

Preliminary Draft of Aug. 29, 2013. Please cite to final version in
54(2) VIRGINIA J. INT'L L. _ (forthcoming 2014)

Public and Private in International Investment Law: An Integrated Systems Approach

JULIE A. MAUPIN^{*}

ABSTRACT

Members of the invisible college of international investment lawyers are engaged in a fierce battle over the conceptual foundations of their common legal enterprise. The debate centers on whether the international legal regime governing foreign direct investment is a de facto transnational public governance system or merely an institutional support structure for the settlement of essentially private investment disputes. These attempts to establish the public versus private nature of the regime are misconceived. International investment law deals with both public and private concerns, impacts upon both public and private actors, and crosses over traditional divides separating public law from private law and public international law from private international law. In light of these overlaps, the regime should instead be analyzed from an integrated systems perspective. This approach better comports with the regime's complex interlocking nature. It is also better suited to the pragmatic challenge of accommodating the conflicting claims of diverse stakeholders within the confines of an outmoded but rapidly evolving legal schema. I illustrate this with concrete examples of minor interventions at three different levels of the regime that could produce major shifts in the prevailing balance between investor and non-investor rights at other levels of the regime. I argue that this strategy represents at once a more feasible and more sensible means of improving international investment law than other alternatives.

^{*} Lecturing Fellow in International Law and Fellow, Center for International and Comparative Law, Duke University School of Law. Comments and criticisms welcome at: maupin@law.duke.edu. For helpful feedback and conversations, I thank the participants in workshops held at Duke and Yale Law Schools and at the American Society of International Law (2012 Biennial International Economic Law Interest Group meeting 2012). Particular thanks go to Bruce Ackerman, Curt Bradley, Rachel Brewster, Guy Charles, Pierre-Marie Dupuy, Mitu Gulati, Laurence Helfer, Jürgen Kurtz, Ralf Michaels, Joost Pauwelyn, W. Michael Reisman, Anthea Roberts, David Schneiderman, and Jorge Viñuales.

TABLE OF CONTENTS

INTRODUCTION	1
I. WHENCE INTERNATIONAL INVESTMENT LAW'S PUBLIC/PRIVATE CRISIS?.....	5
A. <i>Unanticipated evolutionary twists and turns</i>	7
B. <i>Structural peculiarities</i>	11
C. <i>What's really at stake? Three examples of public/private clashes</i>	19
D. <i>Categorical accounts: private dispute settlement or public governance?</i>	25
II. BETWEEN RHETORIC AND REALITY: INTERNATIONAL INVESTMENT LAW'S PUBLIC/PRIVATE OVERLAPS AND DISJUNCTIONS	33
A. <i>Public and private actors and functions</i>	33
B. <i>Public international law and private international law sources and methods</i>	37
C. <i>Public law and private law claims and defenses</i>	41
D. <i>What's left: public and private as decision rules?</i>	44
III. THE INTEGRATED SYSTEMS APPROACH.....	47
A. <i>Systems theory and its potential utility</i>	48
B. <i>Three illustrations: how integrated systems analysis can be used to reshape international investment law</i>	53
C. <i>Comparing the integrated systems approach to the alternatives</i>	62
CONCLUSION.....	65

INTRODUCTION

Imagine a world in which the line between personal rights in property or contract and important public policy concerns – say environmental protection or public health – is drawn in the following way. The individual who seeks vindication of her property rights against governmental regulatory encroachment appoints an arbitrator to hear her claim. She selects the arbitrator she believes most likely to find in her favor, given the arbitrator's record of past decisions. The government whose regulatory measure prompted the complaint responds by appointing the arbitrator it believes most likely to absolve it of liability. A third arbitrator is then selected to chair the three-person panel by a designated appointing authority – perhaps the secretariat of some international arbitral institution. All of the arbitrators are lawyers by training, but none of them hails from the country whose sovereign act forms the basis of the complaint.

The disputing parties then proceed to pay each of the three arbitrators a substantial daily fee¹ to consider whether the maligned governmental regulation improperly impaired the property owner's rights, and if so, how much compensation the government should pay to the owner as a result. The tribunal's award, once issued, cannot be reviewed on the merits by any domestic court,² and the property owner can enforce a favorable award by attaching state assets in 147 countries around the world.³ Upon

¹ The going rate in cases administered by the International Centre for Settlement of Investment Disputes (ICSID) is \$3000 per arbitrator per day. *See* ICSID Schedule of Fees (Jan. 1, 2008), para 3, at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=scheduledFees&reqFrom=Main>. Other arbitral institutions set arbitrator compensation at a pre-specified percentage of the amount claimed. *See, e.g.* International Chamber of Commerce [hereinafter ICC] Alternative Dispute Resolution Rules (2012), Appendix III, available at: <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/>.

² Except on the limited procedural grounds set out under art. 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], or, in some cases, under art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

³ Subject to certain sovereign immunity defenses, enforcement of investor-state arbitration awards is generally governed by arts. 53–55 of the ICSID Convention or arts. III–V of the New York Convention, both *supra*, note 1. As of the date of this writing, both conventions listed 147 contracting state parties. *See List of Contracting States and Other Signatories of the Convention*, ICSID.WORLDBANK.ORG; <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=Contractingstates&ReqFrom=Main> (listing state party signatories to the ICSID Convention) (last visited Sept. 11, 2012); *Contracting States*,

termination of the arbitral proceedings, the three-person tribunal dissolves and its members continue with their various other professional pursuits.⁴

It seems fair to say that few domestic legal scholars, if starting with a clean state, would be likely to propose this set-up as an optimal system for resolving conflicts between privately held rights and important public policy concerns. But the world I have just described is not a fictional one. It is the contemporary international investment law regime. The property owners in question are foreign investors, and the government appearing as defendant might be that of most nations in the world.

Germany is currently facing an \$18.7 billion dollar claim by Swedish energy investors over the German government's decision to phase out nuclear power in the wake of the Fukushima nuclear accident.⁵ Australia is preparing to defend a multi-billion dollar claim by Philip Morris brought in response to that country's recently enacted Tobacco Plain Packaging legislation.⁶ Belgium faces a \$2.3 billion claim by a Chinese insurance company as a result of the government bailout and then sale of a Belgian-Dutch bank during the recent financial crisis.⁷ All of these claims will be adjudicated in the manner described above. And Germany, Australia, and Belgium are actually quite lucky in the grand scheme of things; they are each only now facing their first investor-state claims. The United States, by contrast, has already faced over twenty such claims⁸ by foreign investors seeking compensation for an array of governmental measures ranging from a California environmental regulation⁹ to a Mississippi state jury verdict.¹⁰

NEWYORKCONVENTION.ORG, <http://www.newyorkconvention.org/contracting-states> (listing state party signatories to the New York Convention) (last visited Sept. 11, 2012).

⁴ Typically as law firm partners, arbitrators, expert witnesses, full or part-time law school professors, or some combination of these.

⁵ *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (award pending); *Vattenfall Launches Second Claim Against Germany*, GLOB. ARB. REV. News (June 25, 2012), *available at* www.globalarbitrationreview.com/news/article/30634/vattenfall-launches-second-claim-against-germany/.

⁶ *Philip Morris Asia Ltd. v. Commonwealth of Australia*, United Nations Commission on International Trade Law [hereinafter UNCITRAL], Notice of Arbitration (Nov. 21, 2011), *available at* <http://www.ag.gov.au/InternationalLaw/Documents/Philip+Morris+Asia+Notice+of+Arbitration.pdf> [hereinafter *Philip Morris* – Notice of Arbitration].

⁷ Alyx Barker, *Belgium Faces ICSID Claim from Chinese Investors*, GLOB. ARB. REV. (Sep. 24, 2012).

⁸ A list of claims faced by the U.S. under the North American Free Trade Agreement [hereinafter NAFTA] is available here: http://www.naftalaw.org/disputes_us.htm. Claims against the U.S. under the Dominican Republic-Central America Free Trade Agreement [hereinafter DR-CAFTA] are listed here: http://www.naftalaw.org/disputes_us.htm. and select bilateral investment treaties.

⁹ *Methanex Corp. v. United States of America*, NAFTA (UNCITRAL rules), Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), *available at* <http://italaw.com/sites/default/files/case-documents/ita0529.pdf> [hereinafter "*Methanex* –

In fact, U.S. participation in the international investment law regime is especially deep. The U.S. was a driving force behind the regime's creation and continues to serve as one of its foremost supporters upon the world stage. This seems puzzling in light of the fact that U.S. domestic law contains more sophisticated and democratically legitimate means of handling conflicts between investor rights and broader governmental regulatory concerns than farming them out to ephemeral international arbitration tribunals on a case-by-case basis.

International law scholars in the U.S. and abroad have by and large reacted to this curious state of affairs in an even more curious manner. While many have begun to shine a critical spotlight on various aspects of the international investment law system, most reform proposals have worked outward from one of two initial premises. On one side of the debate are those who view recent investor-state arbitral awards granting compensation to foreign investors for governmental regulatory activities as evidence that international investment law has morphed into a *de facto* public governance system operating on a transnational scale.¹¹ On the other extreme are those who insist that international investment law is of little or no public concern, as it is nothing more than an institutional support structure for the efficient settlement of private investment disputes.¹²

What is curious about these approaches is not only that they are both overly broad and insufficiently nuanced, but that they both take the fundamental question facing the international investment law regime to be a categorical one: is it a public regime or is it a private one? Divergent

Award”]. Unless otherwise specified, all publicly available investor-state arbitral awards discussed in this paper may be accessed at <http://italaw.com/awards/chronological> (last visited Sept. 11, 2012).

¹⁰ The *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, (June 26, 2003), 7 ICSID Rep. 442 (2005) [hereinafter *Loewen Group* – Award].

¹¹ See, most notably, Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007) [hereinafter VAN HARTEN]; DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* (2008) [hereinafter SCHNEIDERMAN]; SANTIAGO MONTT, *STATE LIABILITY IN INVESTMENT TREATY ARBITRATION* (2009) [hereinafter MONTT], *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, (Stephan Schill ed, 2010) [hereinafter Schill (ed.) – IIL & COMPARATIVE PUBLIC LAW]; Stephan Schill, *Enhancing the Legitimacy of International Investment Law: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57–102 (2011) [hereinafter Schill – *New Public Law Approach*].

¹² Examples of works espousing the private dispute settlement perspective (by analogy to international commercial arbitration) include: Barton Legum, *Investment Treaty Arbitration's Contribution to International Commercial Arbitration*, 60 DISP. RESOL. J. 71, 73 (2005); Charles N. Brower, *W(h)ither International Commercial Arbitration?*, 24 ARB. INT'L 181, 190 (2008). See also Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507 (2009) (viewing the regime through the lens of private contract law).

prescriptive recommendations then flow almost automatically – in conflicting directions – from the answer to this question. But it is possible to raise a different question in respect of the regime’s ongoing classificatory debate. Namely, does it even matter?

In this paper, I argue that it doesn’t. I propose that the international investment law regime and its most pressing problems should instead be analyzed from an integrated systems perspective. That is, rather than asking *what is it?* (a classificatory question), we should focus on figuring out how it works in real time and how it can be improved. How do different aspects of the regime interact with one another? How does the regime as a whole interact with other legal regimes at both the domestic and international levels? And most importantly, how are intra- and inter-regime feedback loops dynamically shifting the line between the protection of investor and non-investor rights and interests over time? Only against the backdrop of this more integrated understanding of the international investment law system does it become possible to generate useful suggestions for targeted regime reform, whether on a piecemeal or wholesale basis.

In order to make the case for an integrated systems approach to international investment law, the remainder of this paper proceeds as follows. Part I explains why the public/private framing has gained such salience in the international investment law world notwithstanding the fact that many other scholarly traditions have consistently rejected this framing as unworkable. It describes some of the historical, structural, jurisprudential, and sociological peculiarities contributing to the perception that international investment law generates acute public/private tensions not typical of other areas of international law. These peculiarities help explain why the scholarly debate has so far focused on establishing whether international investment law is a private dispute settlement system or a transnational public governance system. I critique the descriptive utility of these dominant accounts from three perspectives: those of the investor, the state, and the third-party outsider to the investor-state relationship.

Part II lays the groundwork for moving beyond this rudimentary debate. It does so by charting the overlaps and disjunctions between traditional public/private distinctions and the contemporary practice of international investment law. The discussion shows how the investment law system impacts upon both public and private actors, incorporates both public law and private law claims and defenses, and draws sources and methods from both public international law and private international law. In light of this clear straddling of classical public/private divides, I suggest that the frequent invocation of public and private concepts within the international investment law system has little to do with the system’s essential nature. Rather, it reflects strategic attempts by competing stakeholders to advance certain contested propositions at the expense of

others. This serves to obscure, rather than resolve, underlying normative tensions.

Part III introduces the integrated systems perspective as an alternative analytical tool. Since international investment law's public and private features are overlapping and at times even mutually constitutive, a better way to analyze the regime is to view it as a complex dynamic system. To illustrate why the integrated systems perspective is useful, I apply it to the central question that has preoccupied most of the investment regime's critics: how, where, and by whom is the line between investor rights and non-investor rights (including, potentially, the "public interest") drawn?

I propose three different places where making minor adjustments to discrete components of the existing regime could produce significant realignments in the balance struck between investor and non-investor rights and interests at other levels of the regime's functioning. I connect the three proposals back to the case studies developed in Part I in order to show what difference each one might make in practice. My central aim, however, is not to definitively establish the superiority of the three specific proposals. Rather, it is to persuade reform advocates to take advantage of international investment law's many interlocking feedback loops so as to strategically direct the regime's rapid evolution in an iterative fashion.¹³ I argue that this represents the most productive strategy, in the near term, for tackling the system's much touted accountability and legitimacy problems.

I. WHENCE INTERNATIONAL INVESTMENT LAW'S PUBLIC/PRIVATE CRISIS?

The persistence and vehemence of the public/private debate within international investment law is in some ways baffling. A diverse array of scholarly traditions has, over the course of a century, consistently trounced the public/private distinction as artificial, unworkable, or even downright pernicious. Legal realists began exposing the artificiality of the divide in the early 1900s when they recast prevailing conceptions of "private" contract and property rights as mere reflections of coercive "public" political power relations.¹⁴ New Deal theorists and their state action doctrine progeny¹⁵ then demonstrated the unworkability of the divide insofar as it relates to state action versus inaction. Many eventually

¹³ My approach thus works within the existing regime and attempts to "build on the classic model", as prominent investment arbitrator Charles Brower recently put it. See Alison Ross, *London: Build On the Classic Model, Urges Brower*, 7(3) GLOB. ARB. REV. (May 21, 2012).

¹⁴ See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1928).

¹⁵ For one account of the activist state literature, see BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984).

concluded, as Cass Sunstein put it, that “state action is always present.”¹⁶ As to perniciousness, the use and abuse of public/private rhetoric to perpetuate dominant hierarchies and oppress dissenting voices has been a constant refrain of critical legal scholars,¹⁷ feminists,¹⁸ and many others.¹⁹

Placed alongside this larger discourse, it seems likely that international investment law’s public/private debates are actually a microcosm of a much older discussion. Why, then, have international investment law scholars not learned from these other traditions? Why do we continue to fixate on notions of public and private as if these held the key to solving the regime’s problems? There are four main answers to this riddle: one historical, one structural, one jurisprudential, and one sociological. In what follows, I take each in turn.

Before moving to these explanations, however, one preliminary caveat bears stressing. My goal, in this part, is not to present the international investment law regime in a comprehensive, nuanced, or even balanced manner. Rather, it is to highlight the reasons why – rightly or wrongly – a vocal segment of scholars, civil society advocates, journalists, government officials, and other critics has come to view the regime as an epic battle between private investors and the public interest. Focusing on these reasons to the exclusion of competing considerations inevitably makes the presentation one-sided. Not all international investment disputes raise public policy concerns. And among those that do, it is far from inevitable that the final result will be an award which impacts negatively upon the public interest.²⁰ At the level of substantive law, some states have made

¹⁶ Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT’L L. 465 (2002). See also Harold W. Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69 (1967).

¹⁷ For an overview, see Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982).

¹⁸ See e.g. Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, (1987); CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY (Susan B. Boyd ed., 1997); PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES (Margaret Thornton ed. 1995); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319.

¹⁹ See generally Jack M. Balkin, *Deconstruction’s Legal Career*, 27 CARDOZO L. REV. 719, 728 (2005) (noting that public and private power are at once mutually dependent and mutually differentiated).

²⁰ E.g. in the *Methanex* decision, *supra* note 9, the tribunal did not find the United States financially liable for the reduction in profits suffered by the claimant in consequence of California’s environmentally motivated ban on the sale of the claimant’s product.

significant strides in recent years toward making their investment treaties more sensitive to the concerns of non-investors.²¹

These and other countervailing developments are important. As I argue in the third part of this paper, some of them may well hold the key to redressing many of the regime's most pressing problems. But in order to understand the origins of international investment law's particular public/private dilemmas, it is necessary to focus on the aspects of the system that have generated a public backlash rather than on those that have not. With this in mind, I now turn to consider why the regime's potential public impact has recently become the subject of concerted scholarly, civil society, and governmental debate.

A. *Unanticipated evolutionary twists and turns*

The historical answer is that nobody saw it coming. When the contemporary international investment law regime was established in the mid-20th century, the regime's founders expected it to serve a very basic function: protect the investments of developed country nationals against opportunistic expropriations carried out by transitioning, post-colonial developing country governments.²² The idea was that by providing privately actionable protections to foreign investors, backed by a neutral international dispute settlement system, states could encourage the private sector to invest in developing countries, thereby stimulating economic growth to the benefit of all.²³ This is not exactly how things have played out in practice.

²¹ See, e.g. U.S. Model Bilateral Investment Treaty (2012), available at: <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [hereinafter U.S. Model BIT 2012], Preamble (specifying that investment protection should be achieved "in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights"), art. 29 (mandating the transparency of arbitral proceedings), and Annex B, art. 4(b) (stating, "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations").

²² The regime's historical roots stretch back to at least the late 1600s, with some of its basic legal principles finding early articulations in the Friendship, Commerce and Navigation treaties of the European colonial powers and in judicial and arbitral pronouncements concerning the customary practices observed by those powers over the course of the 18th, 19th, and early 20th centuries (such practices having at various points been deemed to form part of the "law of nations"). Notwithstanding this long history, most commentators place the birthdate of the contemporary system in its present form either in 1959 (the year of the adoption of the first modern bilateral investment treaty, concluded between Germany and Pakistan) or 1965 (the year in which the ICSID Convention, *supra* note 2, was opened for signature).

²³ ICSID Convention, *supra* note 1, pmb.; see also International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, ¶ 9, in ICSID CONVENTION, REGULATIONS AND RULES, 4 I.L.M. 524 (1965).

At the time of the establishment of the International Centre for Settlement of Investment Disputes (ICSID), most investor-state disputes were based upon individually negotiated investor-state contracts. They tended to proceed as ordinary breach of contract claims, resolved by ordinary international commercial arbitration. ICSID registered 26 cases of this kind between 1965 and 1990,²⁴ none of which produced any notable public outcry.

