thus, while the Chicago Convention provides the foundation for a comprehensive international air transportation system, several thousand separate bilateral air services agreements build on this foundation, as do multilateral air services agreements for “selected geographic regions, including the EU and parts of the Caribbean, South America, West Africa, and South-East Asia.”⁶¹ Like the Chicago Convention before it, these bilateral agreements often vest ICAO with the authority to settle disagreements between two or more contracting states over the application of its rules.⁶²

The key qualification here is “between two or more contracting States.”⁶³ The possibility for arbitration and a remedy is entirely state-centric; private claimants have no right to press a claim without the proxy of their home sovereign and no right to receive financial relief if a claim made by their state were to succeed.⁶⁴ In all of these legal instruments, however, there is little

⁵⁶ Chicago Convention, *supra* note 52, art. 1.

⁵⁷ *Id.* art. 11.

⁵⁸ *Id.* art. 12.

⁵⁹ *Id.* art. 37.

⁶⁰ Macintosh, *supra* note 55.

⁶¹ *See id.*

⁶² Paul Stephen Dempsey, *Flights of Fancy and Flights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT’L & COMP. L. 231, 234 (2004).

⁶³ Chicago Convention, *supra* note 52, art. 84.

⁶⁴ Dempsey, *supra* note 62.

doubt that the rights established were intended to inure directly to private airlines. Indeed, the preamble to the Chicago Convention envisages benefits to private carriers,⁶⁵ and many of its provisions expressly guarantee rights for private airlines.⁶⁶ The Chicago Convention established rights for aircraft to be free from certain taxes, fees, dues, and other charges imposed by contracting states; for example, national laws imposing financial levies for the mere right to fly over or land in a state's territory are prohibited, as are taxes on fuel onboard a landing aircraft.⁶⁷ Bilateral agreements replicate many of these freedoms⁶⁸ and often include additional guarantees to commercial carriers, like the freedom "to determine the frequency and capacity of the international air transportation it offers based on commercial considerations in the marketplace," and not the regulatory fiat of the destination state.⁶⁹

Multilateral efforts to wrest this exclusive competence from these state-to-state mechanisms have largely failed. In 1989, the United States proposed a draft agreement on trade in services for other countries to consider that included air transportation and applied the GATT principles of national treatment, non-discrimination, and dispute resolution.⁷⁰ Ultimately, however, these principles enshrined in the General Agreement on Trade in Services (GATS) were only applied to a limited range of aviation services, such as aircraft repair and maintenance services,

⁶⁵ See Chicago Convention, *supra* note 52 (aiming to ensure that "international air transport services . . . be established on the basis of equality of opportunity and operated soundly and economically").

⁶⁶ See, e.g., *id.* art. 79.

⁶⁷ Chicago Convention, *supra* note 52, art. 24. U.S. courts have concluded on at least two occasions that these same provisions of the Chicago Convention are "self-executing," and, thus, can be invoked by private claimants in a national court. See *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981) (holding that Articles 15 and 24, *inter alia*, of the Chicago Convention can be invoked by private claimants because they "set forth rights or obligations of the contracting states and their flag carriers that require no legislation or administrative regulations to implement them"); *Aerovias Interamericanas de Panama, S. A. v. Bd. of County Comm'rs of Dade County*, 197 F. Supp. 230, 248 (S.D. Fla. 1961).

⁶⁸ See, e.g., Air Transport Agreement, U.S.-E.U., art. 11, Apr. 18, 2007, 2007 O.J. (L 134) 50 [hereinafter U.S.-E.U. Open Skies Agreement].

⁶⁹ *Id.* art. 3(4) (providing further that "neither Party shall unilaterally limit the volume of traffic, frequency, or regularity of service, or the aircraft type or types operated by the airlines of the other Party").

⁷⁰ See *Whether International Airline Services Should Be Included in the General Agreement on Tariffs and Trade (GATT): Hearing Before the Subcomm. on Aviation of the H. Comm. on Public Works and Transportation*, 101st Cong. 7-8 (1989).

sales and marketing of air transport services, and computer reservation services.⁷¹ The most contentious aspects of civil aviation relations, including routes and fares, were carved out of that multilateral agreement.⁷²

This is where investment treaties come into play. While these instruments do not specifically address the legal regulation of cross-border air operations, when such operations are directly related to a carrier's "investment" in its destination state, BITs require that those operations be treated in a specific manner.⁷³ Only a handful of agreements (nearly all signed by the United States) have carved out aviation disputes from their scope and even then, not completely.⁷⁴ The vast majority of other BITs, however, contain broad substantive protections and compulsory arbitration clauses that *do not* exclude aviation, and hence offer a method of resolving disputes that may prove to be quite effective for airline firms facing market barriers and other "doing business" issues in foreign markets.⁷⁵ Airlines and peripheral

⁷¹ *Id.*

⁷² See the following article for a good overview discussion: Craig Canetti, *Fifty Years After the Chicago Conference: A Proposal for Dispute Settlement Under the Auspices of the International Civil Aviation Organization*, 26 LAW & POL'Y INT'L BUS. 497 (1995).

⁷³ See *infra* Part III.A.

⁷⁴ In the U.S.-Argentina BIT, for instance, the United States expressly "reserve[d] the right to make or maintain limited exceptions to national treatment in the . . . air transportation" sector. U.S.-Arg. BIT, *supra* note 42, Protocol. These carve-outs, however, rarely insulate the entire field of aviation from *all* investment protections. The U.S.-Argentina BIT merely excepts the air transport sector from guarantees of "national treatment," which simply means that the United States reserves the right to discriminate against foreign airlines (*i.e.*, to treat them differently from comparable U.S. airlines). *Id.* Foreign airlines, however, are not deprived of the substantive right to be treated "fair[ly] and equitab[ly]," are guaranteed "full protection and security" treatment in-line with "that required by international law," and are assured that the United States "observe[s] any obligation it may have entered into with regard to [foreign] investments." *Id.* art. II.2(a), (c). All but one of the 50 U.S. BITs follow this general model and only carve-out aviation investments from national and/or most-favored-nation treatment guarantees. See, *e.g.*, Albania Bilateral Investment Treaty, U.S.-Alb., Annex, Jan. 11, 1995, S. TREATY DOC. NO. 104-19 (entered into force Jan. 4, 1991), *available at* <http://www.state.gov/documents/organization/43474.pdf> (reserving the right to "adopt or maintain exceptions to the obligation to accord national and most favored nation treatment to covered investments in the . . . air and maritime transport [sectors]"). Only the U.S.-Bangladesh BIT excepts investments in the air transportation sector investments from national treatment, most-favored-nation treatment, fair and equitable treatment, full protection and security, and the umbrella clause to guarantee contract observance. Bangladesh Bilateral Investment Treaty, U.S.-Bangl., March 12, 1986, *available at* <http://www.state.gov/documents/organization/43480.pdf>.

⁷⁵ See *infra* Part III.B.

aviation businesses have already begun to institute BIT arbitrations to seek compensation for expropriated assets in a foreign state,⁷⁶ to adjudicate breaches of contract with foreign governments,⁷⁷ and to seek damages for the imposition of unreasonable or discriminatory measures⁷⁸—all of which are grounded in the substantive guarantees of most BITs. Some BITs provide airlines with even broader protections and may enable them to challenge foreign regulatory measures that are merely inconsistent with international aviation law as it appears in other aviation treaties.⁷⁹ In that scenario, the airline investor may not be restricted to seeking prospective withdrawal of the measure by petitioning his home state to initiate arbitration before ICAO; it may seek withdrawal and/or payment of damages by filing its own arbitral proceeding against the offending state under the relevant BIT.

These treaties provide a powerful tool for multinational businesses engaged in air transport and aviation services to oppose national regulations and seek compensation for the costs that stem from the exercise of the state's regulatory authority. The following sections will briefly discuss how airlines might have jurisdiction to raise an investment treaty claim and some of the most common claims that might arise.

A. THE AVIATION INDUSTRY'S COVERED "INVESTMENTS"

A threshold question to the jurisdiction of an investment treaty tribunal is whether the claimants have covered "investments" in the territory of the respondent state. Most BITs de-

⁷⁶ See, e.g., *Fraport AG Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Annulment Proceeding, (Dec. 23, 2010), available at <http://italaw.com/documents/Fraport-Annulment-Dcision.pdf> (involving the expropriation of contracts rights in an international air terminal); *Teinver S.A., Transportes de Cercanías S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, (pending) (claim under the Spain-Argentina BIT alleging expropriation of national airline by Argentinean government).

⁷⁷ See, e.g., *Austrian Airlines v. Slovak Republic*, Final Award, UNCITRAL Arbitration (Oct. 9, 2009) (claim alleging breach of contract by Slovak Republic concerning finding the debts of a national airline purchased and operated by a foreign investor).

