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The Internationalized Contract and the Populist Backlash to the Fine Print

ERICK MARQUINA[†]

I. INTRODUCTION

It is no secret that sovereign States are wary of investor-state dispute settlement (“ISDS”)¹ through which foreign investors, namely multinational corporations (“MNCs”), can unilaterally compel binding arbitration for violations of bilateral investment treaty (“BITs”) obligations, often through treaty shopping.² A powerful example of how far those obligations and treaty shopping can extend is the “internationalized” contract, which arises whenever a foreign investor uses a signatory host state’s BIT terms, such as umbrella clauses and Fair and Equitable Treatment (“FET”) language, to broaden the treaty’s protections to encompass a purely domestic transaction.³ In an international legal arena governed by principles of

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1. Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 *BROOK. J. INT’L L.* 639, 639, 649-50, 658-59 (2018) (discussing criticisms from United States conservatives who argue that ISDS will undermine United States’ sovereignty by giving international arbitrators a role typically reserved for domestic courts, as well as opposition from other countries, such as Australia, Brazil, South Africa, and India); *see generally* Dani Rodrick, *Populism and the economics of globalization*, *J. INT’L. BUS. POLICY* (Dec. 2018), https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf.

2. Julian Arato, *Corporations as Lawmakers*, 56 *HARV. INT’L L.J.* 229, 233, 275-83 (2015).

3. *See id.* at 249.

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sovereignty and consent,⁴ the internationalized contract and its underlying mechanics sparked a populist backlash from many States that once tolerated the scope of BIT protections.⁵ Two questions arise in this context: (1) Does the internationalized contract and its mechanisms warrant such a strong populist backlash? (2) Will the internationalized contract as a doctrine survive this populist backlash? This Article's answer to both questions is no and likely not, respectively.⁶

Understanding the internationalized contract necessarily requires understanding the international legal world in which it was born. Part II introduces that world's background by discussing BITs, international investment law, ISDS, International Centre for Settlement of Investment Disputes ("ICSID"), the internationalized contract from a doctrinal perspective, and the populist backlash to those underlying mechanisms.⁷ Then, Part III argues that States see the internationalized contract and its mechanisms as an impermissible encroachment on sovereignty, which gave rise to a populist backlash.⁸ This Article analyzes the merits of that backlash and argues that the internationalized contract will likely not remain in place if populist States continue their backlash.⁹ Lastly, Part IV concludes by arguing that the internationalized contract, though powerful, is a fairly limited doctrine that itself is subject to sovereign forces that States already possess, which suggests that its days are numbered.¹⁰

II. BACKGROUND

The internationalized contract is a doctrinal merger between international law's powerful protections for foreign investments and domestic contract law.¹¹ Those protections manifest through BITs and international investment law, which govern transactions between

4. See Anna Cavnar, *The Foreign Office Model versus the Global Governance Model: An Introduction*, INST. INT'L L. JUST., 2-3, (Dec. 17, 2019), <http://iilj.org/wp-content/uploads/2016/08/Cavnar-The-Foreign-Office-Model-Versus-the-Global-Governance-Model-2008.pdf>.

5. Erik Voeten, *Populism and Backlashes against International Courts*, PERSP. ON POL., 1 (June 20, 2019).

6. *Infra* Part III(D).

7. *Infra* Part II.

8. *Infra* Part III.

9. *Id.*

10. *Infra* Part IV.

11. *Infra* Part II(C).

foreign investors, such as MNCs, and host states.¹² Any disputes arising from transactions protected within the ambit of BITs are adjudicated through ISDS in international tribunals, such as ICSID.¹³ ICSID as a tribunal determines whether BIT protections reach certain transactions and, if so, to what extent.¹⁴ Various cases demonstrate that domestic contracts and those underlying obligations can themselves come under the aegis of BIT protections, which gives rise to internationalized contracts.¹⁵ Those broad protections strike strongly in favor of foreign investors and against the host state, whose sovereign interests in regulating markets within its territory must often yield to BIT enforcement through ISDS.¹⁶ Recently, States have voiced their concerns over what they see as a gross encroachment on sovereignty and the voice of the State's people.¹⁷ Those voices, though not new, recently became salient once more States expressed their frustrations with the current MNC-favored regime, which led to a populist backlash against the doctrine and its mechanisms.¹⁸

A. Bilateral Investment Treaties and International Investment

BITs are agreements between two sovereign States that “protect investment by investors of one state in the territory of another state by articulating substantive rules governing the host state’s treatment of the investment and by establishing dispute resolution mechanisms applicable to alleged violations of those rules.”¹⁹ BIT rules generally come in two forms: negative obligations, which impose a duty on a government to not act, and a positive obligation, which imposes an affirmative duty on a government to defend the investor from threat or hardship.²⁰ From 1959 to 2002, nearly 2200 individual BITs formed, which makes the BIT one of the most widely used form of international agreement for protecting foreign investments.²¹

12. *Infra* Part II(A).

13. *Infra* Part II(B).

14. *Id.*

15. *Infra* Part II(C).

16. *Infra* Part II(B).

17. *Infra* Part II(D).

18. *Id.*

19. Kenneth J. Vandavelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT’L L.J. 469, 469-70 (2000).

20. Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT’L & COMP. L. REV. 403, 417, 421 (2006)

21. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do Bits Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 67 (2005)

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A BIT's purpose is twofold: "to stimulate the reciprocal flow of investment between countries and to afford both countries legal protection in either jurisdiction."²² BITs come with a variety of titles, such as "treaties," "conventions," and "agreements," but an important point is that they fall within the definition of "treaty" under the Vienna Convention on the Law of Treaties.²³ In terms of definitions under a BIT, an "investor" is a natural person or legal entity making the investment in the territory of the other party.²⁴ However, an "investment" has no fixed definition.²⁵ However, an investment can generally include "assets or inputs in money or services, which is invested or reinvested in a sector of economic activity."²⁶

Regarding investments, international investment law is primarily focused on foreign direct investment ("FDI"), that is, "the transfer of tangible or intangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets."²⁷ FDIs involve two states:

22. Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 255, 257-58 (1994). At this point, note that there is vast literature discussing the scope of BITs, ISDS as a process, ICSID as a forum, and general criticisms the spawned from those international legal instruments. This Article will avoid any superfluous and idiosyncratic analysis of these subjects primarily to avoid diluting its main point, which is the underlying internationalized contract doctrine and a populist response therefrom. See generally Jeswald W. Salacuse & Nicholas P. Sullivan, *DO BITS REALLY WORK?: AN EVALUATION OF BILATERAL INVESTMENT TREATIES AND THEIR GRAND BARGAIN*. 46 HARV. INT'L L.J. 67 (2005).

23. Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 255, 257 (1994); Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (VCLT) (defining "treaty" as an "international agreement, concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;") (emphasis added).

24. Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 255, 259 (1994).

25. *Infra* Part II(C). In fact, the definition of an "investment" is at the heart of the internationalized contract doctrine because tribunals dealing with this doctrine ultimately must decide whether the foreign investor's domestic contract is an "investment" protected under the BIT. See, e.g., CMS Gas Transmission Co., ICSID Case No. ARB/01/8, Award ¶ 299 (holding that a BIT's umbrella clause offers international remedies for State contractual violations). *But see* SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak., ICSID Case No. ARB/01/13, Objections to Jurisdiction (Aug. 6, 2003), 8 ICSID Rep. 406, P161 (2005) (refusing to extend BIT protections to a domestic contractual violation absent an express provision in the treaty permitting such a protection).

26. Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT'L L.J. 255, 259 (1994). Some treaties go further to explicitly describe various types of investments. *Id.* The "majority of agreements" typically outline the following: "stocks, credits, securities, real estate, and personal property, in rem assets, intellectual property rights, prospecting, extraction or developing of natural resources, including public law concessions, etc." *Id.*

27. Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment*

one “home” state, where the investor maintains its nationality,” and one “host” state, where the investments are physically located.²⁸ As with any transaction, FDIs provide benefits and costs for involved parties.²⁹ Benefits for the host state can include: (1) an influx of wealth for local producers supplying goods or services to investors; (2) new local jobs; and (3) development of physical infrastructure through new and superior technology from investors.³⁰ However, consequences may include: (1) corruption; (2) environmental degradation; and (3) displacement of local competitors.³¹ The most relevant consequence for this Article’s purposes is that the substantive rules protecting FDI can “encroach on the host state’s sovereignty.”³²

This “encroachment” lies at the heart of the BIT’s protections of foreign investments and enforcement process.³³ An aggrieved party who believes the other party violated a protected transaction under the BIT may seek redress in the host state’s domestic courts.³⁴ Additionally, aggrieved foreign investors, such as MNCs, may initiate arbitration proceedings in an international tribunal pursuant to provisions within the BIT.³⁵ However, foreign investors often faced judicial bias in favor of the host state when the investor attempted to seek remedy in the host state’s domestic courts.³⁶ Accordingly, contemporary arbitrations are frequently heard before ICSID, “an institution within the World Bank Group formed in 1966 to conduct and promote [ISDS].”³⁷

Treaties, 13 U. MIAMI INT’L & COMP. L. REV. 403, 406-07 (2006).

28. *Id.* at 407. These FDIs often take the form of investors, such as MNCs, purchasing and developing productive facilities, such as factories, mines, drilling platforms, or offices. *Id.* These investments can also include ownership of subsidiary corporations within the host state. *Id.*

29. *Id.* at 408.

30. *Id.*

31. *Id.*

32. Joshua Robbins, *The Emergence of Positive Obligations in Bilateral Investment Treaties*, 13 U. MIAMI INT’L & COMP. L. REV. 403, 408-09 (2006)

33. *See id.* at 416.

34. Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT’L L.J. 255, 265 (1994). The host state is the country in whose territory the investment was made. *Id.*

35. *Id.*

36. Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 BROOK. J. INT’L L. 639, 640 (2018).

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

B. Investor-State Dispute Settlement in the International Centre for Settlement of Investment Disputes

Two interrelated solutions arose around the 1960s to combat biases foreign investors faced in trying to enforce their agreements in host state's domestic courts—an international forum through ICSID and the arbitration mechanism of ISDS.³⁸ Proposals at the United Nations sought to resolve disputes between host nations and foreign investors under international law, which contradicted sovereign views that domestic law governed those agreements.³⁹ After a series of proposals and debates, members of the World Bank established the ICSID Convention in 1965 with the goal of providing conciliation and arbitration facilities to resolve international investment disputes.⁴⁰ The ICSID Convention entered into force in 1966 after the first 20 States ratified it, and it is currently ratified by 154 Contracting States.⁴¹ This treaty created ICSID, an institution committed to resolving disputes between countries and international investors.⁴² Article 25 of the ICSID Convention provides that “the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”⁴³ Though this language did not define how to give written consent, consent through BITs became standard practice.⁴⁴ Lastly, States that are party to the ICSID Convention are “bound to comply with any award issued against them by an ICSID arbitral tribunal, and to enforce such awards made against other host

38. See Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 *BROOK. J. INT'L L.* 639, 639-45 (2018).

39. Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 *GA. J. INT'L & COMP. L.* 47, 48-49 (2009).

40. Roderick Abbott, Fredrik Erixon & Martina Francesca Ferracane, *Demystifying Investor-State Dispute Settlement (ISDS)*, EUROPEAN CTR. FOR INT'L POLITICAL ECON., 5, https://ecipe.org/wp-content/uploads/2014/12/OCC52014__1.pdf (last visited Dec. 17, 2019).

41. *ICSID Convention*, THE WORLD BANK GROUP, <https://icsid.worldbank.org/en/Pages/icsidocs/ICSID-Convention.aspx> (last visited Dec. 17, 2019).

42. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 1, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, 182.

43. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, 194. Under Article 25, “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.” CAN THIS BE A SHORT CITE?

44. Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 *GA. J. INT'L & COMP. L.* 47, 56 (2009).

states.”⁴⁵

On the other hand, ISDS is the legal mechanism that “allows [MNCs] a forum, other than the court system of the country in which the dispute arose . . . , to arbitrate a controversy between a corporation and the host country.”⁴⁶ ISDS provides foreign corporations an opportunity to be heard in a fair and neutral manner by allowing both parties to appoint arbitrators.⁴⁷ In order for MNCs to gain access to ISDS, there must be an underlying treaty negotiated by the host country’s government and the country in which the MNC is incorporated, which is where the BITs enter the fray.⁴⁸ Host countries may also statutorily provide an ISDS tribunal jurisdiction over a dispute or by contracting for that forum with the investor.⁴⁹ Regardless of the method, States now give *ex ante* consent for foreign investors to have the exclusive right to bring a claim before an international tribunal.⁵⁰ In contrast, any State government seeking relief against a foreign investor or other domestic corporation seeking relief against their home State must rely on domestic courts for their claims.⁵¹ It is through these mechanisms—ICSID as a forum and ISDS clauses within BITs as the pathway to that forum—that internationalized contracts can exist.⁵²

C. *The Internationalized Contract*

An internationalized contract is a domestic contract that is legally considered an “investment” that falls within the ambit of a BIT’s umbrella clause or FET language, which grants that contract international legal protection under the treaty itself.⁵³ In essence, the internationalization doctrine is a merger between international law’s strong protections for foreign property and domestic contracts.⁵⁴

BITs by their nature incorporate broad standards aimed at protecting foreign property from undue interference by the host

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

46. Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 Brook. J. Int’l L. 639, 639 (2018). Later, in 1959, the first ISDS clause emerged from a bilateral trade agreement between Germany and Pakistan. *Id.* at 647.