But the fall of the Berlin Wall brought about a sea change for the regime. With the simultaneous opening up of so many markets in Eastern Europe, a sort of gold rush ensued. Multinational companies from developed countries raced to seize upon new investment opportunities in previously closed economies. In these circumstances, taking the time to negotiate an investment contract with each host state's government – even assuming a company with sufficient market power to do so – could mean losing out to nimbler competitors. Bilateral investment treaties granting generalized protections to broad classes of foreign investors stepped in to fill this gap.²⁵ Between 1990 and 2012, the number of international treaties protecting foreign investors and their investments abroad rose from 385²⁶ to nearly 3200.²⁷

These fast-paced legal developments were soon followed by another profound shift in the global economy. Important developing and transitioning economies that were once viewed as likely recipients of capital (traditional “host states”) began transforming into major originators of investment. By 2012, their share of global FDI outflows had reached

²⁴ THE ICSID CASELOAD – STATISTICS (Issue 2012-2), Chart 1, at 7, (showing the total number of ICSID cases registered by calendar year), *available at* <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32> [hereinafter ICSID CASELOAD – 2012].

²⁵ Thanks to effective industry lobbying in the 1980s, the U.S., U.K., and several continental European countries had model BITs on-hand ready to do the job.

²⁶ Press Release, United Nations Conference on Trade and Development [hereinafter UNCTAD], *Bilateral Investment Treaties Quintupled During the 1990s*, (Dec. 15, 2000), TAD/INF/2877.

²⁷ Of which 2857 are bilateral investment treaties and 339 are “other IIAs,” such as regional trade agreements with investment chapters. *See* UNCTAD, *WORLD INVESTMENT REPORT 2013, GLOBAL VALUE CHAINS, INVESTMENT, AND TRADE FOR DEVELOPMENT*, 101, U.N. Sales No. No. E.13.II.D.5, *available at* <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=588> [hereinafter UNCTAD – WIR 2013]. The most persuasive account of the diffusion of BITs that I have seen to date can be found in Lauge Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits, Bilateral Investment Treaties and Bounded Rational Learning*, 65(2) *WORLD POLITICS* 273 (2013).

35%,²⁸ with \$168 billion in outbound investment coming from China and Hong Kong alone.²⁹

All of these evolutions combined to create the perfect storm for international investment law. They catapulted the regime almost overnight to a level of legal significance never fully anticipated by many of its principal architects and state participants.³⁰ Developed countries that had aggressively promoted sweeping investor protections in international investment treaties began finding themselves on the receiving end of the investor-state arbitration stick. In the first two decades of operation of the North American Free Trade Agreement (NAFTA), for example, Canada and the United States have each faced more investor-state arbitration claims than Mexico.³¹

The pace of legal claims has also accelerated exponentially. Of the 514 reported investment treaty arbitrations initiated by foreign investors against states to-date,³² more than 90% have been brought in the past twelve years.³³ An increasing number of these claims now challenge the application to foreign investors of general regulatory measures long thought to fall within the legitimate and non-reviewable police powers of sovereign states. Recent targets of investor ire have included environmental regulations, affirmative action measures, cultural protection laws, energy policies, and regulatory responses to economic crises.³⁴ And while it remains difficult for companies to obtain compensation for profit-reducing state regulatory actions in most domestic legal systems, empirical research shows that claimants win investor-state arbitration proceedings around 50% of the time.³⁵

²⁸ UNCTAD – WIR 2013, *supra* note 27, at 4.

²⁹ *Id.* at 6, figure 1.6. For an analysis of China's evolving investment treaty program, see Stephan W. Schill, *Tearing Down the Great Wall: the New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007).

³⁰ The original expectations appear to have been that the regime would promote the flow of foreign direct investment to developing countries and that it would de-politicize the settlement of investment disputes by removing them from the realm of diplomatic protection. *See, respectively*, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ¶¶ 9-10, Mar. 18, 1965, 4 I.L.M. 524 (1965); and Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV.—FOREIGN INV. L.J. 1 (1986).

³¹ *See* NAFTA ch.11 disputes by country at: <http://www.naftaclaims.com/disputes.htm>.

³² UNCTAD – WIR 2013, *supra* note 27, at 110.

³³ *Id.* at Figure III.3, at 102 (showing 514 arbitrations filed as of the end of 2010, with fewer than 50 filed prior to 2000).

³⁴ An overview of some controversial cases from the first decade of the 21st century is provided in INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM 2000-2010, (Nathalie Bernasconi-Osterwalder and Lise Johnson, eds., 2011), available at http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf.

³⁵ Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007).

Not surprisingly, these next-generation disputes, unlike their humdrum contract-based predecessors, have attracted significant public attention. Domestic and transnational constituencies who stand to benefit from governmental regulatory measures – including organized labor, environmental lobbies, and human rights advocates – now routinely decry the international investment law regime as undemocratic, imbalanced, and biased in favor of foreign investors over other important social groups.³⁶ They have begun mobilizing against the regime in sophisticated ways. Prominent NGOs founded in the mid-1990s out of concern that the WTO would negatively impact upon public interest issues are now devoting sizeable portions of their budgets to lobbying for reforms to the international investment law regime instead.

Against this whirlwind backdrop, it is no surprise that practitioners, arbitrators, scholars, and others have only recently begun debating the appropriate role of international investment law in protecting “public” versus “private” rights and interests within the global economy.³⁷ Much of the scholarly discourse characterizes the debate itself as a “backlash” against international investment law.³⁸ Some observers wonder whether the modern system of international investment law is on the verge of collapse.³⁹ Others actively call for the system’s abolition.⁴⁰ Still others

³⁶ See, e.g., Institute for Policy Studies and Food and Water Watch, *Challenging Corporate Investor Rule: How the World Bank’s Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It*, (by Sarah Anderson and Sara Grusky, April 2007); Canada’s Coalition to End Poverty, *Making a Bad Situation Worse: An Analysis of the Text of the Canada-Colombia Free Trade Agreement: In particular the Investment Chapter in the Canada-Colombia FTA*, (by Scott Sinclair, 2009); International Institute for Sustainable Development and World Wildlife Fund, *Private Rights, Public Problems: A Guide to NAFTA’s Controversial Chapter on Investor Rights* (2001); Press Release, Seattle to Brussels Network, Member States Put Corporate Rights over Public Interests in EU Investment Policy, (Oct. 25, 2010) available at http://www.s2bnetwork.org/fileadmin/dateien/downloads/S2B_press_release_Council_conclusions_101025.pdf.

³⁷ Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?* 41 VAND. J. TRANSNAT’L L. 775 (2008); William W. Burke-White and 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 (2010); Amanda L. Norris and Katina E. Metzidakis, *Public Protests, Private Contracts: Confidentiality in ICSID Arbitration and the Cochabamba Water War*, 15 HARV. NEGOT. L. REV. 31 (2010); Noemi Gal-Or, *Dispute Resolution in International Trade and Investment Law: Privatisation of the Public?*, in TRANSNATIONAL PRIVATE GOVERNANCE AND ITS LIMITS (Jean-Christophe Graz & Andreas Nölke eds., 2008).

³⁸ THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY, (Michael Waibel, ed. 2010).

³⁹ Christoph Schreuer, *The Dynamic Evolution of the ICSID System*, 17 (Working Paper, delivered in Frankfurt on 26 Apr. 26, 2006), (“So is investor-state arbitration in danger? The answer is probably: not yet but we should not necessarily take it for granted. There

prefer to view recent developments as growing pains – a temporary “legitimacy crisis” engendered by the novelty (but not necessarily undesirability) of arbitrating public interest issues within a private dispute settlement framework.⁴¹ Reasonable minds may well disagree, it seems. More to the point, we should expect them to do so when they have only recently begun working through a largely unexpected set of problems.

B. Structural peculiarities

If historical happenstance helps explain why scholarly consideration of the regime is still in its early stages, international investment law’s structural peculiarities may explain why the nascent debate has so far centered on trying to pin down the system’s public versus private nature. Several commentators have examined the regime’s unusual structural features at length.⁴² I survey them only briefly here, focusing specifically on four features that seem to underpin the belief that international investment law sets up a novel kind of tension between public and private rights not otherwise seen in other areas of international law.

1. The sweeping global coverage of investment instruments

Numerous international legal regimes are global in scope. The investment law regime is unusual, however, in that its coverage is technically patchy but functionally sweeping. This is because international investment law encompasses a vast number of interwoven legal instruments protecting foreign investors and their investments. These come in three basic types: international investment treaties, investor-state contracts, and domestic investment statutes. Foreign investors can benefit from multiple types of protection simultaneously, and where one type of protection is unavailable, a diligent investor can

may well be further curtailments or even calls to replace the current system by a State v. State system.”), available at www.univie.ac.at/intlaw/pdf/cspubl_86.pdf.

⁴⁰ See *Public Statement on the International Investment Regime*, OSGOODE HALL LAW SCHOOL (Aug. 31, 2010) (public statement in which 50 academics expressed that “[t]here is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration”), available at http://www.osgoode.yorku.ca/public_statement/.

⁴¹ Charles N. Brower, *A Crisis of Legitimacy*, NAT’L L.J. (Oct. 7, 2002); Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 GEO. INT’L ENV’T L. REV. 51 (2004); Susan Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005). I note that the “legitimacy crisis” discussion is not unique to international investment law. See, e.g., A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (2003) (arguing that the reconfiguration of authority in the global political economy portends a “crisis of legitimacy” for international law more broadly).

⁴² See especially VAN HARTEN and SCHNEIDERMAN, both *supra* note 11.

usually find a way to obtain one or more of the other types. One possibility is for an investor who wishes to invest in a country with which its home country does not maintain an investment treaty to route its investment through a third country. This is why Philip Morris, a U.S. incorporated company, brought its dispute against Australia through its Hong Kong subsidiary (thereby taking advantage of the Australia-Hong Kong BIT).⁴³ With more than 3000 bilateral and regional investment treaties now in existence,⁴⁴ it is often possible to structure investments in such a way as to bring them within the ambit of at least one investment treaty. The inclusion of most-favored nation clauses in most treaties then enables investors to claim the benefit of the highest level of protection offered by a state under any of its other treaties.

Even in the case of the few countries that remain outside the investment treaty system (most notably Brazil), an investor with sufficient market clout can often persuade the host state to agree to an investor-state contract offering similar protections.⁴⁵ The upshot of all of this is that, although 100 years' worth of efforts by treaty negotiators have failed to generate a multilateral agreement on investment,⁴⁶ international investment law has nevertheless effectively gone global.⁴⁷ This makes the regime's actual or potential impact upon public policy and the public interest a matter of global significance.

2. The broad and evolving notion of "investment"

Most international legal instruments exposing states to direct financial liability are narrowly drafted. For example, there are thousands of pages of WTO country schedules listing the specific tariff lines in respect of which countries have agreed to be bound. Not so with most existing investment treaties. The majority of contemporary investment treaties protect, as illustrated by the 2012 U.S. Model BIT, "every asset that an

⁴³ In Philip Morris' case, this routing may have been done too late, which could cause problems for the company's claim at the jurisdictional phase. But when done prior to the onset of any dispute, "treaty shopping" is generally accepted by arbitral tribunals as a valid form of investment planning.

⁴⁴ UNCTAD – WIR 2013, *supra* note 27, at 101.

⁴⁵ Because most contract-based disputes remain confidential, it is impossible to know whether the outcomes of contract-based disputes differ substantially from treaty-based disputes arising out of the same sets of facts and circumstances. For a conceptual discussion of the potential parallels between the two types of disputes, *see infra*, notes 168–170 and accompanying text. For a sociological account of the international commercial arbitration world, *see* YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE* (1996).

⁴⁶ For a catalog of the multiple failed attempts, *see* VAN HARTEN, *supra* note 11 at pp. 18–23.

⁴⁷ *See generally* STEPHAN SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

investor owns or controls, directly or indirectly”.⁴⁸ This includes, in particular, but not exclusively: stocks, bonds, debentures, claims to money, tangible and intangible property, intellectual property, contract rights, and more.⁴⁹ The standard definition is broad enough to encompass not only so-called “greenfield” investments but also cross-border mergers and acquisitions and, unless explicitly excluded, portfolio investments.⁵⁰

When combined with the fact that most investment treaties protect both natural and juridical persons as investors, this can lead to some surprising results: host state nationals can sometimes bring international arbitration claims against their own governments simply by incorporating a shell company abroad;⁵¹ shareholders who would have no derivative cause of action under domestic law for a drop in share value brought about by a generally applicable regulatory measure can claim compensation from the state under international law;⁵² foreign investments can benefit from broad international legal protections irrespective of whether they contribute anything of lasting value to the host state or its economy;⁵³ and now, after a 2011 jurisdictional decision that went against Argentina,⁵⁴ foreign speculators in sovereign bond markets may enjoy special guarantees against sovereign default while domestic bondholders (and non-covered foreign bondholders) must accept “haircuts” in the form of debt restructuring deals.

⁴⁸ U.S. Model BIT 2012, *supra* note 21, at art. 1.

⁴⁹ *Id.* arts. 1(a)–(h).

⁵⁰ Both majority and minority shareholdings have been found to fall within the scope of investment treaty protections, even where the investor does not hold significant voting or control rights.

⁵¹ *See, e.g.* Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 1–4, 14–71 (Apr. 29, 2004), 20 ICSID REV.—FOREIGN INV. L.J. 205 (2005); (finding that a Lithuanian company could bring treaty claims against Ukraine, despite the fact that the company was incorporated by Ukrainian nationals using funds imported from Ukraine to Lithuania); *but see* Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Dissenting Opinion [of Prosper Weil] (Apr. 29, 2004), 20 ICSID REV.—FILJ 245 (2005) (reaching opposite conclusion) and TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award (Dec. 19, 2008) (departing from the Tokios Tokelés approach, though the dissenting arbitrator embraced it). Some treaties, like the Energy Charter Treaty, contain provisions which prohibit domestic investors from doing this kind of end-run around their own domestic court systems, but many other treaties do not.

⁵² Argentina has raised this point as a jurisdictional objection in two-dozen of the claims arising out of its 2001 financial crisis. It has lost the objection each time. *See* Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Decision on Jurisdiction (Aug. 16, 2012) [hereinafter *Daimler*], ¶ 91.

⁵³ The *Salini* tribunal famously read an “economic contribution” requirement into the ICSID Convention, but the validity of this move has been disputed, and many tribunals have declined to follow suit. *See* Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Award, ¶ 52 (Jul. 23, 2001), 42 ILM 609 (2003).

⁵⁴ *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4 2011), [hereinafter *Abaclat – Jurisdiction*].

From a business perspective, it makes perfect sense to treat all forms of business participation the same. All are essentially profit-seeking activities, and the decision to pursue one over the others is often made for pragmatic reasons. But if investments need not be truly foreign, nor direct, nor even “investments” in the classical sense of these words⁵⁵ in order to qualify for special protections under contemporary investment treaties, then it becomes difficult to justify the regime under the traditional explanation that it promotes the economic development of host states by encouraging foreign direct investment inflows. This difficulty is propounded by the fact that the empirical literature is beginning to make the investment treaty bargain, in particular, look rather one-sided. Empiricists have so far found little evidence to suggest that investment treaties increase investment flows to the countries that sign them, nor that they reduce political risk insurance premiums for investors.⁵⁶ By contrast, there is ample evidence – in the form of numerous damages awards – that the treaties can impose significant costs on host states.⁵⁷ This empirical lopsidedness supplies yet another reason for the growing perception that international investment law privileges “private” investor rights over all other “public” interests.⁵⁸

3. Vague treaty standards and the elision of rights and interests

A third reason for the perceived imbalance between private and public rights is that states’ legal obligations toward foreign investors under international investment treaties are notoriously vague. They are drafted in the form of broad standards rather than precise obligations. While there are minor differences in wording across treaties, most of them obligate states to do six basic things: provide fair and equitable treatment and full protection and security to the foreign investment; guarantee the free transferability of the investment and its associated returns; treat foreign investors at least as favorably as the State’s own investors (national

⁵⁵ Since some – like sovereign bonds – may be of an entirely speculative nature, capable of being bought and then sold on an international exchange within a span of minutes.

⁵⁶ See Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT’L L. 397 (2011) (summarizing the existing empirical literature which shows investment treaties do not produce increases in investment inflows, and finding additionally that investment treaties do not seem to factor into the decision-making processes of company executives when deciding whether to undertake foreign investments nor of risk insurers when calculating premiums for political risk insurance policies).

⁵⁷ Of course, there are just as many cases wherein investors receive no compensation. (See *supra* note 35.) But this does not satisfy critics who would like to see a demonstrable benefit to host states that is of a sufficient scale to offset the damages paid out in the 50% (on average) of claims lost.

⁵⁸ I discuss some possible alternative justifications for the regime in part III.C. *infra*. Unfortunately, none of these has yet been empirically tested, and data limitations may well prevent their theoretical benefits from ever being conclusively demonstrated.

treatment) and the investors of any third state (most-favored nation treatment); and not to expropriate the investment except for a public purpose, in accordance with due process, and against prompt, adequate and effective compensation – generally interpreted as requiring compensation at fair market value.

All of these obligations sound quite reasonable in the abstract. The difficulty lies in applying them consistently across diverse factual and legal contexts. There are at least three components to the problem. First and foremost is the ambiguity of the textual provisions themselves. What is an expropriation, exactly? Does it cover only physical confiscations of property or also other types of measures having a confiscatory effect? Can a substantial diminution in the value of a property brought about by a government regulatory measure amount to an indirect expropriation?⁵⁹ Can a series of small measures, like progressive tax increases, add up to a “creeping expropriation?”⁶⁰ The fair and equitable treatment standard leaves even more room for interpretation. What does it mean for a government action to be fair and equitable? Fair to whom, and in what sense? Equitable in relation to which standard of reference? Should one look to domestic law, customary practice, the investor’s subjective expectations, or the arbitrator’s own personal sense of fairness?⁶¹

This latter set of questions points to the second aspect of the vague standards problem: they are interpreted on a case by case basis by arbitrators hailing from different backgrounds, each of whom at some level imbues the words of the treaty⁶² with meaning derived from his or her own experience.⁶³ A U.S. trained arbitrator may implicitly read ideas drawn from the American regulatory takings jurisprudence into an expropriation analysis, while a French arbitrator may read-in French and perhaps also European law understandings.⁶⁴ Small wonder, then, that the

⁵⁹ In U.S. parlance, a regulatory taking.

⁶⁰ For a discussion of these questions, see RUDOLF DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008), pp. 89-118.

⁶¹ The NAFTA member countries attempted, in 2001, to bring some clarity to NAFTA chapter 11’s fair and equitable treatment standard by issuing an interpretive note specifying that this standard was meant to reflect the minimum standard of treatment found in customary international law. See Notes of Interpretation of Certain NAFTA Chapter 11 Provisions, NAFTA Free Trade Commission (July 31, 2001), part 2, available at: http://www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf. The utility of this clarification remains disputed, however, since the content of the customary law standard is itself a matter of longstanding debate. See DOLZER AND SCHREUER, *supra* note 60, pp. 119-32.

⁶² Or contract or statute, as the case may be.

⁶³ I do not suggest that arbitrators intentionally impart nationalistic interpretations upon treaty provisions, only that it is human nature to make sense of new information by reference to an existing knowledge base.