⁷⁸ See, e.g., *EDF Services Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶¶ 57, 125–26, 161 (Oct. 8, 2009) (case brought by a UK investor operating the duty-free shops and services in Romanian airports and flights on Romanian airlines for, *inter alia*, the Romanian Government's enactment of a new law, which tightly regulated the operation of duty-free shops and services and, in effect, revoked EDF's existing licenses to operate in Romania).

⁷⁹ See *id.*

fine an “investment” very broadly. For example, the U.S.-Argentina BIT expressly covers “every kind of investment in the territory” of either State,

such as equity, debt, and service and investment contracts, and includes without limitation:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value and directly related to an investment; (iv) intellectual property . . . ; and (v) any right conferred by law or contract, and any licenses and permits pursuant to law.⁸⁰

Arbitral tribunals followed suit and simply look to whether the asset or enterprise in question falls within the treaty’s definition of an “investment” to satisfy their jurisdiction.⁸¹ The jurisdictional decision in *Fedax N.V. v. Republic of Venezuela* is illustrative.⁸² In that case, Venezuela issued promissory notes that were subsequently acquired by Fedax, a Dutch investor.⁸³ When Venezuela refused to pay on the notes, Fedax initiated arbitration.⁸⁴ Venezuela argued that the mere purchase of the notes did not constitute an “investment” in Venezuela and did not fall within the ambit of the Venezuela-Netherlands BIT.⁸⁵ The tribunal, however, found that the treaty’s inclusion of the phrase “‘every kind of asset’” demonstrated “that the Contracting Parties . . . intended a very broad meaning for the term ‘investment.’”⁸⁶ This broad meaning had indeed become the standard usage: “A broad definition of investment . . . is not at all an exceptional situation. . . . [It] has also become the standard policy of major economic groupings.”⁸⁷

⁸⁰ U.S.-Arg. BIT, *supra* note 42, art. I(1)(a).

⁸¹ M.C.I. Power Group, L.C. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶¶ 159–61 (July 31, 2007); Parkerings-Compagniet v. Republic of Lith., ICSID Case No. ARB/05/08, Award, ¶¶ 249–54 (Sept. 11, 2007); Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶¶ 65–66 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

⁸² *Fedax N.V. v. Republic of Venez.*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, (July 1, 1997), 37 I.L.M. 1378 (1998).

⁸³ *Id.* ¶¶ 1, 16.

⁸⁴ *Id.* ¶ 1.

⁸⁵ *Id.* ¶ 19; Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Venez., Oct. 22, 1991, No. 31069, available at http://www.unctad.org/sections/dite/ia/docs/bits/netherlands_venezuela.pdf.

⁸⁶ *Fedax N.V.*, ICSID Case No. ARB/96/3, ¶¶ 31–32.

⁸⁷ *Id.* ¶ 34. There is, however, a contrary trend emerging within ICSID. Those tribunals appear to be “cutting back on their jurisdiction in an . . . effort to com-

The fact that an aviation investment is primarily “operated abroad,” and not solely “in the territory” of the host state should not remove an airline’s investment from BIT protection.⁸⁸ In *Société Générale de Surveillance S.A. v. Republic of the Philippines* (SGS), for example, the tribunal concluded that an investor’s claim to cash due under a service contract to perform “import services and associated customs revenue gathering” both “within and outside the Philippines” was an “asset” “having economic value” in the territory of the Philippines, so as to be entitled to BIT protection.⁸⁹ The fact that much of the service was “performed abroad” did not defeat the jurisdiction of the tribunal.⁹⁰ Those services “were not carried out for their own sake” but to

municate modesty to their state-constituents and avoid applying what some view as the investment regime’s increasingly overbroad substantive rules.” Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Traveaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257, 272 (2010). They are doing so by employing a checklist of criteria that every asset or enterprise must possess before it will be deemed a covered “investment,” irrespective of the language of the particular BIT at issue, including the (i) “duration” of the enterprise, (ii) “a certain regularity of profit and return,” (iii) an “assumption of risk,” (iv) a “substantial” commitment by the investor, and (v) some “significance for the host State’s development.” See *Helnan Int’l Hotels, A.S. v. Arab Republic of Egypt*, ICSID Case No. ARB 05/19, Decision on Jurisdiction, ¶ 77 (Oct. 16, 2006); *Joy Mining Mach. Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award (Aug. 6, 2004), 44 I.L.M. 73 (2005); *Mitchell v. Dem. Rep. Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, (Nov. 1, 2006); *Saipem, S.P.A. v. People’s Republic of Bangl.*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 99 (Mar. 21, 2007), 22 ICSID Rev.-FILJ 100 (2007); see also *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award, ¶ 106 (May 17, 2007) (“[I]f any of [the factors] are absent, the tribunal will hesitate (and probably decline) to make a finding of ‘investment.’”). But see *Salini Costruttori, S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 42 I.L.M. 609 (2003) (holding that the factors were “interdependent” and “should be assessed globally”); *Jan de Nul, N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶ 91 (June 16, 2006) (adopting *Salini* factors as collectively “indicative” of the existence of an investment). This trend has been roundly criticized, and the practical effect has been investors shying away from ICSID, and filing their arbitral claims under UNCITRAL, the International Chamber of Commerce, or the Stockholm Chamber of Commerce when they have the option. See Mortensen, *supra*, at 277, 279.

⁸⁸ *Fedax N.V.*, ICSID Case No. ARB/96/3, ¶ 34.

⁸⁹ *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/06, Decision on Jurisdiction, ¶¶ 99–103 (Jan. 29, 2004) 8 ICSID Rep. 518 (2005); see also *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶¶ 133–43 (Aug. 6, 2003).

⁹⁰ *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/06, ¶¶ 101, 107, 111.

facilitate the entry of goods and the collection of revenue in the Philippines, for which the claimant maintained “a substantial office, employing a significant number of people” in the territory of the Philippines and made an “injection of funds into th[at] territory . . . for the carrying out of [its] engagements under [its] Agreement.”⁹¹

In many ways, *SGS* presents a situation loosely analogous to that of a foreign airline claimant. To commence service into a country, an airline typically must acquire a complex web of “right[s] conferred by law or contract” in the host state.⁹² The mere “licenses [or] permits”⁹³ to land in a state are often contingent on the foreign airline paying a bevy of local usage charges, such as charges for using the runway, air traffic control charges for en route and terminal area services, and charges for meteorological and aeronautical information.⁹⁴ There may also be charges for use of the terminal building and the gates, which can be considerable.⁹⁵ “Above the wing” services that must be contractually secured include passenger bridge access, check-in counter space, security services, customer services, and passenger holding areas. “Below the wing” services such as fueling, maintenance and repair, catering, baggage handling, and cargo related services must also be acquired in the host state. In some states, the airport operator itself will be the foreign carrier’s contracting partner to provide these services; in others, the dominant air carrier may also be the service provider.

Most of those airlines will also maintain “a substantial office, employing a significant number of people” in the territory of the host state.⁹⁶ Beyond the obvious and necessary presence of employees directly related to maintaining a fleet of airplanes, booking, and embarking and disembarking passengers and cargo, airlines usually also establish relationships with distributors of travel services and other professionals to procure advertising and register their trade or service marks to invoke the

⁹¹ *Id.*

⁹² U.S.-Arg. BIT, *supra* note 42, art. I(1)(a).

⁹³ *Id.*

⁹⁴ See *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/06.

⁹⁵ See, e.g., Press Release, Deloitte, UK Airlines Start to Value Landing Slots as Assets on Balance Sheets, *available at* http://www.deloitte.com/view/en_GB/uk/news/news-releases/969833d0303fb110VgnVCM100000ba42f00aRCRD.htm (stating that slots at London Heathrow may cost up to £30 million).

⁹⁶ *Société Générale de Surveillance S.A. v. Republic of Phil.*, ICSID Case No. ARB/02/06, ¶¶ 101, 111.

protections of the jurisdiction's intellectual property laws. The airline may also enter long-term agreements with hotels to house their flight crews during layovers and to accommodate passengers in the event of prolonged delays. In many cities, an airline may have to contract with surface transportation providers to move crews between the airport and hotels.⁹⁷ The net result of these user charges and fees and contractual relationships plainly amounts to an "injection of funds" into that state by the foreign airline.

From all of these legal and contractual arrangements, airlines naturally have a legitimate "claim to . . . performance having economic value" by their host state and their contracting partners.⁹⁸ And, ultimately, by virtue of these arrangements and capital outlays, airlines can expect a legitimate "claim to money" by operating a profitable venture in the host state.⁹⁹ After all, that is the hallmark of an investment. "An *expenditure* to acquire property or other assets *in order to produce revenue*."¹⁰⁰ So when a host state impairs a stream of revenue emanating from the expenditures made by a foreign aviation investor within its borders, it has harmed a foreign "investment" and consented to arbitrate claims that the investor might bring against it.