47. *Id.* at 639.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 639-40.

52. See Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229, 260 (2015).

53. See *id.*

54. *Id.*

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state.⁵⁵ Though these standards rarely differed in textual substance from domestic contracts, tribunals regularly expanded the ambit of BIT guarantees.⁵⁶ Tribunals tend to expand treaty protection for transnational property to cover the total field of possible state action.⁵⁷ In practice, this meant that state action at all levels, including legislative, executive, or judicial, and regulatory domains such as taxation to public health to environmental regulations were not free from international scrutiny so long as they affected foreign property.⁵⁸ Not only did tribunals tackle direct takings and State regulatory efforts to destroy the investment's economic value, tribunals also required compensating for partial takings and the simple diminution of an investment's value. As the ICSID case, *CMS Gas v. Argentina*, reveals, domestic contracts fall well within the scope of foreign property.⁵⁹

In *CMS Gas v. Argentina*, an American investor, CMS, claimed that its host state destroyed the value of a gas transportation concession operated by its local subsidiary.⁶⁰ CMS argued that this loss directly violated its domestic License contract with Argentina and, therefore, fell within the ambit of the Argentina-U.S. BIT's umbrella clause.⁶¹ Additionally, CMS argued that Argentina violated the BIT's FET provision when it left CMS's investment in an unpredictable and unstable condition.⁶² While Argentina argued that it enacted a series of regulatory measures to manage its on-going financial crisis, the tribunal held that the regulations partially vitiated the value of CMS's investment and so the State must compensate them accordingly.⁶³ In viewing a domestic contract as an investment, *CMS Gas v. Argentina* exemplified how internationalized contracts function as a merger of international property protections and domestic contract principles.⁶⁴ By considering Argentina's violation of CMS's contract as tantamount to treaty violation, ICSID

55. *See id.* at 260.

56. *Id.* at 261.

57. *Id.*

58. *See* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 261 (2015).

59. *See generally* CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 21, 2005).

60. *Id.* at ¶¶ 68-73.

61. *Id.* at ¶ 296. This umbrella clause provided that each party "shall observe any obligation it may have entered into with regard to an investment."

62. *Id.* at ¶¶ 266-67. This BIT's FET provision provides: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."

63. *Id.* at ¶ 281.

64. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 260-61 (2015).

internationalized the relevant domestic contract.⁶⁵

Notably, *CMS Gas v. Argentina* also provides an example of how ICSID interprets both primary methods of internationalizing a contract—umbrella clauses and the FET.⁶⁶ ICSID held that domestic contract breaches are likely protected under umbrella clauses when there is “significant interference by governments or public agencies with the rights of the investor.”⁶⁷ Additionally, ICSID held that the FET, though vague as it is in most BITs, requires host states to ensure investments maintain stability and predictability to protect the legitimate expectations of investors.⁶⁸

1. Umbrella Clauses

As *CMS Gas* shows, one of the primary methods through which domestic contracts gain international legal effect is through umbrella clauses.⁶⁹ In essence, umbrella clause are contractual clauses within BITs that purport to include contractual claims within the “umbrella” of a BIT’s protections.⁷⁰ Normally, mere contractual violations cannot trigger treaty protection under customary international law, umbrella clauses attempt to circumvent this tradition through explicit statements that breaches of contract will be considered breaches of treaty as well.⁷¹ In doing so, an umbrella clause can elevate a violation of a contractual provision to an independent international law violation, and, thus, provide foreign investors access to international institutions to resolve their disputes.⁷² This method “extends the public international law principle of *pacta sunt servanda* to commercial contracts with States by transforming contractual obligations into obligations under the applicable investment treaty.”⁷³

65. *Id.*

66. *Id.*

67. *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, Award at ¶ 299.

68. *See id.* at ¶¶ 279-81.

69. Andrey V. Kuznetsov, *The Limits of Contractual Stabilization Clauses for Protecting International Oil and Gas Investments Examined Through the Prism of the Sakhalin-2PSA: Mandatory Law, the Umbrella Clause, and the Fair and Equitable Treatment Standard*, 22 WILLIAMETTE J. INT’L L. & DISP. RESOL. 223, 250 (2015).

70. Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, 51 VA. J. INT’L L. 1005, 1006 (2011).

71. *Id.*

72. Andrey V. Kuznetsov, *The Limits of Contractual Stabilization Clauses for Protecting International Oil and Gas Investments Examined Through the Prism of the Sakhalin-2PSA: Mandatory Law, the Umbrella Clause, and the Fair and Equitable Treatment Standard*, 22 WILLIAMETTE J. INT’L L. & DISP. RESOL. 223, 250 (2015).

73. *Id.* at 250-51; *see* Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (VCLT) (defining “*pacta sunt servanda*” as a principle where “every treaty in force is binding upon the parties to it and must be performed by them in good

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Among the roughly 2600 BITs concluded worldwide, about forty percent include some version of an umbrella clause.⁷⁴

Umbrella clauses range in scope depending on the BIT in which they are found.⁷⁵ They are a regular feature of investment treaties and call for the observance of the obligations entered into by the host State.⁷⁶ Umbrella clauses grant subject-matter jurisdiction that can relate merely from investments directly dealing with the BIT all the way to any investment in which the State is engaged.⁷⁷ Hence, an umbrella clause's ability to internationalize a contract is directly connected to the scope of its language.⁷⁸ Broader umbrella clauses can create international obligations for host states that can elevate contract breaches.⁷⁹ For example, language may state that the State shall "observe any obligation it may have entered to" or "observe any obligation it has assumed."⁸⁰ These are the quintessential umbrella clauses within BITs.⁸¹ A modern example of an umbrella clause is seen in the multilateral investment treaty, the Energy Treaty Charter, which provides that "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."⁸² As most investor contracts with a foreign sovereign can be characterized as "investments" for the purposes of the umbrella clauses, violating

faith").

74. Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, 51 VA. J. INT'L L. 1005, 1007 (2011). In fact, countries regularly and favorably use BITs to solicit foreign investment and to ensure protection of their citizens who invest abroad. *Id.* at 1008. Today, BITs typically cover four substantive issues: (1) "conditions for the admission of foreign investors to the host State;" (2) "standards of treatment of foreign investors;" (3) "protection against expropriation;" and (4) "methods for resolving investment disputes.;" *id.* at 1008-09.

75. OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, in *International Investment Law: Understanding Concepts and Tracking Innovations* 101-34, 102 (2008), <https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471535.pdf>.

76. Michael Feit, *ATTRIBUTION AND THE UMBRELLA CLAUSE – IS THERE A WAY OUT OF THE DEADLOCK?*, 21 MINN. J. INT'L L. 21, 22 (2012).

77. OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, in *International Investment Law: Understanding Concepts and Tracking Innovations* 101-34, 102 (2008), <https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471535.pdf>.

78. *See id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 95, 109. While the Energy Charter Treaty itself is a multilateral treaty and not a BIT, it is an example of how umbrella clauses exist in the language of several types of international agreements to create expansive obligations on Contracting States.

these domestic contracts becomes tantamount to a treaty violation.⁸³ It is this very broad language that allows MNCs to bring States to arbitration for contractual, that is “investment,” violations.⁸⁴

Generally, if an umbrella clause is used to “internationalize” a contract, the following requirements must be met: (1) “the breach of contract must be attributable to the state;” and (2) “the breach of contract must amount to a violation of the umbrella clause.”⁸⁵ The idea behind the process is that investors bring claims against host states when they believe contractual obligations were breached.⁸⁶ Despite the theoretical scope for umbrella clauses, ICSID is currently split as how much substantive force these clauses carry.⁸⁷

As previously mentioned, *CMS Gas v. Argentina* interpreted the scope of umbrella clauses broadly.⁸⁸ In that case, ICSID noted that purely commercial aspects of contract do not necessarily warrant umbrella clause protections, but it is enough that the government interferes with the investor’s rights under the domestic contract.⁸⁹

Noble Ventures, Inc. v. Romania provides an even broader interpretation.⁹⁰ In this case, ICSID expressly stated that a breach of the domestic contract amounts to a breach of the relevant treaty.⁹¹ In that case, the treaty “internationalized” the domestic contract by elevating a standard breach of contract to a breach of international obligations under that same treaty.⁹²

However, ICSID gave an umbrella clause a restrictive interpretation in *SGS v. Pakistan*.⁹³ In that case, SGS directly argued that the umbrella clause elevated all contractual claims to the level of treaty claims.⁹⁴ However, ICSID held that as long as the contractual

83. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229, 250 (2015).

84. *Id.*

85. Michael Feit, *Attribution and the Umbrella Clause – Is There a Way out of the Deadlock?*, 21 MINN. J. INT’L L. 21, 22-23 (2012).

86. *Id.* at 22.

87. Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, 51 VA. J. INT’L L. 1005, 1007 (2011).

88. *See CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, Award at ¶ 299.

89. *Id.*

90. *See generally Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005).

91. *Id.*

92. *Id.*

93. *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, *Objections to Jurisdiction* (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

94. *Id.* ¶ 98. The Swiss-Pakistani BIT’s umbrella clause stated, “[e]ither Contracting Party shall constantly guarantee the observance of commitments it has entered into with

breaches failed to trigger additional protections under the BIT, SGS could not seek remedy before the tribunal.⁹⁵ ICSID stated that it needed a special agreement by the parties to pass judgment on the contractual claims in that case, but concluded that no such agreement existed.⁹⁶

While umbrella clauses carry great potential to elevate domestic contracts, their effectiveness ultimately depends on ICSID's willingness to interpret them broadly.⁹⁷

2. Fair and Equitable Treatment Standard

While both umbrella clauses and the FET are substantive methods to internationalize contracts, interpretations of FET are more amorphous and arguably more powerful.⁹⁸ The FET is a “catch-all autonomous standard of protection found in BITs that address a variety of unjust governmental actions that harm investments but which are not covered by other more specific standards of protection.”⁹⁹ Relevant factors for finding a FET violation include: “(1) ‘whether the State has failed to offer a stable and predictable legal framework;’ (2) ‘whether the State made specific representations to the investor;’ (3) ‘whether due process has been denied to the investor;’ (4) ‘whether there is an absence of transparency in the legal procedure or in actions of the State;’ (5) ‘whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State;’ and (6) ‘whether any of the actions of the State can be labeled as arbitrary, discriminatory or inconsistent.’”¹⁰⁰ The idea is that if a State action violates the FET as it relates to the investment, which can include domestic contracts, then investors are entitled to a remedy before ICSID.¹⁰¹

In terms of protective power, the FET surpasses umbrella

respect to the investments of the investors of the other Contracting Party.” *Id.* at ¶ 97.

95. *SGS v. Pakistan*, Objections to Jurisdiction, ¶ 161.

96. *Id.*

97. *See generally* *SGS Société Générale de Surveillance S.A. v. Islamic Rep. of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction (Aug. 6, 2003), 8 ICSID Rep. 406 (2005).

98. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 258-61 (2015).

99. Andrey v. Kuznetsov, *The Limits of Contractual Stabilization Clauses for Protecting International Oil and Gas Investments Examined Through the Prism of the Sakhalin-2PSA: Mandatory Law, the Umbrella Clause, and the Fair and Equitable Treatment Standard*, 22 WILLIAMETTE J. INT'L L. & DISP. RESOL. 223, 254 (2015).

100. *Id.* at 254-55; *See* *Joseph Charles Lemire v. Ukr.*, ICSID Case No. ARB/06/18, Decision on Jurisdiction, P 284 (Jan. 14, 2010).