⁶⁴ For an extensive discussion of the relationship between arbitrator appointment practices and outcomes, as well as the impact of arbitrator characteristics upon decision-making trends, see Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* (Working Paper) (on file with author) (finding that investment arbitrators are more lenient to host

same treaty standards are sometimes interpreted by different arbitral tribunals in diametrically opposed ways.⁶⁵

Third, the textual ambiguities pose quandaries concerning the very nature of investment disciplines. Are investors rights-holders under investment treaties (since they can lodge claims against host states for violations of treaty obligations)? Or are they mere third party beneficiaries who hold a derivative interest in states' observance of their reciprocal legal obligations (since the investors themselves are not parties to the treaty)?⁶⁶

The treaty standards are so vague that it's difficult to distinguish between rights and interests. Perhaps this explains why arbitral tribunals have tended to elide the two. The fair and equitable treatment standard, for example, has been interpreted as requiring states to protect the legitimate, investment backed expectations of investors concerning their investments.⁶⁷ Do investors then have a right to, or merely an interest in, the protection of their legitimate expectations? Since the concrete components of vague treaty standards are articulated by arbitrators rather than by treaty drafters, it seems strange to call those components rights. But if investors can obtain compensation when states act in ways that contravene their expectations, then the academic distinction between rights and interests becomes moot in any event. The ambiguity of the legal obligations creates an environment wherein investor perceptions seem to matter more than legal doctrine.⁶⁸ This again fuels the concern that the regime favors private investor rights over competing public interest concerns.

countries from their own legal family, and that other aspects of arbitrator experience and training also play an important role in investment arbitration decisions, even after controlling for industry fixed effects and country characteristics).

⁶⁵ Franck refers to this as "privatizing public international law through inconsistent decisions." Franck, *supra* note 41. For an analysis of inconsistent interpretations of most-favored nation clauses, see Julie A. Maupin, *MFN-based Jurisdiction in Investor-State Disputes: Is There any Hope for a Consistent Approach?*, 14(1) J. INT'L ECON. L. 157 (2011).

⁶⁶ For a discussion of this debate, see Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States*, 104 AM. J. INT'L L. 179, 184-5 (2010).

⁶⁷ See *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 152-74 (May 29, 2003), 19 ICSID Rev.—FILJ 158 (2004) (discussing fair and equitable treatment and legitimate expectations). Numerous subsequent tribunals have adopted the same approach. For criticism of this approach, see *Suez v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, Separate Opinion of Pedro Nikken, ¶¶ 2-3, 22-27 (July 30, 2010) (objecting to what he regards as the arbitral invention of the legitimate expectations and stability and predictability doctrines within fair and equitable treatment analysis) [hereinafter *Suez – Dissenting Opinion*].

⁶⁸ For an arbitral refutation of the tendency to accept investor perceptions as law, see *Daimler*, *supra* note 52 at ¶ 246.

4. Extra-democratic dispute settlement

Where the rubber really hits the road, however, in terms of the investment regime's public versus private debate, is in its peculiar brand of investor-state dispute settlement. After all, legal challenges to governmental regulatory activities are hardly a new phenomenon. What makes them novel in the international investment law context is the fact that they are decided entirely outside of the constitutional framework of the state engaging in the regulation. The individuals who decide investor-state disputes are private arbitrators who – for reasons having to do with the perception of neutrality – do not hail from the state concerned. They are not subject to any kind of domestic democratic control. They are, by design, strangers to the legal, political, social, and cultural traditions of the state whose actions they are evaluating.

In most cases, two of the three arbitrators are appointed by the disputing parties themselves – one by the investor and one by the respondent state. The presiding arbitrator is then appointed either by agreement of the parties or their appointed arbitrators or, more commonly, by a designated institutional appointing authority from one of the major arbitration institutions.⁶⁹ This arrangement leads to predictably strategic appointment behaviors. The investor-claimant appoints an arbitrator either believed to be generally pro-investor or known to favor the arguments the investor intends to bring in the particular dispute. The respondent state does likewise, appointing the arbitrator it believes most likely to absolve it of any financial liability. And while party-appointed arbitrators do not always fulfill the expectations of their appointing parties, they appear to do so with sufficient frequency to fuel concerns that the system is biased by design.⁷⁰

Some critics contend that a systemic bias extends to presiding arbitrators as well – the crucial swing vote in many cases. The argument is that, because all three arbitrators are paid by the disputing parties, and only investors (not states) can initiate arbitration proceedings, presiding arbitrators who wish to safeguard the possibility of future investor-state arbitration appointments have an incentive to ensure that investors win

⁶⁹ The arbitration-related institutions that play the biggest role in investor-state disputes include ICSID, the Permanent Court of Arbitration [hereinafter PCA], the International Chamber of Commerce [hereinafter ICC], the London Court of International Arbitration [hereinafter LCIA], the Stockholm Chamber of Commerce [hereinafter the SCC] and UNCITRAL. The first five all offer institutional administration of investor-state disputes, while the last is an inter-governmental body that promulgates a set of procedural rules (commonly referred to as the UNICTRAL arbitration rules) that are used in most “ad hoc” (meaning not institutionally administered) investor-state arbitrations.

⁷⁰ Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN*, ch. 42 (Mahnoush Arsanjani et al., eds., 2011) (finding that dissenting opinions almost always favor the party who appointed the dissenter). See also the collected papers in *Arbitrator Bias*, 4 *TRANSNAT'L DISP. MGMT SPECIAL* (2008).

with some frequency.⁷¹ I have reservations as to the accuracy of such incentive arguments.⁷² Nevertheless, when one adds to the *suggestion* of biased decision-making the facts that: 1) investor-state disputes may impact upon matters of concern to persons who are not before the tribunal, 2) the decisions of investment arbitrators are generally not reviewable in domestic courts,⁷³ and 3) the monetary awards issued by investor-state tribunals are often directly enforceable through the attachment of state-owned resources in dozens of countries around the world,⁷⁴ it becomes easy to see why the regime is described as suffering from a legitimacy crisis.⁷⁵

What is not so obvious, however, is how conceiving of the regime as either a transnational public regulatory system or, alternatively, a private dispute settlement system does anything to resolve the crisis. But before turning to this quandary, it is necessary to fill in one more missing piece of the puzzle. What kinds of public/private dilemmas have actually arisen in investor-state disputes, and why we should care about them? The next section answers these questions by reference to three specific case studies.

⁷¹ For an argument along these lines, see Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION*, (Michael Waibel et al, eds., 2010), ch. 9.

⁷² I find the arbitrator self-interest argument deficient on at least two fronts. First, to the extent that party-appointed arbitrators tend to find in favor of their appointing parties, it seems more likely that this may happen because the appointing parties did a good job of vetting the arbitrators' proclivities in advance (viewpoint bias) rather than because arbitrators are strategically angling to procure a stream of future appointments (incentive bias). Second, the self-interest argument is rather complicated as applied to presiding arbitrators. Even assuming such arbitrators wish to maximize their own personal reappointment prospects, it is not clear that this would be accomplished by favoring claimants over states, since the overall survival of the regime depends upon continued state support. In a more recent article, Van Harten has backed away from the more generalized bias argument, instead suggesting that there is some tentative empirical evidence of a systemic bias in favor of "claimants in general and claimants from major Western capital-exporting states in particular." Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, OSGOODE HALL L.J. (forthcoming 2013), p. 6 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149207 [hereinafter Van Harten – *Arbitrator Behaviour*]. To my knowledge, this more limited claim has not yet been either replicated or refuted.

⁷³ Except on the very limited grounds set out under article 52 of the ICSID Convention or in some cases under article V of the New York Convention, both *supra* note 22.

⁷⁴ Sovereign immunity doctrines render some assets easier to attach than others.

⁷⁵ See references cited *supra* note 41.

C. *What's really at stake? Three examples of public/private clashes*

1. A private concession in public infrastructure services: *Suez et al v. Argentina*⁷⁶

In 1993, Argentina privatized the water distribution and wastewater treatment services for the city of Buenos Aires, an area comprising some eight million inhabitants. A consortium of European companies (the investors/claimants) bid upon and won the 30-year concession contract. Unfortunately, by 2000, Argentina began to experience serious financial difficulties. Faced with massive strikes, riots, runs on the banks, and the ouster of five presidents in ten days, Argentina abandoned the dollar-peso convertibility law which had been the primary guarantor of the concession's profitability. The concession contract entitled the investors to pass the resulting 70% depreciation of the peso along to Buenos Aires' water consumers. As this would have tripled the price of water and rendered it unaffordable to large swaths of the population in the midst of an economic crisis, however, the Argentine government froze the tariffs of all public service utilities and announced the mandatory renegotiation of the concessions.

Dissatisfied with the progress of the renegotiation efforts, the European investors filed an investor-state arbitration claim against Argentina under that country's bilateral investment treaties with Spain, France, and the United Kingdom. The investors claimed that Argentina had, by its emergency measures, expropriated their investment, subjected it to unfair and inequitable treatment, and failed to provide it with full protection and security as required under the treaties. They sought compensation for the full market value of the investment as it stood prior to Argentina's abrogation of the dollar-peso convertibility law, to include 23 years' worth of lost profits calculated at the investment's pre-crisis profitability level.

Argentina defended the suit on the grounds that it had acted out of economic necessity and a duty to protect its population and that it had no reasonable alternative under the circumstances. Several human rights organizations and consumer advocacy groups filed a joint amicus brief urging the tribunal to take into account Argentina's international legal obligations – under several human rights treaties – to ensure uninterrupted access to safe drinking water. The majority of the tribunal paid no heed to either set of public-regarding arguments, however. In an award on liability issued in 2010, the majority of the arbitral tribunal found that Argentina had violated the treaties' fair and equitable treatment standard

⁷⁶ *Suez v. Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Joint Decision on Liability (July 30, 2010), available at <http://italaw.com/documents/SuezVivendiAWGPONo.2.pdf> [hereinafter *Suez – Award*].

by frustrating the investors' legitimate expectations concerning the investment. It did not find the health or human rights implications of allowing the investors to implement the contractually permitted three-fold price hike in the midst of an economic crisis to be relevant to its decision. The tribunal's determination on damages is still pending, though it is expected to be in the hundreds of millions of dollars.⁷⁷

The *Suez* dispute exhibits several features which are typical of many modern-day investor-state arbitration claims. A large number of foreign direct investments are made in sectors which provide essential services to the general public. According to figures from the International Centre for Settlement of Investment Disputes: six percent of all registered ICSID disputes have involved water, sanitation, or flood protection; 13% electric power and energy; 11% transportation; five percent agriculture, fishing and forestry; and 25% oil, gas, and mining.⁷⁸

2. Private financing of public debt: *Abaclat v. Argentina*⁷⁹

Public interest in international investment disputes is not always confined to specific public-service industries or natural resource sectors. Sometimes the public dimensions of disputes are more general in nature. The ongoing *Abaclat* matter, another of the many claims to arise out of the Argentine financial crisis, illustrates this point nicely. *Abaclat* concerns the rescheduling of sovereign debt. After Argentina defaulted on some \$100 billion in external debt in December of 2001, eight major Italian banks formed an association to "represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina."⁸⁰ This association declined to participate in the debt restructuring deal that was offered by Argentina and accepted by the majority of its creditors in 2005. Instead, it launched the first ever mass investor-state arbitration claim. The claim was brought by the Italian association under the Italy-Argentina bilateral investment treaty on behalf of 180,000 Italian holders of defunct Argentine bonds.

Argentina strongly objected to the registration of the dispute, arguing that sovereign bonds sold on international exchanges are not foreign direct

⁷⁷ The size of the investors' claim is not yet a matter of public record. *But see* *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 442 (July 14, 2006), 3 ILM 262 (2004) (awarding investors in similar water concession located in a smaller province a concession of \$US 165.2 million plus interest); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, p. 139, ¶ 2 (May 12, 2005), 44 ILM 1205 (2005) (awarding investors in gas distribution a concession of \$US 133.2 million plus interest).

⁷⁸ ICSID CASELOAD – 2012, *supra* note 24, at 12. Mining is obviously not a direct public service industry, but oil and gas often are, and the ICSID statistics unfortunately do not separate the three.

⁷⁹ *Abaclat* – Jurisdiction, *supra* note 54.

⁸⁰ *Id.*, at ¶ 66.

investments for purposes of the ICSID Convention and that the Argentina-Italy bilateral investment treaty did not contemplate the possibility of mass arbitration claims. Two-thirds of the initial claimants withdrew or settled their claims during the jurisdictional tug of war that ensued. But in August of 2011, a majority of the arbitral tribunal held that it had jurisdiction to entertain the mass action by the remaining 60,000 claimants and that it would proceed to hear the merits of the dispute.⁸¹

The timing of the decision could not have been more momentous. With the Eurozone in full crisis-management mode and the Greek debt restructuring process already underway, disgruntled investors the world over began to consider whether it might be possible to bring similar mass claims against Greece⁸² and perhaps – in the event of an eventual default – against Portugal, Spain, and Italy as well.

It remains to be seen what will happen with the *Abaclat* claim on the merits. Even so, the mere possibility that foreign bondholders might be able to sue for the full par value of defunct sovereign bonds in an investor-state arbitration setting raises important public policy questions. Will allowing such claims encourage holdouts and make future sovereign debt restructurings impossible? If so, what options will be left to heavily indebted countries seeking to recover from crisis episodes? And if national governments can be sued for sovereign default, why not subnational governmental units like states and municipalities? International investment agreements typically hold national governments financially liable for any violations committed by their constituent sub-entities.⁸³ This is noteworthy, since there is increasing evidence that many sub-federal U.S. entities in particular may be carrying large and unsustainable debt burdens.⁸⁴

⁸¹ Arbitrator Georges Abi-Saab, a prominent public international lawyer and former member of the World Trade Organization Appellate Body, wrote a scathing 105-page dissent and then resigned from the tribunal in protest of the majority's decision. See *Abaclat – Jurisdiction*, *supra* note 54, Dissenting Opinion, Georges Abi-Saab.

⁸² Kyriaki Karadelis, *Greece: a new Argentina?*, 7(3) GLOBAL ARB. REV., (June 12, 2012) (noting at least one German law firm had announced plans to bring a treaty claim against Greece on behalf of some German holders of restructured Greek bonds); *Bondholders' Claim Against Greece is Registered at ICSID, as Mandatory Wait-Period Expires on Another Threatened Arbitration*, INVESTMENT ARB. REPORTER (May 30, 2013) (reporting on one filed and one potential claim against Greece).

⁸³ See e.g. U.S. Model BIT 2012, *supra* note 21, art. 2(2) (specifying that the state's obligation to protect investors and their investments applies "to the political subdivisions of that Party"). Such commitments are common in investment treaties. Even if they were not, art. 27 of the Vienna Convention on the Law of Treaties prohibits a state from "invok[ing] the provisions of its internal law [including constitutional federalism provisions] as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 [hereinafter "Vienna Convention"].

⁸⁴ See *State and Municipal Debt: The Coming Crisis?: Hearing Before the Subcomm. on TARP, Fin. Servs., and Bailouts of Pub. & Private Programs of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2011) (testimony of Nicole Gelinias), available at http://www.publicsectorinc.com/psi_articles/2011/02/state-and-municipal-

What the *Abaclat* case makes clear, therefore, is that international investment law may have important implications for how governments go about raising funds and dealing with liquidity crunches. Here it is not simply the public impact of a foreign investment in a particular public service industry that is at issue. It is the government fisc as a whole that is affected.

3. Private property in public health hazards: *Philip Morris v. Australia*⁸⁵

Philip Morris's pending claim against Australia underscores that financially volatile developing country governments are by no means the only ones to face investor-state claims whose ramifications can extend beyond the disputing parties themselves. In November of 2011, the Australian parliament approved the Tobacco Plain Packaging Act (TPP Act). The Act attempts to "reduc[e] the attractiveness and appeal of tobacco products to consumers"⁸⁶ by "prohibit[ing] the use of trade marks, symbols, graphics or images on or in relation to tobacco products and packaging."⁸⁷ Philip Morris responded to the new Australian legislation by filing an investment treaty claim against Australia through its subsidiary, Philip Morris Asia Limited, a Hong Kong company.⁸⁸ It brought the claim under the bilateral investment treaty (BIT) between Australia and Hong Kong.

In its notice of arbitration, Philip Morris has alleged that Australia's prohibition on the display of tobacco-related trademarks has expropriated the value of its shares by "destroy[ing] the commercial value of the [company's] intellectual property and goodwill"⁸⁹ and "undermin[ing] the economic rationale of the investments".⁹⁰ It further claims that the Act violates the treaty's fair and equitable treatment guarantee by frustrating

debt-the-coming-crisis.html. For examples of proposed solutions to the state problem that could be thwarted in the event of an investment treaty claim, see Steven L. Schwarz, *A Minimalist Approach to State "Bankruptcy"*, 59 UCLA LAW REV. 322 (2011); and George Triantis, *Bankruptcy for the States and By the States*, in Peter Conti-Brown & David Skeel, Jr., eds., WHEN STATES GO BROKE (2012).

⁸⁵ See *Philip Morris* – Notice of Arbitration, *supra* note 6; compare *Philip Morris Asia Ltd. v. Commonwealth of Australia*, UNCITRAL, Australia's Response to the Notice of Arbitration (Dec. 21, 2011) [hereinafter *Philip Morris* – Response to Notice of Arbitration].

⁸⁶ *Philip Morris* – Response to Notice of Arbitration, *supra* note 67, ¶ 25 (quoting a submission of the World Health Organization) (internal citations omitted).

⁸⁷ *Philip Morris* – Notice of Arbitration, *supra* note 6, ¶ 4.12.

⁸⁸ The claim was brought under the Agreement Between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, Sept. 15, 1993, 1748 U.N.T.S. 385 [hereinafter the Australia-Hong Kong BIT] and is proceeding under the 2010 UNCITRAL arbitration rules.

⁸⁹ *Philip Morris* – Notice of Arbitration, *supra* note 6, ¶ 7.3(b).

⁹⁰ *Id.*, ¶ 7.3(a).

the company's legitimate interests and expectations concerning the profitability of its investment. By way of remedy, the company asks the arbitral tribunal to order Australia to suspend the enforcement of the plain packaging legislation⁹¹ or, in the alternative, to pay Philip Morris compensatory damages for the lost value of its investment "in an amount to be quantified but of the order of billions of Australian dollars."⁹² Uruguay is facing a similar claim by Philip Morris,⁹³ and the company has threatened parallel suits against other countries that are debating the merits of plain packaging legislation.

These cases test the degree to which international investment law may limit the scope – or raise the price – of a sovereign's right to regulate in the interests of the public. In civil society discourse, this question has become known as the regulatory chill problem.

The basic idea motivating this concern is straightforward. As scientific research advances over time and social attitudes evolve, public policy must adapt. This is as true of public health policy as it is of environmental preservation, financial regulation, and just about every other conceivable area of governmental regulation. Yet if investment treaties are interpreted as requiring governments to pay compensation to foreign investors whenever general welfare-enhancing regulatory activities somehow reduce investor profits, then governments will be hesitant to regulate in the public interest. In some cases, where the price is too high and the government budget too small, governments may even find themselves financially incapable of doing so.