B. USING INVESTOR-STATE ARBITRATION TO REDRESS VIOLATIONS OF INTERNATIONAL AVIATION LAW: DIRECT INCORPORATION AND FAIR AND EQUITABLE TREATMENT

The substantive rules guaranteed to investors, and applicable to their investment claims, are likewise grounded in the text of the relevant treaty. Most BITs contain a clause requiring treatment "in accordance with . . . international law,"¹⁰¹ or "in no

⁹⁷ Some BITs textually incorporate such activities under its rubric of protections by guaranteeing national and/or "fair and equitable treatment" not only to investments *per se*, but also "associated activities," which is defined to include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase, issuance, and sale of equity shares and other securities, and the purchase of foreign exchange for imports.

U.S.-Arg. BIT, *supra* note 42, arts. I(1)(e), II(1).

⁹⁸ *Id.* art. I(1)(a).

⁹⁹ *Id.*

¹⁰⁰ BLACK'S LAW DICTIONARY 825 (6th ed. 1990) (emphasis added).

¹⁰¹ *E.g.*, China-Ger. BIT, *supra* note 24, art. 8(5).

case . . . less [favorable] than that required by international law.”¹⁰² Some BITs are even more explicit in adopting international law as the rule of decision, and provide that:

If the legislation of either Contracting Parties or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over this Agreement.¹⁰³

These provisions beg the obvious question: what constitutes “international law”? The most accepted answer comes from the Statute of the International Court of Justice, which empowers that body to decide cases “in accordance with international law,” which is defined by reference to, *inter alia*, international custom and international conventions.¹⁰⁴ Construed in this light, these BIT provisions appear to call for the application of other bilateral and multilateral treaties, including those adopted after the BIT entered into force. This means that investment arbitration

¹⁰² U.S.-Arg. BIT, *supra* note 42, art. II(2).

¹⁰³ China-Ger. BIT, *supra* note 24, art. 10; *see also* Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Thai., art. 7(1), June 24, 2002, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/germany_thailand.pdf; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Alb., art. 2(4), Jan. 11, 1995, S. TREATY DOC. NO. 104-19; Agreement for the Promotion and Protection of Investments, India-U.K., art. 12, Mar. 14, 1994, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/uk_india.pdf; Agreement on Encouragement and Reciprocal Protection of Investments, China-Neth., art. 3(5), June 17, 1985, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/china_netherlands.pdf; Agreement on Encouragement and Reciprocal Protection of Investments, Czech-Neth., art. 3(5), Aug. 1, 1975, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/czech_netherlands.pdf; Agreement on the Reciprocal Promotion and Protection of Investments, Fr.-Mex., art. 10(1), Nov. 12, 1998, *available at* http://www.unctad.org/sections/dite/ia/docs/bits/mexico_france.pdf. The applicability of these provisions extends even beyond the treaties that expressly include them. For instance, the China-U.K. BIT does not include an international law clause, but it does include a most favored nations clause, which requires China to give U.K. investors no less favorable treatment than other investors. *See* China-U.K. BIT, *supra* note 24, art. 3(2). By the combination of this provision and Article 10 of the China-Germany BIT, then, China is obligated to treat UK investors in line with the “obligations under international law existing at present or established hereafter.” *Id.* art. 10. Most-favored-nation clauses are common in modern BITs.

¹⁰⁴ Statute of the International Court of Justice, art. 38(1), June 26, 1946, 59 Stat. 1055, 8 U.N.T.S. 993.

can serve as a means to enforce airline rights derived under the key international aviation conventions, including the Chicago Convention and various bilateral air services agreements.

Let's take a hypothetical example: Suppose a government in the developing world imposed steep fees on foreign airlines landing at its airports, without relation to any identifiable costs in receiving those aircraft. Also, assume that state is a signatory to the Chicago Convention, and its airports act as an important hub for foreign carriers throughout its region. Those carriers would have a legitimate gripe under the Chicago Convention. Article 15 of the Convention permits charges to be imposed on airlines for the use of airport facilities and air navigation facilities, but expressly states that "[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon."¹⁰⁵ Properly construed, it permits charges to recoup the airport or navigational costs of that state but does not permit charges for overflight, take-off, or landing per se.

So what can those carriers do? They could take their claim to a local court, pleading a violation of international law and treaty. But asking a state's courts to assess its own instrumentalities' observance of international law can be a fool's errand, especially in certain parts of the developing world (and even, some would argue, in the developed world).¹⁰⁶ They could implore their own government to engage a dialogue with the recalcitrant state, and if such efforts were not fruitful, hope that their government would then institute an arbitral action at ICAO (or an ad hoc arbitral body pursuant to a bilateral aviation agreement).

¹⁰⁵ Chicago Convention, *supra* note 52, art. 15.

¹⁰⁶ As famously noted by one renowned arbitrator and commentator, it is an error to think that "injustice is abnormal," and that the "rule of law is the norm." Jan Paulsson, *Enclaves of Justice*, in MIAMI LAW RESEARCH PAPER SERIES 1, 2 (2007). Rather, "a better starting point for analysis than a world with only minor blemishes may be a world where nothing is enforceable, [and] property and individual rights are totally insecure . . . as in the world that Hobbes so vividly depicted." *Id.* Indeed, we can safely say that roughly half of the world's population lives in countries where "*justice is a surprising anomaly*." *Id.* And in such places, it is increasingly commonplace for populist leaders to "lambaste the international system as inherently biased and dominated by regressive forces" that pander to foreign businesses, and openly abrogate treaties that restrict the state's power to work against them. Jan Paulsson, *Unlawful Laws and the Authority of International Tribunals*, 23 FOREIGN INVESTMENT L.J. 215, 222 (2008). The reluctance of a national judge to hold his own state accountable for an international treaty violation is not limited to the developing world. See, e.g., *Medellín v. Texas*, 552 U.S. 491 (2008).

Any true measure of justice can be fleeting there as well. When a similar dispute arose between the United States and the United Kingdom in the late 1970s, a settlement was reached only after five months of intensive negotiations, and an ad hoc arbitral tribunal issued a 369-page opinion from which itself followed a decade of failed attempts to resolve the problem through diplomatic negotiations.¹⁰⁷ Indeed, “[s]ince the promulgation of the Chicago Convention of 1944, only five disputes have been submitted to the ICAO Council for formal judicial resolution,” and none of them resulted in “a formal decision on the merits of the case.”¹⁰⁸

That is why private air carriers may need to look elsewhere to recoup their losses from illegitimate and discriminatory practices and protect their foreign investments going forward. As discussed above, if any of the world’s approximately 2,000 BITs is in place between the carrier’s home state and the offending state, treaty arbitration provides a good and perhaps the best alternative. Such arbitration can be invoked by the carrier without the proxy of its home state; it can elevate the dispute beyond local courts and to a panel of neutral arbitrators; it can decide the case expediently, with a full panoply of available relief; and can result in a binding and enforceable award under the New York Convention.

But can the violation of the Chicago Convention support an investment claim? In other words, is that Convention fairly included as an “obligation[] under international law existing . . . between the Contracting Parties” that “entitl[es] investments by investors of the other Contracting Party” to a certain level of “treatment.”¹⁰⁹ Textually, the answer has to be yes. An “obligation[] . . . between” parties typically connotes a bilateral contractual obligation, which in the context of two sovereigns can only mean a treaty.¹¹⁰ It follows that, when a BIT contains language

¹⁰⁷ Dempsey, *supra* note 49, at 258–63.

¹⁰⁸ *Id.* at 270. These statistics may illustrate that “the [ICAO] Council considers that its main task under Article 84 of the Convention is to assist in settling, rather than in adjudicating, disputes.” Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* 136 (Richard B. Lillich ed., 1969). Indeed, the ICAO has been more successful in assisting the consensual resolution of disputes than have most of the other organs of the UN. See Michael Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)*, in *SETTLEMENT OF SPACE LAW DISPUTES* 87, 87–88 (Karl-Heinz Bockstiegel ed., 1979).

¹⁰⁹ China-Ger. BIT, *supra* note 24, art. 10(1).

¹¹⁰ *Id.*; see also BLACK’S LAW DICTIONARY 322, 1502 (6th ed. 1990).

of this sort, multilateral and bilateral aviation treaties may provide the rule of decision for an investor's claims against a recalcitrant state.

