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International Law's Erie Moment

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INTERNATIONAL LAW'S *ERIE* MOMENT

Harlan Grant Cohen*

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INTRODUCTION

The episode put the question starkly: Who fills the gaps in international law and how? A series of tribunals operating under Chapter 11 of the North American Free Trade Agreement (NAFTA)¹ had adopted broader interpretations of vague treaty language than those recommended by the

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1. North American Free Trade Agreement, U.S.-Can.-Mex., art. 2001, Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993) [hereinafter NAFTA].

state parties.² In response, government ministers from the three state parties, Mexico, Canada, and the United States, operating through the Free Trade Commission (FTC) established by the treaty, adopted “Notes of Interpretation” clarifying their view of the treaty’s meaning.³

International tribunals are generally tasked with examining state practice, either to recognize rules of customary international law that state practice may evidence⁴ or to discover from subsequent practice the intended meaning of treaty provisions. But when a tribunal’s own interpretations conflict with state practice, who wins? Is state practice contrary to a tribunal’s decision a breach of international law or a rebuke of the tribunal’s view? In the case of NAFTA, the general instruction of the Vienna Convention on the Law of Treaties to look to “subsequent agreement”⁵ and “subsequent practice”⁶ in interpreting treaty provisions was paired with a specific recognition of the FTC’s authority to “resolve disputes that may arise regarding [the] interpretation or application” of NAFTA.⁷ Nonetheless, NAFTA tribunals were split on exactly how to regard the “Notes of Interpretation” and how much respect they should be due.⁸ While for some, the Notes provided clear evidence of the parties’ intent,⁹ for others, they were an improper attempt to subvert due process and the rule of law.¹⁰

2. See *Pope & Talbot, Inc. v. Canada*, Award on the Merits of Phase 2, ¶¶ 110–113, 118 (Apr. 10, 2001), 7 ICSID Rep. 102 (2005); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AB)/97/1, Award, ¶¶ 71, 76, 88 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002); Charles H. Brower, II, International Decision, *S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc.*, 98 AM. J. INT’L L. 339, 339–44 (2004) [hereinafter *Brower, S.D. Myers*]; see also Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT’L L. 347, 352–53 (2006) [hereinafter *Brower, Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*] (discussing cases and the Free Trade Commission’s responses). For a terrific discussion of the broader questions about international adjudication raised by the *Pope & Talbot* case, see generally Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179 (2010).

3. NAFTA Free Trade Comm’n, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d>.

4. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter *ICJ Statute*] (directing the International Court of Justice [ICJ] to consider “international custom, as evidence of a general practice accepted as law”).

5. Vienna Convention on the Law of Treaties art. 31(3)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *VCLT*].

6. *Id.* art. 31(3)(b).

7. NAFTA, *supra* note 1, art. 2001(2)(c).

8. Roberts, *supra* note 2, at 180–81.

9. See *id.* at 180–81 (“[W]e have the Parties themselves—all the Parties—speaking to the Tribunal’ and ‘[n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.’” (quoting *ADF Grp. Inc. v. United States*, ICSID No. ARB(AF)/00/1, Award, ¶ 177 (Jan. 9, 2003), 18 ICSID Rev. 195 (2003))).

10. This was the case even if they might begrudgingly have to accept it under the terms of the treaty. See *id.* at 180 n.7 (“The tribunal asked how such a process could be squared with the ‘rule of international law that no-one shall be judge in his own cause’ and the purpose of the arbitral mechanism to ‘assure due process before an impartial tribunal.’” (quoting *Pope &*

This conflict between the NAFTA tribunals and NAFTA state parties well illustrates international law's current identity crisis. One of the most noted developments in international law over the past twenty years has been the rapid proliferation of courts, tribunals, and other adjudicatory bodies.¹¹ This development, resulting in an increasing judicialization of international law, has widely been touted as a success, as a progressive advance for the international legal order.¹² Judicialization would advance the development of international law, increase the clarity of international rules, bring fairer resolution of disputes, and, perhaps, engender greater compliance.¹³ But as international law continues its rapidly expanding trend toward judicialization, difficulties with this rosy picture have begun to emerge. Along with questions about whether more adjudication actually produces better results and whether the ever-expanding catalog of courts instigates the fragmentation of international law, questions about the relationship between state practice and judicial decisions, long recognized as a theoretical difficulty, are emerging as serious practical problems. Across a wide range of issues, from investment treaties to human rights law to the laws of armed conflict, the question of who fills international law's gaps is becoming stark.

This question—how international law's gaps are to be filled—is foundational. It is not just a struggle for control between states, judges, experts, NGOs, and advocates—though it inarguably is that as well. It is not just a

Talbot, Inc. v. Canada, Award in Respect of Damages, ¶ 13 (May 31, 2002), 41 I.L.M. 1347 (2002)).

11. See, e.g., Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 709 (1999) ("When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age."). Conferences and symposia on the subject abound. See, e.g., Symposium, *International Judges*, 9 CHI. J. INT'L L. 387 (2009); Symposium, *The International Judicial Function*, 34 LOY. L.A. INT'L & COMP. L. REV. 1 (2011); Symposium, *Judicialization and Globalization of the Judiciary*, 38 TEX. INT'L L.J. 397 (2003); Symposium, *The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems*, 41 N.Y.U. J. INT'L L. & POL. 755 (2009); Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

12. See, e.g., José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 407 (2003) ("The [International Criminal Court] is seen virtually everywhere, except within John Ashcroft's Department of Justice, as the triumph of international civil society in favor of the judicialization of that last fortress of sovereignty, criminal law."); see also *id.* at 408 ("The spread of new dispute settlers . . . signifies, to many international lawyers, the victory of the rule of law over diplomatic wrangling and the triumph of the lawyers over the politicians."); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 833 (1995) ("Within the legal academy, the new [World Trade Organization (WTO)] system represents a stunning victory for international trade 'legalists' in their running debate with trade 'pragmatists' over how international trade dispute resolution should be structured."); Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 THEORETICAL INQUIRIES L. 199, 212 (2004) ("Prosecutions [and the creation of international tribunals] may represent for many a higher ideal, a detached and fair process for reaching judgment, a reaction to violence and abomination through observance of the Rule of Law, a triumph of law over politics and of civilization over mass insanity.")

13. See, e.g., Alvarez, *supra* note 12, at 407–09 (summarizing these promises).

debate about the level of authority delegated to international courts.¹⁴ Underlying the contest for control and authority, this Article argues, is actually a confused debate about the nature of international law and its sources. Gap filling by states and gap filling by courts represent radically different visions, radically different models of law and lawmaking. The law created by evolving state practice—what I will term here *negotiated law*—and the law pronounced by courts and tribunals—what I will term *adjudicated law*—look different, act differently, and rely on different sources of authority and legitimacy. They build on different principles and are to some extent in conflict with one another.

These differences between negotiated law and adjudicated law mean that the two models are not completely interchangeable or interoperable. Traditional international law doctrine imagined a distinctive form of lawmaking. Courts, although present, were rare.¹⁵ Instead, gaps and disputes in international law were left to state-to-state jawboning. States would argue over the rules and jockey for position; resolution would come through conflict and negotiation.¹⁶ This understanding of the lawmaking process was well captured by the doctrine of sources, which, particularly in its description of customary international law, explained how state practice slowly coalesces around particular agreed-upon (or acquiesced-to) rules.¹⁷

The assumption behind this description's inclusion in the Statute of the International Court of Justice (ICJ),¹⁸ and behind the judicial turn more broadly, is that courts can legitimately find and apply law created through those processes. But that assumption is problematic. Courts find law in a very different way. In contrast to custom's constant negotiation and renegotiation of rules, adjudication relies on reasoned elaboration to fix a rule's meaning. Courts, in a predicament much like that faced by physicists,¹⁹ are left with the paradox that finding a customary rule inevitably distorts it.²⁰ Finding customary rules also raises legitimacy concerns. Courts cannot rely solely on the notions of consent and party autonomy that undergird law created through negotiation. Instead they require additional bases of legitimacy not found in the customary jawboning process, whether implicit or explicit

14. See, e.g., Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L REL. 33, 38–39 (2008); Roberts, *supra* note 2, at 188.

15. See *infra* Part II.A.1.

16. See *infra* note 39 and accompanying text.

17. See ICJ Statute, *supra* note 4, art. 38(1)(b) (listing as a source of law “international custom, as evidence of a general practice accepted as law”). In international law, the doctrine of sources summarizes the accepted wisdom regarding the proper sources of legal authority and their interpretation. Article 38 of the ICJ Statute, *id.*, laying out the rules to be applied by that court in resolving disputes, is generally treated as the starting point for that doctrine. For further discussion of the doctrine, see *infra* note 164 and accompanying text.

18. See ICJ Statute, *supra* note 4, art. 38(1)(b).

19. See Jan Hilgevoord & Jos Uffink, *The Uncertainty Principle*, in STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., summer 2012 ed.), <http://plato.stanford.edu/archives/sum2012/entries/qt-uncertainty/>.

20. Cf. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1770 (1996) (raising concerns about a different type of mismatch in the Uniform Commercial Code's suggestion that courts look to industry custom and practice to resolve contract disputes).

delegations, neutrality, expertise, or reasoned decision making. Again creating a paradox, however, recourse to these additional markers of legitimacy may end up undercutting the party autonomy and consent on which custom as a source relies.

So long as adjudication remained rare in international law, the theoretical problems with using custom as a rule of adjudication could be papered over. But as adjudication has become increasingly normal, the tension between these two visions of lawmaking has only built, producing tremors and fissures across international law. Fueled by alternate visions of the evidence courts should look to²¹ or the proper role of courts,²² disputes rage over the nature of customary international law. Courts strain to squeeze rough-and-ready rules developed for negotiated settlement into the crisp rules of liability and attribution that adjudication requires.²³ In some areas, like the NAFTA context mentioned above, state practice and interpretations of international law by international courts appear to be on diverging paths. The confusion is only compounded by the recognition that many legal regimes, following the judicial turn, may now be designed with adjudication in mind. Which ones? Which gaps in international law should be seen as invitations to future negotiation, and which as delegations to courts? While arguments abound, few clear principles are available.

The time has come for a fundamental rethinking of international law and its sources. Essentially, international law has reached its *Erie*²⁴ moment. Much as U.S. judges and lawyers were forced by *Erie v. Tompkins* to respond to the dramatic ways in which domestic law had changed, so too must international lawyers and international judges now grapple with the expansion and evolution of international law. Just as *Erie v. Tompkins* forced U.S. federal judges out of the shadows of the common law to recognize and justify the authority they exert, so too must international courts now look beyond traditional doctrinal understandings of international law to grapple with the new roles they've been given. The myth that all international law emerges from the practice of states, much like the myth of an overarching, discoverable common law, must be burst. It obscures the true processes of lawmaking and allows courts to duck justifying their authority and legitimacy.²⁵ With reports of a system of precedent emerging from areas as diverse

21. See, e.g., Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–59 (2001).

22. Compare Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 6–7 (2005) (describing international courts as tools states can use to preserve mutually beneficial arrangements), with Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 901, 942 (2005) (developing a richer account in which delegation to international tribunals can make commitments more credible, help resolve commons and public-goods problems, protect the rights of private parties, or solve collective-action problems presented by multilateral agreements).

23. See, e.g., Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1073–78 (2011) (suggesting that liability rules adopted by international criminal tribunals cannot be traced to customary international law).

24. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

25. See Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions As Lawmakers*, 12 GERMAN L.J. 979, 984 (2011) (raising similar questions).

as international investment law,²⁶ international trade,²⁷ human rights,²⁸ and international criminal law,²⁹ the time has come to identify the actual claimed sources of international law and test their legitimacy.

This Article will proceed as follows. Part I develops a model of negotiated law to describe the operation and nature of custom and other nontreaty law under traditional international law doctrine. Drawing on a burgeoning literature regarding areas of primarily negotiated domestic law, including out-of-court settlements, the social norms of specialized business communities,³⁰ and political-branch separation of powers, this Part begins to draw the distinctions between law achieved primarily through negotiated settlement and law created through the adjudication of disputes. Along with a variety of practical differences that make translation between negotiated and adjudicatory contexts difficult, this discussion demonstrates that negotiated law and adjudicated law derive their legitimacy from fundamentally different, and often incompatible, sources.

Part II explores where we are and how we got there. Part II.A looks at the current operation of custom and other unwritten rules in the international system, and describes the transition from relatively rare ad hoc arbitration of international disputes to the widespread judicialization of international law of today. This Section also looks more closely at the theoretical problems this transition has produced, in particular the un-worked-out theoretical complications with the judicial pronouncement of custom and other unwritten rules. Part II.B lays out some examples of areas where judicialized custom seems to be running in different directions from negotiated custom, threatening the legitimacy, coherence, and effectiveness of international law. In many areas, it appears that two parallel international laws have been created: one, gap free, in which courts, tribunals, or expert bodies progressively develop the

26. See, e.g., STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 8–9, 11 (2009).

27. See, e.g., Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 850 (1999) ("In brief, there is a body of international common law of trade emerging as a result of adjudication by the WTO's Appellate Body. We have yet to recognize, much less account for, this reality in our doctrinal thinking and discussions."); Robert Howse, *Moving the WTO Forward—One Case at a Time*, 42 CORNELL INT'L L.J. 223, 223–24 (2009) ("The WTO dispute settlement system has demonstrated its efficacy by evolving incrementally through practice without a formal change in the treaty mandate that established and defined the parameters of that system."); Zhu Lanye, *The Effects of the WTO Dispute Settlement Panel and Appellate Body Reports: Is the Dispute Settlement Body Resolving Specific Disputes Only or Making Precedent at the Same Time?*, 17 TEMP. INT'L & COMP. L.J. 221, 230 (2003) ("If we regard precedents as decisions furnishing a basis for determining later cases involving similar facts or issues we can say without hesitation that large amounts of such precedents exist in the WTO dispute settlement system.")

28. See, e.g., Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203, 1204 (2011) (evaluating the Inter-American Court's dynamic interpretation of rights that, "at times, hardly finds a legal basis in the [governing] Convention").

29. See, e.g., Greenawalt, *supra* note 23, at 1073–78 (tracing liability rules adopted by international criminal tribunals to noncustomary sources).

30. Examples include Robert Ellickson's Shasta County ranchers, Lisa Bernstein's diamond and cotton traders, and the Japanese Tuna Court. See *infra* notes 45–47 and accompanying text.

meaning of international law's unwritten rules, and one, gap filled, in which a great deal of international law remains to be worked out in consultations among states. In some cases, the jurisprudence of international bodies, although widely cited by scholars and advocates, has been ignored by states, raised questions about the bodies' legitimacy,³¹ or even led to backlashes against international law.³² This Section focuses on three examples in particular: (1) the conflict between tribunals and state parties to control the meaning of investment treaties; (2) the conflicts between the European Court of Human Rights (ECHR) and states over the use of diplomatic assurances in the transfer of detainees; and (3) the applicability of self-defense to conflicts with nonstate actors.

Part III considers the way forward. What is most apparent is that we are in a state of confusion. A first, key step is gaining greater precision in our understanding of international sources. Rather than speak only of "custom," using the concept as an all-purpose label for nontreaty rules, we need to think carefully about the different types of unwritten rules currently being applied or asserted in the system. Are we talking about custom, common law, rules of equity, discursive principles, or something else entirely? Only after these types of rules have been properly identified can we really talk about their authority and legitimacy. The second, harder question is how and when different courts should apply these rules. What role are various bodies meant to play within and with regard to particular regimes? Are they arbitral tribunals, common law courts, or something else? Should we encourage the progressive development of the law, revive the presumption against precedent, or develop special rules of decision for the resolution of disputes?³³ This Part considers a number of ways we might answer these questions.

I. NEGOTIATED LAW

A. *International Law and Gaps*

It has become almost axiomatic in discussions of domestic law that gaps or ambiguities in the law are delegations of lawmaking to courts. As Ehrlich

31. See, e.g., H CJ 7957/04 Mara'abe v. Prime Minister of Israel 58(2) PD 393 [2005] (Isr.) (Cheshin, M., concurring), available at http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.htm (deriding the reasoning of the ICJ's advisory opinion and proclaiming that he "could not discover those distinguishing marks which turn a document into a legal opinion or a judgment of a court").

32. See, e.g., Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1836 (2002) (questioning whether the legalization of human rights norms increases state compliance).

33. Rather than tracking the theoretical description of international law's sources, we might instead want a rule tailored to a specific type of suit. This might arguably be what the U.S. Supreme Court was groping toward in developing its "specific, universal, and obligatory" standard for law-of-nations torts recognized under the Alien Tort Statute. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749 (2004); cf. Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1941-43 (2010) (suggesting that the standard is not the international law standard for custom, but a unique standard developed for administering these types of cases).

and Posner observed, the choice between precision and ambiguity, between rules and standards, is a choice between legislative decision making and judicial decision making.³⁴ Legislators enact and parties contract in the shadow of the court system; they know that gaps left in legislation or contracts will eventually be interpreted by courts.

The same, however, cannot be said of international law. Until relatively recently in world history, judicial resolution of international disputes was a rarity. There was no permanent international court until the birth of the Permanent Court of International Justice (PCIJ) in 1922,³⁵ and the dockets of both the PCIJ and its successor, the ICJ, have remained relatively small, representing a tiny fraction of international disputes.³⁶ Ad hoc arbitral tribunals have been used since ancient times but were also rare until the late nineteenth century.³⁷

The absence of adjudication in international law certainly does not reflect an absence of gaps or ambiguities. If anything, international law is notorious for both.³⁸ How then have these been filled or worked out? Rather than delegate gaps to adjudication, international law traditionally has delegated gaps to further negotiation. Where the content of rules has been in dispute or the actions of one state questioned, international law has left it to diplomacy, negotiation, political contestation, pressure, and sometimes war to work out the answers. Disputes, to the extent they are resolved, are settled rather than adjudged.

This process fits well with traditional descriptions of custom, which at least until the twentieth century made up the bulk of international law.³⁹ De-

34. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258, 261 (1974).

35. *The Court: History*, INT'L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (last visited Feb. 10, 2013) [hereinafter *ICJ History*].

36. See Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 805 & n.105 (2012) (estimating that the ICJ heard fewer than two cases a year before the end of the Cold War and still hears no more than an average of three per year). For a comparison with some newer tribunals, see Karen J. Alter, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMP. L. 629, 631 n.11 (2012).

37. See James Parker Hall, *The Force of Precedents in International Law*, 26 INT'L J. ETHICS 149, 151 (1916) ("Nations cannot be forced into courts against their wills, and arbitrations dealing with general questions of international law have been comparatively rare, so that upon many subjects the voluntary usages of nations constitute the principal or most persuasive sources of authority.").

38. See, e.g., Jack J. Coe, Jr., *The State Of Investor-State Arbitration—Some Reflections on Professor Brower's Plea for Sensible Principles*, 20 AM. U. INT'L L. REV. 929, 947 (2005) ("International law specialists, accustomed to the decentralized sources upon which the system depends, tolerate a measure of indeterminacy.").

39. David Bederman, for example, talks about models of customary international law as processes of "struggle and resistance" or of a "'marketplace' in which states affirmatively (and self-consciously) 'bid' and 'barter' and 'trade' in new rules of conduct." DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 57 (2002) [hereinafter *BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW*]. Despite their different valences, both descriptions capture the idea that custom emerges from active contestation over rules. See DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 164–65, 180 (2010) [hereinafter *BEDERMAN, CUSTOM AS A SOURCE OF LAW*] (describing customary international law as a system of "bids" and "blocks"); Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*, in *THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL, AND PHILOSOPHICAL PERSPECTIVES* 13, 32 (Amanda

fining and describing customary international law with precision is a “notoriously difficult” task; disagreements abound,⁴⁰ but through iterative practice between states, laws begin to take shape. The content of the law is clarified, not by adjudication, but by practice.