Fears about regulatory chill are understandable in light of the fact that investor-state disputes often involve high stakes.⁹⁴ The Big Tobacco disputes are multi-billion dollar claims, as is the recent claim by Swedish energy company Vattenfall against Germany.⁹⁵ Of course, investors don't always win these challenges, and even when they do, they rarely recover the full amount of their claims.⁹⁶ Still, the financial implications for states

⁹¹ *Id.*, ¶ 8.2.

⁹² *Id.*, ¶ 8.3.

⁹³ Philip Morris Brand Sàrl (Switzerland) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration (Feb. 19, 2010), *available at* <http://italaw.com/sites/default/files/case-documents/ita0343.pdf>. The named companies are subsidiaries of Philip Morris International, which has its operations center in Switzerland. Thus, the claim is proceeding under the Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, Oct. 7, 1988, 1976 U.N.T.S. 413 [hereinafter Switzerland-Uruguay BIT].

⁹⁴ Susan Franck, *The ICSID Effect? Considering Potential Variation in Arbitration Awards*, 51(4) VA. J. INT'L. L. 977, 856 (2011) (reporting the mean amount claimed in ICSID cases to be \$US 424,615,349 and in non-ICSID investor-state arbitration cases to be \$US 169,463,547).

⁹⁵ *Vattenfall*, *supra* note 5.

⁹⁶ Frank, *supra* note 94 at 58–9. The largest known monetary award to-date came to \$US 1.77 billion. UNCTAD IIA Issues Note No. 1 (May 2013) – Recent Developments in

can be significant. The Czech Republic lost an infamous dispute over media licensing that resulted in it having to pay out \$355 million to a foreign investor.⁹⁷ This amounted to the equivalent of its national healthcare budget for that year.⁹⁸ Argentina has faced 41 investor-state claims as a result of its 2001 financial crisis,⁹⁹ the sum total of which at one point exceeded the country's gross domestic product. Greece and other struggling Eurozone countries may soon find themselves in a similar position.¹⁰⁰ Returning to Philip Morris, the Marlboro brand alone has an estimated worldwide value of \$73.6 billion.¹⁰¹ This surpasses the annual GDP of all but the top 18 richest countries in the world.¹⁰²

Does all of this mean that international investment law makes each state's ability to regulate harmful activities a function of the state's overall economic power relative to the strength of a given foreign investor's market power? If so, might large companies operating in small countries effectively enjoy an internationally protected right to pollute? To frack? To strip-mine? To deforest? To sell hazardous consumer products?

Despite the eye-popping numbers and troubling questions – or perhaps because of them – the regulatory chill hypothesis has been hotly debated within the investment arbitration community. Some claim there is no evidence of any kind of chill actually occurring in practice, while others insist they can point to specific instances where governments have declined to take particular regulatory measures for fear of being hit by an investor-state arbitration claim.¹⁰³ These assertions deserve to be

Investor-State Dispute Settlement (ISDS), p. 1, available at: <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=453>.

⁹⁷ CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Final Award (Mar. 14, 2003), available at http://italaw.com/documents/CME-2003-Final_001.pdf. The case is infamous because the company won its claim under the Czech-Netherlands BIT while its sole shareholder, Ronald Lauder, lost his parallel (and identical) claim under the Czech-U.S. BIT. Cf. Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award (Sep. 3, 2001), available at <http://italaw.com/sites/default/files/case-documents/ita0451.pdf>.

⁹⁸ Mihir A. Desai & Alberto Moel, *Czech Mate: Expropriation and Investor Protection in a Converging World*, 12(1) REV. OF FINANCE 221, 222 (2008), available at http://dev.wcfia.harvard.edu/sites/default/files/928__SSRN_ID585843_code57621.pdf.

⁹⁹ Of the 41 cases, 15 had been concluded and 26 were still pending as of the end of January 2011. See Luke Eric Peterson, *Argentina by the numbers: where things stand with investment treaty claims arising out of the Argentine financial crisis*, INV. ARB. REP. (Feb. 1, 2011).

¹⁰⁰ See *supra* note 82.

¹⁰¹ *BrandZ Top 100 Most Valuable Brands 2012*, MILLWARDBROWN.COM http://www.millwardbrown.com/brandz/2012/Documents/2012_BrandZ_Top100_Chart.pdf (showing Marlboro as the seventh most valuable brand worldwide, with a value of \$73.6 billion, up 9% from 2011).

¹⁰² *Gross Domestic Product Ranking Table*, WORLD BANK.ORG, <http://data.worldbank.org/data-catalog/GDP-ranking-table>.

¹⁰³ See e.g. Matthew C. Porterfield & Christopher R. Byrnes, *Philip Morris v. Uruguay: "Will investor-State arbitration send restrictions on tobacco marketing up in smoke?"*, INV. TREATY NEWS (July 12, 2011) (stating that the RJ Reynolds Tobacco Company's

investigated from an empirical perspective. For now, what is not subject to debate is this: in the present Philip Morris dispute, three privately appointed, non-Australian arbitrators will decide what price Australia must pay, if any, for its most recent effort to reduce the public health scourge of cigarette smoking.¹⁰⁴

D. *Categorical accounts: private dispute settlement or public governance?*

The *Suez*, *Abaclat*, and *Philip Morris* case studies and the foregoing discussion of international investment law's structural peculiarities have shown that the stakes are high in this game. They have also revealed an undeniable, intuitive appeal behind the impulse to discuss the regime's makeup in public/private terms. The trouble with grounding a normative debate upon intuition, of course, is that it is notoriously fickle. What a foreign investor regards as quite evidently a private issue – and the personal value that s/he consequently attaches to that fact – may differ quite dramatically from what a state or its citizens might consider to be private about that particular investor's investment activities. Much depends upon one's point of view.¹⁰⁵

Nevertheless, the bulk of the contemporary discourse in international investment law can be divided into two camps: the private dispute settlement camp and the public regulatory regime camp. Anthea Roberts has described the battle between the two camps as a clash of paradigms.¹⁰⁶ This seems correct as a descriptive matter, but it tells us little about whether one paradigm better reflects the interests of the regime's stakeholders or whether there is reason to believe that one does a better

threat to sue Canada under NAFTA chapter 11 “is widely believed to have deterred the government from taking legislative action on plain packaging”), available at <http://www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/>.

¹⁰⁴ The investment treaty claim is proceeding notwithstanding the fact that Philip Morris just lost its challenge to the TPP legislation before the Australian High Court. See Simon Chapman, *Big Tobacco Crashes at First Legal Hurdle on Plain Packaging*, THE CONVERSATION (Aug. 15, 2012), available at <http://theconversation.edu.au/big-tobacco-crashes-at-first-legal-hurdle-on-plain-packaging-8807>.

¹⁰⁵ See discussion *supra*, notes 14–19 and accompanying text.

¹⁰⁶ Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2033167. Roberts actually identifies four competing paradigms: the commercial arbitration, human rights, trade, and public international law paradigms. While she is correct to point out the nuances separating these perspectives, the latter three all share in common the view of international investment law as a type of transnational global governance regime (albeit with different policy priorities and structural contexts). For my purposes, they can be grouped together and distinguished from the “international investment law as private dispute settlement” view, which is characteristic only of the commercial arbitration paradigm.

job of resolving conflict of rights problems than the other.¹⁰⁷ In order to consider these questions, a few words about the two main scholarly perspectives are in order.

1. Private dispute settlement framing

The private dispute settlement camp is comprised of those who analogize international investment law to transnational commercial law and regard it as having little or no public impact. They view host states' investment law obligations to foreign investors as akin to private contractual commitments and view investor-state arbitration (whether conducted under treaties, contracts, or statutes) as an extension of ordinary commercial arbitration. This perspective emanates primarily from practitioners and scholars of international commercial arbitration.¹⁰⁸ It remains underdeveloped as a theoretical account of the international investment law regime,¹⁰⁹ yet it dominates much of the investor-state arbitral jurisprudence.

The popularity of the approach often puzzles outsiders, but its appeal becomes clearer when one considers three facts. First, the process by which investor-state disputes are decided is modeled on international commercial arbitration.¹¹⁰ Second, around two-thirds of known investment arbitrators hail from a commercial arbitration background.¹¹¹ And third, in the latter half of the 20th century, the vast majority of investor-state disputes involved claims for breach of contract, which for all intents and purposes looked very much like ordinary commercial disputes.¹¹² The private dispute settlement model functions quite well in such circumstances, so it is no surprise that arbitrators from commercial law backgrounds became the go-to appointees for resolving these disputes.

¹⁰⁷ Roberts herself remains agnostic on these questions, predicting that the different paradigms will continue to do battle—sometimes advancing and sometimes retreating—but that no single paradigm will win out in the end.

¹⁰⁸ See references cited *supra*, note 12.

¹⁰⁹ Indeed, there is a paucity of theoretical scholarship on international arbitration more broadly. For one attempt at theorizing the field, see EMMANUEL GAILLARD, *ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL* (2008).

¹¹⁰ Four of the six sets of arbitration rules applied most frequently in investor-state arbitrations (including the UNCITRAL, ICC, LCIA, and SCC rules) were drafted specifically to facilitate contract-based international arbitrations. Only the ICSID and PCA rules have been updated to accommodate the unique features of treaty-based investor-state arbitration.

¹¹¹ Waibel & Wu, *supra* note 64, p. 28 (noting that more than 60% of known investment treaty arbitrators in ICSID cases are in full-time private practice and more than half “wear a second hat as counsel to investor in other ICSID arbitrations”); Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate*, in *THE EVOLVING INTERNATIONAL INVESTMENT REGIME* 174, 186 (Jose E. Alvarez & Karl P. Sauvant eds., 2011) (characterizing the current pool of investment arbitrators as “rooted in international commercial arbitration”).

¹¹² See *supra*, note 24 and accompanying text.

Serious complications arise, however, in transferring the private dispute settlement mindset from the contract-based world to the treaty-based world. In contract-based arbitrations, the goal of the tribunal is to hold the contracting parties accountable to their reciprocal contractual commitments by requiring the breaching party to make the other party whole – typically by payment of compensation. This objective respects the principle of party autonomy inasmuch as the disputing parties before the tribunal are the contracting parties themselves. A cardinal corollary here is that the arbitral tribunal must limit itself to deciding the issues in dispute between the contracting parties on the basis of the contract. Its award is not permitted to impact upon the rights of any parties who are not before the tribunal.¹¹³

In treaty-based arbitrations, by contrast, only one of the disputing parties – the respondent State – is a contracting party to the treaty. The other contracting party (the investor’s home State) is not before the tribunal, and its views on the proper interpretation of the treaty are often not known.¹¹⁴ There are no reciprocal obligations between the disputing parties to which the tribunal can hold them *mutually* accountable, since investment treaties bestow obligations only upon states, not upon investors. Moreover, the open-textured nature of treaty provisions like “fair and equitable treatment” stands in contradistinction to the specificity of most contractual obligations. This, in turn, increases the chance that a tribunal’s interpretation and application of a vague treaty provision may inadvertently impact upon the rights of persons not before the tribunal.

Adherents of the private dispute settlement paradigm do not take sufficient account of these three major differences between contract-based and treaty-based disputes. Rather, they tend to deal with the appearance of public interest issues within international investment disputes in one of two ways. The first method is to hide behind the smokescreen of limited jurisdiction.¹¹⁵ For example, a tribunal may claim that it has no jurisdiction to consider a human rights argument in relation to an alleged investment treaty violation, because to do so would constitute an *excès de pouvoir*.¹¹⁶ I label this method a smokescreen because it raises a

¹¹³ With some exceptions for sub-contracting parties, subrogated entities in interest, etc.

¹¹⁴ There are exceptions, such as in the NAFTA system, which allows all three NAFTA contracting States to submit their views on the proper interpretation of the treaty’s provisions to any investor-state tribunal, even when they do not appear as defendant in the particular dispute.

¹¹⁵ This is a natural outgrowth of applying a commercial arbitration mentality, since commercial arbitrators can only exercise jurisdiction over the parties to the contract containing the arbitration clause and can only authoritatively decide claims arising out of the legal instruments put before them by the disputing parties.

¹¹⁶ For an argument along these lines, see Matthew Coleman & Kevin Williams, *South Africa’s Bilateral Investment Treaties, Black Economic Empowerment and Mining: a Fragmented Meeting*, 9(1) BUSINESS L. INT’L 56, 89-94 (2008) (arguing that an investor-state tribunal hearing an investor’s challenge to South Africa’s black economic empowerment legislation lacked competence to consider the human rights purposes of

conundrum well-known to followers of the ongoing fragmentation debate within international law.¹¹⁷ That is, in the name of arbitral restraint, the tribunal asserts the power to undermine the state's non-investment law-based legal commitments by refusing to take them into account when interpreting the state's investment-law-based legal commitments. This effectively, even if unwittingly, aggrandizes investment law at the expense of other bodies of international and domestic law.¹¹⁸

The second common method for handling conflicts between investor and non-investor rights within the private dispute settlement framing is by making conclusory findings of "no actual conflict". The above-described *Suez* case illustrates this method well. There, the majority of the tribunal found that Argentina was required to respect the foreign-owned water company's original concession terms notwithstanding the fact that the economic crisis had made the contractually stipulated water prices unaffordable to most citizens of Buenos Aires. It found that there was no actual conflict (aka no conflict *in law*) between Argentina's human rights obligation to ensure uninterrupted access to safe drinking water to its citizens and its investment law obligation to abide by the contract. In the tribunal's view, Argentina could have done both simultaneously by directly subsidizing the cost of the water service at the pre-crisis contract rate.¹¹⁹ What the tribunal declined to specify, however, was where Argentina might have found the money to do this *in fact* in the midst of the liquidity crisis.¹²⁰ So applied, this second method becomes as much of a mirage as the first.

the legislation or the content of South Africa's international human rights treaty commitments).

¹¹⁷ See generally, Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* UN Doc A/CN.4/L.682 (Apr. 13 2006) (by Martti Koskenniemi).

¹¹⁸ Remarkably, tribunals operating within this mindset often fail to consider other sources of law notwithstanding the fact that most investment treaties explicitly direct tribunals to apply not only the provisions of the investment treaty, but also the domestic law of the host state and any relevant rules of international law. See, e.g. article 8(4) of the UK-Argentina BIT (one of the BITs upon which the *Suez* dispute was based), stating:

The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, the laws of the Contracting party involved in the dispute, including its rules on conflict of laws, the rules of any specific agreement concluded in relation to such an investment and the applicable principles of international law.

¹¹⁹ *Suez* – Award, *supra* note 76 ¶ 262 (“[u]nder the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, in the tribunal's view, Argentina could have respected both types of obligations.”).

¹²⁰ In making this observation, I do not suggest that the investor should have been forced to provide free water to the citizens of Buenos Aires. However, had the dispute proceeded as a contractual matter rather than as a treaty matter, the tribunal would have had to consider whether the change of circumstances brought about by the devaluation of the peso called for a reduction in the originally specified contractual rate of return.

The shallowness of both interpretive methods helps explain why *amicus curiae* briefs have so far failed to make an appreciable impact on the outcome of investor-state disputes. The private dispute settlement framing of the regime essentially ignores rather than resolves conflicts between the rights of the investor/claimant and the non-investment related rights of others. The fact that this framework is nevertheless still applied in actual treaty-based investor-state disputes involving clear public interest concerns is testament to the strong normative pull of the regime's historical commercial arbitration orientation.

2. Transnational public governance regime framing

On the opposite end of the debate are those who analogize international investment law to domestic administrative and/or constitutional law and regard it as a public governance regime operating on a transnational scale. Gus van Harten laid the groundwork for this approach with his 2007 book, *Investment Treaty Arbitration and Public Law*.¹²¹ In it, he argued that international investment arbitration is best viewed as a transnationalized form of “public law” in that it essentially reviews the validity of state regulatory actions in a manner reminiscent of domestic constitutional or administrative law orders. A year later, David Schneiderman proffered a kindred analysis, arguing that international investment law was “constitutionalizing economic globalization”.¹²² Santiago Montt followed with a 2009 book presenting international investment law as a form of spontaneously emerging global administrative law.¹²³ And most recently, Stephan Schill has been advancing the notion of international investment law as “comparative public law”¹²⁴ or “international public law”¹²⁵ (not to be confused with public international law) – also stressing the regulatory review function of the regime.¹²⁶

Each of these works does an admirable job of highlighting the international investment law system's key sources of regime stress. Each points out the links between these stresses and similar problems found in domestic law – in particular the difficulties inherent in balancing individual rights and societal interests in the course of adjudication.¹²⁷ What is most striking about this strand of scholarship, however, given the remarkably similar way in which its authors conceive of the investment

¹²¹ VAN HARTEN, *supra* note 11.

¹²² SCHNEIDERMAN, *supra* note 11.

¹²³ MONTT, *supra* note 11.

¹²⁴ Schill (ed) – IIL & COMPARATIVE PUBLIC LAW, *supra* note 11.

¹²⁵ Schill – *New Public Law Approach*, *supra* note 11.

¹²⁶ For the most recent installment in the administrative law inspired angle, see Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53(2) HARV. INT'L L.J. 391 (2012).

¹²⁷ Jack Goldsmith and Daryl Levinson provide an insightful analysis of the similarities between carrying out this task at the international and domestic levels in *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

law regime, is the vastly divergent set of prescriptive recommendations it generates in addressing the common problems identified.

Van Harten proposes the creation of a standing judicial body, the “world businessman’s court”, to eliminate the incentive problems of party-appointed arbitrators. Schneiderman is more concerned about democratic accountability and therefore favors returning all investment disputes to the national courts. Montt takes a two-fold approach, on the one hand urging that the system be given time to spontaneously converge upon a *détente* stasis through the operation of network effects while on the other hand urging arbitrators (along with Schill) to help the system along by anchoring their decisions in comparative administrative law reasoning.

These solutions lie at very different points along the spectrum of possibilities, alternately proposing a complete scrapping, major re-design, or mild reform of the existing system. Each solution has its merits and demerits. But taken together as a group, what they point out is that characterizing the international investment law regime as a transnational public governance system does not, on its own, necessarily resolve the tensions between investor and non-investor rights.¹²⁸ In fact, it may do no better than the private dispute settlement characterization of the regime on this score.¹²⁹ The end result would seem to depend upon which particular approach to “public governance” is adopted.

3. Evaluating the two paradigms

Does one perspective nevertheless take better account of the competing stakeholders’ interests than the other? At first blush, the private dispute settlement story appears to align well with the interests of the foreign investors protected by the regime, at least when they find themselves appearing as claimants in disputes with host states. After all, investors who file investor-state arbitration claims against host states do so for self-interested reasons. They do not principally concern themselves with the broader societal reverberations of their claims. Rather, they seek to obtain individual satisfaction of their grievances. A view of international investment law which focuses on its role as an efficient

¹²⁸ I note that parallel discussions about this difficulty are also occurring within international law more broadly. *See, e.g.* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 518–23 (2005); CUTLER, *supra* note 41. *See also* Laura Dickenson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006); *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT (Jody Freeman & Martha Minow eds., 2009); LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PROTECTING PUBLIC VALUES IN AN ERA OF PRIVATIZED FOREIGN AFFAIRS* (2011).