Admittedly, this precise line of reasoning has yet to be pressed before a BIT tribunal,¹¹¹ and where it has been pressed on the international stage—before a NAFTA tribunal—consecutive panels of arbitrators have been reluctant to agree.¹¹² That said, however, NAFTA does not include the same textual incorporation of international “obligations” contained in BITs.¹¹³ NAFTA merely obligates the contracting parties to treat investments “in accordance with international law,” which has been interpreted by these tribunals to mean only “customary international law, and not . . . standards established by other treaties of the three NAFTA Parties.”¹¹⁴ The express incorporation of “obligations under international law existing . . . between the Contracting Parties,”¹¹⁵ as discussed above, may warrant a different result.¹¹⁶

Even if the reference to “international law” in the provisions of BITs cannot be construed as “referring to” other international laws and treaties; aviation law and jurisprudence may still serve as relevant context pursuant to Article 31(3)(c) of the Vienna Convention. Though not a rule of decision, such laws may still “color” the interpretation of substantive BIT provisions. Article 31(3)(c) provides that the treaty interpreter “shall” take into account “any relevant rules of international law applicable in the relations between the parties,” which means that “[e]very treaty provision must be read not only in its own context, but in

¹¹¹ Cf. *CME Czech Republic B.V. v. Czech Republic*, Partial Award, ¶ 615, UNCITRAL Arbitration (Sept. 14, 2001) (sustaining BIT claim for violating “the principle[] of international law assuring the alien and his investment treatment that does not fall below the standards of customary international law”).

¹¹² *Mondev Int'l, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 159 (Oct. 11, 2002); *Methanex Corp. v. United States*, Final Award, at pt. IVD, ¶¶ 7, 15, UNCITRAL Arbitration (August 3, 2005).

¹¹³ *Mondev Int'l, Ltd.*, ICSID Case No. ARB(AF)/99/2, ¶¶ 111–12.

¹¹⁴ *Id.*

¹¹⁵ *China-Ger. BIT*, *supra* note 24, art. 10(1) (emphasis added).

¹¹⁶ On the other hand, BITs that only contain language similar to NAFTA, obligating treatment “in accordance with . . . international law,” or “in no case less [favorable] than that required by international law,” run squarely against the unfavorable NAFTA precedent in *Mondev International, Ltd.* and *Methanex Corp.* Gaetan Verhoosel, *The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6 J. INT'L ECON. L. 493, 502–03 (2003). While perhaps persuasive, however, those decisions need not be dispositive. See *id.* (suggesting that NAFTA precedent should not extend beyond the “idiosyncrasies” of that treaty).

the wider context of general international law, *whether conventional or customary*.”¹¹⁷ With about 140 members, the Chicago Convention is applicable between the parties to many BITs, and there should be no doubt that it contains “relevant” rules of international law.¹¹⁸

Treatment in line with the norms of international law is a justified and legitimate expectation, and these expectations are protected under modern BITs. “Fair and equitable treatment” (FET), for instance, is guaranteed to foreign investors in nearly every modern BIT as “an expression and part of the *bona fide* principle recognized in international law.”¹¹⁹ Because “[a]n investor’s decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment,” the FET standard obligates contracting states “to treat foreign investors so as to avoid the frustration of the investors’ legitimate and reasonable expectations.”¹²⁰ In this way, international law norms are incor-

¹¹⁷ I.M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 139 (2d ed. 1984) (emphasis added); *see also* Vienna Convention on the Law of Treaties art. 31(3)(c), *opened for signature* May 23, 1969, 155 U.N.T.S. 331.

¹¹⁸ The International Court of Justice has recognized in its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* that an adjudicator’s “interpretation cannot remain unaffected by subsequent developments of law,” and that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.” *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 19, ¶ 53 (June 21).

¹¹⁹ *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 153 (May 29, 2003), 43 I.L.M. 133 (2004). In recent years, a considerable body of case law has given specific meaning and content to the FET standard, which has emerged as the dominant rule of protection in investment treaty law. *See* FOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 172–73 (2008).

¹²⁰ *Saluka Invs. B.V. v. Czech Republic*, Partial Award, ¶ 301–02, UNCITRAL Arbitration (Mar. 17, 2006); *see also id.* ¶¶ 285–309 (thoroughly discussing the FET standard as protecting an investors’ “legitimate expectations”). At least twelve investment tribunals have held that the FET standard is violated when a state frustrates an investor’s legitimate expectations. *See, e.g.,* *CME Czech Republic v. Czech Republic*, Partial Award, ¶ 611, UNCITRAL Arbitration (Sept. 13, 2001); *Duke Energy Eltroquil Partners v. Ecuador*, ICSID Case No. ARB/04/19, Award, ¶¶ 365–66 (Aug. 18, 2008); *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009); *Eureko B.V. (Neth.) v. Republic of Poland*, Ad Hoc, Partial Award, ¶¶ 231–35 (Aug. 19, 2005); *Jan de Nul NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, ¶¶ 117, 135 (Nov. 6, 2008); *Occidental Exploration & Prod. Co. v. Ecuador*, LCIA Case No. UN 3467 (2004) (award); *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, ¶

porated into nearly every BIT, irrespective of whether they *expressly* incorporate international law.

Back to our hypothetical example: even if those foreign airlines affected by the schedule of illegitimate landing fees could not, under the relevant BIT, plead a direct violation of an aviation treaty as an investment claim, they may still be able to claim a denial of FET. The unfairness of the levy, in this context, is that it runs contrary to the legitimate and reasonable expectations of those airlines whose investment consists of providing direct flights into that country—specifically, the expectation that they can land free of any “fees, dues or other charges . . . imposed by [the destination] State in respect solely of the right of . . . entry into . . . its territory.”¹²¹ Indeed, now suppose that the destination and origin states have signed open skies agreements, liberalizing their respective markets to each other’s carriers and thereby promising airlines unrestricted route, capacity, and marketing rights.¹²² There cannot be much doubt that such an

272 (May 8, 2008); *Rumeli Telekomz AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 609 (July 29, 2008); *Saluka Invs. B.V. v. Czech Republic*, Partial Award, ¶ 302, UNCITRAL Arbitration (Mar. 17, 2006); *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 153 (May 29, 2003), 43 I.L.M. 133 (2004); *Waste Mgmt., Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (Apr. 30, 2004), 43 I.L.M. 967 (2004).

¹²¹ Chicago Convention, *supra* note 52, art. 15.

¹²² The U.S. State Department lists the following highlights of virtually all open skies agreements, which have by default become the template for many new bilateral air services agreements around the world:

1. Free Market Competition[:] No restrictions on international route rights; number of designated airlines; capacity; frequencies; or types of aircraft.
2. Pricing Determined by Market Forces[:] A fare can be disallowed only if both governments concur—“double-disapproval pricing”—and only for certain, specified reasons intended to ensure competition.
3. Doing Business Protections[:] For example: All carriers of both countries may establish sales offices in the other country, and convert earnings and remit them in hard currency promptly and without restrictions. Carriers are free to provide their own ground-handling services—“self handling”—or choose among competing providers. Airlines and cargo consolidators may arrange ground transport of air cargo and are guaranteed access to customs services. User charges are non-discriminatory and based on costs.
4. Cooperative Marketing Arrangements[:] Airlines may enter into code-sharing or leasing arrangements with airlines of either country, or with those of third countries. An optional provision authorizes code-sharing between airlines and surface transportation companies.
5. Provisions for Consultation and Arbitration[:] Model text includes procedures for resolving differences that arise under the agreement.
6. Liberal

agreement creates, at a bare minimum, a legitimate expectation that the destination state will take necessary steps to make these rights a reality and certainly not to impede their exercise.

Even NAFTA tribunals have held that breaches of international obligations may support, if not directly undergird, a treaty claim.¹²³ According to the tribunal in the *S.D. Myers, Inc. v. Government of Canada* arbitration:

[Even though] the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied “*fair and equitable treatment*,” . . . the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of [the FET standard].¹²⁴

The concurring arbitrator explored the issue in more detail:

The interpretation and application of [FET] must, I tend to think, . . . take into account the letter or spirit of widely, though not universally, accepted international agreements [The] breach of a treaty rule . . . does not appear to be consistent with the concept that the investor has been given . . . “fair and equitable treatment.”¹²⁵

The tribunal in *Mondev International, Inc. v. United States* noted that when a state undertakes to provide investors with FET, it does so “having regard to . . . the evolutionary character of international law, . . . whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce.”¹²⁶

We can easily move beyond a mere hypothetical; fee disputes of this type abound in the world of international aviation. The

Charter Arrangements[:] Carriers may choose to operate under the charter regulations of either country. 7. Safety and Security[:] Each government agrees to observe high standards of aviation safety and security, and to render assistance to the other in certain circumstances. 8. Optional 7th Freedom All-Cargo Rights: Provides authority for an airline of one country to operate all-cargo services between the other country and a third country, via flights that are not linked to its homeland.

Open Skies Agreement Highlights, U.S. DEPARTMENT OF STATE (Jan. 30, 2009), <http://www.state.gov/e/eeb/rls/fs/2009/119760.htm>.

¹²³ *S.D. Myers, Inc. v. Gov't of Canada* (U.S. v. Can.), NAFTA/UNCITRAL Tribunal, ¶ 264 (Nov. 13, 2000), available at <http://italaw.com/documents/SDMeyers-1stPartialAward.pdf>.