But this view of international law's exposition is applicable beyond traditional notions of custom. Gaps and ambiguities in treaties too are often resolved through negotiation and settlement rather than adjudication. The Vienna Convention on the Law of Treaties declares both subsequent agreements and subsequent practice relevant to interpreting treaty provisions, a reflection of international law's preference for negotiated interpretations and gap fillers over ones produced by reasoned judging.⁴¹

As explained in the next Section, the key here is that the difference between adjudicatory gap filling and negotiated gap filling is not merely one of process. Law made through these different mechanisms looks different and acts differently. Negotiated law and adjudicated law are actually two different types of law entirely.⁴²

B. Negotiated Laws: Settlements, Private Legal Systems, and Separation of Powers

One way to begin to look at the differences between adjudicated and negotiated law is to look at instances of negotiated law in domestic systems. Over the past thirty years, scholars working in a variety of areas have begun to study alternatives to the traditional picture of courts as ultimate arbiters of the law. For example, since the publication of Owen Fiss's seminal article *Against Settlement*,⁴³ academic debate has raged over the increased frequency of out-of-court settlements and the concurrent decrease in

Perreau-Saussine & James B. Murphy eds., 2007) (comparing the imagined operation of custom to “the marketplace of ideas”).

40. See, e.g., BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW*, *supra* note 39, at 39 (“[T]he methods for finding the evidences of state practice are very supple and require substantial imagination and skill”); Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 551 (2004) (“Customary international law just happens to be a topic where uncertainties abound.”); Suzannah Linton & Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT'L L. 407, 416 (2009); see also J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 469 (2000) (criticizing custom on those grounds).

41. Article 31(3)(a) of the Vienna Convention on the Law of Treaties requires taking account of “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.” VCLT, *supra* note 5, art. 31(3)(a) (emphasis added). Article 31(3)(b) requires taking account of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” VCLT, *supra* note 5, art. 31(3)(b) (emphasis added).

42. There is, of course, another means of filling the gaps in the law that I explicitly put to one side here: legislation. Legislation actually bears similarities to each of these models. It is negotiated and bears many of negotiated law's hallmarks as compromise solutions. It is, on the other hand, much more like adjudicated law in having the explicit goal of producing rules applicable to future cases. What differentiates it, and requires putting it to the side here, is that legislated law, whether in the form of statutes or treaties, usually follows an explicitly agreed-upon process and involves explicit delegation of lawmaking powers.

43. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

adjudication. Advocates on both sides of the debate highlight both the practical and normative differences between law made each way.⁴⁴ Writing about very different phenomena, scholars including Robert Ellickson and Lisa Bernstein have begun to study specific communities—Shasta County ranchers,⁴⁵ diamond merchants,⁴⁶ cotton traders⁴⁷—in which a shadow community-based law has developed, one that largely avoids formal or official state courts. Another type of negotiation takes place between the legislative and executive branches of the U.S. government in the separation-of-powers context. Many areas of constitutional law, particularly war powers, have remained insulated from judicial review by doctrines of abstention (like the political-question doctrine) or deference.⁴⁸ Much of the doctrine about the branches' respective powers has emerged instead from regular interbranch quarrelling and the resulting interbranch customary practice.⁴⁹ Debates rage over how historical practice should matter,⁵⁰ not over whether it does.⁵¹

A few notes before going any further. First, for some, the term “negotiated” may conjure visions of civil discussions resulting in mutual, consensual, bargained-for benefits. That is not the intent here. The use of the term “negotiated” here is broader and meant only to indicate that resolution is met through the conduct of the parties. Their tactics may include negotiation, threats, even war; differences in power may be rife; and the results may look to some entirely unfair or even coerced. Second, negotiated law and adjudicated law are “ideal types.” No set of laws, including those considered here,⁵² fits one paradigm perfectly. Courts are often involved in negotiation:

44. See *infra* Part I.B.1–4.

45. ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 1 (1994).

46. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

47. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); see also A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 321–22 (1989) (presenting an overview of the cotton industry's private legal system).

48. See, e.g., HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 146–47 (1990) (describing judicial trends in use of nonjusticiability doctrines).

49. See *id.* at 70 (describing “quasi-constitutional custom,” or “institutional norms generated by the historical interaction of two or more federal branches with one another,” that is “not dissimilar to rules of customary law observed by nations in the international arena”). A particularly good illustration of this phenomenon is provided by Peter Spiro, who documents how our current understanding of the constitutionality of congressional-executive agreements is a product of a continuing back-and-forth between the legislative and executive branches. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 965–72 (2001).

50. E.g., Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 110 (1984).

51. These areas of negotiated law are meant to be illustrative rather than exclusive. There are undoubtedly many other areas of law that might provide useful insights.

52. See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2671 (1995) (“[B]oth categories of ‘settlement’ and ‘adjudication’ contain enough variation within them to

sometimes with the litigants (they may actually encourage settlement on issues), sometimes with other courts, sometimes even internally in the case of multimember panels. Similarly, in contexts where interactions are frequent and information about norms and violations are readily available,⁵³ informal dispute resolution may look more adjudicatory. (In such contexts, the overall community may be able to judge certain acts lawful or unlawful.) Negotiated law and adjudicated law are instead attempts to generalize broadly about the making of law in these contexts. As Max Weber explained, an “ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct”⁵⁴ Constructing ideal types like negotiated law and adjudicated law helps us to contrast and understand broad types of phenomena without getting lost in the innumerable differences between individual cases.

Third, while this Section seeks to find commonality among these areas of law made outside of courts, it is important to keep in mind that each of these areas of law is unique, representing a particular set of choices about how law will be made, interpreted, and enforced. The particular mix of negotiation and adjudication, procedural formality and informality, and centralized versus decentralized decision making will differ between each.⁵⁵ It is also important to note that in the domestic context, courts and adjudication often lurk in the shadows and may still exert some unseen force on the law's development even when they are rarely (or never) used.⁵⁶

With those caveats in mind, seen together, various patterns in the operation of law in these areas do seem to emerge. Scholarship in these areas begins to draw an alternative picture of the law, one with some stark differences from the law made by courts.

1. Clarity of Rules

One of the key ways in which settlements, consent decrees, community custom, and political-branch practice often differ from adjudication is in the clarity of the legal rules they produce. This is a regular trope in the debate between advocates and opponents of out-of-court settlements. Critics of

make them almost meaningless concepts to compare in the abstract. The conduct of negotiated settlements and various stages along the adjudication spectrum include such variations of lawyer experience, skill and resources, party motivations and resources, and legal system endowments (both procedural and substantive) that we must, for the purposes of argument, consider these categories as little more than ‘ideal types.’”

53. See ELLICKSON, *supra* note 45, at 230–39 (observing that for informal systems to function properly, information about acts and norms must flow freely within the community).

54. Max Weber, “Objectivity” in *Social Science*, in CLASSICAL SOCIOLOGICAL THEORY 211, 211 (Craig Calhoun et al. eds., 2d ed. 2007) (emphasis omitted).

55. The dispute resolution mechanisms of the National Grain and Feed Association in the United States, for example, while extrajudicial, are highly formal. See Bernstein, *supra* note 20, at 1775.

56. See, e.g., Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (suggesting this basic insight).

settlement contrast adjudication, “the process by which the values embodied in an authoritative legal text, such as the Constitution, are given concrete meaning and expression,”⁵⁷ with settlements that produce no rule or precedent binding on nonparties.⁵⁸

By judging and enunciating rules, judges set baselines for political endowments and entitlements and alternately close and open debates by reviewing facts and articulating the rules and values that underlie particular legal positions. Settlements, on the other hand, represent cruder “compromises” of raw bargaining skill and extra-judicial power imbalances (economics, legal skill, and repeat play experience).⁵⁹

“Rules and precedents . . . have obvious importance for guiding future behavior and imposing order and certainty on a transactional world that would otherwise be in flux and chaos,”⁶⁰ and William Landes and Richard Posner worry that such rules and precedents will be underproduced by private dispute resolution.⁶¹ Settlements may succeed in achieving peace, but “courts,” argues Fiss, “exist to give meaning to our public values, not to resolve disputes.”⁶²

Proponents of settlement disagree about the values at stake, about the relative desirability of adjudication, and about whether settlement in fact produces “no” rules or precedents, but accept the basic contrast. Rules and precedent do emerge from settlements, proponents argue, but in a much more limited fashion.⁶³ As Ben Depoorter argues,

First, prior settlements exert “peer pressure” on similarly situated parties, effectively weakening their position in comparable disputes. Innovative settlements serve as benchmarks to ambitious lawyers, making plaintiffs in future disputes more demanding and thus more

57. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 121 (1982).

58. Jules Coleman & Charles Silver, *Justice in Settlements*, SOC. PHIL. & POL'Y, Sept. 1986, at 102, 114–19. David Luban argues that the clarity of the rules produced by settlement is further diminished by the underproduction of facts (which might clarify rules and precedents). David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2625 (1995).

59. Menkel-Meadow, *supra* note 52, at 2667 (describing David Luban's position).

60. Luban, *supra* note 58, at 2622–23.

61. William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. LEGAL STUD. 235, 238–40 (1979).

62. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979).

63. See, e.g., LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 232–33 (2000) (“For good or ill, however, parties and arbitrators alike frequently refer to previous decisions. Parties usually do so in the hope that previous awards will persuade the arbitrator of the merits of their positions, not because they regard the awards as binding. Arbitrators usually do so to justify their decisions.”); Benjamin C. Fishman, Note, *Binding Corporations to Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. REV. 1433, 1462 (2006) (“There are at least three ways in which [public law] settlements . . . could exert generalized normative pressure: (1) ‘spillover’ effects, where a settlement puts pressure on other corporations to change their behavior; (2) transnational advocacy based on reported violations of the settlement-created code; and (3) further litigation arising from breach of the settlement terms.”).

reluctant to accept settlements below those that parties in prior settlements received.

Second, due to their noncoercive nature, settlements may frame the normative outlook on particular claims or disputes. A novel legal claim for tort compensation might be considered outrageous at first, but will be perceived as less extraordinary if it has been gratified by a prior concession in a settlement agreement. As a settlement precedent reduces the apparent unreasonableness of any claim, it becomes harder for similarly situated parties to contest similar claims in future cases.⁶⁴

In some areas with repeat players on one or both sides of the dispute, settlements and consent decrees may actually become models, setting standards for future behavior.⁶⁵

Public norms do not consist only of the precedents developed and applied by courts or other adjudicative bodies. They also emerge when relevant institutional actors develop values or remedies through an accountable process of principled and participatory decision making, and then adapt these values and remedies to broader groups or situations. [Alternative dispute resolution] can play a significant role in developing legitimate and effective solutions to common problems and, in the process, produce generalizable norms.⁶⁶

But even if rules are produced through these processes, they remain considerably more ambiguous than those typically created through adjudication. Because technical questions about liability do not need to be answered,⁶⁷ there is a "mushiness"⁶⁸ to the precedent that settlements create.

64. Ben Depoorter, Essay, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 960 (2010). As Depoorter explains,

[D]espite the widespread use of nondisclosure agreements, information on settlements is available to those legal professionals for whom such information is most valuable. Information on innovative settlements is distributed both inside and outside legal communities, reaching actors through various channels including the oral culture in legal communities, specialized reporters, professional interest organizations, and mass media coverage.

Id. at 965–66.

65. Menkel-Meadow, *supra* note 52, at 2680–81 ("For example, repeat play arbitrations and mediations are sensitive not only to the 'norms' created by numerous repeat cases, but increasingly to published reports of settlements."). This is particularly the case when the government is on one side enforcing legislation. *See, e.g.*, U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF JUSTICE, MODEL CERCLA MSW GENERATOR/TRANSPORTER CONSENT DECREE (Apr. 4, 2000), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/msw-mss-cd-mod-mem.pdf>. *See generally* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887.

66. Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 3.

67. Depoorter, *supra* note 64, at 983 ("[C]onfidential settlements work to the detriment of the public by delaying awareness of underlying liability issues.").

68. Menkel-Meadow, *supra* note 52, at 2678.

Settlements can also obscure the “true” facts underlying the dispute, making future analogies more difficult and contestable.⁶⁹

The analogy to international law is readily apparent. For example, states often agree on lump-sum payments to settle their disputes. While such settlements might provide very general evidence that a wrongful act has taken place, they often provide little insight into the exact nature of the violation, the identity of the wrongdoer, or the standard of liability (for instance, negligence or strict liability).⁷⁰ A very general rule about “prompt, adequate, and effective” compensation may emerge from state practice regarding investment expropriations, but exactly what it requires will be much harder to discern.⁷¹ And a norm of compensating civilian victims in war zones may appear to be emerging,⁷² but how or when such compensation is actually required remains murky.

But other, less analogous areas of custom suggest similar patterns. The ambiguity of customary separation-of-powers law in the United States is well documented. For Harold Koh, for example, “both the informal process that governs the creation of these customary norms and the difficulties inherent in establishing their existence suggest” caution in applying them.⁷³ This concern is echoed in Justice Frankfurter’s emphasis in the canonical *Youngstown Sheet & Tube Co. v. Sawyer* that a longstanding practice of the executive branch may be assumed to be constitutional, but only where the practice is “systematic, unbroken,” and “long pursued to the knowledge of the Congress and never before questioned.”⁷⁴ And Michael Glennon observes that “the use of custom requires the finding of historical facts, often through reliance on sources that are every bit as obscure as those used to divine the [intent of the framers of the U.S. Constitution]. There is clearly nothing approaching certainty in this fact-finding process.”⁷⁵ Individual examples abound in the United States of reasonably durable rules produced by interbranch jawboning, whether with regard to the constitutionality of

69. See Luban, *supra* note 58, at 2625 (arguing that the clarity of the rules produced by settlement is further diminished by the underproduction of facts, which might clarify rules and precedents).

70. See, e.g., José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 47 (2009) (“In addition, within the sphere of international investment law, arbitral decisions have always been treated as more relevant to determining the rules of CIL than, for example, lump sum agreements—which tell us only what the last set of states were willing to settle for and not what the law is.”).

71. Frank G. Dawson & Burns H. Weston, “Prompt, Adequate and Effective”: A Universal Standard of Compensation?, 30 FORDHAM L. REV. 727, 727 (1962).

72. See, e.g., Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, HUM. RTS. BRIEF, Fall 2007, at 16, 16–17 (discussing the narrow norm of compensation that is emerging); Ron Synovitz, *Afghanistan: NATO Begins Fund for Civilian War Victims*, RADIO FREE EUR./RADIO LIBERTY (Jan. 26, 2007), <http://www.rferl.org/content/article/1074305.html>.

73. KOH, *supra* note 48, at 70.

74. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

75. Glennon, *supra* note 50, at 126. Further, “[f]acts, as Jerome Frank reminded us, are guesses, and the guesswork is particularly troublesome in the law of interbranch relationships.” *Id.*

congressional-executive agreements,⁷⁶ congressional authorizations of military force,⁷⁷ or recess appointments,⁷⁸ where the exact contours of the rule remain in doubt. Questions remain regarding the interchangeability of congressional-executive agreements and Article II Treaties,⁷⁹ the meaning of “hostilities” under the War Powers Resolution,⁸⁰ or the exact meaning of a “recess.”⁸¹

The lesson from each of these examples is that negotiated law often produces rules and precedents that are less certain and more ambiguous than those produced by courts. As Frederick Schauer explains, in both the common law and civil law contexts, adjudication “seeks to eliminate internal inconsistency when the opportunity arises, and treats mutually exclusive norms as at least problematic.”⁸² This stands in contrast to custom, which is much more likely to accept the presence of “plural and diverse”⁸³ rules.

What is key, though, is that within these areas of negotiated law, the potential ambiguity of rules is seen as a benefit, not a detriment.⁸⁴ This ambiguity leaves much greater room for flexibility,⁸⁵ experimentation, and

76. See Spiro, *supra* note 49, at 993 (“[A]n ad hoc typology has developed [in the United States] under which some types of international agreements continue to be submitted [to the U.S. Senate] as treaties, arguably by constitutional mandate, and others might require the form of congressional-executive agreement.”).

77. See *id.* at 1021–22, 1023 n.255 (suggesting a general consensus surrounding the balance of congressional and executive authority in the United States).

78. See generally HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS (2008).

79. See Spiro, *supra* note 49, at 995–1002 (arguing that U.S. interbranch custom suggests that arms control and human rights treaties may or may not be proper subjects of congressional-executive agreements).

80. E.g., Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16.

81. E.g., Charlie Savage, *Justice Dept. Defends Obama Recess Appointments*, N.Y. TIMES, Jan. 13, 2012, at A12. The D.C. Circuit has recently weighed in on this question in *Canning v. NLRB*, Nos. 12–1115, 12–1153, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), holding that recess appointments could only be made between formal sessions of Congress. Interestingly, the decision itself might demonstrate some of the differences described in this Section between negotiated and adjudicated interpretations, as the decision adopted a much stricter interpretation of the recess-appointment power than had been accepted in practice by Congress and the executive branch. See, e.g., Emily Heil, *Obama Not Only President with Recess Appointments*, WASH. POST: IN THE LOOP (Feb. 5, 2013, 12:48 PM), http://www.washingtonpost.com/blogs/in-the-loop/post/obama-not-only-president-with-recess-appointments/2013/02/05/153c6e74-6fb4-11e2-8b8d-e0b59a1b8e2a_blog.html (describing prior practices).

82. Schauer, *supra* note 39, at 30.

83. *Id.* at 30; see also BEDERMAN, CUSTOM AS A SOURCE OF LAW, *supra* note 39, at 180.

84. See Menkel-Meadow, *supra* note 52, at 2678 (“We should continue to discuss whether rules and principles are fair, whether ‘giving up’ something is necessary or justified, whether rules should be sharply delineated or allow more discretion and elasticity to meet the needs of particular circumstances, and what principles should govern particular situations.”).

85. See KOH, *supra* note 48, at 72 (“That legal structure both facilitates and constrains the operation of the [U.S.] national security policy process.”); Spiro, *supra* note 49, at 1009 (“A constitutional increments approach, by contrast, presents a constant dynamic in which the [U.S.] Constitution exploits the advantages both of flexibility and constraint.”).

renegotiation.⁸⁶ As Peter Spiro writes of interbranch foreign-affairs custom in the United States, “[t]he structure is one that can be changed, and in fact each succeeding generation will change it.”⁸⁷ This is key because negotiated law is often chosen in contexts of continuing or ongoing relationships, where the finality produced by adjudication is less valuable than the possibility of renegotiation as circumstances change. The clarity produced by adjudication may foster predictability, but the ambiguous results of negotiation foster flexibility.⁸⁸

2. Winners and Losers Versus Compromise

Some of these differences in rule clarity result from adjudication’s and negotiation’s contrasting approaches to dispute resolution. Adjudication as a model (again, we’re talking about ideal types here) seeks an ultimate decision about the rightfulness or wrongfulness of the parties’ conduct. That is what is in dispute. And in reaching a conclusion, one side will win and the other side will lose. The result is essentially binary⁸⁹—the behavior was lawful or unlawful, excusable or inexcusable.⁹⁰ Negotiation need not follow that pattern. The parties to a dispute can choose a variety of ways to reach some sort of settlement and may find a mutually acceptable resolution that avoids either blame or vindication.

This is, of course, Alternative Dispute Resolution 101. As the nearly canonical *Getting to Yes* reminds us, in negotiations, the goal should be to “Focus on Interests, Not Positions.”⁹¹ And contrasting the narrowness of the choices presented to courts with the much broader calculus, the greater range of issues that can be brought to the table for negotiated solutions is a key theme of the out-of-court-settlement literature.⁹² Whereas settlement skeptics worry that negotiated resolutions favor peace over justice,⁹³ settlement’s proponents worry that “a litigated outcome will produce binary

86. See Koh, *supra* note 48, at 71 (“Although this large body of quasi-constitutional custom fills in the interstices of the textual and statutory skeleton of the National Security Constitution, it is perennially subject to revision.”).