¹²⁹ An illuminating side-by-side comparison of public international law and private international law conflict resolution techniques can be found in Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law*, 22 DUKE J. COMP. & INT'L L. 349 (2012).

means for settling specific disputes comports well with their objectives as investor-claimants.¹³⁰

As soon as an investor takes off its claimant hat and dons its award-holder's hat, however, the picture changes. At that point, the investor's main concern is to obtain actual payout on the award. But to the extent that the award itself – by failing to show sufficient deference to governmental regulatory prerogatives – invites civil society criticism and generates political opposition, the investor faces a correspondingly reduced prospect of recovery. The actual investor-friendliness of the private dispute settlement model, at the end of the day, is thus *inversely* related to the degree to which non-investor concerns are negatively impacted (or perceived to be impacted) by the award.¹³¹

The public governance framing, on the other hand, excels in accounting for the interests of all who stand outside of the immediate investor-state relationship – broadly speaking, civil society. It takes a holistic view of a state's obligations, placing the state's duties to foreign investors under international investment law alongside its duties to its own citizens under domestic law and to other national and transnational constituencies under other bodies of international law. The public governance view thus incorporates civil society concerns to a much greater degree than the private dispute settlement story.

Its major weakness is that it paints with too broad a brush. While many investor-state disputes do raise important governance concerns, as illustrated by the *Suez*, *Abaclat*, and *Philip Morris* cases, not all of them do. It is not clear what might be gained by analyzing ordinary investor-state breach of contract claims, for example, through the lens of global administrative law, global constitutional law, or international public law. Most of the authors writing within the transnational public governance stream have so far left such disputes to the side. Given that contract-based disputes likely outnumber treaty-based disputes in any given year, this omission is significant.¹³² It could lead to the promulgation of regime reform recommendations (like abolition) that are entirely out of whack with the underlying realities of investor-state arbitration.

¹³⁰ Whether this view is also preferred by foreigners in their role as *putative* investors is a more difficult question. It depends upon strategic and market-based considerations, such as whether the putative investor would be indemnified against any losses caused by changes in the host state's regulations in circumstances wherein a major competitor would not be so indemnified (e.g. because the latter doesn't enjoy the protection of an investment treaty) or the other way around.

¹³¹ The investors who hold awards against Argentina as a result of its financial crisis – all of which remain unpaid – can attest to this inverse relationship. See *Come and Get Me, Argentina is Putting International Arbitration to the Test*, THE ECONOMIST (Feb 18, 2012), at: <http://www.economist.com/node/21547836>.

¹³² The precise number of contract-based investor-state claims is not known, since most of them are probably arbitrated in venues other than ICSID and are therefore never made public.

What about states' interests within the regime? Again, it might appear that the public governance framing of international investment law does a good job of taking these into account. If states are viewed as faithful representatives of their citizenry – consistent with the traditional Westphalian legal fiction – then this might well be so. But since quite a few of the states participating in the international investment law regime are not of the democratic sort,¹³³ it is doubtful whether the interests of states are always aligned with the interests of their domestic constituencies. Some states might be quite happy to sacrifice certain public welfare objectives on the altar of foreign investment protection (and thus prefer the private dispute settlement model); others less so.

Moreover, it is important to bear in mind that states appear only as defendants (never claimants) in treaty-based investor-state disputes.¹³⁴ When operating at the international treaty-making level, by contrast – as they do when *concluding* investment treaties – states occupy the driver's seat. They view themselves as sovereigns bound by nothing but their own voluntary consent.¹³⁵ International relations scholars have long argued that power differentials among states play a key role in the making and sometimes breaking of international law.¹³⁶ If they are right, then it is difficult to see why strong states should embrace the idea of international investment law as a type of transnational public governance regime, since this would entail an unnecessary relinquishment of their power advantages on the international plane. In short, neither side of the international investment regime's ongoing public versus private categorical debate seems to fully capture the interests of investors, states, or third parties.¹³⁷

All of this begs the question whether the tension is really about the regime's "public" versus "private" nature at all, or whether these labels are misnomers serving to obscure deeper normative disagreements between competing sets of stakeholders. In the next part, I peel back the onion a bit further by asking what meaning the terms "public" and "private" actually have in the everyday practice of international investment law.

¹³³ In the past 10 years, for example, China has been one of the most active countries in pursuing international investment agreements with other states. *See generally* Stephan W. Schill, *Tearing Down the Great Wall: the New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007).

¹³⁴ States may bring counterclaims in some circumstances, but only after an investor has initiated an arbitration proceeding against the State in the first place.

¹³⁵ This is permissible under the principle of sovereign equality, as articulated in the well-known "Lotus principle," as described in *Case of the S.S. Lotus (Fr. v. Turk.)*, P.C.I.J. Ser. A, No. 10, 18 (Sept. 7, 1927), although states are of course still subject to peremptory norms of international law.

¹³⁶ *See, e.g.*, JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001); Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 WORLD POL. 317 (1976); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

¹³⁷ At least not when viewed from a rational choice perspective.

II. BETWEEN RHETORIC AND REALITY: INTERNATIONAL INVESTMENT LAW'S PUBLIC/PRIVATE OVERLAPS AND DISJUNCTIONS

Legal scholars have historically distinguished between public and private along three classical axes. The first is the distinction between public and private actors; the second, between public law and private law; and the third, between public international law and private international law. In this part, I consider whether any of these classical distinctions is borne out by international investment law, such that the debate over the regime's public versus private nature might be meaningful along one or more of the three axes.

A. *Public and private actors and functions*

One possible means of differentiating between public and private is to look at the actors involved. This can be done in one of two ways. The first is to reserve the term "public" exclusively for states and their subnational levels of government and apply the label "private" to all non-state actors. This seems to be the usage underlying the public/private tension in the *Abaclat* case: the public (state) fisc is put in peril by the financial claims of private (non-state) actors. The second way of differentiating between public and private is to make a distinction between the individual and the collective. The *Suez* case illustrates this usage by pitting the contract rights of private (individual) investors against the general public's (collective) right of access to water. Regulatory chill concerns appear to blend the two usages. In the *Philip Morris* dispute, for example, the fear is that privately held (by individual, non-state actors) intellectual property rights might make regulating in the interests of public (collective) health too expensive for the public (state) fisc.

How do these two actor-based usages line up with the structural features of international investment law? To answer this question, it is necessary to consider the lawmaking and dispute resolution levels of the regime separately. On the lawmaking side, investment law's three main permutations involve three different sets of actors. International investment treaties are concluded between states (public-public). Investment promotion and protection statutes are enacted unilaterally by domestic governments (public). Investor-state contracts are negotiated between specific states and specific investors (public-private). As a result, an actor-based public/private distinction seems to signal potential public/private conflicts at the substantive lawmaking level only in the case of investor-state contracts,¹³⁸ and then only if the state/non-state usage is

¹³⁸ This observation seems counterintuitive in light of the fact that most of the recent public outcry over international investment law has been directed at treaty-based law, not investor-state contracts. One possible explanation might be that the obviousness of the public/private tensions inherent in investor-state contracts leads states to negotiate them much more carefully than investment treaties, the majority of which were not expected (at least not at the time of their original negotiation) to have much public bite.

adopted. The individual/collective usage has no obvious relevance to the investment lawmaking process.¹³⁹

At the level of dispute resolution, by contrast, there is always nominally a government on one side of the equation and an investor on the other. This holds true irrespective of whether the dispute arises under a treaty, statute, or contract. Thus, all three types of disputes appear, as a matter of first impression, to comport with the state/non-state usage of the public/private actors divide. This impression breaks down upon closer inspection, however. Most disputes arising under investor-state contracts involve ordinary commercial transactions. In commercial relations, respect for principles such as the autonomy of the parties and the need to preserve the benefit of their bargain requires adjudicators to treat states as ordinary contracting parties, which essentially turns these disputes into private-private affairs.

Treaty-based and statute-based disputes are different in that they need not involve a specific contract between an investor and a state¹⁴⁰ and need not arise out of ordinary commercial relations. Even so, it is not obligatory that the dispute must be between a state and a non-state actor. State-owned enterprises make up only a tiny fraction of transnational corporations worldwide, but their outward investment accounted for 11% of global FDI in 2012.¹⁴¹ Similarly, while relatively few countries maintain sovereign wealth funds, those that do have a huge number of assets under management, many of which are invested abroad.¹⁴² And since most investment treaties and domestic investment statutes don't exclude state-owned companies or sovereign wealth funds from their broad definitions of investors and investments,¹⁴³ it is entirely possible to have state actors on both sides of the dispute.¹⁴⁴ The arbitration community, at least, appears to accept that this is so.¹⁴⁵

¹³⁹ One could attempt to give it relevance by complicating the analysis with public choice theory considerations. E.g. it may well be the case that some groups exert a greater influence over domestic lawmaking or treaty ratification processes than others. However, since public choice theory variables such as political power, access, and funding may rest with either discrete individuals or large groups, it is still difficult to describe the international investment lawmaking process in individual versus collective terms. One would need to devise some way of determining what percentage of the potentially affected population enjoyed effective representation during the lawmaking process.

¹⁴⁰ In the case of investment treaties which contain an umbrella clause (obligating the state to abide by any specific commitments it makes to a foreign investor), it is possible to get a mix of contract and treaty claims.

¹⁴¹ UNCTAD – WIR 2013 *supra* note 2733, at xiv.

¹⁴² *Id.* (noting that “[c]umulative FDI by SWFs is estimated at \$127 billion” and pointing out that “more than 70 per cent of SWFs’ FDI in 2012 was targeted at developed economies”).

¹⁴³ Many Middle Eastern treaties even expressly include them.

¹⁴⁴ There has been at least one investment treaty case in which a state entity (the regional government of Kaliningrad) was deemed a protected investor under a BIT. The award remains unpublished, but was reported in Luke E. Peterson, *Lithuania Prevails in*

Conversely, it is also possible to have non-state actors in interest on both sides of the dispute. This can happen where a state delegates a governmental function to a non-state company, and then the company does something that violates the state's investment treaty or statutory obligations toward a foreign investor.¹⁴⁶ Here the international law principles on attribution come into play to transform the non-state company into a state actor, thereby rendering the state liable for the company's actions under international law.¹⁴⁷ All of these scenarios seem to undermine the utility of the strict state/non-state distinction between public and private in international investment disputes.¹⁴⁸

As for the individual/collective distinction, it too suffers challenges. First there is the question of whether claims by multiple claimants may properly be classified as individual, and if so, up to what threshold. Most investment disputes have historically involved between one and five claimants. In the *Abaclat* matter, however, 180,000 claimants participated in the initial filing. If international investment law has now entered an era

Investor-State BIT Claim Brought by Russian Regional Government: ICC Tribunal Rules That Enforcement of Commercial Arbitration Award in Lithuania Cannot Be Challenged as an Expropriation under BIT, 2(5) INV. ARB. REP., 4–5 (2009).

¹⁴⁵ See Claudia Annaker, *Protection and Admission of Sovereign Investment under Investment Treaties*, 10 CHINESE J. INT'L L. Part I.A. (2011). For scholarly perspectives on the complexities of regulating sovereign wealth funds and state-owned enterprises, see Larry Cata Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State Owned Enterprises and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3 (2010); Joel Slawotsky, *Sovereign Wealth Funds as Emerging Financial Superpowers: How U.S. Regulators Should Respond*, 40 GEO. J. INT'L L. 1239 (2009). A more general discussion of some of the international law problems raised by multinational corporations can be found in Jose Alvarez, *Are Corporations "Subjects" of International Law*, 9 SANTA CLARA J. INT'L L. 1 (2011); and Joel Slawotsky, *The Global Corporation as International Law Actor*, 52 VA. J. INT'L L. 79 (2012).

¹⁴⁶ There is a large literature on the public accountability issues attending the delegation of sovereign powers to private companies. See, e.g. Richard J. Pierce, Jr., Book Review, *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216 (2008) (reviewing Paul Verkuil's book on the privatization of governmental functions); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061 (2000); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813 (2000).

¹⁴⁷ See International Law Commission, *Draft Articles on the International Responsibility of States for Wrongful Acts*, art. 5, available at <http://www.unhcr.org/refworld/docid/3ddb8f804.htm>.

¹⁴⁸ Admittedly, the state action doctrine may make it possible to rescue the actor-based distinction in at least some of the scenarios sketched. However, that doctrine has itself been subject to considerable criticism, which puts into question the wisdom of resorting to it in order to rescue an already dubious distinction. See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993) (finding that the scholarly attack on the public-private distinction was successful and that there are no private actions).

in which mass arbitrations are possible, then pouring public and private tensions through the individual/collective sieve begins to fit ill.

In addition to the numbers problem, there are questions as to who is counted among the collective and who gets to speak for the collective interest. Some commentators have pointed out that the activities of non-governmental organizations might qualify as protected investments under investment treaties.¹⁴⁹ This raises the prospect that an investment dispute might involve a state (as representative of the public) on one side versus a civil society organization (as representative of the public interest) on the other. Which one speaks for the collective “public” in such a case? Does it matter whether the state is democratic or authoritarian? Does the breadth of the civil society organization’s support base – local, national, transnational – make a difference? What if the civil society organization is a business lobby instead of a human rights or environmental group?

This points to another drawback of the individual/collective taxonomy: the difficulty in ascertaining the degree to which particular rights or interests actually benefit discrete individuals (e.g. particular investors) versus society as a whole. The ICSID Convention was concluded in the belief that the protection of individual investor rights would increase the cross-border flow of investment to developing countries, which would in turn stimulate their economies and improve the general welfare of their populations.¹⁵⁰ Unfortunately, empiricists have found little support for the first leg in this chain of assumptions.¹⁵¹

But by the same token, the competing thesis – that the societal good is best advanced through the assertion of collective rights – is also contested. This is because the concept of “public interest” is vulnerable to capture by specialized interest groups. Just as it may be difficult to determine in which circumstances the protection of individual investor rights may serve the collective interest, it may be equally difficult to ascertain whether the rights and interests asserted by actors other than investors actually serve the collective interest versus that of the asserting party. As one scholar has noted:

If, however, “public” means serving the interest of the community, and “private” means serving the interest of the

¹⁴⁹ Luke Eric Peterson & Nick Gallus, *International Investment Treaty Protection of Not-For-Profit Organizations*, 10(1) INT. J. OF NOT-FOR-PROFIT L. 47 (2007)

¹⁵⁰ See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ¶ 9, Mar. 18, 1965, 4 I.L.M. 524 (1965) (“Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State; Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States[...].”). The preambles to many international investment treaties reflect the same optimistic trickle down assumption.

¹⁵¹ See Yackee, *supra* note 56 and references cited therein.

individual, it may be a conceptual error to separate the “public” from the individuals within it. The terms “public” and “private,” if used to describe community or individual returns, may be similar to that proverbial glass of water, which may be half full or half empty depending on perspective. A different terminology is in order, one that does not automatically tar one perspective as selfish and one perspective as altruistic. ... Many of the so-called public interests represent the individual preferences, desires, or convictions of the parties supporting them.¹⁵²

Such difficulties suggest that individual and collective rights are inseparably intertwined. Both may play an important role in protecting and promoting the interests of society, just as both may be used to protect and promote the interests of individuals.

For all of these reasons, neither of the principal actor-based characterizations of the public/private divide provides a firm anchor to which one might attach a meaningful debate concerning the international investment law regime’s public versus private nature.

B. Public international law and private international law sources and methods

Does the divide between public international law and private international law supply the distinction sought? Public international law has historically referred to the set of norms “having their source in the international community of States”.¹⁵³ It includes norms binding upon states in their relations with one another¹⁵⁴ and by extension norms binding as between states and the international organizations created by states.¹⁵⁵ It also extends to norms applicable in the relations between states and individuals in circumstances where these norms derive either from international treaties¹⁵⁶ or from customary international law.¹⁵⁷

¹⁵² Marla Mansfield, *When “Private” Rights Meet “Public” Rights: The Problems of Labeling and Regulatory Takings*, 65 U. COLO. L. REV. 193, 201–02 (1994).

¹⁵³ John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952).

¹⁵⁴ J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (4th ed. 1949).

¹⁵⁵ The International Court of Justice effectuated this extension in the International Court of Justice Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, , I.C.J. REP. 174 (1949).

¹⁵⁶ International human rights treaties and international investment treaties both fall within this class.

¹⁵⁷ This is the case, for example, of the international customary law minimum standard of treatment for aliens, which was the forerunner of the fair and equitable treatment standard now contained in most modern investment treaties. *See e.g.* MONTT, *supra* note 11, ch. 1.

By contrast, private international law – or international conflict of laws, as it is referred to in some jurisdictions¹⁵⁸ – comprises “the body of norms applied in international cases to determine the judicial jurisdiction of a State, the choice of the particular system or systems of law to be applied in reaching a judicial decision, and the effect to be given a foreign judgment.”¹⁵⁹ These rules may derive either from domestic or international law.¹⁶⁰

Contemporary international investment law, meanwhile, allows for the three basic types of claims by foreign investors against states already described above: treaty-based, contract-based and statute-based.¹⁶¹ In considering the three classes, the first (treaty-based claims) clearly originates in public international law;¹⁶² the second (contract-based claims)¹⁶³ will in most cases call for the application of private international law rules; and the third (claims based on domestic investment statutes) may implicate either public or private international law, or indeed neither or both, depending upon the terms of the domestic statute.

Can it fairly be said that at least one of these types is fundamentally about private dispute settlement while another is about public governance? In a word: no. The central difficulty in all three types of claims lies in deciding how to reconcile states’ obligations toward investors on the one hand, with their obligations toward non-investors, on the other. This difficulty arises irrespective of whether public international law or private international law applies.

If one limits the scope of the inquiry to investment disputes brought under international investment treaties, as many authors on the public

¹⁵⁸ See e.g. ALBERT V. DICEY, *CONFLICT OF LAWS* (2d ed. 1908).

¹⁵⁹ Stevenson, *supra* note 153 at pp. 561–62. Note however that some of these issues may be removed from the realm of private international law by treaty. This is the case, for example, with the New York Convention, *supra* note 1.

¹⁶⁰ Stevenson, *supra* note 124, at 564–67 (discussing “diverse views of the relationship” between public and private international law, some of which give pride of place to international law and others to municipal law).

¹⁶¹ The latter two possibilities were the ones primarily envisaged by the ICSID Convention at the time of its adoption. Existing IIAs did not then provide for investor-state dispute settlement, only state-to-state arbitration. Indeed, the possibility of treaty-based investor-state dispute settlement appears to have taken the international arbitration community by surprise. See Jan Paulsson, *Arbitration Without Privity*, 10(2) ICSID REV. – FOREIGN INV. L.J. 232 (1995).

¹⁶² In many treaty-based disputes, arbitral tribunals may also find it necessary to have recourse to principles of private international law to determine the extent of an investor’s rights under an international contract (since contract rights constitute a protected interest under most investment treaties) or in applying a treaty’s “umbrella clause”.

¹⁶³ For a discussion of the problem of reconciling investors’ private rights with public interests under a concession contract, see Laura Henry, *Investment Agreement Claims under the 2004 U.S. Model BIT: A Challenge for State Police Powers?* 31 U. PA. J. INT’L L. 935, 936 (2010).

governance side of the debate have done,¹⁶⁴ the basic problem unfolds as follows. Most investment treaties grant a specified set of arbitrarily enforceable protections to a defined class of foreign investors. These protections necessarily exist under public international law, since the protection-granting instrument is itself an international treaty. But other public international law instruments protect the rights of individuals and groups other than investors in diverse areas, including human rights, environmental protection, cultural preservation, financial regulation, trade, and international peace and security.