¹²⁴ *Id.*

¹²⁵ *Id.* ¶¶ 234–38 (Schwartz, J., concurring).

¹²⁶ *Mondev Int'l, Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 119, 125 (Oct. 11, 2002), 125 I.L.R. 110 (2004) (emphasis added).

U.S.-U.K. dispute briefly noted above involved the British Airports Authority's imposition of a new landing fee schedule that incorporated a steep increase in peak-period charges and a weight element, which fell primarily upon the wide-bodied aircraft used by transatlantic carriers rather than domestic or intra-Europe flights.¹²⁷ These charges violated Article 15 of the Chicago Convention, as well as Article 10(3) of the U.S.-U.K. Aviation BIT, which provides that such "charges may reflect, *but shall not exceed*, the full cost to the competent charging authorities of providing appropriate airport and air navigation facilities and services."¹²⁸

A more recent dispute between U.S. carriers and Argentina is clearer still:

In early 2002 the government of Argentina delinked its peso from the U.S. dollar, whereupon the value of the peso quickly fell to about 33 U.S. cents. In an attempt to mitigate the ensuing panic, the Argentine Congress passed a law requiring that public service tariffs, including airport user fees, which were formerly denominated in dollars, be paid in pesos as though each peso were still worth \$1.00, that is, at a one-to-one rate. The Argentine Executive, however, issued a Decree requiring that airport user charges for *international* flights—for landing, parking, and air traffic control—at Buenos Aires International Airport . . . be paid in dollars at the floating exchange rate of roughly three-to-one.¹²⁹

The result was that the airport charges for foreign carriers were approximately three times higher than those paid by Argentina's domestic carrier, Aerolineas.¹³⁰ These sorts of charges,

¹²⁷ Dempsey, *supra* note 49, at 258–59.

¹²⁸ *Id.* at 259–60 (emphasis added).

¹²⁹ *Aerolineas Argentinas S.A. v. U.S. Dep't of Transp.*, 415 F.3d 1, 3 (D.C. Cir. 2005).

¹³⁰ *See id.* Nearly a decade later, this dispute remains, to some degree, unresolved. In June 2003, DOT found that "the imposition of higher fees at Ezeiza airport on U.S. carriers than those paid by Aerolineas Argentina constitutes, on its face, the type of activity that [the FCPA] was intended to reach" and that this situation constitutes a violation of the Air Transport Agreement between the United States and the Republic of Argentina. *Id.* at 3–4. After months of unsuccessful talks between the two countries, the DOT imposed countermeasures on Aerolineas, and conditioned their foreign carrier permit on periodic payments into a U.S. escrow account to offset the difference between what it actually pays for services at Ezeiza airport and the higher amount it would be paying were it not benefiting from discriminatorily favorable treatment vis-a-vis U.S. carriers. *Id.* These countermeasures against Aerolineas remain in place, and have resulted in Aerolineas Argentina having deposited over \$6 million into the escrow account since 2003.

the amount of which has no connection to the cost of services provided, arguably violate Article 15 of the Chicago Convention and a host of bilateral commitments in the U.S.-Argentina aviation treaty.¹³¹ The U.S.-Argentina BIT guarantees U.S. investors “fair and equitable treatment . . . required by international law,” so being subject to these illegitimate charges likely falls below that minimum standard.¹³²

Now let’s adapt our hypothetical to illustrate the full scope of BIT protections: suppose the charges on incoming aircraft were based not on the nationality of the airline, but on the distance or route travelled to its destination.¹³³ Because the charge is still untethered to the cost of services provided by the destination state, it plausibly remains in violation of the Chicago Convention and its progeny of bilateral aviation agreements.¹³⁴ But it also violates something more fundamental. The charge is, in essence, an attempt to regulate conduct occurring over the high seas and in the territory of third-party states. It is a basic rule of customary international law that each state has sovereignty over its “land area, internal waters and territorial sea”—no more, and

¹³¹ See *id.* at 3.

¹³² U.S.-Arg. BIT, *supra* note 42, art. II(2)(a).

¹³³ There is, again, real-world precedent for such a scheme. An initial iteration of the U.K.’s increased landing fees were based on the distance flown, thereby [(once again)] falling most heavily upon transatlantic carriers. Because the fees were not related to the costs of providing such services, the United States in 1975 found under its Fair Competitive Practices Act (FCPA) that they were excessive and discriminatory. As a consequence, the distance-based formula was eliminated for most British airports immediately, although they were retained at Scottish airports until late 1979.

Dempsey, *supra* note 62, at 258.

¹³⁴ ICAO’s decision rejecting the United States’ attempt to impose extraterritorial security provisions on foreign carriers is instructive on this point. In 1999, the United States issued a Notice of Proposed Rulemaking (NPRM) that would have required foreign air carriers to adhere to security measures that were “identical” to U.S. security measures when departing other states bound for the United States. See ICAO Secretary General, *Ramifications of the Notice of Proposed Rulemaking (NPRM) Related to Security Provisions to be Applied to Foreign Air Carriers by the United States* ¶ 1.5 (ICAO Council, Working Paper No. 11030, 1999). The ICAO Secretary General concluded that the proposed rule would “fall outside the framework of the Chicago system.” *Id.* at ¶¶ 3.8, 4.1. Upon review, the ICAO Council agreed, deciding that the proposed NPRM infringed on the right of each State to “legislate and to enforce their legislation within their sovereign territories.” Int’l Civil Aviation Org., *Summary of Decisions*, at 2, ICAO Doc. No. C-DEC 156/1 (Feb. 8, 1999).

no less.¹³⁵ This precise delineation of a state's territorial jurisdiction applies to the airspace above land and waters, too.¹³⁶ It is thus a rule of customary international law that all aircraft are subject to that state's regulatory jurisdiction while they are within a state's sovereign sphere.¹³⁷ But, it is equally clear as a matter of custom that a state cannot regulate conduct of a non-national aircraft *before* it reaches the state's airspace.¹³⁸ A violation of this principle can equally color an investor's legitimate expectations and his claim to vindicate the FET he is due. In many ways, claims of this nature lie at the apex of aviation law, whose *raison d'être* is to "avoid friction" in the overlap of sovereignties that occurs as "international civil aviation [is] developed in a safe and orderly manner."¹³⁹ Real world examples of this type of dispute, where a state reaches to extend its regulatory reach over international aviation, are becoming more commonplace,¹⁴⁰ and may well be another situation where international airlines can assert their treaty-based rights when such regulations harm their foreign investments.

However they are designed, these sorts of regulations do more than merely hinder air transport operations. When the regulation is accomplished by levying fees, duties, or taxes, these regulations require illicit payments to be made by the foreign

¹³⁵ Agreement on Encouragement and Reciprocal Protection of Investments, China-Fin., art. 1(4), Nov. 15, 2004, *available at* <http://tfs.mofcom.gov.cn/article/h/au/201001/20100106725240.html>; *see also* Chicago Convention, *supra* note 52, art. 2.

¹³⁶ Chicago Convention, *supra* note 52, art. 1.

¹³⁷ *Id.* arts. 11–13.

¹³⁸ *See id.* art. 11; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 403 (1987); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 272 (2009).

¹³⁹ Chicago Convention, *supra* note 52.

¹⁴⁰ A diplomatic and legal row occurred in the mid-1990s when the U.S. forbade gambling and smoking on international flights. Foreign carriers understandably claimed the law sought improperly to extend the jurisdiction of the United States to conduct aboard foreign aircraft operating outside the United States' airspace—which they deemed a trespass on their respective sovereignties. *See* Brian C. O'Donnell, *Gambling to Be Competitive: The Gorton Amendment and International Law*, 16 DICKINSON J. INT'L L. 254, 257–60 (1997). More recently, the European Union has sought to incorporate international aviation into its emissions trading regime, and in effect impose heavy fees on international flights based on fuel used over their states and the high seas. Foreign carriers, through their respective trade associations, have challenged that extraterritorial extension of EU regulation in the U.K. High Court. The matter was referred to, and remains pending before, the court of Justice for the European Communities. *See* Preliminary Reference C-366/10, 2010 O.J. (C 260), 1, 9–10.

investor to the regulating state.¹⁴¹ What results is an “unjust enrichment,” the avoidance of which is “recognized as a general principle of international law.”¹⁴² A leading treatise concluded that “the inherent equitable character that lies behind the principle of unjust enrichment fits perfectly the objective and meaning of the FET.”¹⁴³ Like the “unfairness” of a levy, the “unjustness” of the enrichment can be defined by the violation of a multilateral or bilateral aviation agreement or customary international law more generally.