101. *See* *Joseph Charles Lemire v. Ukr.*, ICSID Case No. ARB/06/18 at P 284.

clauses because it is not limited to the literal observance of contractual commitments.¹⁰² The FET protects domestic contracts from even governmental depreciation of a contract's value on grounds ranging from discrimination to a failure to meet an investor's legitimate expectations.¹⁰³

The Tecmed Case is the most frequently cited case that interprets the FET, and it is also one of the most expansive interpretations to date.¹⁰⁴ The court in the Tecmed Case used the "good faith" interpretation of FET from *Mondev*, which provided: "To the modern eye, what is unfair and unequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."¹⁰⁵ In light of this definition, the ICSID stated the following:

[Fair and equitable treatment] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparent in its relation with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulation.¹⁰⁶

Under the Tecmed Case, the FET protects the investor's legitimate expectations, which entails the need for consistency, non-arbitrariness, freedom from ambiguity, and "total transparency," as well as compensation for the deprivation of the investment.¹⁰⁷

Though FET interpretations tend to grant it high substantive protections, ICSID does not always immediately defer to that broad

102. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 259 (2015).

103. *Id.*

104. *Id.* at 265; see generally *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 23, 2003).

105. *Tecmed*, ICSID Case No. ARB(AF)/00/2 at ¶ 153-54; see *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 116 (Oct. 11, 2002).

106. *Tecmed*, ICSID Case No. ARB(AF)/00/2 at ¶ 154

107. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 266 (2015).

interpretation.¹⁰⁸ For example, in *CMS Gas v. Argentina*, the tribunal took a more cautious approach in interpreting the FET.¹⁰⁹ While CMS explicitly cited *Tecmed* in their argument, ICSID also looked to the contours of the BIT itself, commonalities among other BITs, and commonalities among prior ICSID cases in its reasoning.¹¹⁰ Specifically, ICSID reasoned that the FET calls for a stable legal and business environment because the BIT's preamble envisions that the FET is desirable "to maintain a stable framework for investments and maximize effective use of economic resources."¹¹¹ Additionally, ICSID reasoned that a significant number of BITs "unequivocally show" that the FET is "inseparable from stability and predictability" and that many "arbitral decisions and scholarly writings point in the same direction."¹¹² Sure enough, ICSID does cite to the *Tecmed* Case, but not before going further to look to precedent and contextualizing the FET within this specific dispute.¹¹³

Regardless of whether corporations use FET or umbrella clauses to internationalize domestic contracts, the reasons for using either contractual strategy are similar—investors are acting to protect their investments.¹¹⁴

3. How MNCs Use Internationalized Contracts

Generally, the internationalized contract arises from a domestic agreement that imposes substantial risks for the investor.¹¹⁵ The duties involved for these contracts can include the exploration, extraction, and sale of a state's natural resources, the construction of fundamental infrastructure, and the operation of utilities.¹¹⁶ These domestic contracts entail some temporary transfer of the state's sovereign prerogatives to the MNC.¹¹⁷ There is an expectation that these contracts will benefit the economy of the host State in a meaningful way.¹¹⁸ Given such high-stakes-investments, foreign investors readily seek compulsory arbitration to resolve any major

108. *Id.*

109. *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, Award at ¶¶ 279-81.

110. *Id.* at ¶¶ 273-76.

111. *Id.* at ¶ 273.

112. *Id.* at ¶ 276.

113. *Id.* at ¶ 279.

114. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 250-51 (2015).

115. *Id.*

116. *Id.* at 250.

117. *Id.*

118. *Id.* at 250-51.

grievances they may have against a state.¹¹⁹

D. Populism

Globalization and the growing role of international institutions in investor-state affairs generated some populist backlash.¹²⁰ Populism is an “ideology that considers society to be ultimately separated into two homogenous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’ and which argues that politics should be an expression of the . . . general will of the people.”¹²¹ Despite this dichotomy, populists typically distinguish “pure people” from other groups, such as immigrants, ethnic or racial minorities, criminals, or some other group that is “singled out as undeserving in a specific national context.”¹²² This division means that populists, in practice, divide society into three groups—the elite, the majority, and the minority.¹²³ Populist leaders focus heavily on the principle that the people should rule, and these leaders claim legitimacy on the grounds that they speak for the people.¹²⁴ Populism fights against globalization in ways that seeks to limit the scope of investor-state relations.¹²⁵ If the sovereignty is the normative paradigm that governs international law and foreign-investor-based concerns gave rise to mechanisms permitting the internationalized contract, then populism is the sovereign response that criticizes that “solution” as going too far.¹²⁶

Populism in any given State is in large part influenced by how globalization affected that State.¹²⁷ Globalization greatly expanded opportunities for exporters, MNCs, investors, and international

119. *Id.* at 250.

120. Erik Voeten, *Populism and Backlashes against International Courts*, PERSP. ON POLITICS, 1 (June 20, 2019), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/22D6468FD3316BB74A63BAD7BBAE8E5C/S1537592719000975a.pdf/populism_and_backlashes_against_international_courts.pdf. For the purposes of this article, a backlash is a government action that attempts to curb or reverse the authority of an international court. *Id.* at 2.

121. *Id.* at 5.

122. *Id.* at 1.

123. *Id.* at 13.

124. *Id.* at 5-6.

125. See Erik Voeten, *Populism and Backlashes against International Courts*, PERSP. ON POL., 1-4 (June 20, 2019), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/22D6468FD3316BB74A63BAD7BBAE8E5C/S1537592719000975a.pdf/populism_and_backlashes_against_international_courts.pdf.

126. *Id.*

127. Dani Rodrick, *Populism and the economics of globalization*, J. INT. BUS. POLICY, 2, (Dec. 2018), https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf.

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banks, and professional classes to take advantage of larger markets.¹²⁸ In doing so, globalization decreased global inequality by helping poor countries, such as China, adapt to changing markets and international trade to spur growth and reduce poverty.¹²⁹ However, globalization also increased domestic inequalities by creating several wedges in society between capital and labor, skilled and unskilled workers, employers and employees, globally mobile professionals and local producers, and elites and ordinary people.¹³⁰ Those wedges drew the ire of a growing populist ideology because populists felt that the rules for international market competition were unfair and MNCs and foreigners were taking advantage of that unfair system.¹³¹ Populist leaders can more easily mobilize along ethno-national or cultural lines when globalization becomes salient in the form of immigration and refugees.¹³² On the other hand, populists may mobilize around socioeconomic class lines when globalization takes the form of trade, finance, and foreign investment.¹³³ In essence, populist movements provide narratives that motivate political mobilization around common concerns, or the “enemies of the people.”¹³⁴ Therefore, populism is ultimately a question of how States frame their response to globalization.¹³⁵

III. ANALYSIS

State voices are clear regarding the internationalized contract: they go too far and MNCs should no longer be able to leverage them as tools against sovereignty.¹³⁶ To their credit, States properly point out that only foreign investors may access ISDS, which makes arbitrations under BITs seem one-sided.¹³⁷ However, these criticisms of the internationalized contract and its enforcement undermine its limited applicability and status as an insecure doctrine.¹³⁸ Despite these dubious merits of populist sentiments, the backlash remains and

128. *Id.* at 12.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 2.