87. Spiro, *supra* note 49, at 1032.

88. Cf. LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 39 (1st ed. 1905) (“Codification certainly interferes with the so-called organic growth of the law through usage into custom.”).

89. See, e.g., Menkel-Meadow, *supra* note 52, at 2672 (discussing “adjudication, with its binary or win-loss solutions”).

90. Of course, adjudication is more complicated than this. Courts may, for example, adopt rules that seek to reconcile the arguments of the parties. The result though—that one party will win and the other lose on any given issue—is likely to remain the same.

91. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* ch. 3 (Bruce Patton ed., Penguin Books 1991) (1981).

92. See e.g., Coleman & Silver, *supra* note 58, at 106; Menkel-Meadow, *supra* note 52, at 2672.

93. E.g., Fiss, *supra* note 43, at 1075; Luban, *supra* note 58, at 2620–21; Menkel-Meadow, *supra* note 52, at 2668 (“[Luban] suggests that those who continue to favor secret settlements prefer the ‘problem-solving’ (dispute resolution) conception of our legal system to ‘public production of rules and precedents’ or the ‘public goods and discourse’ function.”).

win-lose results that often do not capture the 'just reality.'"⁹⁴ "[C]ompromise (or at least nonbinary solutions)," on the other hand, "may represent more 'precise justice,'"⁹⁵ offering "the opportunity to craft solutions that do not compromise, but offer greater expression of the variety of remedial possibilities in a postmodern world."⁹⁶ "Noncompromise settlements offer the promise that more than money can be at stake and that the parties can negotiate such other items as future relationships and conduct, apologies, in-kind trade, new contracts, etc."⁹⁷ This theme is echoed in the community-custom literature, which notes the different logic of negotiated and adjudicated dispute resolution. Lisa Bernstein, for example, notes that merchants will often distinguish between more flexible "relationship-preserving norms" that they will use to settle their own disputes and stricter "endgame norms" that they will ask external adjudicators to apply.⁹⁸

Finding examples of international law disputes resolved this way is also easy. Disputes between states initially framed in terms of opposing legal positions are often settled through the negotiation of some broader agreement from which both sides can benefit. Resolution of the underlying legal issue may drop away completely. Mexico, for instance, chose not to press for adoption of a favorable panel report in the *Tuna-Dolphin* dispute, leaving open the legal questions at the heart of its conflict with the United States⁹⁹ in return for favorable access to the U.S. tuna market and smooth passage of the much more important NAFTA.¹⁰⁰ The 1794 Jay Treaty similarly resolved some of the legal issues between the United States and Great Britain, but the United States sacrificed agreement on the status of neutral shipping, one of its key legal arguments against Great Britain, in return for broader shipping access to British West Indies ports.¹⁰¹ In a more recent example, the dispute between the United States and Pakistan regarding alleged CIA agent Raymond Davis's diplomatic status¹⁰² was never directly resolved. Instead, Davis

94. Menkel-Meadow, *supra* note 52, at 2674.

95. *Id.* at 2674.

96. *Id.* at 2675.

97. *Id.* at 2674.

98. Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 766-71 (1999).

99. Specifically, these questions involved the permissibility of Process and Production Method regulation and the territorial scope of acceptable animal-health regulations under the General Agreement on Tariffs and Trade. *See* sources cited *infra* note 100.

100. Torsten H. Strom, *Another Kick at the Can: Tuna/Dolphin II*, 33 CAN. Y.B. INT'L L. 149, 155-60 (1995); Kohei Saito, *Yardsticks for "Trade and Environment": Economic Analysis of the WTO Panel and the Appellate Body Reports Regarding Environment-Oriented Trade Measures* (Jean Monnet Ctr. for Int'l & Reg'l Econ. Law & Justice, Working Paper No. 14/01, 2001), available at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/013701-02.html>. Mexico was apparently concerned that pressing its victory might mobilize U.S. environmental groups to try to scuttle NAFTA. Strom, *supra*, at 161 n.52; accord JOHN J. AUDLEY, GREEN POLITICS AND GLOBAL TRADE: NAFTA AND THE FUTURE OF ENVIRONMENTAL POLITICS 73 (1997).

101. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 412-13 (1993).

102. *E.g.*, Charlie Savage, *Pakistan Case Tests Laws on Diplomatic Immunity*, N.Y. TIMES, Feb. 23, 2011, at A7.

was released from Pakistani custody after an unclear source made payments to the families of the two people he had shot.¹⁰³

Importantly, achieving the divergent outcomes or goals of adjudication and negotiation requires the production of different types of legal rules. Deciding authoritatively the rightfulness or wrongfulness of each side's conduct requires a host of specific rules regarding, among other things, liability (whether strict liability or negligence or forms of accomplice liability) and burdens of proof. These types of rules may be produced in the negotiation context but need not be. "‘Settlement facts’ may indeed be different from ‘adjudication facts.’"¹⁰⁴ In contrast, negotiation will emphasize other legal questions like the presence of "good faith" in the conduct of the parties' relations.¹⁰⁵ This difference has become particularly apparent in the efforts of international criminal tribunals and domestic courts to find rules regarding individual and corporate liability for violations of international law. Criminal trials and civil actions in the United States under the Alien Tort Claims Act require clear liability rules in order to fairly assign blame while meeting standards of due process, legality, and *nulla poena sine lege*.¹⁰⁶ Given customary international law's general development through negotiation and jawboning, contexts in which such rules may be neither necessary nor desirable, such rules are difficult to find.¹⁰⁷

Again, the key here, as with rule clarity above, is that these differences are not random. They stem from the fact that adjudication and negotiation often serve different purposes and goals. Adjudicatory law, like adjudication, has developed to foster justice and finality. Negotiated law has developed with an eye toward "peace," continuity, and ongoing relationships.

3. Speed and Path Dependence

A third, related difference between adjudicated and negotiated law concerns speed and directionality. As noted above, adjudication generally produces much clearer outcomes¹⁰⁸ and rules than negotiation. Almost by

103. E.g., Carlotta Gall & Mark Mazzetti, *Hushed Deal Frees C.I.A. Contractor in Pakistan*, N.Y. TIMES, Mar. 17, 2011, at A1; Greg Miller & Pamela Constable, *CIA Contractor Raymond Davis Freed After "Blood Money" Payment*, WASH. POST, Mar. 16, 2011, at A1.

104. Menkel-Meadow, *supra* note 52, at 2685.

105. See Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 382–83 (1995) (discussing how business communities develop understandings of "good faith"); William A. Klein & Mitu Gulati, *Economic Organization in the Construction Industry: A Case Study of Collaborative Production Under High Uncertainty*, 1 BERKELEY BUS. L.J. 137, 164–66 (2004) (discussing the importance of "good faith" in the construction and film industries).

106. The Alien Tort Claims Act grants the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2011). U.S. federal courts have struggled to find the proper standards for liability for international law violations. See *infra* note 295. Compare *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), with *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

107. See Greenawalt, *supra* note 23, at 1073–78.

108. Specifically, adjudication produces clearer resolutions of the contested legal issues. See *supra* Part I.B.1. Raymond Davis going free was obviously a clear "outcome" of the nego-

necessity, such rules create a focal point for future decisions and future interpretations.¹⁰⁹ This is true regardless of the exact rules regarding precedent. Even in a system without formal precedent, the rules produced through adjudication cannot be ignored.¹¹⁰ A prior court's decision "provides a good reason or justification why the subsequent decision should be as argued, all other things being equal,"¹¹¹ and becomes a "real constraint"¹¹² "clutter[ing] previously unencumbered argumentative freedom."¹¹³ Embedding such rules within a system of adjudication magnifies the effect. "Cases unavoidably add layer upon layer of judicial gloss to the understanding of law, which eventually becomes thick and encrusted and thus increasingly hard to break out of."¹¹⁴ Where adjudication is reasonably frequent, it creates a self-perpetuating engine for law elaboration. Interpretations easily build on one another, allowing the law on an issue to develop very rapidly. "Precedents can thus lead to path-dependency by organising complex environments and creating argumentative frameworks, be it directly or more obliquely."¹¹⁵

In contrast, settlements, by obscuring questions like liability and responsibility (or even whether a rule was agreed upon), leave a great deal of room for future argument over the exact rule the settlement stood for, slowing the process of elaboration considerably.¹¹⁶ Precedents developing out of negotiated contexts will be more ambiguous and contestable,¹¹⁷ new

tiations between the United States and Pakistan, if albeit a practical, as opposed to legal, one. See *supra* notes 102–103 and accompanying text. Thank you to Tim Meyer for clarifying this point.

109. Sturm & Gadlin, *supra* note 66, at 2–3 ("Adjudication elaborates public norms by developing binding precedents in a particular case, which will then apply in the future to comparable cases.").

110. See Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 GERMAN L.J. 1005, 1019 (2011) ("[D]eliberately ignoring relevant prior decisions is so arbitrary and artificial a suggestion as to verge on farce."); see also Hall, *supra* note 37, at 152 ("On the continent of Europe no such effect is theoretically attributed to judicial decisions, but in recent years the greatly increasing citation of former decisions by the courts with a visible reluctance to depart from them has made the difference in practice between the Continental and the Anglo-American systems one of degree only. Similarly, judicial precedents in international law have great weight as authorities, especially where rendered by nationally impartial tribunals composed of recognized experts in the subject.").

111. Jacob, *supra* note 110, at 1024.

112. *Id.*

113. *Id.*; see also *id.* at 1019 ("[D]eliberately ignoring relevant prior decisions is so arbitrary and artificial a suggestion as to verge on farce.").

114. *Id.* at 1024.

115. *Id.* at 1015.

116. See OPPENHEIM, *supra* note 88, at 40 ("The growth of the law through custom goes on very slowly and gradually.").

117. See, e.g., David M. Golove, *Leaving Customary International Law Where It Is*, 34 GA. J. INT'L & COMP. L. 333, 348–50 (2006) (complicating and contextualizing the U.S. Civil War incidents between the United States and the United Kingdom used as examples in JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 225 (2005)); see also Hall, *supra* note 37, at 153 ("Important questions of municipal law are almost certain to be forced into the courts soon after they arise, and a decision one way or the other tends to clear the air of the defeated theories, for no one can long seriously maintain that the law is something which the courts are patently deciding in actual controversies that it is not. But, in the

negotiation can much more freely ignore the purported rules that other negotiations may have stood for, and it may take many interactions over a long period of time before a single clear rule seems to emerge.¹¹⁸ Writing about alternative dispute resolution, for example, Susan Sturm and Howard Gadlin describe the process through which “informal [public] norms often inform formal policy and law” as one of “reiteration, coordination and revalidation.”¹¹⁹ In the U.S. separation-of-powers context, this often means requiring “repetition and longevity,”¹²⁰ “consistency,” “duration,” and “continuity,”¹²¹ or “unbroken” practice,¹²² before distilling a rule from custom. The paradigmatic description of this process within international law can be seen in the U.S. Supreme Court’s analysis in the *Paquete Habana*, tracing hundreds of years of zigzagging state practice regarding the immunity of small fishing vessels from wartime capture to discover a “gradually ripening” rule of customary international law.¹²³

Again, importantly, within negotiated law, this slower pace is seen as a virtue; rules develop in light of the lived life of the rule. As Glennon writes of U.S. separation-of-powers custom: “Custom draws vitality as a source of authority from its utility as a reality-tester; the act constituting it has been carried out over a period of time, and found workable.”¹²⁴ Developing in increments over time, explains Spiro, “moors the law in the full texture of our experience as a national community.”¹²⁵ In the conventional account of custom, Schauer explains, “as mistakes are corrected more often than sound practices are discarded, then over time custom gets better . . . and the law is to be praised for drawing on and treating it as authoritative.”¹²⁶

4. Legitimacy

As has already been noted, the differences between negotiated and adjudicated law are in many ways a function of the different values they serve. But the differences run even deeper than that. As the settlement scholars are quick to point out, negotiated and adjudicated resolutions draw authority from different sources of both sociological and normative legitimacy.

absence of any internationally binding authority upon many important questions of international law, rival experts may announce and adhere to the most conflicting theories with the greatest confidence and pertinacity.”)

118. See Schauer, *supra* note 39, at 31 (“Customs change, and they generally do so in incremental response to new acts, events, decisions, and interpretations.”).

119. Sturm & Gadlin, *supra* note 66, at 52.

120. Spiro, *supra* note 49, at 1015.

121. Glennon, *supra* note 50, at 146–47.

122. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

123. *The Paquete Habana*, 175 U.S. 677, 686 (1900); see also Hall, *supra* note 37, at 155 (“In international matters a nation may do the same—but, owing to the lack of compulsory tribunals for the decision of such controversies, years or even generations may elapse before it can be said that the proposed change has become effective or has been defeated.”).

124. Glennon, *supra* note 50, at 135.

125. Spiro, *supra* note 49, at 1034.

126. Schauer, *supra* note 39, at 32.

Negotiated rules invoke principles of party autonomy and consent.¹²⁷ They also invoke notions of compromise and practical justice. Rules develop slowly in light of practical realities, always leaving room for reassessment along the way. As mentioned above, separation-of-powers custom, for example, derives its authority from its time-testedness—"the act constituting it has been carried out over a period of time, and found workable."¹²⁸

Arbitration can likewise derive legitimacy from consent. Adjudication, however, requires more. It may invoke implicit or explicit delegations of authority,¹²⁹ neutrality,¹³⁰ finality,¹³¹ or reasoned decision making¹³²—sources very different from those invoked in defense of negotiated rules.¹³³ This can be seen in constant critiques of decisions by constitutional courts—the claims are often that lawmaking has not been delegated to the court, that the people's representatives agreed to something else, or that decisions are not neutral.

Importantly, these notions of legitimacy are not only different from those undergirding negotiated law, but may at times be in conflict with them; neutrality, expertise, and reasoned decision making may all require ignoring party wishes.¹³⁴ Finality may be in conflict with the flexible ambiguity, the potential for renegotiation that supports negotiated law. These legitimacy distinctions thus give the practical distinctions between the two

127. Menkel-Meadow, *supra* note 52, at 2669–70 (describing the values supporting settlement as including "consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice"); see also Spiro, *supra* note 49, at 981 ("It is ultimately the acceptance of the congressional-executive agreement by the President, the Congress, and the People themselves that drapes it with constitutional legitimacy.").

128. Glennon, *supra* note 50, at 135.

129. See Roberts, *supra* note 2, at 185 (discussing this distinction in the investment tribunal context).

130. Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 *GEO. WASH. INT'L L. REV.* 107, 121 (2009) (identifying the "perception that the tribunal is fair and unbiased" as a key factor in its perceived legitimacy); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 312–14 (1997).

131. WALLACE D. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS, AND TEXT* 530 (1984) ("The perceived legitimacy of adjudication depends in part on its authoritative finality.").

132. See Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 *WASH. & LEE L. REV.* 1011, 1014–15 (2007); see also J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 13 *AM. REV. INT'L ARB.* 177, 193 (2002) ("The legitimacy of courts rests in grand part on their capacity to listen to the parties, to deliberate impartially favoring neither the powerful nor the meek, to have the courage to decide and then, crucially, to motivate and explain the decisions.").

133. Sturm & Gadlin, *supra* note 66, at 52 ("[Adjudication presumes] a particular idea of public [decision making]—the formal declaration of general rules by courts or legislatures—and a particular conception of how public values emerge from conflict resolution—through Socratic reasoning from binding precedent.").

134. In the words of Carrie Menkel-Meadow: "Do the parties, whose dispute is being settled, or the public, who needs guidance from enunciated rules, control the judgment?" Menkel-Meadow, *supra* note 52, at 2679.

legal ideal types normative resonance and relevance, setting up stark choices.

5. Summary

The chart below attempts to summarize the various differences between the ideal types of negotiated and adjudicated law:

	Negotiated Law	Adjudicated Law
Clarity of Rules	Ambiguous, Open to Interpretation	Clearer, More Predictable in Application
Pace of Development	Slow, Incremental	Potentially Fast, Path-Dependent
Method of Development	Practical Experience	Reasoned Elaboration
Intended Outcome	Flexibility, Potential for Renegotiation	Certainty, Finality
Goal	Continuing Relationship, Peace	Justice
Sources of Legitimacy	Consent, Autonomy, Compromise, Pragmatism	Delegation, Neutrality, Expertise, Reasoning, Finality

What should be becoming clearer is that “customary law” developed through adjudication is fundamentally different in kind from the customary law developed through community practice.¹³⁵ Developed for different purposes, these rules differ in shape. Developed through different processes by different actors, these rules invoke different forms of legitimacy. Of course, looking at this chart, one will immediately think of examples of trials or negotiations that do not fit the bill, to which one or more of these supposed attributes do not attach. But the constant invocation of these attributes in the literature demonstrates the deep justificatory role the ideal types play.¹³⁶

These differences between adjudicated law and negotiated law complicate the transposition of rules from one context to the other. At a practical level, the two may simply be mismatched. For example, negotiated-law rules intended to be open ended may have their possibilities closed off in adjudication’s quest for clarity.¹³⁷ But at a deeper, more theoretical level, applying in one context rules developed in another presents a paradox. Courts cannot apply custom without essentially destroying it. The development of “custom” via adjudication is not merely a continuation of that rule’s development, but its transformation into something new.¹³⁸ Some process of

135. True, the common law is often described as a type of customary law. But insofar as that is the case, it is a customary law of courts rather than a customary law of the external community.

136. Individual adjudications or negotiations will stray from their ideal attributes, but they can’t stray too far without raising questions about their legitimacy.

137. See *infra* Part II.B for potential, though controversial, examples.

138. Hall, *supra* note 37, at 151–52 (“Thus, a rule may have originated in custom, professional opinion, public policy, or even in a statute, but, once it has been declared in a judicial

translation, explicit or implicit, is needed in order to turn the rules developed in one setting into rules usable in the other.

This realization is not, in fact, new. Early common law lawyers had to come to terms with a similar problem in the transposition of community custom into common law rules. As early as 1610, Thomas Hedley was distinguishing the “artificial reason” of the common law from the “bare precedents” of custom.¹³⁹ As Michael Lobban explains:

[C]ommon lawyers did not feel that community practices could by themselves generate binding norms. In their view, while community custom provided the historical foundation of the common law, its development was the preserve of judges. Community practices were only permitted to derogate from the common law where they were ancient and unchanging; and old common law could not be abrogated by new custom. Equally, although judges could incorporate newer customs and practices—whether domestic or international—in developing the common law, their authority and validity derived from the judicial decision and not from the custom itself.¹⁴⁰

English common law thus developed a mechanism for translating custom from practice to adjudication. Customs could be looked to for rules, but the resulting rules were controlled by judges rather than the community and elaborated through common law reasoning rather than community practice. International law is now in need of a similar set of translation rules. What will they be?

II. FROM DIPLOMACY TO ARBITRATION TO ADJUDICATION

Figuring out what role courts and tribunals should play in interpreting or articulating international law is a relatively recent problem. It is only over the last century that the arbitration or adjudication of international law disputes has become frequent enough to really raise concerns. This Part traces the historical development of international adjudication from the late nineteenth-century enthusiasm for arbitration through the creation of the PCIJ and up to today's flowering of courts, tribunals, and other interpretive bodies. It then continues by looking more closely at problems created by asking courts to apply negotiated law, demonstrating through three examples—(1) the interpretation of international investment treaties, (2) the use of diplomatic assurances in Europe, and (3) the availability of self-defense against

decision (in the case of a statute taking the form of an interpretation of the legislative meaning), succeeding cases of like import are almost certain to be decided upon the authority of the previous decision, which, by frequent references of this character, finally becomes not only practically but theoretically almost as fixed a part of the law as even a statute that it interprets.”).