C. USING INVESTMENT ARBITRATION TO VINDICATE THE
SUBSTANTIVE RIGHT TO NATIONAL AND NON-
DISCRIMINATORY TREATMENT

Our hypothetical example of the landing fee being imposed on foreign carriers not only offends international aviation law and the legitimate expectation of international airlines—it is also patently discriminatory. Fortunately for airlines, nearly every BIT will oblige host states to afford “national treatment” to foreign investors,¹⁴⁴ meaning that foreign investors be treated no differently from comparable investors that are nationals of the host state.¹⁴⁵ According to a 1999 report by the United Nations Conference on Trade and Development (UNCTAD), “[t]he national treatment standard is perhaps the single most important standard of treatment enshrined in international in-

¹⁴¹ See *id.*

¹⁴² Indeed, at least one arbitral tribunal has acknowledged that an investor might be protected by the fair and equitable treatment standard against unjust enrichment by the host state. *Saluka Invs. BV v. Czech Republic*, Partial Award, ¶¶ 448–56, UNCITRAL Arbitration (Mar. 17, 2006) (denying relief on this claim because the claimant could not satisfy the necessary elements to plead unjust enrichment).

¹⁴³ TUDOR, *supra* note 119, at 173.

¹⁴⁴ See, e.g., China-U.K. BIT, *supra* note 24, art. 3 (obliging the state to “accord treatment in accordance with the stipulations of its laws and regulations to the investments of nationals or companies of the other Contracting Party the same as that accorded to its own nationals or companies”); Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. II(1), Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (entered into force May 11, 1997) [hereinafter U.S.-Ecuador BIT] (“Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable.”).

¹⁴⁵ U.S.-Ecuador BIT, *supra* note 144.

vestment agreements.”¹⁴⁶ Some BITs have even more explicit anti-discrimination provisions, and prohibit the host state from taking any “unreasonable or discriminatory measures against the management, maintenance, use, enjoyment or disposal of investments in its territory.”¹⁴⁷ No matter how they are phrased, these provisions prohibit measures that are both “discriminatory in effect as well as those which are intentionally discriminatory.”¹⁴⁸ Tribunals tend to focus on the discriminatory effect of the conduct, holding “that the impact of the measure on the investment [is] the determining factor to ascertain whether it had resulted in non-discriminatory treatment.”¹⁴⁹

Take, for example, a Mexican law adopted in 2001 that imposed a 20% tax on any drink that used sweetener not made from cane sugar.¹⁵⁰ On its face, the new tax applied to companies across the board, irrespective of nationality.¹⁵¹ And, while it was directly applied to soft drink bottlers, its most significant effect was felt by high fructose corn syrup (HFCS) manufacturers as the soft drink bottlers switched from using HFCS to sugar cane sweeteners.¹⁵² CPI, an American company, immediately brought an investment treaty claim against Mexico under Chapter 11 of the North American Free Trade Agreement (NAFTA), alleging a breach of “national treatment.”¹⁵³ As it was, CPI was the dominant supplier of HFCS to the Mexican soft drink industry, and the imposition of the tax nearly destroyed its market.¹⁵⁴ In fact, the “production of HFCS in Mexico was wholly concen-

¹⁴⁶ United Nations Conference on Trade & Development, N.Y., N.Y. & Geneva, Switz., 1999, *National Treatment*, at 1, U.N. Doc. UNCTAD/ITE/IIT/11 (Vol. IV), available at www.unctad.org/en/docs/psiteiitd11v4.en.pdf.

¹⁴⁷ China-U.K. BIT, *supra* note 24, art. 2(2); see also U.S.-Ecuador BIT, *supra* note 144, art. II(3)(b) (“Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.”).

¹⁴⁸ KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 77 (1992).

¹⁴⁹ Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 321 (Feb. 6, 2007); see also RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 177 (2008).

¹⁵⁰ Ley del Impuesto Sobre Producción y Servicios [Law on the Special Tax on Production and Services], art. 2(I)(G), Diario Oficial de la Federación [DO], 12 de enero 2002 (Mex).

¹⁵¹ See *id.*

¹⁵² See Corn Prods. Int’l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 44 (2008).

¹⁵³ *Id.* ¶ 52; see North American Free Trade Agreement, U.S.-Can.-Mex., art. 1102, Dec. 17, 1992, 32 I.L.M. 289 (1993).

¹⁵⁴ See Corn Prods. Int’l, Inc., ICSID Case No. ARB(AF)/04/01, ¶¶ 27, 83.

trated in foreign-owned enterprises (predominantly CPI . . .), whereas production of sugar was largely carried out by Mexican nationals.”¹⁵⁵ Because “HFCS is directly substitutable for sugar as a soft drink sweetener,”¹⁵⁶ it follows that “the effect of what was, in substance, a special tax on HFCS was the distortion of the market in favour of domestic suppliers and to the disadvantage of the foreign investors protected by Chapter XI of the NAFTA.”¹⁵⁷ As a result, the tribunal held that “the HFCS tax was a violation of CPI’s right[]” to be accorded “national treatment” in Mexico.¹⁵⁸

Let’s assume, then, that our hypothetical aviation state has older, smaller aircraft comprising its national fleet. Foreign carriers who have begun to operate much newer and, thus, much larger aircraft serve its airports. These foreign carriers purchased these planes with an eye toward servicing the long-haul travel needs of the state’s growing population as well as their own citizens. The state, however, refuses to grant permission for them to enter its airspace or, more commonly, limits landing slots at reasonable times of the day. Its officials cite non-existent “infrastructure” concerns, but the real reason for these restrictions is to protect the national airline.¹⁵⁹ Like the Mexican levy

¹⁵⁵ *Id.* ¶ 132.

¹⁵⁶ *Id.* ¶ 124.

¹⁵⁷ *Id.* ¶ 132. The tribunal noted that the case might have been different “if HFCS had been produced in equal (or nearly equal) volume by Mexican-owned and U.S.-owned firms. In that circumstance, a measure designed adversely to affect the market for HFCS . . . could not have been held to violate the requirement of national treatment.” *Id.*; see also *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 146 (Oct. 3, 2006), 21 ICSID Rev.-FILJ 155 (2006) (sectorial discrimination does not run afoul of national treatment unless the measure specifically targets foreign investors).

¹⁵⁸ *Corn Prods. Int’l, Inc.*, ICSID Case No. ARB(AF)/04/01, ¶ 143. *But see Methanex Corp. v. United States*, Final Award at pt. IVD, ¶¶ 7, 15, UNICITRAL Arbitration (Aug. 5, 2005) (upholding an industry-wide ban on certain chemical products was nondiscriminatory, even though most of those chemicals were foreign-made, because there was a reasonable showing that it was undertaken “for a public purpose,” as the result of relevant studies, and enacted “with due process” and in good faith).

¹⁵⁹ These fact patterns, too, are not purely hypothetical. See Jay Menon, *India Still Not Ready to Accommodate A380*, AVIATION WK. (May 17, 2011), http://www.aviationweek.com/aw/generic/story_channel.jsp?channel=comm&id=news/avd/2011/05/17/10.xml (discussing India’s refusal to allow Lufthansa’s A380 aircraft into its airports; but while India cites the infrastructure concerns, commentators believe that the government’s approach is more likely focused on curtailing competition for domestic carriers, who do not have the new A380s); *Taffaha Defends Arab Carriers to US Aviation Club and Predicts Further Growth*, ARABIAN AEROSPACE ONLINE NEWS SERVICE (April 28, 2011), <http://www.arabianaer->

on HFCS; it is difficult to view this regulation as anything more than discriminatory protectionism in violation of its bilateral investment obligations.¹⁶⁰

Real cases like this abound in the world of aviation. When the U.K. imposed high fees on heavy airplanes, it naturally and unavoidably discriminated against U.S. transatlantic carriers in favor of domestic carriers.¹⁶¹ Some of these cases are patently discriminatory without even a guise of legitimate non-protectionism; the charges on U.S. carriers in Argentina, for example, were discriminatory on their very face.¹⁶² Even more recently, in 2004, Italy denied U.S. carriers the right to market service at Milan's Linate airport through code-sharing arrangements with their European airline partners, but permitted its own national carrier, Alitalia, to serve the same market through code-sharing

ospace.aero/article.php?section=Air-transport&article=taffaha-defends-arab-carriers-to-us-aviation-club-and-predicts-further-growth (quoting head of major Arab airline trade group as stating that lack of slots at major airports in Europe, "more often than not, nullifies [sic] the liberalization of traffic rights").