133. Dani Rodrick, *Populism and the economics of globalization*, J. INT. BUS. POLICY, 2, (Dec. 2018), https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf.

134. *Id.* at 13.

135. *Id.*

136. *Infra* Part III(A).

137. *Id.*

138. *Infra* Part III(C).

any further action against BITs, ISDS, and ICSID, suggest that the internationalized contract's days are numbered.¹³⁹

A. The Reason States Are Upset

The degree to which internationalized contracts grant MNCs access to tribunals also counteracts populist principles of sovereignty and skepticism of corporate power over the people.¹⁴⁰ The uniqueness of the internationalized contract lies in the sheer flexibility and degree of access that MNCs have to international tribunals and remedies through a purely domestic vehicle.¹⁴¹ While access to ISDS in ICSID is commonplace with BITs at a purely international, or horizontal, level, the internationalized contract goes one step further by accomplishing the same result by elevating purely domestic affairs to the international stage in a vertical manner.¹⁴²

Internationalized contracts, unlike domestic contracts, occupy a hierarchical position outside and above the entire domestic legal order.¹⁴³ This is because the breach of an internationalized contract becomes a treaty violation, which comes within the jurisdiction of judicial bodies like ICSID.¹⁴⁴ The governing core principle behind this institutional interest is that domestic law cannot excuse a state's violation of its international obligations nor its duty to compensate.¹⁴⁵ By haling states to institutions like ICSID, MNCs unilaterally force states to obey their obligations at a domestic level, run the risk of compulsory arbitration to enforce the violated agreement, or abandon the ISDS system entirely.¹⁴⁶ From the populist perspective, the voice of the people, in this case the sovereign State, is shut down by outside forces that fundamental exceed domestic control.¹⁴⁷

139. *Infra* Part III(D).

140. See Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 243-44 (2015).

141. See *id.* at 240-44.

142. *Id.*

143. *Id.* at 240.

144. *Id.*

145. *Id.* at 241; see Vienna Convention on the Law of Treaties, art. 27, 1969 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

146. See Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 251 (2015).

147. Erik Voeten, *Populism and Backlashes against International Courts*, PERSP. ON POL., 1, 7 (June 20, 2019) (discussing that it is easier for populists to use sovereignty-based arguments to attack foreign institutions adjudicating domestic matters). But see Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 BROOK. J. INT'L L. 639, 640 (2018) (discussing that States adopted ISDS because MNCs feared that domestic courts within a sovereign host State would not fairly hear their grievances).

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That populist perspective is exacerbated by the internationalized contract's insulation from all forms of domestic public law, ranging from environmental and public health to management of national emergencies.¹⁴⁸ MNCs may seek remedies for small infractions, such as national regulations that abrogate the contract, materially breach it, or even significantly depreciate its value.¹⁴⁹ Thus, internationalized contract doctrine becomes a public lawmaking deterrence against states that may otherwise elect to enact laws that may risk violating the contract in question.¹⁵⁰ In doing so, MNCs directly affect not only international law, but also domestic law of a given state, which runs afoul the populist principles that reject "outside" voices from influencing internal affairs in a meaningful way.¹⁵¹

B. Populist Backlash

Tangible examples of populist backlash against the internationalized contract doctrines includes States criticizing ISDS and ICSID, as well as seeking potential alternatives to both.¹⁵² In 2016, the European Union Parliament adopted a series of recommendations on the Transatlantic Trade and Investment Partnership ("TTIP"), which included an amendment that sought to replace ISDS with a new system entirely.¹⁵³ The amendment called for a system that was "subject to democratic principles and scrutiny" that requires "publicly appointed, independent professional judges in public hearings."¹⁵⁴ The goal of this "European Commission's Investment Court System" is to replace ISDS over time and "further increase the efficiency, consistency, and legitimacy of the international investment dispute resolution system."¹⁵⁵ Presumably, the internationalized contract cannot survive in a domestic regime whose purpose is to balance a dispute resolution system which maintained strong international protections for foreign investments—

regarding international investments).

148. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229, 243 (2015).

149. *Id.*

150. *See id.*

151. *See id.*

152. Michael Waibel et al., *The Backlash Against Investment Arbitration: Perceptions and Reality* 8 (Jan. 2001) (working paper) (on file with the Peter A. Allard Sch. L. Univ. British Colum.), https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1193&context=fac_pubs.

153. Michael D. Nolan, *Challenges To The Credibility Of The Investor-State Arbitration System*, 4 AM. U. BUS. L. REV. 429, 436 (2016).

154. *Id.* at 436-37.

155. *Id.* at 437.

a core aspect of the internationalization doctrine.¹⁵⁶ In summation, the European Union perceives that the manner in which MNCs use ISDS is unfair to the State and thus created a system under its own regime that fell in line with populist concepts of fairness.¹⁵⁷

The European Commission's backlash also challenged the legitimacy of ICSID as a whole.¹⁵⁸ In *Micula v. Romania*, the Micula brothers brought a claim in ICSID against Romania under the Sweden-Romanian BIT after Romania withdrew economic incentives that harmed the brothers' business.¹⁵⁹ With the European Commission as an *amicus curiae*, Romania argued that ICSID should deny jurisdiction because Romania changed its laws to comply with European Union competition law when it acceded to the EU.¹⁶⁰ However, ICSID rejected the argument and issued an award for the Micula brothers with an accompanying order for Romania to pay \$250 million compensation.¹⁶¹ However, in May 2014, the European Commission issued an injunction to prevent Romania from honoring the ICSID award.¹⁶² After an investigation, the European Commission enjoined Romania from honoring the award on the ground that it infringed European Union law and ordered Romania to recover any money already paid.¹⁶³ By issuing an injunction, the European Union's populist sentiments directly undermined ICSID's power that treats all awards as final judgments within the individual signatory States' domestic courts.¹⁶⁴

Latin American countries mirrored Europe's populist perceptions of unfairness in the ISDS and ICSID systems.¹⁶⁵ In 2007, Bolivia withdrew from the ICSID after submitting a Notice under

156. *See id.*

157. *See id.*

158. *Id.*

159. *See generally* *Micula v. Romania*, ICSID Case No. ARB/05/20, Final Award, (Dec. 11, 2013).