139. 2 PROCEEDINGS IN PARLIAMENT 1610, at 175–76 (Elizabeth R. Forster ed., 1966). As Michael Lobban explains, “The common law was not developed in the community by the people, but was developed in court by the ‘artificial reason’ of judges.” Michael Lobban, *Custom, Common Law Reasoning and the Law of Nations in the Nineteenth Century*, in THE NATURE OF CUSTOMARY LAW, *supra* note 39, at 256, 258.

140. See Lobban, *supra* note 139, at 257.

nonstate actors—how the jurisprudence of international courts and the state practice those courts are theoretically interpreting can start to diverge.

A. *The Rise of International Adjudication*

1. The Path to Courts

International tribunals have been around almost as long as international law. Herodotus and Thucydides both recount stories of arbitration among ancient Greek city-states.¹⁴¹ A number of famous ancient Greek interpolis arbitrations actually turned on interpretations of Homer,¹⁴² and the treaty establishing the thirty-year peace between Athens and Sparta famously included a clause requiring arbitration of disputes.¹⁴³ And the tradition continued through ancient times into the Middle Ages.¹⁴⁴ A modern era of international arbitration was inaugurated by the 1794 Jay Treaty between the United States and the United Kingdom and its provision for the arbitration of disputes between the two parties.¹⁴⁵ But arbitration remained rare and ad hoc until the latter half of the nineteenth century, when the success of the high-profile, high-stakes Alabama arbitration between the United States and the United Kingdom,¹⁴⁶ combined with a growing international peace movement, generated new enthusiasm for arbitration and the peaceful settlement of interstate disputes.¹⁴⁷

This enthusiasm culminated in the establishment first of the Permanent Court of Arbitration at the 1899 Hague Peace Conference and later, in 1922,

141. See, e.g., HERODOTUS, *THE HISTORIES* 342, 366 (Carolyn Dewald ed., Robin Waterfield trans., Oxford Univ. Press rev. ed. 2008) (c. 425 B.C.E.); THUCYDIDES, *THE PELOPONNESIAN WAR* 15–21 (Steven Lattimore trans., Hackett Publ'g Co. 1998) (c. 411 B.C.E.).

142. See John M. Wickersham, *Myth and Identity in the Archaic Polis*, in *MYTH AND THE POLIS* 16, 16–31 (Dora C. Pozzi & John M. Wickersham eds., 1991).

143. See DONALD KAGAN, *THE OUTBREAK OF THE PELOPONNESIAN WAR* 128 (1969) (explaining how Sparta's refusal to go to arbitration as agreed helped precipitate the Second Peloponnesian War); JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO* 155–68 (1929) (detailing arbitral practice among the ancient Greeks); CHRISTIAN REUS-SMIT, *THE MORAL PURPOSE OF THE STATE: CULTURE, SOCIAL IDENTITY, AND INSTITUTIONAL RATIONALITY IN INTERNATIONAL RELATIONS* 58–59 (1999).

144. See RALSTON, *supra* note 143, at 174–89.

145. See Carla S. Copeland, Note, *The Use of Arbitration to Settle Territorial Disputes*, 67 *FORDHAM L. REV.* 3073, 3073 (1999).

146. The Alabama was a Confederate raider responsible for numerous attacks on Union ships built in Britain allegedly in violation of British neutrality during the U.S. Civil War. See Mark Weston Janis, *Americans and the Quest for an Ethical International Law*, 109 *W. VA. L. REV.* 571, 596–99 (2007).

147. E.g., *id.* at 580–89; *ICJ History*, *supra* note 35. These trends were further buttressed by the simultaneous emergence of arbitration as a primary means for resolving alien-protection disputes between the United States and Latin American states. See Alan T. Nissel, *Big Suck Arbitration* 31–35 (Jan. 4, 2013) (unpublished manuscript) (on file with author). Nissel makes the compelling case that it was in these arbitrations that the modern practices of international dispute resolution were developed. Given the centrality of U.S. statesmen-lawyers in the development of early international arbitral and adjudicatory bodies, this should not be surprising.

of the PCIJ.¹⁴⁸ After World War II, the PCIJ was replaced by the ICJ,¹⁴⁹ and over time additional courts and tribunals have been created, such as the European Court of Justice (ECJ) in 1952¹⁵⁰ and the ECHR in 1959.¹⁵¹ Since the end of the Cold War, however, the number of international courts, tribunals, and other adjudicatory or interpretative bodies has exploded. According to one count, there are now 142 “international institutions controlling implementation of international law and/or settling disputes arising out of its interpretation and implementation.”¹⁵² These range from formal courts established under multilateral treaties, like the Law of the Sea Tribunal, the World Trade Organization (WTO) Appellate Body, and the International Criminal Court; courts or tribunals established under regional human rights agreements, like the ECHR, the Inter-American Court of Human Rights, and the African Court of Justice; courts or tribunals established under regional economic agreements, like the ECJ, NAFTA tribunals, Mercosur arbitration panels and appellate body, the Court of Justice of the Economic Community of Western African States, and the Court of Justice of the Andean Community; ad hoc or hybrid international criminal tribunals for the former Yugoslavia, Rwanda, Sierra Leone, East Timor, Cambodia, and Lebanon; quasi-judicial expert bodies with authority to hear individual complaints under a range of human rights treaties; and what has been described as “an emerging system” of investor-state investment tribunals called for under the vast array of bilateral investment treaties (BITs).¹⁵³ These bodies can be extraordinarily hard to classify given that they differ dramatically in permanence, structure, and the bindingness of their decisions, among other things,¹⁵⁴ and those listed here form merely the very tip of a very large iceberg. What these bodies share in common is that they are delegated some authority to interpret international law and its application to specific disputes and situations.

148. *Permanent Court of Arbitration*, HAGUE JUST. PORTAL, <http://www.haguejusticeportal.net/index.php?id=311> (last visited Feb. 10, 2013); *Permanent Court of International Justice*, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=6340> (last visited Feb. 10, 2013).

149. *International Court of Justice*, HAGUE JUST. PORTAL, <http://www.haguejusticeportal.net/index.php?id=305> (last visited Feb. 10, 2013).

150. *European Court of Justice*, EUROFOUND, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeancourtofjustice.htm> (last updated Sept. 21, 2011); *The Institution: General Presentation*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_6999/ (last visited Feb. 10, 2013).

151. EUR. COURT OF HUMAN RIGHTS, THE COURT IN BRIEF (2012), available at http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/ENG_Court_in_brief.pdf.

152. Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT'L DISP. SETTLEMENT 241, 241–42 (2011).

153. E.g., SCHILL, *supra* note 26, at 24; Alvarez, *supra* note 70, at 17; Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 128 (2003).

154. Perhaps the most comprehensive effort has been made by Cesare Romano. Romano, *supra* note 152, at 241. For additional discussions of the type of tribunals existing in Europe and the functions they perform, see generally KAREN J. ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS, at ix (2009).

It was the PCIJ Statute that first grappled with the legal sources international courts would apply. Article 38 of the Statute, later incorporated into the Statute of the ICJ, laid out the sources to be used in cases before the court, and it is from here that we get the doctrinal rule that courts are to apply the rules created by states in their interactions with one another.¹⁵⁵ Aside from “international conventions,” the PCIJ was to apply “international custom, as evidence of a general practice accepted as law,” and “[t]he general principles of law recognized by civilized nations.”¹⁵⁶ Interestingly, despite stated hopes of court proponents like Manley Hudson that the PCIJ would be a force for the reasoned elaboration of the law,¹⁵⁷ the potential conflict between this goal and the PCIJ’s mandate to track state practice seems to have raised few concerns at the time of drafting. The inclusion of “international custom, as evidence of a general practice accepted as law,”¹⁵⁸ seems to have elicited little debate. On the contrary, James Brown Scott, Technical Delegate of the United States to the Conference that drafted the Statute, described the list of sources eventually codified in Article 38 as “not only acceptable in themselves but . . . in accordance with the decisions of English and American courts of justice, both as to the law and as to the rules of interpretation.”¹⁵⁹ And if anything, the goal seems to have been to constrain the judges of the new court to apply only those rules created by states, whether by treaty or by customary practice.¹⁶⁰ As Scott explains, “the Committee [drawing up the Statute] was anxious to quiet the apprehensions of the parties that the judges might make an undue use of their power and, by the interpretation of their jurisdiction, assume the role of legislator.”¹⁶¹ The ICJ Statute emphasizes this point by reducing judicial opinions to mere subsidiary sources¹⁶² and by denying decisions precedential force.¹⁶³ Essentially, the court was to be limited to applying negotiated law.

Now often referred to as international law’s *doctrine of sources*, Article 38, together with relevant rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties, has since become the template for other judicial or quasi-judicial bodies tasked with applying or interpreting interna-

155. ICJ Statute, *supra* note 4, art. 38.

156. *Id.*

157. MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1942: A TREATISE § 545 (1943).

158. ICJ Statute, *supra* note 4, art. 38(b).

159. JAMES BROWN SCOTT, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS: REPORT AND COMMENTARY 107 (1920).

160. This becomes apparent in the provision of Article 38 that did apparently result in some debate among the delegates drafting it: that referring to “general principles of law.” ICJ Statute, *supra* note 4, art. 38(c). The language eventually chosen was meant to provide a means of judicial gap filling that would nonetheless be constrained by some form of state consent. See G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 136–39 (1983); Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT’L L. REV. 275, 307–08 (2008).

161. SCOTT, *supra* note 159, at 107.

162. ICJ Statute, *supra* note 4, art. 38(d).

163. *Id.* art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

tional law.¹⁶⁴ These bodies regularly recite oaths of loyalty to these traditional sources.¹⁶⁵ But perhaps demonstrating the inherent difficulty translating negotiated law into adjudicated law, various courts and tribunals have found themselves swaying farther and farther from Article 38, whether intentionally or not.

Across a wide swath of international law, from international trade¹⁶⁶ to international investment arbitration,¹⁶⁷ international human rights¹⁶⁸ to international criminal law,¹⁶⁹ precedent and jurisprudence have emerged as important, if unspoken, sources, notwithstanding the PCIJ (and later ICJ) Statute's embrace of negotiated law and denial of precedential effect to court

164. Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 69, 75–76 (2007) [hereinafter Cohen, *Finding International Law I*]; Harlan Grant Cohen, *Finding International Law Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049, 1056–59, 1069 (2012) [hereinafter Cohen, *Finding International Law II*].

165. See Greenawalt, *supra* note 23, at 1075 n.55 (collecting such cases from the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia [ICTY]); Theodor Meron, Editorial Comment, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 821 (2005) (“[I]nternational criminal tribunals have taken an essentially conservative and traditional approach to the identification and application of customary international law principles.”); see also Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005) (basing decision in WTO case on VCLT rules); U.N. Human Rights Comm. [U.N. HRC], General Comment No. 26(61): General Comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997) [hereinafter U.N. HRC, General Comment No. 26(61)] (using VCLT to interpret the International Covenant on Civil and Political Rights); U.N. HRC, General Comment No. 24: General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) [hereinafter U.N. HRC, General Comment No. 24].

166. E.g., Bhala, *supra* note 27, at 850; Howse, *supra* note 27, at 223; Lanye, *supra* note 27, at 230.

167. *Int'l Thunderbird Gaming Corp. v. United Mexican States, Final Award*, ¶ 129 (Jan. 26, 2006), reprinted in 6 ASPER REV. INT'L BUS. & TRADE L. 419, 571 (2006) (“In international and international economic law—to which investment arbitration properly belongs—there may not be a formal ‘stare decisis’ rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence.”); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1611–12 (2005) (“The fact is that investment awards are not technically precedential. . . . As a practical matter, however, private investors, governments, and arbitral tribunals rely on previous awards to interpret similar provisions in investment treaties.”); Matthew Belz, Comment, *Provisional Application of the Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties*, 22 EMORY INT'L L. REV. 727, 752 (2008) (“Second, there is strong pressure on arbitrators to follow other tribunals’ decisions, even though stare decisis does not govern international arbitration. As stated by one . . . scholar, ‘[t]he reasoning of almost all modern arbitral awards demonstrate [sic] the great care investment arbitral tribunals apply to ensure they are positioned in the mainstream of emerging jurisprudence.’” (alteration to internal quotation in original)).

168. See Binder, *supra* note 28, at 1203–05.

169. See Greenawalt, *supra* note 23, at 1073–78.

decisions. In some areas, the traditional sources seem unable to provide the rules courts need in order to fulfill their mandates. This has become most stark in the international criminal context; determining an individual's criminal liability for a violation of international law requires clear rules regarding forms of liability, burdens of proof, and mens rea that have not and could not have been worked out through traditional state practice.¹⁷⁰ Instead, courts have by necessity looked to the practice of international and domestic courts for answers.¹⁷¹ The result is an international adjudicatory common law that must disguise itself as custom lest those courts overstep their mandates.¹⁷² And in still other areas, international law's recognition of new rights holders beyond the state, whether individuals in the human rights context or investors in the investment context, has made reliance on the practice of states seem anachronistic or paradoxical.¹⁷³ It is reining in the practice of states, of course, that is the purpose of the law in these areas. Perhaps not surprisingly, reconciling the mandate to protect individuals with the mandate to apply traditional sources of international law has forced these bodies to reinterpret notions of custom to deemphasize state practice¹⁷⁴ and to assert their independent authority to elaborate the objects and purposes of the treaties before them.¹⁷⁵

2. The Path to Precedent

Given this drift toward adjudicated law, one must wonder, why didn't the articulation of negotiated law by a permanent court raise more red flags for the drafters of the PCIJ Statute? Why weren't the difficulties translating between the legitimacy of negotiation and the legitimacy of adjudication more apparent? Should the drafters have anticipated these developments?

What seems to have been missed in the transposition of custom to courts, in the adoption of arbitral rules as judicial rules, are the systemic effects of creating a system of courts.¹⁷⁶ Although some of the theoretical

170. *Id.* at 1080–81.

171. *See id.* at 1075–77, 1076 n.60 (“[T]he Trial Chamber must examine customary international law in order to establish the content of this head of criminal responsibility . . .” (quoting *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 191, 193 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (internal quotation marks omitted))).

172. Cohen, *Finding International Law II*, *supra* note 164, at 1078–79.

173. *Id.* at 1078–79, 1084; *see also* Alvarez, *supra* note 70, at 47 (“[Investment arbitration decisions] are also more likely to offer useful ‘neutral’ guidance for law interpreters than diplomatic actions by self-interested states.”).

174. *See* Roberts, *supra* note 21, at 758–59.

175. *See* U.N. HRC, General Comment No. 26(61), *supra* note 165, ¶ 5; Cohen, *Finding International Law II*, *supra* note 164, at 1073–74. Additionally, precedent may be a natural response to the changing nature and audience of these and other more modern areas of international law. In a variety of areas, human rights and trade most notably, the treaty makers are often not the most important compliance agents. Domestic audiences, both judges and legislators, may be the ones who must act to implement particular obligations. Appeals to precedent may signal both neutrality and rule-of-law values that might make more of an impact on those actors.

176. As Scott describes, the definition of custom in the Permanent Court of International Justice Statute appears to have been borrowed wholesale from earlier arbitral tribunals and

difficulties with adjudicating negotiated law may be present even in the delegation of a single dispute to an ad hoc tribunal, it is only with increased frequency, density, and transparency of judicial proceedings that these problems become manifest. One of the lessons of the literature on precedent in international law is that appeal to prior decisions depends little on the actual rules regarding precedent, but rather on the density and frequency of adjudication as compared to other sources.¹⁷⁷ The emerging literature on the evolving “system” of international investment arbitration is particularly illustrative here, given that it depends on the density of decisions by *many* tribunals rather than the authority of a single one.¹⁷⁸ In essence, the weight carried by precedent is a function of the discursive burden prior interpretations place on future arguments about a rule. As a feature of legal argumentation, once a body with some authority¹⁷⁹ interprets a rule, any future discussion of the rule must take that interpretation into account, even if to argue that it is wrong; further interpretations along the same lines make the burden of dismissing it even harder.¹⁸⁰ This helps explain why the use of the orthodox definition of custom by infrequent, ad hoc arbitral tribunals was less problematic: those tribunals’ decisions, which might be washed away in a sea of state practice,¹⁸¹ exerted less pull on the rule than do decisions by

domestic courts. See SCOTT, *supra* note 159, at 106–11. Little thought seems to have been given to why a permanent court might need different rules.

177. See Jacob, *supra* note 110, at 1020 (“[T]he shaping of international law is owed to the cumulative effect of the often unnoticed tweaking and tinkering constantly carried out regarding issues that do not usually arouse the hotter convictions of men and women.”).

178. See *e.g.*, SCHILL, *supra* note 26, at 14; Roberts, *supra* note 2, at 180, 204, 216.

179. This, of course, raises other questions that cannot fully be discussed here regarding when or why certain bodies will be seen as authoritative. The factors that might make a body authoritative likely differ with circumstances; different audiences, formal delegation, professionalism, expertise, neutrality, or opinion-writing style might all be more or less important to a body’s perceived authority.

180. Some international tribunals have explained their use of precedent along similar lines. For example, the WTO Appellate Body has explained:

It is well settled that Appellate Body reports are not binding This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the [Dispute Settlement Body]. . . . Ensuring “security and predictability” in the dispute settlement system, as contemplated in Article 3.2 of the [Dispute Settlement Understanding], implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.

Appellate Body Report, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, ¶¶ 158, 159–162 & n.309, WT/DS344/AB/R (Apr. 30, 2008). In essence, responding to prior decisions is simply a requirement of reasoned decision making. See *Int’l Thunderbird Gaming Corp. v. United Mexican States*, Final Award, ¶ 129 (Jan. 26, 2006), reprinted in 6 *ASPER REV. INT’L BUS. & TRADE L.* 419, 571 (2006) (“Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence.”).

181. Cf. Frank Partnoy, *Synthetic Common Law*, 53 U. KAN. L. REV. 281, 323 n.179 (2005) (“Each arbitrator therefore owes no more than ‘due regard’ to the decisions of other arbitrators. Nor is there complete publication of awards. Those published form only a small, and not necessarily representative, portion of the whole. Many parties have no convenient access to the publishing services, and many parties forego the use of lawyers who could discover and argue the pertinent precedents.”).

modern bodies, which may actually decide cases faster (developing what might quickly look like a consensus interpretation) than state practice can play out. This also explains why the formal nature of a tribunal may matter less than its ability to claim authoritative interpretative power. An expert body under a human rights treaty may put as much burden on future arguments as a decision of a formal court; an ICJ advisory opinion, technically nonbinding but purportedly a neutral interpretation of a rule, may act more like precedent than a decision under the ICJ's binding contentious jurisdiction that merely resolves a fact-specific dispute between two states.¹⁸²

These system effects are compounded as increasing opportunities for arbitration and adjudication produce an international litigation bar across a wide range of areas.¹⁸³ Whether private attorneys or government lawyers, lawyers focused on international adjudication have many reasons to find precedent attractive. They may have been socialized into a professional culture that reifies precedent's apparent neutrality and predictability. Appeals to precedent might dovetail with their professional training and skills. And for repeat players in the system, predictability in decision making may be something they both demand from tribunals and sell to clients, namely, expertise in predicting results and in advising on arguments.

Importantly, these system effects may arise not only from the increased use of courts and tribunals in one area of international law, but also across all of them.¹⁸⁴ Courts or tribunals in one area of law may have a hard time ignoring decisions in other areas interpreting common or similar provisions.¹⁸⁵ An obvious example is the appearance of human rights body precedents in the decisions of investment arbitral tribunals.¹⁸⁶ In essence, a

182. Cf. Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 516–17 (2009) (making the point that despite technically being nonbinding, the decisions of bodies like the Human Rights Committee can influence expectations about what particular rules mean and, in turn, can affect states' reputations for compliance or noncompliance). Although we use different terminology—in Guzman and Meyer's case “soft law,” in mine “precedent”—I believe the point is substantially the same: authoritative interpretative decisions by international bodies inevitably shape the meaning of the rules they interpret.

183. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 3 (1996) (discussing international arbitration bar); John Hagan & Ron Levi, *Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice*, 1 EUR. J. CRIMINOLOGY 446 (2004) (criminal law bar); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. (forthcoming 2013) (manuscript at 21), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167.

184. These effects are moreover compounded by a parallel increase in the interpretation of international law by domestic courts. A full discussion of the role of precedent in international law would have to include these courts as well. For a much fuller discussion of the complex, hybrid, perhaps even schizophrenic, role of national courts in interpreting international law, see generally Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 73–81 (2011).

185. This may be particularly important given that precedent may be more attractive in certain more modern areas of international law. See Roberts, *supra* note 21, at 788–89.

186. E.g., Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 885–86 (2005); Andrea Bjorklund & Sophie

developed jurisprudence with regard to fair-trial rights in human rights law may make a “denial of justice” provision in an investment treaty seem less unclear and less like a gap purposefully left open by states. This system effect confounds attempts by states to carefully design and calibrate the powers of tribunals at the front end and may be something lost in rationalist approaches to the creation of courts and tribunals. A state might predict that over time, with increased decision making, a court like the ECJ or ECHR might grow in influence and its decisions might be harder to ignore. It is hard to imagine, however, that in designing a settlement regime for one area of international law—say investment arbitration—states are thinking about the system effects of the simultaneous development of tribunals in other areas. Predicting the future course of a single dispute resolution system may be difficult; trying to predict how all of these systems will develop and the influence they may exert on one another seems nearly impossible. It should not be surprising that these developments would have been beyond the thinking of the drafters of the PCIJ Statute.

Nor could the PCIJ Statute’s drafters have likely predicted the radical expansion of international law’s subject matter and how new areas of governance might make precedent more attractive or valuable. In a variety of areas, human rights and trade most notably, the treaty makers are often not the most important compliance agents. Domestic audiences, both judges and legislators, may be the ones who must act to implement particular obligations. A court may need to order compliance with or accept an international decision;¹⁸⁷ legislators may need to be persuaded to change a state’s laws. Appeals to precedent may signal both neutrality and rule-of-law values that might make more of an impact on those actors.¹⁸⁸

Finally, these system effects of adjudication were likely obscured by the fact that despite the “ideal” of adjudicated law, adjudication actually exists along a spectrum with the most informal, ad hoc arbitration on one end and a permanent, institutionalized judiciary on the other. When a tribunal is invoked and constituted by the parties merely to resolve a specific dispute, it can reasonably claim to be acting solely at the consent of the parties. Particularly when the parties narrow the issues before the tribunal, the arbitration may just be a negotiated result in a specific form. The tribunal can reasonably “borrow” legitimacy from the parties and the rules they have established. But

Nappert, *Beyond Fragmentation*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE* 439, 453–66 (Todd Weiler & Freya Baetens eds., 2011).

187. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008) (ruling that “self-executing” treaties constitute binding domestic law); see also *Earth Island Inst. v. Christopher*, 20 Ct. Int’l Trade 1221, 1222–23 (1996) (ordering the United States to take action eventually held to violate the United States’ commitments under the WTO in Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 8.1–2, WT/DS58/R (May 15, 1998)).

188. Cf. Erik Voeten, *Does a Professional Judiciary Induce More Compliance?: Evidence from the European Court of Human Rights* 4–6 (Mar. 27, 2012) (unpublished manuscript), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2029786 (finding empirical support that decisions by professional judges have a greater impact on compliance in the European Court of Human Rights [ECHR] and suggesting that an explanation might be the respect national judges show for well-reasoned, well-crafted judicial decisions that skillfully cite prior precedents).

as the procedure for invoking the tribunal become more automatic, as the tribunal becomes more permanent, as the rules applied become standardized and obligatory, and as authority of the tribunal increases,¹⁸⁹ the precedential effect of the tribunal's decisions increases and the tribunal's ability to rely on direct consent decreases. It is then that the tribunal's credit runs out; it can no longer rely on the legitimacy of the parties or of custom; it must rely on some legitimacy of its own.

Many international law bodies exist somewhere along this spectrum: permanent courts whose jurisdiction depends on party consent (ICJ), or formal, permanent bodies of experts without the authority to issue binding decisions (the Human Rights Committee [HRC]). Even individual courts (and this is of course true in domestic law as well) may at times look more like arbitrators and others more like common law courts; the ICJ may be asked to resolve a highly fact-specific dispute between two states with little precedential value for other situations,¹⁹⁰ or it may be asked to issue an advisory opinion about a broad question of uncertain international law like the legality of nuclear weapons¹⁹¹ or the Kosovar declaration of independence.¹⁹² In fact, there is no clear line separating arbitration from adjudication in international law, and it is only as we get closer to the adjudicated-law ideal that the mismatch between sources and the need for additional forms of legitimacy become clear. And as noted above, the tipping point may come only with increased use.

Whatever the reasons, it is becoming harder to pretend that international courts and tribunals merely apply the rules developed by states. This is becoming clearest and most dangerous in a variety of contexts in which the jurisprudence of international courts and the state practice it purports to interpret seem to be on diverging paths.

B. Rival International Laws

The rise and proliferation of courts, tribunals, and other bodies applying negotiated law has led to increasing disconnects between the law as articulated by courts and the law that might be gleaned from state practice. Once a court (or other body) decides the shape of state practice and the content of custom, that decision becomes the baseline for further judicial articulation of the rule. This is true even if the initial evidence of state practice was questionable or difficult to discern or if state practice continues to develop in a different direction from the initial opinion. The result can be two parallel versions of the law, one articulated by courts and an-

189. Of course, the last may be a result of the others. Permanent, experienced judges with expertise in the rules they apply are likely to be held in greater esteem.

190. *E.g.*, *Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 I.C.J. 554 (Dec. 22).

191. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 226 (July 8).

192. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403 (July 22).

other developed through actual state practice.¹⁹³ Because each type of law invokes different types of legitimacy,¹⁹⁴ debates over which one is correct become rife. In some areas, states question whether courts truly had the delegated authority they claim. In others, contrary state practice is portrayed by court backers as rogue lawlessness or obstructionism. The result is a legitimacy crisis for international law.¹⁹⁵

In each of the examples below, state practice and precedent seem to point in opposite directions.¹⁹⁶ The point of these examples is not that either the court or the states are right or wrong; international lawyers will undoubtedly differ over who should eventually prevail in each instance. The point instead is to illuminate the ways in which the unrecognized tension between the negotiated-law and adjudicated-law models fuels these conflicts. The differences in the operation of negotiated law and adjudicated law can result in divergent answers; the differences in the sources of negotiated law's and adjudicated law's legitimacy fuel normative arguments over which one is right.

1. Investment Tribunals As Agents or Trustees

Investor-state arbitration is a relatively new phenomenon and one that puts particular pressure on the negotiated-law/adjudicated-law dichotomy. Until relatively recently, foreign investors had few avenues of recourse if their rights were violated by their host state. If, for example, the host state illegally expropriated their property, they could bring claims in the host state's courts; failing that, investors could seek the help of their home states in raising their claims as the home states' own. That picture has been transformed by the rising number of bilateral and regional investment treaties providing investors with the right to initiate binding international

193. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (explaining how the "[p]ersistence of state courts in their own opinions on questions of common law prevented uniformity" and fueled divergences in state and federal common law).

194. See *supra* Part II.A.2.

195. Notably, this story is not entirely new. In prior periods in which court decisions interpreting international law have increased rapidly, concerns about the legitimacy of those courts and the resulting jurisprudence also emerged. In particular, the extraordinary density of purportedly authoritative prize decisions coming out of U.K. courts of admiralty during the Napoleonic and Revolutionary wars led to serious attacks on those courts' authority. Even Sir William Scott and Lord Stowell, one of the most respected judges of his time, came under attack for developing a jurisprudence biased toward Britain rather than neutrally interpreting state practice. See James Thuo Gathii, *The American Origins of Liberal and Illiberal Regimes of International Economic Governance in the Marshall Court*, 54 *BUFF. L. REV.* 765, 797–98 (2006) (discussing U.S. Chief Justice John Marshall's criticism).

196. Any number of examples of conflict between state practice or expectations and international court jurisprudence could be cited, including the conflict over the spreading jurisprudence of "death row syndrome," see *infra* notes 221–231 and accompanying text, or conflicts over the legality of amnesties, see Binder, *supra* note 28, at 1204. Even the WTO Appellate Body's discussion of precedent met some stiff resistance from state parties who believed that "this Appellate Body Report's approach, including its references to a 'coherent and predictable body of jurisprudence', would appear to transform the WTO dispute settlement system into a common law system," something "nowhere agreed among Members." WTO Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 20 May 2008, ¶ 53, WT/DSB/M/250 (July 1, 2008).

arbitrations against their host states. From a relative handful in the 1980s, there are now more than 2500 such treaties¹⁹⁷ between over 177 states,¹⁹⁸ and the World Bank's International Centre for the Settlement of Investment Disputes, just one body charged with investor-state arbitrations, has registered over three hundred cases.¹⁹⁹

As Anthea Roberts has wisely explained, despite its sudden familiarity, investment arbitration remains something of a puzzle.²⁰⁰ On the one hand, investment treaties are agreements between states governed by international law rules of interpretation. On the other hand, they create at least some rights in individual investors, and arbitrations are designed to allow investors to vindicate those rights against state parties. Complicating matters more, investor claims often involve review of the host state's public policies and legal processes.²⁰¹ Should these arbitrations best be seen as functions of international law, in which the state parties' views should be paramount; analogs to commercial arbitration, in which arbitrators should strive for "equality of arms" between claimant investors and respondent states; or some form of public law review, with its appropriate deference to democratic decision making?²⁰²

This conceptual puzzle became a doctrinal problem and a real-world conflict between negotiated-law and adjudicated-law models in the context of NAFTA. NAFTA, a regional trade and investment agreement between Canada, the United States, and Mexico, provides in Chapter 11 for investor-initiated arbitrations against the three state parties. After a series of arbitrations²⁰³ interpreted the treaty in favor of the investors, adopting broad interpretations of Article 1105's promise of "fair and equitable treatment" and "full protection and security,"²⁰⁴ Canada, the United States, and Mexico took joint action to declare their contrary understanding of the treaty provisions in question. NAFTA includes provisions for an FTC made up of representatives from the three states that can "resolve disputes that may

197. Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 401–02 (2011).

198. Alvarez, *supra* note 70, at 20–21.

199. Yackee, *supra* note 197, at 403.

200. See Roberts, *supra* note 183, at 19–22; Roberts, *supra* note 2, at 179.

201. See Roberts, *supra* note 183, at 19–20.

202. *Id.* at 18–20; see also Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 888 (2011).

203. Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, ¶¶ 110–113, 118 (Apr. 10, 2001), 7 ICSID Rep. 102 (2005) (holding that fair and equitable treatment requires compliance with not only international law, but also with the "ordinary standards" of fairness "applied in the NAFTA countries"); Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AB)/97/1, Award, ¶¶ 71, 76, 88 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002) (holding that "fair and equitable treatment" includes transparency obligations similar to those in other chapters of NAFTA); Brower, *S.D. Myers*, *supra* note 2 ("[T]he breach of a rule of international law specifically designed to protect investors would 'weigh heavily' in favor of finding a violation of Article 1105(1).") (quoting *S.D. Myers, Inc. v. Canada, Partial Award*, ¶ 264 (Nov. 13, 2000), 40 I.L.M. 1408 (2001))). For discussion of the cases, see Brower, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, *supra* note 2, at 352.

204. NAFTA, *supra* note 1, art. 1105.

arise regarding [the treaty's] interpretation or application" by adopting interpretations of the agreement binding on NAFTA tribunals.²⁰⁵ Acting under the FTC's mandates, the three states issued "Notes of Interpretation,"²⁰⁶ which among other things made clear that Article 1105 promised nothing more than the international minimum standard of protection.²⁰⁷

Even in the absence of the FTC's special authority, an agreement on interpretation by the three state parties would have deserved special deference under the Vienna Convention on the Law of Treaties, which gives special weight to "subsequent agreements by the parties"²⁰⁸—a nod to international law's negotiated-law model of gap filling. Nonetheless, at least one NAFTA arbitral tribunal chafed at the decisions. Communicating an implicit adherence to an adjudicated-law model of their role, one panel questioned the FTC interpretation's faithfulness to the "rule of international law that no-one shall be judge in his own cause" and arbitration's goal of "assur[ing] due process before an impartial tribunal."²⁰⁹

In the end, NAFTA tribunals fell in line, but perhaps only because of the unique nature of the FTC and the unusually clear and formal joint agreement between the three state parties.²¹⁰ That situation is unlikely to repeat itself in the bilateral treaty context, mostly because most arbitrations pit one state's (usually the developed one's) investors against the other state (usually the less developed one). As a result, the commonality of interests necessary to produce an FTC-style renegotiation is rarely present. The conflict between visions is likely though to gurgle beneath the surface, as respondent states continue to bristle at "activist" decisions by arbitrators. Respondent states continue to ask tribunals to look to evidence of subsequent agreement or practice in interpreting vague provisions of the treaties; embracing an adjudicated-law model of their roles, arbitrators have often rejected these requests as too biased in favor of states.²¹¹

The picture is changing as developed states increasingly find themselves responding to arbitration demands under these agreements, and perhaps the point will come where the parties can jointly revise their agreements.²¹² The

205. *Id.* arts. 1131(2), 2001(1)–(2)(c).

206. NAFTA Free Trade Comm'n, *supra* note 3.

207. ROLAND KLÄGER, "FAIR AND EQUITABLE TREATMENT" IN INTERNATIONAL INVESTMENT LAW 68–71 (2011); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2143–44 (2004); Brower, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, *supra* note 2, at 353–55.

208. VCLT, *supra* note 5, art. 31(3).

209. *Pope & Talbot Inc. v. Canada*, Award in Respect of Damages, ¶ 13.1 (May 31, 2002), 41 I.L.M. 1347 (2002).

210. *See* KLÄGER, *supra* note 207, at 72–74; Brower, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, *supra* note 2, at 355–56.

211. *See* Roberts, *supra* note 2, at 215–23 (summarizing these practices). As Roberts explains, the picture is actually quite hazy, with some tribunals accepting such evidence and some rejecting it. *Id.*

212. In one case, *Aguas del Tunari, S.A. v. Bolivia*, the government of the Netherlands indicated that it agreed with Bolivia's interpretation of the Netherlands-Bolivia bilateral investment treaty (BIT). *See* *Aguas del Tunari, S.A. v. Bolivia*, ICSID Case No. ARB/02/3,

United States' new Model BIT, for example, seems to scale back investors' rights, perhaps a response to developing jurisprudence.²¹³ But given that questions have already been raised regarding the actual value of these BITs for developing states,²¹⁴ dissenting states may simply seek to withdraw from them, as Bolivia,²¹⁵ Ecuador,²¹⁶ and Venezuela²¹⁷ have, or to ignore the judgments, as Argentina has been accused of doing.²¹⁸

Decision on Respondent's Objections to Jurisdiction, ¶ 249 (Oct. 21, 2005), 20 ICSID Rev. 450 (2005), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC629_En&caseId=C210. In another case, Pakistan complained that it had not been consulted before the tribunal interpreted a provision of its BIT with Switzerland in a case against that state. *SGS Société Générale de Surveillance, S.A. v. Pakistan*, ICSID Case No. ARB/03/11, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 79–81 (Aug. 6, 2003), 18 ICSID Rev. 307, 331 (2003), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622_En&caseId=C205. For more on these cases, see Roberts, *supra* note 2, at 216–17, 220.

213. E.g., Wenhua Shan, *From "North-South Divide" to "Public-Private Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 Nw. J. INT'L L. & BUS. 631, 650–51 (2007).

214. E.g., U.N. CONFERENCE ON TRADE & DEV., *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, at 1, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998); Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 827–28 (2008) (finding little impact on foreign direct investment); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite* 18–23 (World Bank Dev. Research Grp., Policy Research Working Paper No. 3121, 2003), available at <http://tinyurl.com/3akk3af> (finding little correlation between BITs and foreign direct investment). *But see* 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, 111 (2005) (finding some positive impact on foreign direct investment).

215. News Release, Int'l Ctr. for Settlement of Inv. Disputes [ICSID], *Bolivia Submits a Notice Under Article 71 of the ICSID Convention* (May 16, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3>; *see also* Kate M. Supnik, Note, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 355–57 (2009) (describing Bolivia's withdrawal).

216. News Release, ICSID, *Ecuador Submits a Notice Under Article 71 of the ICSID Convention* (July 9, 2009), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

217. Sullivan & Cromwell LLP, *Venezuela Withdraws from ICSID*, at 1 (Jan. 27, 2012), http://www.sullcrom.com/files/Publication/36d01dac-d00c-4b4e-99ba-5cddb9a36435/Presentation/PublicationAttachment/c22652b9-2993-461d-97c2-63a5707ed34a/SC_Publication_Venezuela_Withdraws_From_ICSID.pdf.

218. *Argentina's Oil Industry: Feed Me, Seymour*, ECONOMIST (Apr. 16, 2012, 11:16 PM), <http://www.economist.com/blogs/americasview/2012/04/argentinas-oil-industry>. *See generally* Charity L. Goodman, Comment, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 U. PA. J. INT'L ECON. L. 449 (2007) (discussing Argentina's history regarding these conventions).

2. Diplomatic Assurances

The ECHR is famous for its effectiveness.²¹⁹ Its reputation for compliance is so strong that in some studies of compliance and international law, it is treated as an outlier, best left out of consideration.²²⁰ If any international tribunal has the authority to fill the gaps in state obligations, certainly it would be the ECHR. It is thus all the more notable when European states assert that it is their prerogative, not the court's, to develop the uncertain areas of law through state practice.

The conflict over who should develop the gaps in European human rights law has come to a head over the question of extradition, transfer, and removal. In an initial episode that pitted judicial interpretation against state prerogatives, the ECHR held in *Soering v. United Kingdom*²²¹ that under the European Convention's prohibition on torture and inhuman or degrading treatment or punishment,²²² member states were barred from transferring individuals to states where such treatment might occur.²²³ Although members chafed at the decision from the beginning,²²⁴ this jurisprudence became newly relevant and problematic with European counterterrorism efforts following the September 11th attacks on the United States. Finding suspected foreign terrorists in their midst, but lacking the evidence of a crime necessary for domestic prosecution, European states sought to return them to their states of origin, some of which were interested in prosecuting the alleged

219. E.g., LOUIS HENKIN, *THE AGE OF RIGHTS* 23–24 (1990) (noting the “dramatic successes” of the ECHR); Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 *EUR. J. INT'L L.* 1, 29 (2007) (“The high level of compliance with the [European Court of Human Rights] jurisprudence is an exception.”); Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 *MICH. J. INT'L L.* 311, 315 n.16 (2001) (“The exception here is the European Court of Human Rights, which has established a remarkable record of compliance.”).

220. See ALTER, *supra* note 154, at 27 (“[T]he empirical analysis reveals that the [European Court of Justice] and the ECHR are outliers.”); Christopher J. Borgen, *Triptych: Sectarian Disputes, International Law, and Transnational Tribunals in Drinan's Can God and Caesar Coexist?*, 45 *J. CATH. LEGAL STUD.* 11, 43 (2006) (“While the ECHR and the [Inter-American Court of Human Rights] have certain strengths relative to the United Nations system, the European experience is still an outlier point. Furthermore, while the ECHR is perhaps the most successful of human rights tribunals, it is not a helpful analogy when designing a global tribunal on religious rights.”).

221. *Soering v. United Kingdom*, 161 *Eur. Ct. H.R.* (ser. A) at 5 (1989).