¹⁶⁰ This typical fact pattern illustrates why most BITs juxtapose the obligation of states to refrain from both "arbitrary" and "discriminatory" treatment. See, e.g., U.S.-Ecuador BIT, *supra* note 144, art. II(3)(b). *Black's Law Dictionary* defines "arbitrary" as "[i]n an unreasonable manner," "[w]ithout adequate determining principle," "[w]ithout fair, solid, and substantial cause; that is, without cause based upon the law," "not governed by any fixed rules or standard," "[w]illful and unreasoning action, without consideration and regard for facts and circumstances presented," and "synonymous with bad faith or failure to exercise honest judgment." BLACK'S LAW DICTIONARY 104 (6th ed. 1990). BIT tribunals have followed this lead. The *Lauder v. Czech Republic* tribunal specifically referred to this definition in defining "arbitrary" to mean "depending on individual discretion; . . . founded on prejudice or preference rather than on reason or fact." *Lauder v. Czech Republic*, Final Award, ¶ 221, UNCITRAL Arbitration (Sept. 3, 2001). In our hypothetical, if the claimant can show that the developing state's airports have sufficient capabilities to handle the jumbo aircraft, it follows that the decision to ban them is not just a discrimination tactic, but also an "arbitrary" decision likely based upon "prejudice or preference rather than on reason or fact." While these provisions coalesce in this hypothetical case, scholars have noted that "the separate listing of the two standards, typically separated by the word 'or,' suggests that each must be accorded its own significance and scope." DOLZER & SCHREUER, *supra* note 149, at 173. So there remains the possibility that a national measure may be arbitrary, but not necessarily discriminatory, and vice versa.

¹⁶¹ This is because the parking and landing cost for a British Airways Trident was only about one-ninth that of a Boeing 747, and the landing cost for a British Airways Concorde was a mere fraction of the B-747 cost. See *A Review of U.S. International Aviation Policy, Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Pub. Works and Transp.*, 97th Cong., 1st & 2nd Sess. (1982) (statement of C.E. Meyer, Jr.).

¹⁶² See *supra* text accompanying notes 129-32.

with Delta and Air France.¹⁶³ United and American were, thus, placed at a substantial disadvantage in competing for U.S.-Italy traffic.¹⁶⁴ Like the other disputes before it, this one, too, was ultimately settled through state-to-state negotiations.¹⁶⁵ American and United requested the DOT to apply countermeasures to eliminate this advantage by (1) barring all flights to the United States that originate at Milan's Linate airport; and (2) barring Alitalia from code-sharing with any other carrier to display service to or from Linate in conjunction with services offered by that other carrier to or from the United States.¹⁶⁶ The complaint prompted consultations between the U.S. and Italian governments,¹⁶⁷ which eventually led Alitalia to cease its third-country code-sharing service to the United States.¹⁶⁸

State-centric resolution was the only avenue of relief for the U.S. carriers in these instances. There is no U.S.-U.K. BIT, no U.S.-Italy BIT; and the U.S.-Argentina BIT, like most U.S. BITs, permits the states to make certain exceptions to the guarantee of "national treatment" in the field of air transport.¹⁶⁹ But, the U.K., Italy, and Argentina combine for a total of 219 BITs in force with countries other than the United States;¹⁷⁰ countries whose terms guarantee national treatment for aviation investors, whose home states have far less diplomatic clout and economic leverage than the U.S. government, but whose airlines are detrimentally affected by the same discriminatory treatment.¹⁷¹ Investment treaty arbitration is another potentially powerful avenue for these carriers to assert their rights.

¹⁶³ *Am. Airlines v. Alitalia-Linee Aeree Italiane-S.P.A.*, OST-2004-19790, 2004 WL 2747636 (D.O.T. Nov. 30, 2004) [hereinafter *American Order Instituting Proceedings*].

¹⁶⁴ *Id.*

¹⁶⁵ See *Am. Airlines*, Joint Pet. for Recons. of Order 2005-7-22 (Aug. 15, 2005), available at <http://www.airlineinfo.com/Sites/DailyAirline/web-content/ostdocket2004/ost0419790.html> [hereinafter *American Joint Petition*].

¹⁶⁶ *American Order Instituting Proceedings*, *supra* note 163.

¹⁶⁷ *American Joint Petition*, *supra* note 165.

¹⁶⁸ *Id.*; *Joint Reply of American Airlines and United Airlines*, AIRLINE INFO. SEARCH (Dec. 20, 2004), <http://www.airlineinfo.com/ostdocket2004/ost0419790.html>.

¹⁶⁹ U.S.-Arg. BIT, *supra* note 42, Protocol.

¹⁷⁰ See *Investment Instruments Online Bilateral Investment Treaties*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, http://www.unctadxi.org/templates/DocSearch_779.aspx (last updated Mar. 15, 2011) (allowing user to search for BITs by country).

¹⁷¹ See, e.g., China-U.K. BIT, *supra* note 24, art. 2 (providing for comprehensive national treatment without enumerating exceptions).

D. "UMBRELLA CLAUSES" IN INVESTMENT TREATIES: THE
ELEVATION OF ORDINARY CONTRACT DISPUTES INTO
TREATY DISPUTES

The plain language of many BITs requires an investment host state to "observe any obligation it may have entered into with regard to investments."¹⁷² This provision has very broad repercussions. By their express terms, these so-called "umbrella clauses" do not specify to whom the obligation is owed, and they do not limit the host state's obligations to parties with direct privity of contract.¹⁷³ The history and modern application of such clauses illustrates that their very purpose is to ensure that a state's violation of a contract that impairs foreign investment constitutes an international wrong and, thus, an actionable wrong under the treaty.¹⁷⁴

In 1959, the drafters of the Ab-Shawcross Draft Convention on Investments Abroad included an umbrella clause stipulating that "[e]ach Party shall at all times ensure the observance of any undertakings, which it may have given in relation to investments made by nationals of any other Party."¹⁷⁵ This provision's purpose was to ensure that a state's unilateral violation of a contract that relates to foreign investment would be deemed to constitute an international wrong.

The purpose of the clause is to dispel whatever doubts may possibly exist as to whether a unilateral violation of a concession contract is an international wrong. . . . [It thus] served two purposes: it involved an undertaking that the state would not interfere with contractual arrangements made with foreign investors and crucially, when coupled with compulsory dispute settlement provi-

¹⁷² See, e.g., U.S.-Ecuador BIT, *supra* note 144, art. II(3)(c).

¹⁷³ See *id.*

¹⁷⁴ See, e.g., RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 81–82 (1995); John P. Gaffney & James L. Loftis, *The "Effective Ordinary Meaning" of BITs and the Jurisdiction of Treaty-Based Tribunals to Hear Contract Claims*, 8 J. WORLD INV. & TRADE 5, 17–23 (2007); Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims—The SGS Cases Considered*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* (Todd Weiler ed., 2005); F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 245–46 (1982); Hein-Jürgen Schramke, *The Interpretation of Umbrella Clauses in Bilateral Investment Treaties*, 4 TRANSNAT'L DISP. MGMT. 1, 22 (2007).

¹⁷⁵ *Draft Convention on Investments Abroad (ABS-Shawcross Draft Convention)*, UNCTAD, art. II, <http://www.unctad.org/sections/dite/ia/docs/Compendium/en/137%20volume%205.pdf> (last visited Oct. 11, 2011).

sions, it would create a remedy for breach of that obligation in international law where one did not exist in municipal law.¹⁷⁶

In the same year as the Ab-Shawcross Draft, the umbrella clause appeared in the first-known BIT between Germany and Pakistan.¹⁷⁷ It stated that “[e]ither Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party.”¹⁷⁸ Commentators describe the role of the umbrella clause as that of “transform[ing] responsibility incurred towards a private investor under a contract into international responsibility.”¹⁷⁹

In 1967, the Organization for Economic Cooperation and Development (OECD) recommended to its member states a draft Convention on the Protection of Foreign Property (OECD Draft Convention) as both a model for their bilateral investment treaties and as a general statement of international law rules applicable to foreign investment.¹⁸⁰ Article 2, the “Observance and Undertakings” clause, stipulated that “[e]ach Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.”¹⁸¹ Eliu Lauterpacht explained that the umbrella clause’s effect was to “put [investor-state contracts] on a special plane in that breach of

¹⁷⁶ Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT’L 411, 423–24 (2004).

¹⁷⁷ See Emily Sweeney Samuelson & Solomon Ebere, *Could a Foreign Investor Use GATS Disciplines in a BIT Claim?* 12 (Working Paper on GATS Negotiations on Domestic Regulation, Discussion Draft of March 12, 2010, 2010), available at <http://www.boell.org/web/161-558.html>.

¹⁷⁸ *Id.*

¹⁷⁹ Sinclair, *supra* note 176, at 433.

¹⁸⁰ Organisation for Economic Co-operation and Development (OECD), *Draft Convention on the Protection of Foreign Property*, at pmbl., Oct. 12, 1967, 7 I.L.M. 117.

¹⁸¹ *Id.* art. 2; see also Sinclair, *supra* note 176, at 427. More recently, the United Nations Conference on Trade and Development concluded that the existence of an umbrella clause in a BIT means that “violations of commitments regarding investment by the host country would be redressible through the dispute settlement procedures of a BIT.” UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, *BILATERAL INVESTMENT TREATIES IN THE MID-1990s*, *supra* note 16, at 56. The United Nations Centre on Transnational Corporations likewise concluded that an umbrella clause

makes the respect of such contracts [between the host State and the investor] . . . an obligation under the treaty. Thus, the breach of such a contract by the host State would engage its responsibility under the agreement and—unless direct dispute settlement procedures come into play—entitle the home State to exercise diplomatic protection of the investor.