160. *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 40-41, (Sept. 24, 2008).

161. *Micula v. Romania*, ICSID Case No. ARB/05/20, Final Award, ¶ 1329, (Dec. 11, 2013).

162. Michael D. Nolan, *Challenges To The Credibility Of The Investor-State Arbitration System*, 4 AM. U. BUS. L. REV. 429, 437-38 (2016).

163. *Id.* The Miculas sought relief in the General Court of the European Union, which overturned the European Commission's injunction. *See generally* *T-624/15, European Foods et al. v. Comm'n*, 2019 E.C.R. II-423. However, this case is currently subject to appeal, so the final outcome is still pending.

164. Michael D. Nolan, *Challenges To The Credibility Of The Investor-State Arbitration System*, 4 AM. U. BUS. L. REV. 429, 438 (2016).

165. *Id.* at 432.

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Article 71 of the ICSID Convention.¹⁶⁶ Bolivian President Evo Morales stated that “Governments from Latin America and I think all over the world never win the cases. The transnationals always win.”¹⁶⁷ Then, Ecuador and Venezuela withdrew from ICSID in 2009 and 2012, respectively.¹⁶⁸ Since that time, Bolivia, Ecuador, and Venezuela terminated some of their existing BITs and all three have not signed any new investment agreements.¹⁶⁹ These States were motivated by the sentiment that foreign investments “promote imperialism and hinders the distribution of benefits from natural resources to the people.”¹⁷⁰ While populism did not eliminate the ISDS and ICSID systems, it limited their scope in States that took political action against them.¹⁷¹

C. Are Internationalized Contracts Really So Bad?

Despite the breadth and power of internationalized contracts, their reach is limited by the practical need for an underlying treaty.¹⁷² Moreover, other private entities, such as people and domestic organizations, do not have the same flexibility as MNCs to treaty shop for more expansive opportunities to hale States into ISDS.¹⁷³

1. Treaties – The Lifeblood of Internationalized Contracts

A key element in “internationalizing” contracts is the use of treaties as a necessary catalyst for international effect.¹⁷⁴ By considering domestic contracts as “investments” under umbrella terms, treaties do the necessary legwork that gives corporations the right to bring states into international tribunals for violating domestic contracts or even just depreciating their value.¹⁷⁵ However, unless a

166. *Id.*

167. *Id.* at 433.

168. *Id.* at 432. A 2008 empirical study by Washington and Lee University Associate Professor of Law Susan Frack revealed that governments won 57.7% of investment treaty cases whereas investors prevailed in only 38.5% of cases. *Id.* at 433. While the factual correctness of individual State populist responses to globalization is outside the scope of this article, it should be noted that *feelings* of unfairness regarding international tribunals is sufficient to motivate populist political responses. *Id.* at 432-33.

169. *See id.* at 432.

170. Erik Voeten, *Populism and Backlashes against International Courts*, PERSP. ON POL., 1, 9 (June 20, 2019).

171. *See* Michael D. Nolan, *Challenges To The Credibility Of The Investor-State Arbitration System*, 4 AM. U. BUS. L. REV. 429, 432 (2016).

172. Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229, 245 (2015).

173. *Id.* at 275-80.

174. *See id.* at 275-80.

175. *Id.*

treaty is ratified by at least two States, the domestic contract lacks the vehicle to gain international power.¹⁷⁶ By including umbrella terms and FET, the BITs themselves provide for ISDS in ICSID and, by extension the internationalized contract.¹⁷⁷ However, even the presence of a BIT is not enough because a private party must still be able to access that treaty.¹⁷⁸

2. Treaty Shopping, Nationality, and Non-Multinational Corporation Entities

Another limit in “internationalizing” contracts is the inherent need for fluid nationality in relation to a relevant treaty.¹⁷⁹ While States view the internationalized contract as undermining sovereignty, the doctrine is still meaningfully limited by sovereign-focused realities, such as nationality.¹⁸⁰ A BIT’s aegis only covers investments that relate to its signatory nations, which requires any MNC seeking relief under that BIT to acquire the nationality of one of those States.¹⁸¹ MNCs have fluid nationality in the sense that their several subsidiaries and potential acquisitions permit them to effectively gain the nationality of any State they choose in order to use a particular treaty.¹⁸² This fluid nationality allows MNCs to treaty shop to maximize their chances of finding a mechanism to force States into ISDS before ICSID in order to enforce domestic agreements.¹⁸³ However, non-MNC entities do not have this option as readily available because people and domestic organizations are usually bound to a single State.¹⁸⁴ Moreover, some MNCs may not have the necessary resources to change their nationality beyond the ones they currently have, which limits the scope of their treaty shopping.¹⁸⁵ While these limitations may suggest that the

176. *Supra* Part II(C).

177. *Id.*

178. Jose Luis Siqueiros, *Bilateral Treaties on the Reciprocal Protection of Foreign Investment*, 24 CAL. W. INT’L L.J. 255, 257-58 (1994) (explaining that BITs set substantive rules between two State parties and their respective investors).

179. *See* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229, 275-80 (2015).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *But see* *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction (Oct. 21, 2005). In this case, an American MNC, Bechtel, owned a Cayman Island subsidiary that entered into an agreement with that subsidiary. *Id.* ¶ 73. However, civil unrest caused Bolivia to terminate the agreement, just five months into the forty-year contract. *Id.* ¶ 8. Bechtel successfully gained

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internationalized contract is far less threatening to State sovereignty than populist sentiments may argue, the doctrine remains at risk of disappearing in the face of a continued populist assault.¹⁸⁶

D. The Future of the Internationalized Contract in the Face of Populism

The sovereign response to the internationalized contract is not kind.¹⁸⁷ The main tool for internationalizing contracts—BITs—faced populist resistance because of State distrust in ISDS's ability to appropriately resolve investment disputes.¹⁸⁸ Some countries outright reject the use of ISDS in their investment treaties.¹⁸⁹ Australia stated that it will not support ISDS in future trade agreements.¹⁹⁰ Brazil refuses to sign trade agreements that contain ISDS.¹⁹¹ South Africa and India stated that they will withdraw from treaties with ISDS clauses.¹⁹² Opponents of ISDS argue that the FET standard is overly broad and should be properly defined through clearer language in future BITs to promote predictability.¹⁹³ Similarly, others suggest delineating specific types of claims that investors can bring under ISDS, such as “discrimination and expropriation and clarify that all other disputes are to be brought to the domestic court system of the State.”¹⁹⁴ Others still suggest that BITs should require foreign investors to exhaust all local remedies before they seek ISDS.¹⁹⁵ Though internationalized contracts remain intact today by virtue of ISDS, opponents are clear that they feel that it limits State sovereignty.¹⁹⁶

access to ISDS in ICSID through a treaty between Bolivia and the Netherlands by shifting its Cayman Island subsidiary's shares to Bechtel's Dutch subsidiary. *Id.* ¶¶ 68, 182.