This multivalent norms scenario was precisely the sticking point in the *Suez* case discussed above.¹⁶⁵ There, several NGOs invoked the Argentine consumers' right to water under the International Covenant on Economic, Social and Cultural Rights in opposition to the investors' assertion of their investment treaty-based right to realize the full extent of their profit entitlements in respect of the Buenos Aires water concession. Both sets of obligations arose out of public international law. Both were subject to the public international law principles governing the interpretation of treaties.¹⁶⁶ The central conflict manifested itself as one of public international law versus public international law. Yet this did not prevent the arbitral tribunal from deciding the dispute under the private dispute settlement model while civil society pundits decried its negative public health impact.¹⁶⁷

What of private international law? Do contract-based investor-state disputes, at the very least, fall squarely within the realm of private dispute settlement, to the exclusion of public governance concerns? Often, perhaps, but not always. To see why not all contract-based disputes are of purely private concern, one need only imagine what the *Suez* dispute might have looked like had it proceeded as a contract-based arbitration rather than as a treaty-based one.¹⁶⁸ This alternate scenario would involve the same facts, the same contractual rights, and the same set of public policy concerns (the right to uninterrupted access to water) that emerged in the wake of Argentina's economic crisis. The legal claims and defenses

¹⁶⁴ The above-mentioned works by Montt, Schill, Schneiderman, and Van Harten, *supra* note 11, for example all deal only with treaty-based investor-state disputes.

¹⁶⁵ See *Suez – Award*, *supra* note 76 and accompanying discussion.

¹⁶⁶ Vienna Convention, *supra* note 83, arts. 31–32.

¹⁶⁷ The same problem arises in disputes brought pursuant to domestic investment statutes. In such cases, domestic law defines the scope of the investors' rights and the state's obligations to the investor and likewise defines the scope of non-investors' rights and the state's obligations to non-investors. Statute-based investor-state disputes, too, must balance investor and non-investors rights in some fashion. The difference is that in a statutory setting this is usually accomplished by applying the domestic legal system's constitutional and other legal parameters, whereas in the public international law setting it should theoretically proceed under the public international law principles governing conflict of norms.

¹⁶⁸ The concession contract did provide for contract-based arbitration of many of the investors' claims. The decision to initiate a treaty-based arbitration instead was strategic.

of the disputing parties would differ, however. The investors would be limited to bringing claims for breach of contract,¹⁶⁹ since the tribunal would have no jurisdiction to decide claims of expropriation and the like. The government, for its part, could take advantage of contractual defenses that were unavailable to it in the treaty setting, such as impossibility or changed circumstances.¹⁷⁰

This re-orientation of the dispute would no doubt significantly impact the manner in which the case would be pled and defended. What it would not do is alter the fundamental task faced by the tribunal. The arbitrators would still have to decide whether, on balance, the investors should receive the full amount of their contractually stipulated 30-year returns (expectations damages), or whether, on balance, the circumstances were such that some lesser recovery would be warranted (reliance damages, perhaps). In the end, the discretion left to the tribunal in the contractual scenario mirrors that of the tribunal in the treaty scenario, because the same competing rights and obligations problem appears in both settings.

Moreover, all putatively private dispute settlement systems are embedded in broader public (in the sense of state-sanctioned) legal regimes. They derive their authority, efficacy, and legitimacy from the support lent to them by the legal machinery of states. In contract-based investment arbitration, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards plays this backstop role.¹⁷¹ Like the ICSID Convention, which serves a similar function in treaty-based arbitrations, the New York Convention is a public international law instrument. The public international law and private international law sides of the investment arbitration coin are thus integrally linked at the enforcement stage irrespective of which body of law breathes life into the disputes at the filing stage.

What these considerations make clear is that the debate over whether international investment law is a private dispute settlement system or a transnational public governance regime does not map onto the distinction, such as it is, between private international law and public international law. In consequence, this division cannot provide a conceptual foothold for either perspective.

¹⁶⁹ And perhaps some ancillary claims arising by reason of the contract, such as unjust enrichment or tortious conversion of property.

¹⁷⁰ Though these might be unsuccessful, given that good faith principles in contract law typically estop parties from claiming these defenses in circumstances where their own behavior led to the change in circumstances or made it impossible to fulfill the contract.

¹⁷¹ New York Convention, *supra* note 2. The New York Convention regulates the manner and circumstances in which states agree to place their judicial enforcement mechanisms at the disposal of parties attempting to collect on international arbitration awards.

C. *Public law and private law claims and defenses*

The third classical public/private distinction found in legal discourse is that separating public law from private law. Both common law and civil law systems historically recognized a distinction between these two types of law, though on the basis of different legal philosophies.

In the civil law tradition, private law traditionally consisted of “that area of law in which the sole function of government was the recognition and enforcement of private rights.”¹⁷² The nineteenth century civil codes of the major continental European powers concretized these private law rights, with property rights and contract rights being paramount among them.¹⁷³ The driving consideration behind public law, on the other hand, “was the effectuation of the public interest by state action.”¹⁷⁴ As explained by Merryman and Pérez-Perdomo:

Public law had, from this point of view, two major components: constitutional law in the classic sense – the law by which the governmental structure is constituted – and administrative law – the law governing the public administration and its relations with private individuals. In private legal relations the parties were equals and the state the referee. In public relations the state was a party, and as a representative of the public interest (and successor to the prince) it was a party superior to the private individual.¹⁷⁵

In the English common law tradition, by contrast, private law rights included not only rights in property and contract but also rights of personal security and personal liberty.¹⁷⁶ Blackstone described them as absolute rights “inherent in every Englishmen”,¹⁷⁷ comprising “either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up

¹⁷² JOHN HENRY MERRYMAN & ROGELIO PERÉZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA*, 92 (3rd ed. 2007).

¹⁷³ *Id.* at 93. Family law, rights of succession (trusts and estates) and delict (or tort) are also among the subject matters that may fall under private law in civil law systems, though different civil law jurisdictions may classify some of these matters differently.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 94. As the authors go on to note, the civil law reinforced this distinction by dividing the court system into two branches: administrative courts (overseeing public law matters) and ordinary courts (handling private law matters). This correspondence was not always perfect however, as criminal law (widely considered in the continental European tradition to be a matter of public law) was assigned to the ordinary courts rather than the administrative courts.

¹⁷⁶ WILLIAM BLACKSTONE, *1 COMMENTARIES ON THE LAWS OF ENGLAND*, 125, 130, 134. Interestingly, the latter two categories would have included many rights that we now identify as human rights (and consequently associate with public law, not private law).

¹⁷⁷ *Id.* at 125.

by individuals.”¹⁷⁸ These private common law rights were held to pre-exist statutory (or codified) law – a view subsequently transferred to American law as well.¹⁷⁹ 19th century Anglo-American jurists conceived of public law rights, for their part, as “claims that were owned by the government – the sovereign people as a whole – rather than in persons’ individual capacities.”¹⁸⁰ Regulatory claims by individuals against the government did not originally fall under the domain of public law.¹⁸¹

Over time, of course, the traditional civil law and common law distinctions between public law and private law have both confronted theoretical and practical difficulties. The rise of the regulatory state – under the auspices of modern constitutions explicitly limiting the scope of private rights in accordance with the public interest – has made it apparent that the content of private rights is shaped not solely by their definition in civil codes but by their circumscription by public law principles.¹⁸² Where public law plays an important role in defining the private rights of individuals *inter se*, the government can no longer be seen as a mere neutral referee resolving private disputes between private parties.¹⁸³

The trend toward increasing government participation in market-based economic activities, meanwhile, undermines the traditional assumption that all government action necessarily occurs within the public law domain;¹⁸⁴ this accordingly questions the entitlement of governments to a superior status in all legal proceedings. Moreover, in the contemporary Anglo-American understanding, the government no longer holds a monopoly over public law. Individual citizens and groups of citizens may now assert public law claims against the government or against other

¹⁷⁸ *Id.* at 134.

¹⁷⁹ *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171 (1803) (mentioning the “absolute rights of individuals”); JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 1 (1827) (“The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable.”).

¹⁸⁰ Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020 (April 2006) (internal citations omitted). *See also id.* at 1021 (listing five classes of rights falling within the 19th century conception of public rights).

¹⁸¹ This understanding slowly morphed, however, such that by the late 20th century public law rights had taken on “a broad connotation of constitutional or statutory claims asserted in the perceived public interest against government or regulated parties.” *Id.* at p. 1021 (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1316 (1976)).

¹⁸² *See* MERRYMAN & ROGELIO PERÉZ-PERDOMO, *supra* note 172 at 94–96 (exploring five challenges to the distinction and concluding that “dichotomies like public law and private law seem to lose their utility”).

¹⁸³ *See* references cited *supra*, notes 14–19.

¹⁸⁴ *Id.*

private citizens.¹⁸⁵ These challenges and others have forced both civil and common law scholars to propose doctrinal modifications to traditional public law/private law divisions,¹⁸⁶ with the result that they no longer correspond tightly to the distinction between personal and societal rights.

In the United States, one may even go so far as to say that the concepts of public law and private law have in any event lost much of their force.¹⁸⁷ Modern U.S. law faculties are not divided into public law and private law departments, as are many of their counterparts in other parts of the world. And while subject matter specializations proliferate, most U.S. scholarly writing now treats law as a unitary rather than bifurcated field.¹⁸⁸ Interestingly, despite this erosion – or some might say confusion – in the distinction between public and private law, U.S. lawyers and legal scholars have served as the primary progenitors and champions of the “public interest law” movement, which seeks to strategically deploy the law in furtherance of the common (as opposed to individual) good.¹⁸⁹ This may help to explain why American NGOs have been at the forefront of attempts to re-align international investment law with the “public interest.”¹⁹⁰ Indeed, the modern American concept of public interest law¹⁹¹ might be the idea that best explains the ongoing drive to reconcile public and private interests within international investment law.

¹⁸⁵ Woolhandler *supra* note 180 at 1021–22 (describing this new breed of public law claims as a hybrid between the 19th century classifications of public law and private law claims).

¹⁸⁶ For a comparison of U.S. and German evolutions in the concepts, see Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006).

¹⁸⁷ Perhaps due to the gradual elision of the terms by scholars. See Randy E. Barnett, *Forward: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J. L. & PUB. POL'Y. 267 (1986) (identifying four different senses of the public law-private law distinction in American legal thought and stressing that all four have become inseparably intertwined). See also Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982).

¹⁸⁸ Indeed, I would posit that modern U.S. law now conceives of all law as essentially public in nature. For arguments along these lines, documenting the decline of private law in the United States, see Chaim Saiman, *Public Law, Private Law, and Legal Science*, 56 AM. J. COMP. L. 691, 692–97 (2008); Benjamin C. Zipursky, *Philosophy of Private Law*, in PHILOSOPHY OF THE COMMON LAW 625, 630 (2002) (noting that the predominant position had become one of regarding “the distinction between private and public law as artificial in the pejorative sense of that term”).

¹⁸⁹ See Scott L. Cummings and Louise G. Trubek, “Globalizing Public Interest Law,” 13 UCLA J. INT'L L. & FOREIGN AFF. 1 (2008) (providing an account of the globalization of the American practice).

¹⁹⁰ The Center for International Environmental Law has been a leader in this regard. For a description of the Center’s activities, see http://ciel.org/Tae/Trade_Investment.html. The International Institute for Sustainable Development (a Canadian organization) is another leading example. See <http://www.iisd.org/investment/>.

¹⁹¹ For U.S. perspectives on why lawyers should perform public interest work, see Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than*

Be that as it may, the upshot of the present discussion is that using the terms public and private says little about the underlying legal classification of the rights at stake in the contemporary investment regime. Most international investment agreements allow investors to claim damages for harms done to both private law and public law rights. This is so whether one adopts a civil law or common law understanding of the terms. For example, the typical investment treaty's expropriation clause empowers investors to claim damages for violations of their property and contract rights (traditionally private law claims), while its fair and equitable treatment clause empowers them to claim damages for violations of certain public law rights, such as the rights to procedural fairness, transparency, and non-discrimination. On the other side of the dispute, states may raise either private law defenses – for example defenses of justification or excuse for breach of contract – or public law defenses such as public necessity. A given dispute may indeed involve a complex mixture of several types of claims and defenses.

In short, many investment arbitration cases simply do not fall neatly along public law/private law lines. Debates over the appropriate role of international investment law in regulating the world economy nevertheless continue to be framed in public versus private terms. If one looks closely, however, the principle questions underlying what the relevant actors perceive to be the public/private dilemma are twofold: firstly, who benefits from the competing rights and interests at stake, and second, how and by whom are the competing claims to be balanced? This is so irrespective of whether the competing rights and interests sound in public law or private law in any particular legal tradition.¹⁹²

D. What's left: public and private as decision rules?

If none of the three classical legal distinctions between public and private rings true in international investment law, we are left with a puzzle: why has the debate over the regime's essential nature shaped up in public/private terms? The most prominent explanation advanced to date centers on the sociologically fractured epistemic community of international investment lawyers.¹⁹³ Since the majority of investment

Charity?, 96 W. VA. L. REV. 367 (1994); Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245 (1997); Deborah Rhode, *Pro Bono in Principle and in Practice*, 26 HAMLINE J. PUB. L. & POL'Y 315 (2005).

¹⁹² It is interesting to note, however, that notwithstanding the historical understanding, some more contemporary authors seem to have redefined "public law" and "private law" in terms of the individual versus collective conception I described above. See e.g. Harry Woolf, *Public Law – Private Law: Why the Divide? A Personal View*, [1986] PUB. L. 220, 221.

¹⁹³ See, e.g., Roberts, *supra* note 106; Stephan Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22(3) EUR. J. INT'L L. 875 (2011); Moshe Hirsch, *The Sociology of International Investment Law*, in CONCEPTUAL

arbitrators come from private law or commercial dispute settlement backgrounds, the argument goes, and the majority of investment law scholars come from public law or public international law backgrounds, it makes sense that the former would view the regime's function in private terms and the latter in public terms.¹⁹⁴ To a person with a hammer, everything looks like a nail.

Anyone who has ever attended two investment law conferences on the same topic in the same year – one organized by a group of public law scholars and the other by representatives of the “arbitration mafia” – can attest that this explanation carries weight. It would be difficult to overstate how differently the discourse unfolds across the two conference settings. Still, most articulations of the sociological explanation are incomplete in that they focus on only a subset of the investment regime's epistemic community without taking sufficient account of other subsets, such as state lawmakers and treaty negotiators, civil society activists, the in-house counsel of large multinational companies, and the institutional personnel who staff the major arbitration institutions.¹⁹⁵

An illustration from the civil society angle will help explain why one should not focus the sociological camera lens too narrowly. Civil society advocates primarily invoke the public/private rhetoric for its emotive value.¹⁹⁶ I presaged this point in the headings used to introduce the three public/private clashes described in Part I above – all of which reflected the emotive framing of the public interest perspective. After all, what could be worse than allowing private property rights to trump public health concerns (*Philip Morris*) or private contract rights to compromise the public's access to water (*Suez*) or private profit expectations to wipe out the public fisc (*Abaclat*)? To ask the question in this manner is to presuppose the answer. It taints the investment law regime with a sense of injustice, which in turn assists public interest groups in mobilizing resources to advance their particular viewpoints.

Yet industry groups are civil society organizations too. They, too, can deploy public/private rhetoric as an emotional subtext to help them

FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW, (Douglas, Pauwelyn, Vinuales, eds., forthcoming 2013) (on file with author); David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 N.W.J. INT'L L. & BUS. 383 (2010).

¹⁹⁴ See, e.g., Roberts, *supra* note 106.

¹⁹⁵ I explain the importance and close-knit nature of the regime's epistemic community in Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters, eds., forthcoming 2012), (analyzing the investment law regime's major transparency questions through the lens of its key stakeholders), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2058195 [hereinafter Maupin – *Transparency*].

¹⁹⁶ Examples of civil society arguments can be found in the references cited *supra*, note 36. Most of the amicus briefs that have been filed in investor-state disputes can be downloaded on the Investment Treaty Arbitration website, at <http://italaw.com/>.

achieve their objectives. After all, if private businesses serve the greater good by creating employment, driving technological innovation, and fueling economic growth, what could be worse than allowing a greedy government to abolish hard-earned private property rights without paying any compensation (*Philip Morris*) or abuse its sovereign powers to appropriate to itself all of the benefits of a bilateral contract (*Suez*) or invoke sovereign immunity to avoid repaying its debts to the investors who have financed its very existence (*Abaclat*)? Framing the same three disputes in the inverse manner evokes a similar emotional reaction to the seeming unfairness of the underlying events – at least in the absence of the other side of the story.

This consideration of how civil society organizations use the terms “public” and “private” usefully brings two insights to the fore. First, emotional associations derived from particular viewpoints can enable the public/private rhetoric to take the place of considered deliberation. Decisions concerning how to reconcile conflicting interests in a particular investment dispute then become implicit in the choice of labels applied. Second, this maneuver supplies instantaneous decision rules. If the circumstances of an investment dispute set off an arbitrator’s public protection alarm, then he or she may in good conscience decide the case in favor of the state. If, to the contrary, they set off the arbitrator’s government abuse alarm, she or he may find for the investor. Finally, if both sets of warning bells sound simultaneously, the arbitrator may find a way to split the baby. Rational reasons for any of the three decisions can always be supplied after the fact.¹⁹⁷

One could levy a whole host of criticisms against the idea of applying emotive associations as decision rules. Indeed, I will devote the remainder of this paper to showing why the approach I have just described must give way to an integrated systems perspective on the international investment regime’s conflict of rights dilemmas instead. But before moving on to that final task, I wish to pause for a moment to consider the merits – from the point of view of the regime’s stakeholders – of the current approach.

The chief advantage of employing latent public/private associations as decision rules is that the sociological (political, cultural, ideological, etc.) predispositions triggering an actor’s gut-level reactions need never be disclosed, let alone critically examined and dealt with. This benefits treaty negotiators by enabling them to conclude agreements with states whose value systems differ from their own.¹⁹⁸ It benefits investors by

¹⁹⁷ See generally, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge University Press, 2005).

¹⁹⁸ A number of scholars explain the phenomenon of vague treaty provisions as instances in which the negotiating states could not actually agree on the meaning to be given to a particular provision. The idea is that states sometimes intentionally leave provisions open-ended in order to conclude the treaty, which effectively shifts the task of establishing the provision’s meaning to some future dispute resolution process.

streamlining negotiations over lucrative state contracts without having to stop and consider how political opposition from non-investors might impact upon the profitability of the contract (which could impede deal-making).

Sequestering contested values propositions away in a black box also benefits civil society groups, whether “public interest” groups or industry groups. They get to espouse their emotive stories, and sometimes achieve their preferred outcomes, while dodging thorny questions concerning what makes their values important or valid or legitimate and why their values should trump the potentially equally valid competing values of others. Scholars similarly gain the freedom to conceive of and promote theoretical approaches to the investment law regime’s public/private problems which, if implemented, would result in the privileging of their particular normative suppositions over those of others.