U.N. CTR. ON TRANSNATIONAL CORPS., *BILATERAL INVESTMENT TREATIES*, at 39, U.N. Doc. ST/CTC/65, U.N. Sales No. E.88.II.A.1 (1988).

them becomes immediately a breach of convention.”¹⁸² The early model BITs of both France and the United States were also “cast in nearly identical terms to the OECD[’s] Draft” and intended to “raise[] to a treaty issue any attempt by a BIT partner to invalidate a contract by changes in domestic law or otherwise . . . a breach of contract constitutes a breach of treaty.”¹⁸³

Numerous arbitral tribunals have since ruled that umbrella clauses in BITs provide foreign investors with an international forum to resolve their commercial contract disputes with host governments. In *Noble Ventures, Inc. v. Romania*, the tribunal held that Article II(2)(c) of the US-Romania BIT had the effect of “transform[ing] contractual undertakings into international law obligations and accordingly makes it a breach of the BIT.”¹⁸⁴ After analyzing the plain language and purpose of the umbrella clause, as well as arbitral precedent, the tribunal concluded that such clauses may impose

international responsibility [upon a signatory state] by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus “internationalized”, i.e. assimilated to a breach of the treaty. In such a case, an international tribunal will be bound to seek to give useful effect to the provision that the parties have adopted.¹⁸⁵

So long as the contract in question was part of an “investment,” alleged breaches of it can be brought by an international airline against a foreign sovereign not in the sovereign’s own courts,

¹⁸² See Eli Laughterpacht, *The Drafting of Treaties for the Protection of Investment*, in THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT IN DEVELOPING COUNTRIES 18, 31 (1962); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 147 (2006) (alteration in original).

¹⁸³ Sinclair, *supra* note 176, at 433. Kenneth Vandevelde, former lead attorney within the U.S. State Department on investment matters, who participated in the preparation of the U.S. Model BIT and in the negotiation of several U.S. BITs, explained that, pursuant to an umbrella clause:

a party’s breach of an investment agreement with an investor becomes a breach of the BIT, for which the investor or its state may seek a remedy under the investor-to-state or state-to-state disputes procedures. In effect, this clause authorizes use of the BITs’ disputes procedures to enforce investment agreements between the investor and the host state.

VANDELDELDE, *supra* note 148, at 78.

¹⁸⁴ *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 46 (Oct. 12, 2005).

¹⁸⁵ *Id.* ¶ 54.

but in an international arbitral forum. Thus, a state's decision to include umbrella clauses in investment treaties is precisely "to elevate [it]'s contractual breaches to the level of treaty violations."¹⁸⁶

The experience of Zeevi Holdings in Bulgaria is a paradigmatic case of the type of aviation/investment contract being settled by international arbitral bodies.¹⁸⁷ Zeevi was an Israeli investor that, in 1999, purchased a 75% share of Balkan, Bulgaria's national airline, from the government of Bulgaria.¹⁸⁸ The company presented as having a valuable asset: status as the Bulgarian exclusive national carrier, which grants various rights and privileges upon the airline.¹⁸⁹ Soon after consummation of the privatization agreement (PA), which assured Balkan's continued National Carrier Status (NCS) and represented certain assets and debts in an independent audit report, the government of Bulgaria divested Balkan of its NCS.¹⁹⁰ This led to Balkan's bankruptcy, and Zeevi brought an UNCITRAL arbitration against the government of Bulgaria.¹⁹¹ The tribunal eventually found that the revocation of NCS, *inter alia*, breached the PA.¹⁹² In the tribunal's words, the NCS "is of vital importance for an airline since it assures the airlines rights and overflight rights via international treaties . . . [without which] it cannot collect royalties."¹⁹³ Because NCS was "expressly assured by the Respondent" in the PA, it alone assumed the risk of revocation by third

¹⁸⁶ Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty—The Jurisdiction of Treaty-Based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines*, 5 J. WORLD INV'T & TRADE 555, 567 (2004) (citing the UNITED NATIONS CONFERENCE ON TRADE & DEV., BILATERAL INVESTMENT TREATIES IN THE MID-1990S, *supra* note 16 (noting that while umbrella clauses contained in BITs are "directed in particular at investment agreements that host countries frequently conclude with individual foreign investors . . . the language of the provision is so broad that it could be interpreted to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally"))).

¹⁸⁷ See *Zeevi Holdings v. Republic of Bulg.*, Final Award, UNCITRAL Arbitration (Oct. 25, 2006).

¹⁸⁸ *Id.* ¶ 2.5.

¹⁸⁹ See *id.* ¶ 9.

¹⁹⁰ *Id.* ¶¶ 9–11, 24.

¹⁹¹ *Id.* ¶ 25.

¹⁹² *Id.* ¶ 238.

¹⁹³ *Id.* ¶ 274.

states and is thereby liable to the investor for over USD 10 million in damages.¹⁹⁴

The obligation expressed in umbrella clauses goes beyond bilateral contracts, too. In *Enron v. Argentine Republic*, the tribunal noted that the umbrella clause is meant to cover “both contractual obligations such as payment *as well as obligations assumed through law or regulation*.”¹⁹⁵ The *Continental Casualty Co. v. Argentine Republic* tribunal also ruled that the umbrella clause of the U.S.-Argentina BIT guarantees a state’s adherence to “unilateral commitments arising from provisions of the law of the host State regulating a particular business sector and addressed specifically to the foreign investors in relation to their investments therein.”¹⁹⁶ As the *Eureko B.V. v. Republic of Poland* tribunal concluded, the umbrella clause “means what it says,” and its plain language does not differentiate between undertakings of a commercial as opposed to a sovereign nature.¹⁹⁷ “Any obligation” means just that—it does not mean “any sovereign obligation” or “any sovereign, non-commercial obligation,” which are limiting phrases that could have been included in the clause had the parties so intended.¹⁹⁸

This provision brings us full circle. As discussed above, the web of aviation bilaterals contains a host of sovereign obligations that inure directly to airlines. Those are plainly “sovereign obligations” directed at the aviation sector, so by virtue of these “umbrella clauses” prevalent in most modern BITs, states must solemnly abide by those obligations. While these clauses may only provide a belt to the existing suspenders that uphold compliance with international aviation laws, it provides the perfect foil to understand the focus—and the power—of bilateral investment treaties for international airlines: states can no longer arbitrarily violate the global web of international aviation law,

¹⁹⁴ *Id.* ¶¶ 276, 994. Jurisdiction for this claim was founded upon an arbitration clause in the PA, but if that clause did not exist, the same claim could likely have been brought under the umbrella clause in Article 11 of the Israel-Bulgaria BIT.

¹⁹⁵ *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 320 (May 22, 2007) (emphasis added).

¹⁹⁶ *Cont’l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 301 (Sept. 5, 2008).

¹⁹⁷ *Eureko B.V. v. Republic of Pol.*, (Aug. 19, 2005) (Partial Award and Dissenting Opinion), reprinted in 12 ICSID Rep. 335 (2007).

¹⁹⁸ See *El Paso Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶¶ 75, 77 (Apr. 27, 2006); *Pan Am. Energy v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, ¶ 106 (July 27, 2006).

for instance, to protect its national carriers or derive an unjust windfall of regulatory fees. When they do, and they harm a foreign airline's investment, they can be held accountable by foreign investors for their actions.

IV. CONCLUSION

The traditional state-centric mechanisms to resolve aviation disputes are not entirely ineffective or outmoded. They serve their intended purpose to provide states a forum for specialized dialogue; frequently, bilateral negotiations resolve market access and doing-business problems. The mechanism available to states under the Chicago Convention, however, hardly whets the appetite; for the development of aviation law and the vindication of private rights under that law, five disputes in 65 years is a starvation diet.¹⁹⁹ The ability of a private airline to force international aviation law directly upon a recalcitrant state, and bypass the state-to-state mechanisms presented by aviation treaties, may provide a powerful tool to force compliance with the global web of *supranational* regulation provided by those laws. In a highly-regulated industry like aviation, with internationally generated legal norms, the developing mechanism of BIT arbitration can exert a strong disciplinary influence over the exercise of a state's regulatory authority and gives industry participants a powerful form of judicial protection and judicial review.

¹⁹⁹ Noteworthy commentators have said the same thing about the ICJ's jurisdiction to hear commercial disputes brought by sovereigns on behalf of their investors, which has led to a paltry two decisions in fifty years and—concomitantly—the evolution of investor-state arbitration to fill the void. See Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3 TRANSNAT'L DISP. MGMT. (2006).



Book Review