186. *Id.* Part III(D).

187. See Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 *BROOK. J. INT'L L.* 639, 658 (2018).

188. *Id.* at 659.

189. *Id.*

190. *Id.* at 659-60.

191. *Id.* at 659.

192. *Id.*

193. *Id.*

194. *Id.* at 659-60.

195. *Id.* at 660.

196. *Id.* The European Union voted in favor of the Transatlantic Trade Partnership, an investment agreement between the United States and the EU, on the condition that ISDS was replaced with a new system to resolve international investment disputes—the Investment Court System. *Id.* The concern was that ISDS was not public or transparent, corporations were not subject to public law, and that the interests of foreign investors began to supersede public interest. *Id.*; but see Nikolaj Nielsen, *TTIP Investor Court Illegal, Say German Judges*, *EU OBSERVER* (Feb. 16, 2016, 9:23 AM), <https://euobserver.com/economic/132295>.

Despite these potentially far-reaching changes, there are reasons to question the populist sentiment that the internationalized contract undermines sovereignty.¹⁹⁷ Though criticized as asymmetrical, ISDS still permits host states to bring counterclaims against MNCs.¹⁹⁸ Moreover, populist responses neglect that States, as hosts, inherently have great sovereign authority to police transactions within their borders.¹⁹⁹ Additionally, ostracizing foreign investors, ISDS, and ICSID as the “other” does not necessarily justify the belief that domestic courts are better suited to resolve foreign investment disputes.²⁰⁰ The populist concern that MNCs go too far seems dubious when the internationalized contract itself is deeply in flux, which leads to unreliable results for the MNC pursuing arbitration before ICSID.²⁰¹

Developing or poorer countries have an incentive to sign BITs to promote foreign investment, which increases capital and associated technologies that flows to their territories.²⁰² If States wish to limit or even withdraw from BITs or ISDS, they necessarily remove the international protections that MNCs relied upon to reduce the risks for transnational investments.²⁰³ If the international enforcement mechanism is removed, MNCs naturally have far less incentive to invest in a host State that no longer wishes to independently protect the MNC’s investment interests.²⁰⁴ BITs, by their nature, “have the effect of stabilizing a country’s investment policy and its legal and contractual commitments to individual foreign investors.”²⁰⁵ By abdicating these international obligations, States elect to forgo any

The German Association of Magistrates criticized the EU’s suggestion as unlawful, and America wishes to retain the ISDS system.

197. See Stephen M. Schwebel, *The Overwhelming Merits of Bilateral Investment Treaties*, 32 SUFFOLK TRANSNAT’L L. REV. 263, 268 (2009).

198. *Id.*

199. *Id.*

200. See *id.* But see Michael D. Nolan, *Challenges to the Credibility of the Investor-State Arbitration System*, 5 AM. UNIV. BUS. L. REV. 429 (2018) (raising questions about neutrality of arbitrators in ICSID, who are increasingly filing dissenting opinions, almost 100% of which are in favor of the party that appointed the dissenting arbitrator).

201. *Supra* Part III(C).

202. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do Bits Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 77 (2005).

203. See *id.* at 95 (“The basic working assumption upon which BITs rest is that clear and enforceable rules that protect foreign investors reduce risk, and a reduction in risk promotes investment.”).

204. See *id.*

205. *Id.* at 96.

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benefit they once drew from those investors.²⁰⁶

Regardless of the merits behind populist sentiments, States are clear that they are not happy.²⁰⁷ These populist proposals, if implemented, may spell the death knell of the internationalization doctrine.²⁰⁸ If States begin actively negotiating for clearer language in their BITs, MNCs cannot rely on umbrella clauses or the FET standard to elevate mere contractual violations to the level of a treaty violation.²⁰⁹ By stripping away the vagueness that gave rise to the internationalized contract, States could effectively remove subject-matter jurisdiction from ICSID to ever entertain these suits again.²¹⁰ Furthermore, if States outright abandon ISDS as a dispute resolution mechanism, MNCs may likely be forced to return to using the domestic courts of their host state, much like the earliest foreign investors that came before them.²¹¹ Neither option is favorable, but because BITs require sovereign consent, even MNCs with fluid nationality may not be able to rely on the internationalized contract for much longer.²¹²

IV. CONCLUSION

The status of the internationalized contract is symptomatic of the continued health of broad BITs and ISDS as a whole.²¹³ The internationalized contract is based on a doctrine that, though potentially robust, is consistently in flux, which renders it unreliable in practice.²¹⁴ Despite that unreliability, a galvanized populist sentiment poses a significant risk to the doctrine with more States seeking to limit or withdraw from BITs and ISDS.²¹⁵ If States choose to still sign BITs, they may reaffirm their sovereignty by drafting narrower FET standards and umbrella clauses, which may mark the demise of the internationalized contract.²¹⁶ With BITs rendered

206. *See id.*

207. *See* Emily Osmanski, *Investor-State Dispute Settlement: Is There a Better Alternative?*, 43 *BROOK. J. INT'L L.* 639, 660 (2018).

208. *See id.* at 659 (discussing methods to reduce the scope of BITs, which directly limits internationalization doctrine).

209. *Id.* (expressing that the FET standing is too broad and lacks predictability).

210. *See id.* at 639.

211. *See id.* at 658 (discussing ideas to reform ISDS include refining ISDS to proposing a completely new forum).

212. *See id.*

213. *Supra* Part II(C).

214. *Supra* Part III(C).

215. *Supra* Part II(D).

216. *Supra* Part III(D).

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useless in enforcing domestic contracts, MNCs may be forced to play by sovereign rules within domestic courts.²¹⁷ Whether foreign investors retaliate to these limitations—and whether populist States even care—remains to be seen.²¹⁸ However, the populist State response is obvious: the internationalized contract and its underlying mechanisms are in trouble.²¹⁹

217. *Id.*

218. *Id.*

219. *Supra* Part III(A).