222. European Convention on Human Rights art. 3, Nov. 4, 1950, 213 *U.N.T.S.* 221.

223. *Soering*, 161 *Eur. Ct. H.R.* at 5.

224. This decision actually produced an earlier standoff between courts and states. In this same decision, the ECHR found extended stays on death row violative of the Convention's prohibition on cruel or degrading treatment. *Id.* at 5–6. Much in the style of common law jurisprudence, other courts began adopting the interpretation for other similar provisions. As recounted by Larry Helfer, however, the eventual application of the rule to the Jamaican Constitution by the British Privy Council created a backlash across Caribbean death-penalty states that led to their eventual withdrawal from the jurisdiction of the Privy Council, the Human Rights Committee, and the Inter-American Court. See Helfer, *supra* note 32, at 1910. The story suggests an implicit view by some that the ambiguity regarding the death penalty's status under international law should be resolved by state practice, not judicial reasoning.

terrorists for crimes committed there.²²⁵ Many of these potential receiving states, however, had less than glowing human rights records or criminal justice systems, and legitimate questions could be raised about the treatment suspected terrorists would receive upon their return, particularly as those suspects might be members of groups warring against the receiving states as well.²²⁶ After *Soering* was extended to deportation of non-national security risks in *Chahal v. United Kingdom*,²²⁷ European states sought assurances from receiving states regarding the proper treatment of transferees upon their arrival lest they run afoul of their Convention obligations as interpreted by the ECHR.²²⁸

In a series of cases starting with *Saadi v. Italy* in 2008,²²⁹ the ECHR has taken an increasingly restrictive stance with regard to these assurances. Although not ruling out that some form of assurance might comport with member states' obligations with regard to torture, the court has asserted its authority to review such assurances for itself and has suggested that such assurances will rarely, if ever, be reliable when the country in question has a poor human rights record.²³⁰ In a recent 2012 decision, the ECHR ruled against the United Kingdom in its attempt to transfer Abu Qatada, an alleged top Al Qaeda official, to Jordan because he could not be guaranteed a fair trial there.²³¹

225. See, e.g., *Gasayev c. Espagne*, App. No. 48514/06, at *2 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91735> (applicant wanted for trial in Russia); *Saadi v. Italy*, App. No. 37201/06, ¶¶ 9–94 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276> (applicant wanted for trial in Tunisia); U.N. HRC, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/88/D/1416/2005, Annex (Nov. 10, 2006) (applicant indicted in Egypt); U.N. Comm. Against Torture, Decision of the Committee Against Torture Under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 2.1–4, U.N. Doc. CAT/C/34/D/233/2003, Annex (May 24, 2005).

226. See sources cited *supra* note 225.

227. *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, ¶¶ 72–107.

228. Among states seeking assurances are the United Kingdom, Germany, Italy, Spain, Russia, and Sweden. See generally HUMAN RIGHTS WATCH, STILL AT RISK: DIPLOMATIC ASSURANCES NO SAFEGUARD AGAINST TORTURE 3–4 (2005) (describing state practice); Alice Izumo, Note, *Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence*, 42 COLUM. HUM. RTS. L. REV. 233 (2010) (same).

229. *Saadi*, App. No. 37201/06, ¶¶ 148–149.

230. See Izumo, *supra* note 228, at 233. Notably, as Izumo points out, although rejecting transfers to Tunisia, Jordan, India, Tajikistan, Turkmenistan, Uzbekistan, and Belarus, the ECHR has approved transfers to the United States on a number of occasions. *Ahmad v. United Kingdom*, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09, 67354/09, at *81 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267>; *Boumediene v. Bosnia & Herzegovina*, 2008 Eur. Ct. H.R. 1612, ¶¶ 67–68; *Al-Moayad v. Germany*, App. No. 35865/03, ¶¶ 103–108 (Eur. Ct. H.R. 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79710>; see also Izumo, *supra* note 228, at 272 (noting the ECHR's reliance on a "good-faith presumption arising out of the U.S. human rights record [and] the specificity of the assurances and the lack of evidence that the U.S. had ever breached its assurances in the past").

231. *Othman (Abu Qatada) v. United Kingdom*, App. No. No. 8139/09, at *91 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629>.

These decisions are particularly notable because they came at the same time European states were collecting relevant state practice on the issue.²³² From 2005 to 2006, the Group of Specialists on Human Rights and the Fight Against Terrorism, a group of government representatives created by the Council of Europe's Steering Committee for Human Rights, studied "issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures."²³³ The goal was to "consider the appropriateness of a legal instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances, and, if need be, present concrete proposals."²³⁴ Central to the study was a questionnaire that sought state practice on assurances.²³⁵ It quickly became clear that states had very different positions, some using assurances, some seeking to limit them, and some rejecting them outright as perversions of the absolute prohibition against torture.²³⁶ Ultimately, the Group of Specialists suggested against a new legal instrument, noting among other reasons that "it would be particularly difficult to draft such an instrument as member states had no common position on the use of diplomatic assurances."²³⁷

These divergent positions appear to have survived the ECHR's decisions, as a number of European states have continued their practice of collecting assurances.²³⁸ Given the ECHR's failure to adopt a categorical ban, these states may not technically be in noncompliance. Nonetheless, it is clear that they do not agree with the strongest implications of the ECHR's jurisprudence. Multiple states have continued to seek and use assurances to transfer individuals to other countries, and the United Kingdom is coming under increasing domestic pressure to withdraw from the court's jurisdiction,²³⁹ something that would undoubtedly precipitate a crisis of legitimacy

232. These ECHR decisions are also of note because they depart from the ECHR's usual sensitivity to evolving state practice through the application of "margins of appreciation," which grant greater deference to state decision making when no common European standard has emerged but less when one has. Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 450–66 (2001). Unlike other provisions of the Convention, Article 3 is nonderogable, and as such the ECHR has decided the rule is absolute and that no margin of appreciation applies. See *infra* notes 326–333 and accompanying text.

233. Izumo, *supra* note 228, at 250–51 (internal citation omitted).

234. *Id.* at 251 (internal citation omitted).

235. *Id.*

236. See Rep. of the Group of Specialists on Human Rights and the Fight Against Terrorism, 2d Meeting, Mar. 29–31, 2006, app. III, ¶¶ 12–16, Doc. No. DH-S-TER(2006)005 (Apr. 3, 2006), available at http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2006_005_en.pdf.

237. *Id.* app. III, ¶ 17(ii).

238. Izumo, *supra* note 228, at 274–76. See generally AMNESTY INT'L, DANGEROUS DEALS: EUROPE'S RELIANCE ON "DIPLOMATIC ASSURANCES" AGAINST TORTURE 13–14, 18–31 (2010), available at <http://www.amnesty.org/en/library/asset/EUR01/012/2010/en/608f128b-9eac-4e2f-b73b-6d747a8cbaed/eur010122010en.pdf> (summarizing cases).

239. E.g., James Landale, *David Cameron Plays for Time on European Human Rights*, BBC NEWS (Jan. 25, 2012, 3:34 AM), <http://www.bbc.co.uk/news/uk-politics-16712705>; Paul Vale, *European Convention of Human Rights: Cameron Under Pressure to Withdraw Britain from Treaty*, HUFFINGTON POST U.K. (Jan. 22, 2012, 5:01 PM), <http://>

for the previously effective court. U.K. Prime Minister David Cameron has attacked the court's legitimacy over the decisions, proposing amendments to the court's rules that might require greater deference to national decision making.²⁴⁰ And he is clearly not alone among European leaders, as the Council of Europe unanimously adopted most of his reforms in April 2012.²⁴¹ Touting the Brighton Declaration's reforms and highlighting the philosophic differences between states and the ECHR, U.K. Attorney General Dominic Grieve explained:

This Declaration makes clear that the primary responsibility for guaranteeing human rights rests with the government, parliament and courts of a country. It sets out clearly that the Court should not routinely overturn the decisions made by national authorities—and it should respect different solutions and different approaches between states as being legitimate.²⁴²

In the language of this Article, for Grieve, the question of diplomatic assurances is a matter for negotiated law. Any gaps in the European Convention on the appropriateness of assurances are for the states, rather than the court, to work out among themselves. Whether this vision or that of the ECHR will prevail remains an open question.

3. Defending Oneself from Nonstate Actors

The news abounds with stories of the threats of nonstate actors: Al Shabab in Somalia, the Taliban in Pakistan and Afghanistan, Al Qaeda in the Arabian Peninsula in Yemen, the FARC in Columbia. Increasingly, these groups are accused of leaving their safe havens in one country to plot attacks on others: Al Shabab against Kenya,²⁴³ the Taliban and Al Qaeda against the United States,²⁴⁴ the FARC from Ecuador into Colombia.²⁴⁵ When, if ever, are targeted states permitted to use force against these groups in their home or host territory? Although Article 2(4) of the U.N. Charter requires all member states to “refrain in their international relations from the

www.huffingtonpost.co.uk/2012/01/22/european-convention-of-human-rights-david-cameron-under-pressure-to-withdraw-britain-from-treaty_n_1222086.html.

240. E.g., Helen Warrell, *Clarke Hails ECHR Reform but Critics Unconvinced*, FIN. TIMES (Apr. 19, 2012, 8:31 PM), <http://www.ft.com/intl/cms/s/0/99a30bb4-8a4a-11e1-93c9-00144feab49a.html>.

241. Brighton Conference on the Future of the European Court of Human Rights, Apr. 19–20, 2012, *Brighton Declaration*, ¶ 15, <http://hub.coe.int/20120419-brighton-declaration>; see also *Q&A: Reforming European Court of Human Rights*, BBC NEWS (Apr. 23, 2012, 11:07 AM), <http://www.bbc.co.uk/news/world-europe-17748313>.

242. Press Release, U.K. Ministry of Justice, UK Delivers European Court Reform (Apr. 20, 2012), <http://www.justice.gov.uk/news/press-releases/moj/uk-delivers-european-court-reform>.

243. See, e.g., Jeffrey Gettleman, *At Least 15 Die in Kenya Church Attacks*, N.Y. TIMES, July 2, 2012, at A4.

244. See, e.g., Charlie Savage, *Christmas Day Bomb Plot Detailed in Court Filings*, N.Y. TIMES, Feb. 11, 2012, at A15.

245. See, e.g., Stephan Küffner, *Ecuador Officials Linked to Colombia Rebels*, TIME WORLD (Dec. 15, 2009), <http://www.time.com/time/world/article/0,8599,1948040,00.html>.

threat or use of force against the territorial integrity or political independence of any state,"²⁴⁶ Article 51 preserves states' "inherent right of individual or collective self-defense if an armed attack occurs against" them.²⁴⁷ Does an attack by a nonstate actor implicate a state's right to self-defense? Does that right allow targeted states to violate other states' sovereignty, otherwise protected by Article 2(4), to counter the threat? If so, under what conditions?

A number of scholars have begun to collect state practice surrounding the issue. Although they quantify the level of consensus differently, many seem to agree that a common standard is emerging: when a nonstate actor's actions against a state rise to the level of "an armed attack," a targeted state's right to self-defense attaches, and where the host state is "unwilling or unable" to prevent the threat, the targeted state may use force within the host state's borders to counter the nonstate actor.²⁴⁸ Of course, many questions remain at the margins: among others, how much weight to give to the practices of some states rather than others, what kind of threat or attack by a nonstate actor would amount to an "armed attack," what constitutes an unwillingness or inability by a state to act, whether any procedural rules should attach to the determination.²⁴⁹

Even with some consensus surrounding the evidence, though, the meaning of this state practice remains controversial. For some, the emerging practice is not a real-time negotiation of a gap in international law with regard to nonstate actors, but an attempt to overrule prior doctrine and understandings. These scholars point to the ICJ's opinions in the *Military and Paramilitary Activities in and Against Nicaragua*,²⁵⁰ *Legal Consequences of Construction of a Wall in Occupied Palestinian Territory (Israeli Wall)*,²⁵¹ and *Democratic Republic of Congo (DRC) v. Uganda*²⁵² cases as

246. U.N. Charter art. 2(4).

247. *Id.* art. 51.

248. *E.g.*, Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 495 (2012); Steven R. Ratner, *Self-Defense Against Terrorists: The Meaning of Armed Attack*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER (Larissa van den Herik & Nico Schrijver eds., forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047778; Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 244 (2011); Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 378–81 (2010). Tom Ruys exemplifies that this is a matter of quantification, noting the same emerging practice but finding insufficient evidence of a customary international law rule. Although "[d]e lege ferenda, we believe that customary law is evolving toward a different application of Article 51 [of the] UN Charter," writes Ruys, "[d]e lege lata, the only thing that can be said about proportionate trans-border measures of self-defence against attacks by non-State actors in cases falling below the *Nicaragua* threshold is that they are 'not unambiguously illegal.'" TOM RUY, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 531 (2010).

249. *E.g.*, Deeks, *supra* note 248, at 483; Ratner, *supra* note 248.

250. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 205 (June 27).

251. *Legal Consequences of Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 184 (July 9).

252. *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, 215 (Dec. 19).

proof of a different rule. In each case, the court at least implied that self-defense is only possible against a state and that reprisals against nonstate actors in a foreign state are lawful only when the nonstate actors' actions are attributable to that state.²⁵³ The court in the *Nicaragua* case, faced with the question whether a nonstate group's actions could be an "armed attack" triggering self-defense, focused on whether the nonstate actor's actions could be attributed to a state, developing a test of "effective control."²⁵⁴ In the *Israeli Wall* advisory opinion, the court held that Israel could not invoke self-defense because Israel did not allege that the acts were imputable to a foreign state and "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State."²⁵⁵ And in the *DRC v. Uganda* opinion, despite declining to address "whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces," the court held that the attacks in question did not trigger Uganda's right to self-defense because they were "non-attributable to the DRC."²⁵⁶

Again the conflict seems clear: Is international law in this area a function of negotiated law or adjudicated law? Are states filling a gap in the law of armed conflict through common practice as many states and observers suggest,²⁵⁷ or are they seeking to overrule a rule articulated in one of international law's most solemn documents (the U.N. Charter) and elaborated by its most esteemed court (the ICJ)? Everything seems to turn on one's baseline understanding of how international law is meant to work.²⁵⁸

In the United States, it was the divergence between federal common law and state common law²⁵⁹ rules that forced the Supreme Court in *Erie Railroad Co. v. Tompkins* to recognize that there was, in fact, no general common law to draw from and that they, the judges, were the ones actually producing those rules.²⁶⁰ The divergence between the jurisprudence of international courts and

253. E.g., RUYS, *supra* note 248, at 475–76; Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 115, 140 (2011); Mary Ellen O'Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT'L L. & POL'Y 585, 594–95 (2011) ("Thus, although this notion is often heard, there is no actual right to use military force triggered by a state unwilling or unable to control such groups.").

254. *Nicaragua*, 1986 I.C.J. at 64–65, 103–04.

255. *Wall in Occupied Palestinian Territory*, 2004 I.C.J. at 194.

256. *Territory of Congo*, 2005 I.C.J. at 222–23.

257. E.g., Deeks, *supra* note 248, at 483; Ratner, *supra* note 248.

258. E.g., RUYS, *supra* note 248, at 530–31.

259. E.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 (1938) (noting the criticism produced by *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), and how the Court in that case tacitly accepted the applicants' blatant forum shopping for federal rather than Kentucky common law).

260. *Erie*, 304 U.S. at 78. The basic question before the U.S. Supreme Court in *Erie* was whether federal courts should decide cases between citizens of two states on the basis of federal or state common law doctrines. *Id.* at 71. Although the U.S. Constitution does not give the federal government general legislative authority over issues like contract or tort, prior decisions had held that federal courts should apply federal common law. *Id.* at 71–72. These decisions were based, at least in part, on the notion that the common law existed external to

state practice should be a similar source of soul searching.²⁶¹ International courts can no longer hide behind a “transcendental body of”²⁶² state-produced custom to deny responsibility for the rules they expound. As Justice Holmes explained, “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”²⁶³ Once the curtain of custom has been lifted, how will international judges justify their authority?

III. TRANSLATIONS

Has international law reached its *Erie* moment? *Erie Railroad Co. v. Tompkins* was a response to the conflicting claims to regulate an increasingly complex world of interconnected interstate activity.²⁶⁴ It “sought to adapt the architecture of American government to the challenges of a new, expanding, and dynamic interstate society”²⁶⁵ by forging a new, modern jurisprudence. With its twenty-first-century regulations of an increasingly globalized world putting pressure on its early twentieth-century jurisprudence, international law now finds itself at a similar crossroads. And whether or not it’s recognized as such, much like the federal courts of the early twentieth century, international law has reached a legitimacy crisis. The rapid judicialization of international law over the last fifty years has left us with two rival pictures of international law—one ruled by states, in which their actions and reactions shape the law, and a second ruling over states, in which an increasingly dense group of courts, tribunals, and expert bodies develops and elaborates the law’s gaps away. Both have some claims to legitimacy: states can point to international law doctrine’s continued reliance on state practice and state consent, international judges to the increased reliance on their good offices for dispute resolution. But both also find their legitimacy questioned: states shouldn’t be allowed to act as judge and jury

any state and was simply “discovered” by whatever court construed the rule. *Id.* at 79. By this account, federal courts were equally placed to construe common law doctrines for themselves. *Id.* at 73. *Erie* rejected that position, holding that there is no general common law and that the common law was state law, based on state legislative authority. *Id.* at 79–80.

261. Making the analogy even stronger, although *Erie* is often framed in terms of state versus federal courts, *Erie* may have in fact reflected a battle between the courts and legislatures. As Edward Purcell explains, conservative federal jurists had used the general common law to limit the reforms enacted by progressive-era state legislatures. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 12–13 (2000). By denying the federal courts that jurisdiction, Justice Brandeis gave those legislatures considerably more room and authority. *Id.* at 299–305.

262. *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533 (Holmes, J., dissenting)) (internal quotation marks omitted).

263. *Black & White Taxicab & Transfer Co.*, 276 U.S. at 533 (Holmes, J., dissenting).

264. “Developments in communications and transportation during the nineteenth century and the establishment of a national market following the Civil War multiplied the number and variety of interstate activities.” PURCELL, *supra* note 261, at 182. *Erie* “was grounded in . . . Brandeis’s practical understanding of the structural and operational requirements of American constitutional federalism in an age of burgeoning multistate activities.” *Id.*

265. *Id.* at 185.

in their own cause;²⁶⁶ international judges have usurped authority that was never given to them.²⁶⁷ And with no single picture of international law able to win the day, all of international law looks more questionable.

But how can we move forward and put international law on firmer ground? Although this Article's primary purpose is to illuminate the problems of translation created by international law's increasing judicialization, it can suggest some steps forward. Questions similar to those raised in this Article have arisen in other forms, whether in discussions of *lex lata* versus *lex ferenda* (law as it is versus law as it should be)²⁶⁸ or *non liquet* (whether international law has gaps in its coverage or is a complete system).²⁶⁹ Recognizing, however, that there may actually be two different types of law—negotiated law and adjudicated law—competing for predominance within the international system suggests that the choice is not one between two different interpretations of the law (should a more conservative or more progressive approach be adopted),²⁷⁰ but rather one between different sources entirely. Moving forward seems to require both a clearer understanding of the types of nontreaty law that may be in play and the reasons why various actors might or might not be in a position to apply them.

This requires two key steps. First, we must ask the difficult question of what the potential sources of nontreaty international law actually are. Is custom the primary source of these rules, or are there other nontreaty sources of law in use? Second, we must ask the even more difficult question of what role these various sources should play in the international system. Who in the international system should have the authority to use or elaborate different types of rules? If, for example, forms of international common law seem to play a role in international law, which bodies have the authority to use them and when? More importantly, what should be the relationship between these various sources? In a conflict between custom and common law, which should prevail? Are there any techniques available to mediate conflicting claims? This Part will take each step in turn and suggest some initial answers.