All of these efforts to promote contested viewpoints by dressing them up in public/private rhetoric share something in common: they all effectively shift the task of deciding between competing value propositions to the dispute resolution level of the regime. This explains why investor-state arbitration tribunals have become the major object of attack from all quarters. Woe to the arbitrators, one might say!¹⁹⁹ Yet herein lies the rub. Investment arbitrators tend to be accomplished individuals of high repute who strive to render decisions in a manner that is consistent with their own personal values.²⁰⁰ Understandably, however, they have no more desire than anyone else to submit those values to general scrutiny. And because arbitrators sit at the pinnacle of all of this ongoing systemic contestation, they are the ones who stand to benefit most by taking cover behind seemingly clear-cut decision rules. This, in turn, explains why many of the regime’s most difficult base questions have remained perpetually unanswered.

To admit this is not to endorse the status quo, but merely to acknowledge the gravitational pull of the regime’s present course. I now turn to consider what might be done to move the international investment law debate beyond the cyclical trap of public/private smoke and mirrors in the future.

III. THE INTEGRATED SYSTEMS APPROACH

I have argued that there can be no neutral ordering as between public and private rights within international investment law, nor between public governance and private dispute settlement; the operative value

¹⁹⁹ With apologies to Sir Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty, or Our “Interpretation” of it?*, 65 AM. J. INT’L. L. 358 (1971) (reviewing Myres S. McDougal, et al., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1986)).

²⁰⁰ Indeed, the majority are likely appointed precisely because of their values, or at least their known viewpoints. See discussion, *infra*, at 13–14.

decisions inhere in the labeling exercise itself. As Karl Llewellyn put it in his discussion of the use of precedent in the 1930s (presaging international investment law's jurisprudential inconsistency problem by some decades):

If deduction does not solve cases, but only shows the effect of a given premise; and if there is available a competing but equally authoritative premise that leads to a different conclusion--then there is a choice in the case; a choice to be justified; a choice which can be justified only as a question of policy--for the authoritative tradition speaks with a forked tongue.²⁰¹

This statement rings even truer in international investment law, which has no doctrine of precedent and an even greater diversity of “competing but equally authoritative premises” than the constitutionally constrained common law system Llewellyn was analyzing. I therefore propose, as did Llewellyn, “let this be recognized.”²⁰²

Effectuating this recognition requires international investment lawyers to move beyond the current categorical debate. I suggest that we do so by analyzing the regime from an integrated systems perspective. In the remainder of the paper, I explain how this proposal works and why it is better able to address international investment law's most pressing problems than the existing public governance and private dispute settlement modes of analysis.

A. *Integrated systems analysis and its potential utility*

The term “system” can of course mean different things to different people. It is therefore pertinent to note some of the principal ideas with which the term has been associated and explain how these relate to the more pragmatic notion of an “integrated system” I employ here.

Within the life sciences community, the branch of study known as systems theory sprang up from a broad array of scientific and philosophical roots over the course of the 20th century. The person credited with first articulating it in a rigorous form was Ludwig von Bertalanffy, an Austrian-born biologist.²⁰³ Bertalanffy criticized the traditional method of biological study, which tended to “equate the

²⁰¹ Karl N. Llewellyn, *Some Realism about Realism--Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1252-53 (1930-1931) (footnotes omitted).

²⁰² *Id.* at 1253.

²⁰³ Bertalanffy developed his views on theoretical biology and general systems theory from the 1920s through the 1970s. Some of his best known works include: Ludwig von Bertalanffy, *Theoretische Biologie* (1952), *Vom Molekül zum Organismenwelt* (1956); *Problems of Life* (1960); *Biophysik des Fließgleichgewichts* (1961); *Allgemeine Systemtheorie und die Einheit der Wissenschaften*, Atti del XII Congresso Internazionale di Filosofia, vo. IV, Firenze (1962); *Robots, Men and Minds* (1965); *Organismic Psychology and System Theory* (1967); *General System Theory* (1968); and GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATION (1971).

structure of the organism with that of the machine” – a “conglomeration of separate elements” – and viewed it as “something static, acting only under external influence”.²⁰⁴ In place of this limiting view, Bertalanffy made the case for an open systems approach to biology which saw the organism as an active and continually changing system that possessed internal organization and wholeness. He insisted that the best way to study organisms was to take a dynamic approach – a view he later generalized to scientific study writ large as well as to philosophy.²⁰⁵

Bertalanffy’s analysis proved at once simple and powerful, and it has since been taken up with enthusiasm by scholars in other fields. In legal scholarship, perhaps the best-known contributions have come from Niklas Luhmann²⁰⁶ and Gunther Teubner.²⁰⁷ These scholars describe law as an “autopoietic” system – aka a self-referential communicative process which recursively constitutes and maintains itself.²⁰⁸ In this depiction, a legal system’s particular set of self-referencing relationships is what differentiates the system from its surrounding environment, and the communicative acts that instantiate and validate these relationships are what enable the system to generate a cohesive internal order amidst a sea of external complexity and chaos. Autopoietically autonomous systems are then postulated to be connected to one another and to their environment through “structural couplings” – designated pathways through which information from the outside can enter, be processed by, and relayed throughout the system.²⁰⁹

In short, for Luhmann and Teubner, social systems – whether legal, political, or otherwise – are at once “operatively closed” and “cognitively open”. That is, although they are structurally self-referential, they are nevertheless connected to and able to respond to information emanating from outside of their own self-constructed boundaries.²¹⁰

²⁰⁴ I.V. BLAUBERG, V.N. SADOVSKY, & E.G. YUDIN, *SYSTEMS THEORY, PHILOSOPHICAL AND METHODOLOGICAL PROBLEMS* (Sergei Syrovatkin & Olga Germogenova trans., 1977), p. 44.

²⁰⁵ Ludwig von Bertalanffy, *General System Theory as Integrating Factor in Contemporary Science and in Philosophy*, Akten des XIV Internationalen Kongresses für Philosophie, Bd. II, Wien, 1968, S. 335-240.

²⁰⁶ See, principally, NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Klaus A. Ziegert trans., 2003); and earlier NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (Edith King & Martin Albrow transl. 1985), pp. 281-88.

²⁰⁷ GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (European University Press, 1992).

²⁰⁸ The term autopoiesis comes from the Greek *αὐτο-* (*auto-*), meaning “self”, and *ποίησις* (*poiesis*), meaning “creation, production.”

²⁰⁹ LUHMANN, *LAW AS A SOCIAL SYSTEM*, supra note 206 at ch. 10;

²¹⁰ Teubner in particular has vigorously defended the notions of operational closure and cognitive openness against attacks from later “open systems” theorists. See e.g., Gunther Teubner, *Introduction to Autopoietic Law*, in Gunther Teubner, ed. *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (1987), p. 2:

A radical closure of the system – under certain conditions – means its radical openness. This is one of the most challenging theses of

More recently, the rise of complex adaptive systems theory has colored the word “system” with yet another set of influential ideas. In simplified form, a complex adaptive system is “a system in which large networks of components with no central control and simple rules of operation give rise to complex collective behavior, sophisticated information processing, and adaptation via learning or evolution.”²¹¹

All of these branches of systems scholarship are fascinating, and it is easy to imagine how each might yield insights into the functioning of the international investment law regime. But it is not my present aim to provide a definitive exposition of the various branches of systems theory or to debate their merits at an abstract level.²¹² Nor do I seek to establish the superiority of one branch over the others as an analytical lens for the study of the investment regime. My goal is instead much more limited and concrete. Namely, if I am correct about the malleable and interdependent nature of the investment regime’s “public” and “private” characteristics, then it seems plausible that at least some of the regime’s major sources of dissatisfaction might be addressed through minor interventions within the existing regime. Viewing the regime as an integrated system – in the common sense notion of the phrase – supplies a simple conceptual framework with which to test this hypothesis.

There are at least three reasons to believe that the exercise might prove fruitful. First, as I have emphasized above, the international investment law regime consists of many moving parts. It rests upon a complex web of thousands of overlapping treaties, investment statutes, and contracts. It encompasses hundreds of arbitral decisions issued by arbitrators from dozens of different countries applying numerous different bodies of law. And it impacts in complex ways upon investors, states, and a broad swath of other individuals and groups.

Second, much like Bertalanffy’s living organism, all of these moving parts display a pattern of internal organization and wholeness. As in Luhmann and Teubner’s description, the investment regime’s organization is not hierarchical, but rather communicative in nature. Its substantive

autopoietic theory. The more the legal system gains in operational closure and autonomy, the more it gains in openness toward social facts, political demands, social science theories, and human needs.

²¹¹ MELANIE MITCHELL, *COMPLEXITY A GUIDED TOUR* (Oxford University Press, 2009), p. x. See also John H. Holland, *Studying Complex Adaptive Systems*, 19 (1) JOURNAL OF SYSTEMS SCIENCE AND COMPLEXITY 1 (2006) <<http://hdl.handle.net/2027.42/41486>> (defining CAS as “systems that have a large numbers of components, often called agents, that interact and adapt or learn”).

²¹² For an extensive critique of the biological theory and its application, see BLAUBERG, SADOVSKY, & YUDIN, *supra* note 204, Part II. For a critique of Luhmann’s social systems theory, see Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, MIT Press, Cambridge, MA [Der philosophische Diskurs der Moderne: zwölf Vorlesungen. Suhrkamp, Frankfurt a.M., 1985.], pp. 368-85 (“Excursus on Luhmann’s Appropriation of the Philosophy of the Subject through Systems Theory”);

legal obligations are *generated* variably by treaty negotiators, domestic legislatures, and specific investors and host state officials. They are then *concretized* by counsel, expert witnesses, and arbitrators over the course of successive investor-state disputes. A small but non-exclusive set of arbitration-related institutions, meanwhile, *mediates* the way in which investment law principles are developed and applied by promulgating different procedural rules and processes for the conduct of investor-state arbitration.

Once a specific award has been issued, domestic courts in the enforcing state determine whether to *enforce* the award (under the New York Convention),²¹³ or the executive branch of the host state decides whether to *comply* with the award (under the ICSID Convention).²¹⁴ On the back end, civil society groups of all sorts attempt to *shift* the regime in the direction of their respective competing normative preferences by pressuring states to change substantive law, institutions to change procedural practices, arbitrators to change interpretive methodologies, and courts to change enforcement schemes. In short, the international investment law regime's many layers are systemically organized and thickly interconnected via multi-directional feedback loops.

Third, each of the international investment law system's constituent sub-parts is active, not static (as emphasized by complex adaptive systems accounts), with the result that the system as a whole is dynamically evolving in real time. New states continue to join the ICSID Convention each year,²¹⁵ and many countries remain committed to concluding new investment treaties. On the other hand, some states have registered their disapprobation of what they regard as the regime's excessive encroachment upon their regulatory powers. They have done so by pulling out of the ICSID Convention,²¹⁶ narrowing the scope of their treaty-based substantive obligations,²¹⁷ terminating existing bilateral

²¹³ The New York Convention, *supra* note 2, allows the courts of an enforcing state to refuse recognition or enforcement if granting it would violate the public policy of the enforcing state.

²¹⁴ The ICSID Convention, *supra* note 2, obligates all states parties to comply with any award issued under the Convention. In practice, most states do, with the notable recent exceptions of Argentina and Zimbabwe.

²¹⁵ The list of states that either signed or ratified the ICSID Convention between Jan. 1, 2010 and July 25, 2012 includes: Cape Verde, Montenegro, Qatar, and South Sudan. ICSID, List of Contracting States and Other Signatories of the Convention (as of July 25, 2012), at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

²¹⁶ Bolivia, Ecuador and Venezuela have all formally denounced the ICSID Convention (in 2007 2009, and 2012, respectively), and Nicaragua has threatened to do so. The respective ICSID news releases announcing the denunciations are available at: <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDBibliographyRH&actionVal=goIndex>.

²¹⁷ The United States and Canada have moved to narrow the scope of their obligations to foreign investors, both by issuing restrictive *ex post* interpretations of NAFTA and by

investment treaties,²¹⁸ or moving to exclude investor-state arbitration from future investment agreements.²¹⁹

Prominent arbitrators, in turn, are reacting to these developments in a proactive manner. It is not uncommon nowadays to see arbitrators lambasting other arbitrators in the form of scathing dissents,²²⁰ public speeches,²²¹ or scholarly articles²²² whenever they fear that a particular award's interpretation of a state's obligations toward a foreign investor has either gone too far or stopped too short. A few even appear to have reversed course as a result of these exchanges, departing from their own past arbitral decisions in some instances.²²³

Consistent with the notion of cognitive openness, these re-alignments suggest that dynamic potential rests in each of the international investment law system's many joints. This should be music to the ears of critics who are unhappy with the current status quo. It means that it might well be possible to address some of the regime's most pressing problems without having to resolve the intractable public system/private system debate. In the next section, I demonstrate how this might work in practice by illustrating three ways in which the degree of protection afforded to investor versus non-investor rights at one level of the regime can be significantly shifted by introducing a modest change at some other level of the regime. The idea, with each example, is to take advantage of at least

amending the model texts upon which their future bilateral investment treaties will be negotiated. For contrasting appraisals of these developments, compare Stephen Schwebel, *The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law*, TRANSNAT'L DISP. MGMT. 2 (2006); Roberts, *supra* note 66.

²¹⁸ Jana Marais, *South Africa, European Union Lock Horns*, BUSINESS TIMES (Sep. 23, 2012), available at: <http://www.bdlive.co.za/business-times/2012/09/23/south-africa-european-union-lock-horns> (reporting that South Africa has terminated its bilateral investment treaty with Belgium and Luxembourg and has announced its intention to terminate its BITs with all other European states).

²¹⁹ Luke Eric Peterson, *In Policy Switch, Australia Disavows Need for Investor-State Arbitration Provisions in Trade and Investment Agreements*, INV. ARB. REP. (Apr. 14, 2011), available at <http://www.iareporter.com/articles/20110414>.

²²⁰ Arbitrator Pedro Nikken wrote a pointed dissent from the above-discussed *Suez* award, for example. See *Suez – Dissenting Opinion*, *supra*, note 67.

²²¹ See, e.g. Brower, *supra* note 13.

²²² See, e.g., Brigitte Stern, *ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case*, in LAW IN THE SERVICE OF HUMAN DIGNITY, ESSAYS IN HONOUR OF FLORENTINO FELICIANO (S. Charnovitz, D. Steger and P. Van den Bossche, eds., 2005) 246.

²²³ Most recently, arbitrator Domingo Bello Janeiro completely recanted his previous interpretation of the Argentina-Germany BIT's jurisdictional requirements for the institution of investor-state arbitration proceedings. See *Daimler*, *supra*, note 52, Opinion of Professor Domingo Bello Janeiro (Aug. 16, 2012) (recanting his earlier holding on the same question in *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004)), available at <http://www.italaw.com/sites/default/files/case-documents/ita1084.pdf>.

one of the regime's dynamic feedback loops – to treat it, in other words, as an integrated system.

*B. Three illustrations: how integrated systems analysis can be used to reshape international investment law*²²⁴

1. A textual reform

At present, few if any investment treaties contain a clause specifying the manner in which arbitrators should take into account a host state's various obligations toward non-claimants when interpreting that state's obligations toward a particular foreign investor under the treaty.²²⁵ Several commentators have stressed that articles 31 and 32 of the Vienna Convention on the Law of Treaties provide guidance in this matter.²²⁶ Unfortunately, the Vienna Convention has proven insufficient to ensure much consistency of approach in practice.²²⁷ Tribunal members tend to interpret treaty provisions in accordance with their understanding of the regime's essential function – whether as a private dispute settlement system, a public governance system, or otherwise.²²⁸ This generates inconsistent interpretations of the same treaty provisions, which raises rule of law concerns. More troubling still, from a regulatory point of view, it results in the line between investor rights and non-investor rights being drawn in different places by different tribunals from one case to the next, even under the same treaty.

Suppose a state were to address this problem by inserting an explicit interpretive clause of the following sort into all of its investment treaties:²²⁹

²²⁴ Each of the examples provided in this section is drawn from my doctoral dissertation, which I am presently working to turn into a book. See JULIE A. MAUPIN, *RECONCILING PUBLIC AND PRIVATE RIGHTS AND INTERESTS IN INTERNATIONAL INVESTMENT LAW: CONCRETE OPTIONS AND THEIR PRESENT AND FUTURE TENABILITY* (unpublished manuscript) (on file with author).

²²⁵ Some, like the U.S. Model BIT 2012, *supra* note 21, contain exceptions clauses for certain types of governmental measures, but I have yet to see a treaty with a general interpretive clause.

²²⁶ See, e.g., Pierre-Marie Dupuy & Jorge Viñuales, *Human Rights and Investment Disciplines: Integration in Progress*, in *INTERNATIONAL INVESTMENT LAW*, Part 4.B (M. Bungenberg, et al., eds., forthcoming 2012).

²²⁷ On the regime's jurisprudential inconsistency problems, see Franck, *supra* note 41; Maupin, *supra* note 65.

²²⁸ See generally Roberts, *supra* note 106.

²²⁹ Note that some treaties outside of the investment law context do contain clauses specifying how they are to be interpreted when their provisions come into conflict with the provisions of other treaties. See e.g. art. 22 of the Convention on Biological Diversity, which states:

[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and

Interpretation & application

When interpreting and applying this treaty in any dispute between a Contracting Party [“the host State”] and an investor of the other Contracting Party [“the investor”], a tribunal:

- 1) Must explicitly address in its written decision any conflicts as may arise, on the facts of the dispute, between the host State’s obligations toward the claimant(s) under this treaty and its concomitant legal obligations toward parties other than the claimant(s) which derive from:
 - a) the provisions of this treaty;
 - b) other international agreements to which the host State is a party; and
 - c) the fundamental rights provisions contained in the host State’s highest domestic law.
- 2) Must calculate the amount of compensation due to claimant(s) by reason of the host State’s violation of any provision of this treaty in such a manner as to avoid making it infeasible, either in law or in fact, for the host State to simultaneously satisfy its obligations to the claimant under this treaty and its concomitant obligations to other persons under the bodies of law specified in paragraph 1) above.

What impact might this interpretive clause have upon a competing rights dilemma of the kind raised by the *Suez v. Argentina* water privatization dispute profiled above?²³⁰ Quite evidently, a tribunal applying this clause would be precluded from resolving the dispute in the superficial “no *de jure* conflict” manner adopted by the *Suez* tribunal. The tribunal would instead be obliged to address the potential *de facto* conflict between Argentina’s human rights obligation to ensure uninterrupted access to water to the citizens of Buenos Aires and its contractual obligation to ensure a pre-specified rate of return to the claimants. And if, as the dissenting arbitrator in *Suez* argued, the financial crisis rendered Argentina temporarily incapable of directly subsidizing the price of water at the stipulated contractual level in the wake of the massive depreciation of the peso, the tribunal would be forced to adjust its compensation award

obligations would cause a serious damage or threat to biological diversity.

Convention on Biological Diversity art. 22, June 5, 1992, 1760 U.N.T.S. 79.

²³⁰ See *infra*, at 15–16.

accordingly.²³¹ At the initial award stage of the international investment law regime, then, this type of interpretive clause would result in shifting the balance struck between investor rights and non-investor rights in the direction of non-investors.