266. Pope & Talbot, Inc. v. Canada, Award in Respect of Damages, ¶ 13.1 (May 31, 2002), 41 I.L.M. 1347.

267. WTO Dispute Settlement Body, *supra* note 196, ¶ 53 (recording the United States' objection that "this Appellate Body Report's approach, including its references to a 'coherent and predictable body of jurisprudence', would appear to transform the WTO dispute settlement system into a common law system," something "nowhere agreed among Members").

268. See Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987); Roberts, *supra* note 21, at 763, 773–78; John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85, 85 (1996).

269. E.g., Daniel Bodansky, *Non Liquet and the Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 153 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

270. This would track choices between *lex lata* and *lex ferenda* or between gap-filled or gapless views regarding *non liquet*.

A. Cataloging Nontreaty Law

Better identifying what a rule is allows us to better identify its sources of authority. Identifying the rule's sources of authority, in turn, allows us to develop more precise accounts of its legitimacy or illegitimacy. If the rule we are talking about is a rule of "true" custom, its sources of authority can be found in state practice, and its legitimacy will be tested against traditional concerns regarding that process: Is it coherent enough to suggest an actual rule, does the rule seem to be the result of practical experience, and is the practice widespread and well known enough to suggest some form of consent or acquiescence by others? If, on the other hand, what we are talking about is a form of common law,²⁷¹ its authority must emanate from the judges who expound it, and its legitimacy will be a function of a court's perceived authority, neutrality, and reasoning. This, of course, was the lesson in the United States of *Erie Railroad Co. v. Tompkins*: common law case-by-case elaboration is lawmaking, and the courts that exercise it must justify their authority.²⁷²

What follows is a very preliminary list of nontreaty sources we might identify.

1. Custom

Most nontreaty law in international law is currently categorized as custom. The reasons for this are largely doctrinal. Article 38 of the ICJ Statute's list of sources has generally been treated as an authoritative list of the sources of international law, and that list provides only two possible sources of nontreaty law—custom and general principles of law.²⁷³ Although some nontreaty rules, like estoppel or statutes of limitation, have been described by scholars and courts as general principles, custom has been the principal claimed source of nontreaty rules. But while the process of trying to find nontreaty rules in the practice of states may once have provided a reasonable picture of international law's rules, and may have been useful in disciplining claims that new rules had been discovered, it now obscures far more than it reveals.

Custom is the paradigmatic negotiated law. It is developed through states' interactions with one another over time. As the traditional definition explains, customary international law emerges from the practices of states followed out of a sense of legal obligation.²⁷⁴ "A signal feature of custom

271. I use this term loosely to refer to processes of reasoned elaboration broader than the Anglo-American model. I do realize, however, that this sets me up, rightly, for criticisms that the Article suffers from an Anglo-American bias. Cf. Howse, *supra* note 27, at 223 (recounting a common-law-prejudiced view of the prerequisites for an effective legal system, including that it evolve incrementally over time).

272. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it." (quoting *Black & White Taxicab & Transfer Co.*, 276 U.S. 518, 533 (Holmes, J., dissenting)) (internal quotation marks omitted)); see PURCELL, *supra* note 261, at 190 ("For Brandeis, the *Swift* doctrine [which *Erie* overturned] ultimately posed an issue not of philosophy or even of federalism but of political accountability and constitutional balance.").

273. ICJ Statute, *supra* note 4, art. 38(1).

274. Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, in *THE NATURE OF CUSTOMARY LAW*, *supra* note 39, at 279, 285 ("Customs are primarily

[then] is that it is a *practiced norm*²⁷⁵ within the community of states.²⁷⁶ As has long been recognized,²⁷⁷ however, many purported nontreaty rules in international law cannot meet this definition. This does not mean that they are not international law.²⁷⁸ There are other options.

2. General Principles of Law

The traditional list of international law's sources embodied in Article 38 does include another nontreaty source: "the general principles of law recognized by civilized nations."²⁷⁹ For better or worse, this source has received less attention than treaties and custom. Part of the reason for this source's general neglect may be uncertainty over exactly what it means. Is the reference to "general principles common to the major systems of the world,"²⁸⁰ general principles of international law,²⁸¹ or to principles inherent in the concept of law—perhaps a feature of law's internal morality?²⁸² Each of these types of rules would be in its own way difficult to find. As David Bederman writes, for example,

In order for an international lawyer to argue that a general principle of law is a binding rule of international law, it would be necessary to canvass all of the world's great legal systems for evidence of that principle, and also to reference manifestations of that principle in

concerned with (social) behavior, but they are not (merely) *patterns of behavior*; rather they set *standards* for behavior, standards of correct and incorrect behavior, and thus purport to guide that behavior and provide bases for its assessment.”)

275. *Id.*

276. Although not entirely relevant to the discussion here of negotiated versus adjudicated law, there may be additional forms of nonstate community custom in international law as well. We might expect that communities of professionals working together closely on issues—for example, in investment arbitration—may develop their own authoritative practices concerning the acceptable interpretations of international law. Cohen, *Finding International Law II*, *supra* note 164, at 1084, 1089–90. This custom would thus be akin to the sorts of “commercial practices” recognized by the Uniform Commercial Code in the United States. U.C.C. § 1-103(a)(2) (2005).

277. Roberts, *supra* note 2, at 206, 214–15.

278. See *e.g.*, Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 141–49 (2005); *cf.* Cohen, *Finding International Law I*, *supra* note 164, at 70–71 (suggesting that it is *opinio juris* and not state practice that determines whether a rule is treated as international law).

279. ICJ Statute, *supra* note 4, art. 38(1)(c).

280. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1)(c) (1987) (defining sources of international law); see also DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 13–14 (3d ed. 2010) (adopting this view).

281. See MALCOLM N. SHAW, INTERNATIONAL LAW 92–99 (5th ed. 2003) (“It is not clear, however, in all cases, whether what is involved is a general principle of law appearing in municipal systems or a general principle of international law.”).

282. See LON L. FULLER, THE MORALITY OF LAW 153 (rev. ed. 1969); *cf.* Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19, 55–56 (2000) (distinguishing rules of law based on the internal rationality of the law).

the actual domestic law of as many nations as possible. This is no easy task.²⁸³

It is further unclear whether general principles are themselves a source of international law or merely a source of supplementary rules that can fill gaps where necessary to resolve a specific dispute.²⁸⁴ It is perhaps not surprising that few such “general principles” have been found.

The source may nonetheless have great value in explaining some of the nontreaty rules currently referenced. Bederman suggests that *pacta sunt servanda*, the obligation to follow one’s agreements that undergirds much of international law, is a general principle.²⁸⁵ Philip Alston and Bruno Simma have argued that fundamental human rights law may be better understood as deriving from general principles than from custom,²⁸⁶ a recharacterization that would sidestep some of the thornier questions about the meaning of state practice in the area.

What is key, though, is that anchoring the legitimacy of a general principle will again depend on exactly what it is we’re talking about. The authority of a general principle common to national legal systems would essentially be derivative, borrowing legitimacy from the legal systems that recognize it. A general principle of “international law” would likely require some concept of tacit or community consent. A general principle of “law” would require some explanation of its basis in a concept of law. If general principles of one of the three types listed above are actual sources being referenced by courts, tribunals, or other bodies, they should be properly justified as such.

3. General Discursive Principles of International Law

Dan Bodansky has noted that there is a range of purported rules of custom, like the precautionary principle, that are too abstract to really be described as custom but that are clearly principles of international, rather than municipal, law.²⁸⁷ These principles are often too abstract to be followed or not followed—respect for human dignity might be a similar type of principle in human rights law. Instead their role is more as interpretative principles. They frame and guide arguments over international law’s more specific rules, much in the way concepts like separation of powers or federalism do in the U.S. constitutional context. Their authority seems to derive from the extent to which they’re actually invoked by the various actors jockeying for position over international law’s rules.

283. BEDERMAN, *supra* note 280, at 13.

284. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(4) (1987) (referring to general principles “as supplementary rules of international law where appropriate”).

285. BEDERMAN, *supra* note 280, at 15.

286. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 102–06 (1988).

287. Daniel Bodansky, *Prologue to a Theory of Non-treaty Norms*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 119, 127–28 (Mahnoush H. Arsanjani et al. eds., 2011).

4. International Common Law

Many of today's purported rules of nontreaty international law seem to be emerging not from the customary practice of states, but instead from the jurisprudence of an ever-thickening network of international courts, tribunals, and expert bodies. As the adjudicatory-law model suggests, adjudication requires the elaboration of rules in a way negotiated law does not. When adjudication outpaces actual state practice, courts are much more likely to cite each other than the actual practice of states in finding those rules.

There are actually a few different versions of international common law we might expect to find. The first is a type of procedural common law.²⁸⁸ These are rules developed and borrowed by international bodies to fill the gaps in their own procedural mandates—how to hear and conduct cases, how to weigh evidence. While not entirely without controversy,²⁸⁹ these rules are generally the least problematic because they seem reasonably within the authority of courts to establish, at least in the face of silence in their constituting documents, and are easily contained within the adjudicatory context and a particular body (though perhaps not between them). A second type, which may at times overlap with the first, is regime-specific common law. International criminal law provides numerous examples here of rules about mens rea or accessorial liability that must be developed to determine guilt or innocence but that simply will not be found in the practice of states.²⁹⁰ International criminal law also faces interpretative concerns absent from other areas of international law, like the legality principle and rule of lenity. These concerns suggest that international criminal tribunals should have different, or at least narrower, rules regarding prohibited conduct than international law more broadly.²⁹¹ It should thus be no surprise that international criminal tribunals are often left parsing the practices of the Nuremberg and other tribunals rather than state practice itself.²⁹² Finally, there might be a more general international

288. See, e.g., CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 38–39 (2009) (detailing how international courts borrow rules of procedure from a variety of nonformal sources).

289. See, e.g., Patrick Robinson, Address, *The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia*, 16 ILSA J. INT'L & COMP. L. 5, 13–14 (2009) (describing the ICTY's "controversial procedure of judicial notice of adjudicated facts"); Daniel Tilley, *The Non-rules of Evidence in the Ad Hoc Tribunals*, 45 INT'L L. 695, 696–70 (2011) (describing controversial evidentiary rulings of the ICTY and International Criminal Tribunal for Rwanda).

290. See, e.g., Greenawalt, *supra* note 23, at 1080–83.

291. This type of regime-specific common law might also best describe the rules adopted by domestic courts interpreting international law in furtherance of a domestic statute. The resulting jurisprudence may present hybrid domestic-international rules keyed to the specific statutory context that might not perfectly reflect general international law. See Roberts, *supra* note 184, at 73–81. U.S. doctrine regarding the Alien Tort Statute may be a particularly good example. *Id.* at 76–78. The "specific, universal, and obligatory" test developed for ascertaining actionable violations of international law, for example, is derived from domestic legal sources with an eye toward domestic legal concerns rather than international law itself. See Wuerth, *supra* note 33, at 1941–43.

292. See Greenawalt, *supra* note 23, at 1075.

common law. These are rules adopted by particular tribunals with an eye toward elaborating or influencing international law more broadly. They are likely to be the most controversial as they insert themselves directly into the process of gap filling normally inhabited by states. The clearest examples are the rules adopted in decisions of the ICJ, but other bodies, like investment tribunals or the HRC established under the International Covenant on Civil and Political Rights, have been known to opine on general international law.²⁹³

What is key here is that recognizing the rules' status as common law focuses our inquiries regarding the legitimacy of those rules more directly on the courts that develop them. Currently, courts can obscure these questions by invoking custom; it is states, they imply, who have made these rules, not they. But just as *Erie* punctured the myth of a legal ether in which the law floated, waiting to be discovered, so too must we put aside the myth that custom answers all. And with the obscuring curtain of custom now pulled aside, international judges, like U.S. federal judges before them, will now be forced to more precisely justify their own authority, whether by claiming the mantle of agent or trustee, invoking their neutrality, or articulating persuasive reasoning.

Moreover, shifting this focus reframes questions about how the rules developed in one tribunal should be used in others. To the extent that courts are interpreting custom, it would be reasonable for other courts inside and outside a specific regime to borrow their interpretations (even if not treating them as authoritative or precedential).²⁹⁴ All of these courts are involved in a common endeavor and looking at common evidence. But if what courts are instead doing is common law lawmaking, then courts should be much more discerning in borrowing rules. The authority of common law rules derives from a particular court and its particular context, neither of which may be transferable. Instead, a court looking at a rule developed by another must first ask how persuasive that court's solution was to a supposedly common problem and then independently justify its own decision to adopt a similar path.²⁹⁵

293. See, e.g., U.N. HRC, General Comment 29: Article 4: Derogations During a State of Emergency, ¶ 13(a)–(b), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (describing the right to be “treated with humanity and with respect for the inherent dignity of the human person” and “prohibitions against taking of hostages, abductions or unacknowledged detention” as nonderogable as a matter of general international law); U.N. HRC, General Comment No. 26(61), *supra* note 165, ¶ 1 (looking to general international law to determine “possibility of termination, denunciation or withdrawal”); Anastasios Gourgourinis, *General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System*, 22 EUR. J. INT’L L. 993, 1006–07 (2011) (describing references to general international law by investment tribunals).

294. See ICJ Statute, *supra* note 4, art. 38.

295. This might change, for example, how U.S. courts ascertain standards of liability in Alien Tort Statute actions. Entertaining claims for torts “committed in violation of the law of nations” requires standards for aiding and abetting liability and for corporate or individual liability. 28 U.S.C. § 1350 (2011). Attempting to parse often-contradictory decisions of international criminal tribunals from Nuremberg to the ICTY, U.S. courts have struggled to figure out whether customary international law supplies such a standard and, if it does, what it might be. Compare *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), with *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); compare *Kiobel v. Royal*

B. States or Courts?

1. Beyond Delegation

So far, we have talked about international courts and tribunals without any specification or differentiation. In fact, though, the list of quasi-judicative bodies in international law varies widely. They differ in their constitution, their mandates, their permanence, and the bindingness of their decisions. Which of these bodies should hew closely to state practice and eschew precedent and which might reasonably claim rights to develop a fuller, more far-reaching jurisprudence is a very difficult question.

The obvious corollary to the quest for precision in sources might be a quest for precision in court mandates. States should be clearer about what they are creating. But expecting states to do this even in the future, let alone to rewrite existing treaties, borders on the fantastical. There are simply no incentives for states to do that—they chose the current ambiguity for a reason. Even if states were to agree on clear mandates at the outset, we would still have to consider whether certain courts have outgrown their original mandates and accrued more authority—patterns clearly visible in courts like the ECJ and ECHR.²⁹⁶

But it seems equally difficult to impose a backward-looking doctrinal test. The most common approach to this problem is to focus on the question of delegation: how much authority have the state parties actually delegated to the particular tribunal in question? Are tribunals in a particular area agents or trustees?²⁹⁷ For a number of reasons, this approach seems unlikely to yield many clear answers.

First, there are roughly two approaches one could take to assessing the level of delegation to and, in turn, the proper authority of particular courts, tribunals, or bodies. The first, a formal approach, would focus on actual language of the treaties creating the tribunals. Exactly what powers has the treaty explicitly granted or failed to grant the particular body? The second, a more functional approach, would focus instead on the role the tribunal seems to play in the structure of a given regime. Does the function or pur-

Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *with* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011). As mentioned above though, *see supra* notes 107, 170–171, 290–292 and accompanying text, these types of questions seem unlikely to be answered through traditional custom; states have little need for such rules in negotiating settlements. On the contrary, the standards developed by international criminal tribunals look much more like international common law, with tribunals citing one another rather than state practice in search of such rules. Recognizing these standards as international common law would change the analysis for U.S. courts. As common law gap fillers, the standards developed by prior international tribunals should be seen as keyed very specifically to the mandate and circumstances of those courts. U.S. courts might find the reasoning of those tribunals and the standards they adopt persuasive and worth following, but they must be highly cognizant of the differences in context, being very careful, for example, in translating rules from some international crimes to others and from criminal law to tort. A U.S. court applying the Alien Tort Statute might, for example, find Nuremberg-era decisions about corporate liability too tied to criminal liability and to the specific politics of that moment and opt for traditional federal common law principles about corporate liability for torts instead.

296. Helfer & Slaughter, *supra* note 130, at 276–82.

297. *See, e.g.,* Alter, *supra* note 14, at 38–39.

pose of a tribunal suggest that it was meant to play more of an independent role in developing the law? This might focus the scope of the delegation created by the vagueness or certainty of the rules they've been mandated to apply—vaguer rules coupled with authority to resolve disputes may simply require a level of common law lawmaking (early international criminal tribunals might fit here). It may focus on the extent to which courts seem to be created to protect interests other than those of states, as might be the case with human rights and investment tribunals.

Neither of these approaches seems likely to answer the question satisfactorily. The main problem is that the two approaches often seem to suggest opposite outcomes, making any decision based on one or the other controversial. From a formal perspective, bodies like the HRC established under the International Covenant on Civil and Political Rights and the Inter-American Commission, labeled as expert bodies rather than courts and with less-than-clear mandates, might seem to have the weakest claim to delegated authority. It is nonetheless those bodies that have made the strongest functional claims to interpret the law authoritatively and have acted the most like common law courts in developing a jurisprudence.²⁹⁸ Similarly, when the ICJ operates under its advisory jurisdiction, its opinions are specifically nonbinding, yet because of the broad nature of the questions posed (contrasted with the sometimes narrow disputes it faces in its contentious jurisdiction) and the apparent authority of the Court, it is those decisions that often have the most jurisprudential influence.²⁹⁹ Beyond that, both the formal and functional approaches are largely indeterminate. From a formal standpoint, how much authority does the WTO Dispute Settlement Understanding actually give the panels and Appellate Body to apply general international law? Article 3 of the Dispute Settlement Understanding expressly commands recourse to “customary rules of interpretation of public international law.”³⁰⁰ The same provision, though, adds that “[the Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements.”³⁰¹ Debate rages over exactly what these provisions allow or require.³⁰² What effect should be given to decisions of the HRC established under the International Covenant on Civil and Political

298. See, e.g., Binder, *supra* note 28, at 1203–06 (analyzing the Inter-American Court of Human Rights).

299. See, e.g., Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) (setting standards for reservations to multilateral treaties); Reparations for Injuries Suffered in Service of United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) (setting standards regarding the personality of international organizations); see also Karin Oellers-Frahm, *Lawmaking Through Advisory Opinions?*, 12 GERMAN L.J. 1033, 1041–42 (2011) (discussing impact of decisions).

300. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

301. *Id.*

302. Compare Joost Pauwelyn, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law*, 37 J. WORLD TRADE 997, 998 (2003), with Joel P. Trachtman, Book Review, *Conflicts of Norms in International Law: How WTO Law Relates to Other Rules of International Law*, 98 AM. J. INT'L L. 855, 857–58 (2004).

Rights? Neither the Covenant nor the Optional Protocol (granting the HRC jurisdiction over individual communications) says.³⁰³

But there is a second, broader problem with approaching the question of what authority courts, tribunals, and other bodies have as one of delegation. Delegated by whom and when? Various bodies may disagree over who their principals are—human rights bodies, for example, might suggest it is the people rather than states³⁰⁴—or when the relevant delegation occurred—some bodies, like the ECJ, might claim an evolving mandate over time.

2. Toward Dialogue

So what is there left to do? How can we mediate between custom and common law in international law? Rather than try to draw clear lines around the authority of states and courts, lines both are likely to ignore, a better approach might be to develop interfaces between the two, ways for states and courts to communicate, and ways for custom and common law to respond to each other. Fully developing such approaches is an enormous project and one beyond the scope of this Article, but some possibilities can be gleaned from current practice and are sketched out below.

The key to developing interfaces between court and state, common law and custom, is recognizing the reality noted earlier, that in both domestic and international law, negotiated law and adjudicated law rarely exist in their purest form, hermetically sealed off from each other.³⁰⁵ Instead, negotiations often occur under litigation's threatening shadow, negotiated settlements may be monitored by courts, and courts often encourage and direct negotiation between parties. Similarly, common law rules may include a variety of reference points to negotiated rules, whether incorporating business custom as a rule of decision or recognizing industry standards as a safe harbor. International legal regimes have also experimented with different ways to interface, some of which may suggest ways to mediate the claims of states and tribunals to interpretative authority in the future. In the best cases, such interfaces might actually be able to mobilize the best attributes of both negotiated and adjudicated law laid out earlier in Part I.B.

a. Encouraging Prior Settlement, Negotiation, or Conciliation

One way to mediate between negotiated and adjudicated law is to build a preference for negotiated solutions into the adjudicative process. Either

303. Optional Protocol to the International Covenant on Civil and Political Rights art. 5(4), Dec. 16, 1966, 999 U.N.T.S. 302 (stating merely that the Committee "will forward its views").

304. U.N. HRC, General Comment No. 26(61), *supra* note 165, ¶ 5 (declaring that even if state parties attempt to withdraw, their populations will continue to have rights under the Convention); Inter-Am. Comm'n on Human Rights [IACHR], *Annual Report of the IACHR 2006*, ch. 4, ¶ 54, IACHR Doc. OEA/Ser.L/V/II.127 (Mar. 3, 2007) ("[I]t was not the intention of the Organization of American States to leave the Cuban people without protection. That Government's exclusion from the regional system in no way means that it is no longer bound by its international human rights obligations." (quoting IACHR, *Annual Report of the IACHR 2002*, ch. 4, ¶ 7, IACHR Doc. OEA/Ser.L/V/II.117 (Mar. 7, 2003)) (internal quotation marks omitted)).

305. See *supra* notes 52–54 and accompanying text.

specific procedural rules or professional norms may direct litigants to first try some form of negotiation, conciliation, or mediation before fully embarking on adjudication. In some cases, the court itself may even supervise the process. Many courts in the United States, for example, have programs to encourage mediation,³⁰⁶ and scholars have noted that, for better or for worse, U.S. judges seem increasingly to favor and endorse out-of-court settlement as a means of dispute resolution.³⁰⁷ The length, breadth, and expense of the discovery process in the United States may structurally favor settlements as well.

A preference for negotiated settlements is also common, and often explicitly required, in international regimes. The WTO Dispute Settlement Understanding requires complaining members to first seek “consultations” with offending members before gaining access to the adjudicative machinery.³⁰⁸ The International Centre for the Settlement of Investment Disputes encourages recourse to its conciliation machinery in investment disputes, and the U.S. Model BIT includes a “standard exhortation to consult before arbitrating.”³⁰⁹ Even the PCIJ and ICJ have at times called on the parties before them to further negotiate.³¹⁰ As the PCIJ has explained,

the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement.³¹¹

Such preferences for negotiation reflect a view that adjudication should be extraordinary and that an adjudicated result may not capture or forward the goals of the parties as well as negotiation. These preferences mediate the negotiated-law/adjudicated-law divide by creating space for negotiated law to prevail in the first instance and by channeling a smaller percentage of cases to adjudication.

306. Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates As Mediators*, 73 NEB. L. REV. 712, 715 & n.9 (1994) (describing the alternative dispute resolution movement in the United States); see also Fiss, *supra* note 43, at 1073 (criticizing the alternative dispute resolution movement).

307. *E.g.*, Fiss, *supra* note 43, at 1073.

308. DSU, *supra* note 300, art. 4.

309. Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch*, 12 U.C. DAVIS J. INT’L L. & POL’Y 7, 12 (2005).

310. See Ernst-Ulrich Petersmann, *Justice As Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT’L ECON. L. 273, 354 (2006).

311. *Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.)*, 1929 P.C.I.J. (ser. A) No. 22, at 13 (Aug. 19); see also *Passage Through Great Belt (Fin. v. Den.)*, 1991 I.C.J. 12, 20 (July 29) (quoting *Free Zones*, 1928 P.C.I.J. (ser. A) No. 22 at 13); *Frontier Dispute (Burk. Faso/Mali)*, 1986 I.C.J. 554, 577–78 (Dec. 22) (noting a preference for the parties to negotiate their own solutions).

b. Draft Opinions

Another way to mediate between negotiated law and adjudicated law would be through the issuance of draft opinions by courts. Courts, tribunals, and other bodies might circulate a draft to the parties and invite their comments in at least some form. The D.C. Court of Appeals in the United States experimented with just such a technique in *Alabama Power Co. v. Costle*, where the court first issued a tentative opinion, seeking comments from the parties.³¹² Based on the submissions of the parties, the court then revised and issued its final opinion.³¹³ The experiment inspired others to propose its wider use, particularly where courts of appeals seek to overrule district court opinions.³¹⁴ U.S. state appellate courts in Arizona, California, and New Mexico have also experimented with draft or tentative opinions.³¹⁵

A variant of this approach would be to subject tribunal decisions to acceptance by the parties, either the specific parties to the dispute³¹⁶ or, as in the pre-WTO General Agreement on Tariffs and Trade,³¹⁷ all parties to the agreement, before giving them effect or making them binding. While from a cynical standpoint, such a technique may look like nothing more than a way for parties to avoid liability and to allow interest to trump law, such a standpoint oversimplifies the dynamic set in motion by a draft opinion. For one thing, the rules about revising or rejecting a decision can of course be calibrated in a variety of different ways to give more or less voice to various parties. Even if parties do have the ability to reject opinions entirely though, the draft opinion could have considerable influence on customary practice going forward. Assuming it is only privately available, the draft opinion may signal to parties the direction a future tribunal might take and suggest the wisdom of changing one's actions or, alternatively, more proactively renegotiating a custom or agreement. If publicly available, the draft opinion may have even broader effects on existing practice. The unadopted panel report in the original GATT *Tuna-Dolphin* case might be a good example.³¹⁸ In that case, the panel's views on whether states could regulate Process and Produc-

312. *Ala. Power Co. v. Costle*, 606 F.2d 1068 (D.C. Cir. 1979), *superseded by* 636 F.2d 323 (D.C. Cir. 1979).

313. *Id.*; see also Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 810 n.582 (1984) (noting *Costle* as an example of a court effectively engaging the parties in a dialogue).

314. Estreicher & Sexton, *supra* note 313, at 810 n.582.

315. See generally Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 SANTA CLARA L. REV. 1, 1-5 (1995) (describing the practice in the California Court of Appeal, Fourth Appellate District, Division Two; Second District of the Arizona Court of Appeal; and New Mexico Court of Appeal).

316. An example here might be how the U.N. Convention on the Law of the Sea deals with claims to the continental shelf beyond two hundred miles. U.N. Convention on the Law of the Sea art. 76(8), Dec. 10, 1982, 1833 U.N.T.S. 397. States submit claims to the Commission on the Limits of the Continental Shelf, which then issues a recommendation on boundaries. *Id.* If the state submitting the claim accepts the recommendation, it becomes binding on all other parties to the Convention. *Id.*

317. See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 21-22 (2005) (describing the evolution of the consensus requirement).

318. Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993).

tion Methods and the territorial reach of their authority to regulate “to protect human, animal or plant life or health” have exerted considerable influence on state practices since—the United States, for example, revised both its policy and its arguments,³¹⁹ and reactions to the unadopted report undoubtedly influenced the WTO Appellate Body’s eventually binding decision in the similar *Shrimp-Turtle* case.³²⁰ This was all notwithstanding the fact that the questions answered by the *Tuna-Dolphin* panel are regularly described as remaining open.³²¹ From a positive perspective, such draft decisions might have the advantage of leaving space for state practice while simultaneously influencing its direction, essentially fostering a dialogue between adjudicated and negotiated law.

c. Margins of Appreciation

Another way that adjudicated law interacts with negotiated law in both the domestic and international systems is by incorporating a role for current custom into the rules courts apply. Examples in domestic systems are familiar. In tort law, industry or professional standards may be used to determine best practices within a certain field.³²² Although they may not serve as full defenses to liability, they may have a role in defining at least a minimum standard of caution.³²³ In medical malpractice cases in the United States, liability is determined with reference to the professional standards among physicians.³²⁴ And commercial law may incorporate industry custom and usage in a variety of ways, exemplified in the U.S. Uniform Commercial Code’s use of “usage of trade” in interpreting contracts.³²⁵

319. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 9–29, WT/DS58/AB/R (Oct. 12, 1998).

320. *Id.* ¶¶ 180–184.

321. Robert Galantucci, *Compassionate Consumerism Within the GATT Regime: Can Belgium’s Ban on Seal Product Imports Be Justified Under Article XX?*, 39 CAL. W. INT’L L.J. 281, 311 (2009).

322. Alex J. Grant, *New Theories of Cigarette Liability: The Restatement (Third) of Torts and the Viability of a Design Defect Cause of Action*, 3 CORNELL J.L. & PUB. POL’Y 343, 375 (1994); Alex B. Long, *Lawyers Intentionally Inflicting Emotional Distress*, 42 SETON HALL L. REV. 55, 67–68 (2012); Michael L. Rustad & Thomas H. Koenig, *The Tort of Negligent Enablement of Cybercrime*, 20 BERKELEY TECH. L.J. 1553, 1587–88 (2005).

323. 3 J.D. LEE & BARRY A. LINDAHL, *MODERN TORT LAW: LIABILITY AND LITIGATION* § 27:85 (2d ed. 2011) (“While compliance with or deviation from industry standards may be some evidence of defectiveness, such evidence is not conclusive. However, if a manufacturer knows that a common practice in an industry presents substantial and unjustifiable risk to consumers, then compliance with the common practice is not an absolute bar to recovery.”); Rustad & Koenig, *supra* note 322, at 1588 (“Custom provides the floor, but not necessarily the ceiling, of reasonable care.”).

324. *E.g.*, M. Gregg Bloche, *The Invention of Health Law*, 91 CAL. L. REV. 247, 290 (2003); Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51, 51 (2007).

325. U.C.C. § 1-205 (2001). It should be noted, though, that the Uniform Commercial Code is more open to such custom than the common law rules it replaced. *Id.* § 1-205 cmts. 4–5.

One way in which international regimes may seek to incorporate rules developed from custom is through the application of margins of appreciation.³²⁶ In contrast to its approach in the deportation and extradition context described above,³²⁷ the ECHR is usually quite sensitive to evolving state practice on open questions of law or interpretation. Where no European consensus on an issue has emerged, the court has applied a margin of appreciation—essentially a form of deference—to government actions or decisions. The doctrine has been applied to the regulation of speech³²⁸ and political parties³²⁹ and the relationship between state and religion,³³⁰ among other issues. Where applied, the doctrine leaves room for custom to develop. Importantly though, the doctrine seems to act as a one-way ratchet; once a consensus has emerged, that rule will be adopted into ECHR jurisprudence and applied in future cases.³³¹ Proposals have already been made to extend the ECHR's approach to other areas of international law, including international intellectual property law³³² and investment law.³³³

Related techniques might be seen as ways to collect practice before or in preparation for adjudicated decisions. Requirements to exhaust local resources before availing oneself of the jurisdiction of various international bodies, whether in human rights³³⁴ or investment law,³³⁵ might be seen as a way to allow state practice to develop or percolate before international adjudication adopts a specific rule. Even if adjudication ends up replacing negotiated law with an adjudicated rule, that rule may be responsive to, rather than ignorant of, customary practice. Essentially, these various techniques confirm the superiority and supremacy of adjudicated law while still granting some respect to negotiated solutions.

326. “Under this doctrine, national governments are given a certain degree of discretion regarding the specific manner in which they implement European Convention rights. . . . When a state’s choices fall within a predictably amorphous range of acceptable alternatives, the ECHR will uphold the state’s actions as being within its so-called ‘margin of appreciation.’” Donoho, *supra* note 232, at 451–52.

327. See *supra* Part II.B.2.

328. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

329. *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 35.

330. *Lautsi v. Italy*, App. No. 30814/06, ¶ 70 (Eur. Ct. H.R. 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040>.

331. *E.g.*, *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 15 (1988).

332. *E.g.*, Graeme B. Dinwoodie, *Copyright Lawmaking Authority: An (Inter)Nationalist Perspective on the Treaty Clause*, 30 COLUM. J.L. & ARTS 355, 388 (2007); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 432 (1998).

333. *E.g.*, William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 283, 333–44 (2010).

334. European Convention on Human Rights, *supra* note 222, art. 35(1).

335. Anne van Aaken, *Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 721, 735–39 (Stephan W. Schill ed., 2010).

d. Legislative Overrides

In the Anglo-American system, legislation overrides common law rules. In international law, treaties usually operate the same way. But one could also create mechanisms to allow less formal state practice to override an opinion.³³⁶ The FTC set up under NAFTA arguably operates in this way, offering the state parties an opportunity, acting together, to override a tribunal's interpretation and replace it with their own. Members of the WTO have similar authority to override an opinion while meeting as the Dispute Settlement Body. Such a decision, however, must be accepted by all WTO members, making such rules very hard to enact.³³⁷ Still another version of such an override might be found in the U.N. Security Council's ability to delay proceedings before the International Criminal Court.³³⁸ Although this authority operates more at a procedural level than a substantive one—it changes no substantive rulings of the court—it could nonetheless be seen as a way in which adjudicative law is pushed aside while states attempt to resolve the dispute themselves.

The impact such an override rule might have is particularly obvious in the case of self-defense and nonstate actors described above.³³⁹ A formal rule that state practice in the area, whether in the form of government statements, military manuals, or justifications and reactions to attempted interventions, could override the few comments by the ICJ on the matter would dramatically tip the scales in favor of finding an international law rule accepting an “unwilling or unable” standard for taking action in the territory of another state.

e. Contestation

A final way to mediate the relationship between negotiated law and adjudicated law might be to encourage explicit contestation between states and courts over their relative authority to shape international law rules. This would differ from current jockeying described above in that it would not center on contested claims about the content of custom, but instead on who should be elaborating the rules in a particular system. It would allow human rights and investment tribunals to make claims to be guardians of third-party beneficiaries and states to assert claims of greater democratic legitimacy. This approach has at times been adopted by the HRC³⁴⁰ and is arguably at

336. Of course, over time, state practice might be seen as developing a new rule, but the general assumption is that in overriding a prior rule, state practice will have to be reasonably clear and not just evidence of widespread violation.

337. *E.g.*, Pauwelyn, *supra* note 302, at 998–99.

338. *See* Rome Statute of the International Criminal Court art. 16, July 17, 1998, 2187 U.N.T.S. 3 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”).

339. *See supra* Part II.B.3.

340. The Human Rights Committee has, for example, asserted its authority over that of states to determine the effectiveness of reservations. U.N. HRC, General Comment No. 24, *supra* note 165, ¶ 18.

the heart of the ECHR's firm stand on assurances.³⁴¹ It may also be implied in arbitral tribunals' attempts to ensure "equality of arms" between investors and states.³⁴² This approach relates back to the discussion of sources above³⁴³ in that it encourages crisper, clearer arguments about the stakes involved in battles between states and courts.

Such a combative approach, of course, will be available to very few tribunals—likely only those with sufficient independence from states³⁴⁴ and sufficient ability to appeal to audiences other than the states themselves (investors, human rights advocates, domestic populations, or national judges) to bolster their legitimacy and influence compliance. It is arguably this confluence of factors that has allowed the ECHR to push back against state resistance on the question of assurances. But it is a confluence of factors that will likely be rare among international tribunals tasked with technical aspects of the law with little salience outside a small community.

As noted, many of the techniques suggested above are already in use in various legal regimes. Future work could focus on why certain techniques have been adopted in some regimes rather than others and when and why they have proved effective. It might, for example, focus on why negotiated law might be favored in some contexts and accommodated through legislative overrides or draft opinions, and why adjudicated law might be favored in others, through margins of appreciation. It might consider when negotiation ought to be encouraged and when courts should claim interpretative power for themselves.

Here, the differences between the negotiated law and adjudicated law models laid out in Part I.B may serve as guideposts. For example, one of the distinctions that emerges from the literature on out-of-court settlements is between private law and public law values. Negotiated law, with its emphasis on the value of bargained-for outcomes and ongoing relationships,³⁴⁵ may be more appropriate to situations that look more like contracts. Translation tools like legislative overrides or draft opinions that favor state practice over court interpretations may be most valuable in those contexts where the rules in question are the result of careful and explicit bargaining for reciprocal benefits between states, as is perhaps the case with trade or investment agreements.

By contrast, adjudicated law's attributes seem particularly important in areas of public law, where the rights and responsibilities of broad classes are at issue. In such cases—perhaps, for example, human rights law—the values of neutral judging and reason giving, of justice rather than peace, and of developing clear rules that set precedents for state action and individual

341. See *supra* Part II.B.2.

342. E.g., Thomas W. Wälde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Proactively, the Equality of Arms*, 26 *ARB. INT'L* 3, 4–5 (2010).

343. See *supra* Part III.A.

344. Investment arbitral tribunals demonstrate the fragility of such independence. On the one hand, arbitrators are not beholden to states and could decide each case as they deem just with little concern of punishment. On the other hand, as repeat players seeking future appointments, arbitrators may not be willing to challenge states too directly.

345. See *supra* Part I.B.2.

rights in the future seem particularly important.³⁴⁶ (A key argument in the debate over out-of-court settlements is that settlements don't develop rules that can benefit all.³⁴⁷) It may be in just such cases that judges' claims to control legal developments, either through margins of appreciation or through more aggressive contestation, are most appropriate. It should not be surprising that as areas like trade and investment start to touch on public law questions like the environment, calls for these judge-centric tools increase.³⁴⁸

Alternatively, choosing the right translation tools may turn on the perceived value of accumulated experience in informing final outcomes and rules. Draft opinions, for example, may marry some of the best features of negotiated and adjudicated law. On the one hand, adjudicating a question allows for a quicker, clearer articulation of the key arguments and a proposed rule; on the other, if unadopted, the proposed rule is stripped of some of its precedential value, allowing it to be tested more slowly by experience and to play out over time. Margins of appreciation similarly allow courts to collect state practice and use it as an input, informing their decision making through experience. Margins build authority for courts' judgments by anchoring them more directly in state practice while simultaneously swaying state practice in the direction of the courts' preferred rules.³⁴⁹ Choosing between the more state-controlled option of draft opinions and the more court-controlled option of margins of appreciation (as well as calibrating those options themselves) may turn on the relative perceived importance for an area of law of the experience states can bring to the table and the fundamental values that courts should articulate and protect.

Neither of the two steps described above—neither clarifying the sources of nontreaty law nor mediating between judicial and state control of doctrine—will definitively resolve the types of conflicts over particular rules laid out in Part II.B. Instead, they reveal the stakes of the arguments by clarifying sources of authority and claims of legitimacy while suggesting techniques that can channel these disputes into constructive dialogue. They demonstrate that these disputes are not the result of international law's radical indeterminacy, as some critics might suggest, but principled disagreements over the nature of international law in certain areas. These steps can also hopefully allow international doctrine to develop more organically, as courts and other interpretative bodies are liberated from the warping box of "custom" to better articulate the sources of the rules they apply.

CONCLUSION

"The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified,"

346. See *supra* Part I.B.5.

347. See *supra* Part I.B.1.

348. See, e.g., Burke-White & von Staden, *supra* note 333, at 283. See generally SCHILL, *supra* note 26.

349. See, e.g., Donoho, *supra* note 232, at 450–66.

Justice Holmes famously proclaimed.³⁵⁰ It is time for international law's purported sovereigns and quasi sovereigns to stand up and articulate their claims to legal authority. Only when we recognize the very different sources of law in play in international law, and the very different rationales behind them, will we be able to fully grapple with the relationship between court and state and the roles each will play in a world of expanding, increasingly complex international regulation.

350. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Holmes's dissent presaged the majority opinion in *Erie*.