The billiard balls do not stop there, however. How might the clause subsequently impact upon developments at the review and enforcement level of the regime? By staving off the issuance of awards that place states between a legal (or financial) rock and a hard place, the inclusion of this type of interpretive clause could well lead to a decrease in the percentage of annulment and set-aside requests lodged by states under the applicable enforcement conventions.²³² This would most likely improve pay-out rates on arbitral awards by reducing the political cost of compliance for the respondent state.²³³ It might even soften civil society opposition to the regime, thereby reducing the pressure on states to either abandon the regime or narrow the scope of their substantive legal commitments to foreign investors. All three of these developments would move the balance back toward the investor side of the equation. Moreover, by providing guidance on how conflicts between investor rights under an investment treaty and the rights of non-investors will be resolved, an interpretive clause would improve legal certainty for both investors and states. This would allow investors to build more accurate regulatory risk assessments into their investment planning. States, for their part, would enjoy greater certainty as to the limits of their potential financial liability to foreign investors when undertaking governmental regulatory activities.

2. An institutional reform

One difficulty with any textual reform of the sort just proposed is that it could only be implemented comprehensively by amending or replacing some 3000 existing treaties – a difficult and lengthy process.²³⁴ The major

²³¹ Dissenting arbitrator Pedro Nikken, a human rights lawyer by background, suggested the tribunal should have excused Argentina from abiding by the original contractual terms during the acute portion of the crisis but required Argentina to re-establish the contractual equilibrium once Argentina had sufficiently recovered from the crisis (which Argentina failed to do). *Suez – Dissenting Opinion*, supra note 67, ¶¶ 35-44.

²³² Between 1965 and 2000, ICSID tribunals issued around five original arbitral awards for every annulment decision (annulment proceedings were thus initiated in respect of about 16% of the awards). From 2001 to 2010, the ratio was 3.7:1 (annulment proceedings initiated in respect of 21% of awards). In 2011, the ratio climbed to 2.1:1 (annulment proceedings initiated in respect of 30% of awards). See ICSID CASELOAD – 2012, supra note 24, chart 8, at 15. To my knowledge, there are no similar statistics available in respect of set aside proceedings registered under the New York Convention.

²³³ Contrast this to the current situation, in which several investors hold large awards against Argentina in consequence of the measures taken in response to the country's 2001 financial crisis, but Argentina has so far refused to pay any of them, probably because to do so would be to commit political suicide.

²³⁴ It should be noted however, that the European Union's plan to replace 1407 bilateral investment treaties with new comprehensive EU-wide treaties may make the textual

arbitral institutions that administer investor-state disputes, on the other hand, do not face the same kinds of collective action and bargaining power dilemmas faced by treaty negotiators. ICSID has already taken advantage of this fact on at least one prior occasion. In 2006, it amended its procedural rules to stipulate that ICSID tribunals may accept *amicus curiae* briefs from non-disputing parties and that the ICSID Secretariat would begin publishing final awards – or at the very least excerpts of their underlying legal reasoning – on its website.²³⁵

Suppose ICSID similarly decided, of its own initiative, to take up the challenge of ensuring that investor-state tribunals take account of non-investor rights when deciding investor-state disputes adjudicated under the ICSID arbitration rules. There are several ways in which it might approach the task. One possibility would be to add a step to the procedural intake process. Upon certifying the constitution of a new tribunal, the ICSID Secretariat typically designates one of its legal counsels to act as secretary to the tribunal. These individuals are highly competent and experienced lawyers who labor, at the pleasure of ICSID's member countries, as international civil servants. They provide a broad range of services for ICSID tribunals behind the scenes.

Suppose that at the time of this designation, the secretary is tasked with preparing a memo on the basis of the initial request for arbitration and the respondent state's response to the initial request. In this memo, the secretary flags the potential conflicts of rights that he or she perceives might arise on the facts as between the host state's investment law-based obligations to the claimant and its obligations to other persons arising out of the bodies of law specified in the above-proposed interpretive clause. The secretary then provides the memo to the tribunal and to the parties, and the Secretariat also publishes the memo on the ICSID website.

In the *Philip Morris* claim described above, for example, the secretary might note the following potential sources of conflict. Australian law creates and limits the scope of intellectual property rights within the territory of Australia. In addition, several international treaties govern the obligations of states in recognizing and protecting within their borders the intellectual property rights granted by other states. Among these, Australia is a party to: the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT), and the Paris Convention for the Protection of

reform route a very viable possibility in the near future. *See generally* Julie A. Maupin, *Where Should Europe's Investment Path Lead? Reflections on August Reinisch*, "Quo Vadis Europe?," in *THE LAW AND POLITICS OF FOREIGN INVESTMENT*, Symposium Edition (invited contribution), *SANTA CLARA J. INT'L L.* ____ (forthcoming 2013).

²³⁵ *See* Rule 48, ICSID Arbitration Rules (2006) and Rule 53, ICSID Arbitration (Additional Facility) Rules (2006), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

Industrial Property.²³⁶ It is also a party to the World Health Organization Framework Convention on Tobacco Control (FCTC), which requires Australia to use all reasonable efforts to reduce smoking,²³⁷ including through the use of tobacco packaging regulations.²³⁸

The major weakness of such a secretarial memo is that it would have no legal force in the arbitration proceedings. Disputing parties are always free to develop and defend their arguments however they see fit, and the tribunal hearing the dispute must remain free, as before, to direct the proceedings and resolve the claims entirely in accordance with its authorized discretion.

Nonetheless, the mere fact of the publication of the secretary's memo would likely produce three results. First, it would alert outside persons to the existence of legal questions in respect of which they may have an interest in submitting amicus briefs. Second, it would alert the tribunal to the potential that the dispute may raise controversial conflicts between the investors' claims and the competing claims of others who are not before the tribunal, which – if not dealt with delicately – could ultimately impact upon the award's enforceability.²³⁹ Third, it would frame the questions raised in a comprehensive and less partisan manner than would otherwise be the case were the questions to receive their initial framing solely from the self-interested pleadings of the disputing parties.

Whether or not this practice would affect the arbitral outcomes of individual disputes is anyone's guess. But looking at the proposal from the integrated systems perspective once again raises some interesting possible interaction effects. A tribunal that paid heed to the issues raised in the secretary's memo might find itself better insulated against an attempt, by one of the disputing parties, to annul the award on the grounds that the tribunal either failed to apply the applicable law or failed to state reasons for its decision.²⁴⁰ Here again, this scenario might prove more investor-friendly than the alternative, since an award that is overly

²³⁶ As pointed out by the claimants, *Philip Morris – Notice of Arbitration*, supra note 6, at ¶ 6.6.

²³⁷ See Framework Convention on Tobacco Control, *entered into force* Feb. 27, 2005, 2302 U.N.T.S. 166, art. 5(3) (“In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”).

²³⁸ *Id.*, art. 8.

²³⁹ Jan Paulsson has recently argued that tribunals should take public policy into account when rendering their decisions, since producing an enforceable award is one of their primary duties. Alison Ross, *Seoul, Paulsson Ponders Public Policy*, 7(4) GLOB. ARB. REV. (2012).

²⁴⁰ These are two of the most frequently cited grounds for annulment under the ICSID Convention.

dismissive of non-investor rights may be more susceptible of annulment or non-payment.²⁴¹

There could also be some inter-institutional competition effects.²⁴² Many investment treaties allow investors to choose among several arbitral fora when initiating a claim. Thus, if ICSID were to adopt the practice of publicizing this kind of secretarial intake memo, investors who wish to avoid a public vetting of potential conflicts between their claims and the rights of non-disputing parties might opt for a non-ICSID arbitral forum instead. Such a development could shift the balance away from non-investors and toward investors.

But here again, countervailing reactions are to be expected. Civil society advocates might well respond by dropping their opposition to ICSID and re-directing their lobbying efforts against non-ICSID arbitral forums. If so, this could prompt states to eliminate from their treaties the provisions that allow investors to choose among forums. The mere threat of this possibility might even persuade the non-ICSID arbitration institutions to adopt the secretarial memo practice as well. Here again, it is difficult to predict precisely what new equilibrium between investor and non-investor rights this proposal would generate in the end. What is clear, however, is that it could effectuate a significant re-calibration of the system no less than the more cumbersome textual reform route posited above.

3. An enforcement reform

As a third possibility, suppose that states who are concerned about the preservation of their regulatory space are unable to persuade some of their investment treaty partners to adopt any kind of treaty revision (whether an interpretive clause or otherwise). Suppose further that institutional culture and related reasons prevent not only ICSID but all of the major arbitration institutions from adopting any kind of institutional reform.²⁴³ Would this mark the end of the story, making all internal systems-inspired reform proposals dead in the water? Not necessarily. States still control multiple levers within the system, and they can press on these at any time.²⁴⁴

²⁴¹ As demonstrated by the recent split decisions of ad hoc annulment committees concerning the scope and effect of Argentina's necessity defense under both treaty law and customary international law.

²⁴² To my knowledge, there has been very little comparative investigation of the role played by the major arbitral institutions and their procedural rules, including ICSID, the PCA, ICC, LCIA, SCC, and UNCITRAL. I have outlined one possible research agenda, which I hope to take up in the near future, in Maupin – *Transparency*, *supra* note 195.

²⁴³ This is a real possibility, as evidenced by the continual failure of the UNCITRAL II Working Group to fulfill the Commission's 2008 mandate to promulgate a new set of arbitration rules specifically tailored to the needs of treaty-based (as distinct from purely commercial) arbitrations.

²⁴⁴ Which implies, of course, that civil society groups can pressure them to do so.

A state that is unhappy with ICSID can withdraw from the ICSID Convention on six months' written notice²⁴⁵ – as Venezuela, Ecuador, and Bolivia have all done.²⁴⁶ This move does not insulate the exiting state from future investor-state claims, since many investment treaties allow investors to bring claims in other arbitral fora. Even so, withdrawing from the ICSID Convention might allow the state, at the enforcement level of the regime, to exercise a greater degree of control over how arbitral tribunals balance investors' rights against non-investment concerns. This is because investment arbitration awards issued outside of the ICSID framework are subject to enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Unlike the ICSID Convention, the New York Convention allows states to refuse to recognize or enforce a foreign arbitral award on certain public policy grounds.²⁴⁷ These include circumstances in which enforcing the award would violate the public policy of the enforcing state and cases where the award has been set aside by a competent authority of the state under whose law the award was made.²⁴⁸

An example from the U.S. enforcement context will help to clarify how these facts might be used to alter the balance between investor and non-investor rights in practice. What would happen if Philip Morris, having obtained a several billion dollar award against Australia as compensation for its lost profits under the Tobacco Plain Packaging Act, sought to enforce the award by attaching Australian assets in the United States? The U.S. court considering the attachment request would look to the Federal Arbitration Act, which gives domestic effect to the New York Convention.²⁴⁹ Motivated by commercial efficiency justifications, U.S. courts have developed a longstanding tradition of respecting the finality of arbitral awards under this Act.

There is good reason to think a U.S. court might prove less amenable to enforcing an award like the hypothetical Philip Morris one, however. An award against Australia on the facts of the Philip Morris dispute would essentially amount to an international finding of a domestic regulatory taking. When it comes to foreign regulatory measures, U.S. courts tend to show a high degree of deference to foreign states for reasons of both comity and reciprocity. After all, U.S. regulators do not wish to see their own regulatory actions result in the attachment of U.S. government-owned

²⁴⁵ ICSID Convention, *supra* note 2, art. 71.

²⁴⁶ See *supra* note 216.

²⁴⁷ Much of the existing scholarship on the two conventions compares their parallel provisions or reviews how these have been applied in specific cases. But since investors can often choose which of the two conventions their disputes will proceed under, what is needed is an analysis of the interplay between the two enforcement systems.

²⁴⁸ New York Convention, *supra* note 2, art.V.

²⁴⁹ Federal Arbitration Act, 9 U.S.C. §§ 201–208. In more monist systems, the corresponding provisions of the New York Convention would apply directly.

assets abroad. These considerations would weigh all the more heavily if the arbitral award were to be formally set aside by the Australian courts.²⁵⁰

Even if current U.S. judicial practice did not portend enforcement problems in cases like *Philip Morris v. Australia*, the U.S. legislature could move to preempt the question altogether by amending the Federal Arbitration Act.²⁵¹ It could do this, for example, by directing the courts to apply a stricter type of public policy review when considering the enforcement of treaty-based and statute-based arbitration awards which grant investors monetary compensation on account of a foreign sovereign's regulatory measures.²⁵²

Bifurcating the review standards under the New York Convention in this fashion would be unorthodox, but it would offer three key advantages. First, it would not impede commerce by upending a country's tradition of respecting the finality of arbitral awards in ordinary breach of contract situations. Second, in disputes where one of the scenarios originally envisaged by the investment law regime's member states materializes – namely, outright governmental expropriation or physical destruction of a particular foreign investor's property²⁵³ – the enforcement process would remain smooth and swift. Third, in cases where the underlying cause of action is a generally applicable sovereign regulatory measure, a bifurcated review standard would allow different states to follow variegated enforcement policies tailored to the strictures of their internal constitutional structures and the preferences of their domestic constituencies.²⁵⁴ This would effectively re-introduce a considerable measure of democratic (or at least domestic) accountability to the investor-state arbitration system on the back end, at least in respect of the category of cases that is most likely to raise significant domestic and international policy concerns.

In the end, the degree to which the bifurcated enforcement reform I suggest would move the regime's balance from the investor to the non-

²⁵⁰ As it almost certainly would be, given that the Australian High Court has already found the maligned TPP Act to be consistent with the Australian constitution.

²⁵¹ Argentina and Zimbabwe have shown that outright refusal to pay out on investor-state awards is also an option. But as this flies in the face of the rule of law, I would hesitate to endorse it so long as other, perfectly legal means of addressing systemic problems (such as the legislative fix I suggest) might be pursued.

²⁵² The basic idea here is that domestic courts in enforcing states should review the awards of investor-state tribunals more closely, on public policy grounds, whenever there is reason to doubt that the institutional process underlying the award will guarantee that the tribunal took sufficient account of the respondent state's competing obligations to non-investors.

²⁵³ See, e.g. *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) (claim for compensation for complete destruction of shrimp farm by government military forces during battle with Tiger rebels).

²⁵⁴ Some countries – notably within the EU – are quite comfortable with the idea of submitting to supranational judicial review of domestic regulatory measures. Others, such as the U.S., are much less

investor side of the equation would depend upon the policy decisions of each state's domestic legislature, as well as the degree of deference to such decisions shown by the enforcing courts of other states.²⁵⁵ These nuances aside, the larger point is that *any* enforcement reform is likely to have a significant impact upon the way in which arbitrators decide investor-state disputes, since arbitrators whose awards exhibit a high rate of non-enforcement will lose out on future appointments.

4. Summary of integrated systems based reforms

What the three foregoing examples show is that treaty negotiators, arbitral institutions, domestic legislators, civil society advocates, and arbitrators all have it within their power to make moves that prompt other actors within the regime to adjust their behavior. Each of these moves entails ripple effects that reverberate throughout the system. Even minor moves at one level of the regime can produce major shifts in the way in which the regime impacts upon investor versus non-investor rights and interests in practice.

Because some reforms may be additive in their effect while others work at cross-purposes, the best way to strategically direct the evolution of this dynamic integrated system is to experiment with minor changes in a successive fashion. The difficult part is determining which experiments should be performed first. The answer will depend upon which specific elements of the regime's current legitimacy and accountability deficits one finds most troubling. The integrated systems approach cannot answer this normative question. Its chief virtues, rather, are descriptive and predictive.²⁵⁶ In effect, an integrated systems analysis of international investment law reveals three things:

- *how* different types of normatively-motivated reforms can be implemented within the confines of the existing system;
- *who* within the existing system has incentives to attempt to push the system, and *in which direction* they are likely to push; and

²⁵⁵ Historically, participating states within the New York Convention system have shown a high degree of deference to the enforcement policy decisions of other member states, as would be expected under existing comity doctrines. There are exceptions, however.

²⁵⁶ See Teubner, *supra* note 207, p. 1 (“autopoiesis proposes, as a new and promising research strategy, to identify circular relationships within the legal system and to analyze their internal dynamics and their external interactions”).

- at *what points* the system is capable of accommodating differentiated, country-specific approaches while still hanging together as a system.²⁵⁷

My own prescriptive inclination, as revealed by the above three proposals, is to start by trying out different means of ensuring that important non-investment related policy goals are not overshadowed by the policy goal of protecting foreign investors. The *Suez*, *Abaclat*, and *Philip Morris* case studies all underscore the need for recalibration on this point. I therefore advocate beginning the experimental process immediately. But because complex integrated systems can respond to slight stimuli in unpredictable ways, reform strategies should work up incrementally from the conservative to the more sweeping, allowing sufficient time in between to see how the system as a whole adapts to each new innovation. In the final part of the paper, I explain why this integrated systems approach is preferable to each of the three major alternatives on offer.

C. *Comparing the integrated systems approach to the alternatives*

1. The status quo alternative

The easiest alternative to dispense with, in my view, is that of maintaining the status quo. The problems I have profiled throughout this paper are afflicting the international investment law regime with an unprecedented level of turmoil. The system faces pressure to change from within and without.²⁵⁸ Almost no one is satisfied with the current state of affairs. States find it too costly; investors find it too unpredictable, and critics find it too intrusive upon non-investor concerns. Moreover, the regime is already evolving at a rapid pace²⁵⁹ – albeit not yet in a coherent or uniform direction. To simply sit back and continue to allow the system to evolve haphazardly would, I argue, be as unwise as it would be unlikely to produce desirable results. Better to learn from the regime's tumultuous history than to repeat the mistakes of its past. This makes it incumbent upon the regime's supporters and detractors alike to think through what

²⁵⁷ There is a fourth insight to be gained from the approach, namely how the system responds to, incorporates, or rebuffs external stimuli from closely related systems (e.g. the WTO system) and less-closely related systems (e.g. the international human rights system). This avenue of inquiry promises to be fruitful, but cannot be pursued within the confines of this paper.

²⁵⁸ See, e.g. *Investment, Arbitration and Secrecy: Behind Closed Doors, a Hard Struggle to Shed Some Light on a Legal Grey Area* THE ECONOMIST, Apr. 23, 2009, available at <http://www.economist.com/node/13527961>. Moreover, specialized news publications like the INVESTMENT ARBITRATION REPORTER and the GLOBAL ARBITRATION REVIEW now provide daily reporting and critique of developments in investor-state arbitration.

²⁵⁹ Precisely as the integrated systems perspective would predict.

should be done about the fact that the international investment law system is today performing some feats for which it was never designed.²⁶⁰

2. The multilateralization alternative

An alternative to the status quo approach would be to attempt to multilateralize the regime. Were it possible to replace the whole patchwork of overlapping investment instruments, arbitral institutions, enforcement mechanisms, etc. with a unified regime, many of the regime's consistency problems would go away. Creating a new, globally uniform system from the ground up would also give regime architects (principally treaty negotiators and domestic legislatures) the chance to hammer out more democratically legitimate and accountable means of protecting the rights of investors and their investments abroad. Alas, the international community of states appears unlikely to reach a multilateral accord on investment anytime soon. Every prior attempt to do so has failed,²⁶¹ and civil society opposition to the idea of a multilateral regime has grown to such proportions that it is no longer even feasible for most countries to put a multilateral investment agreement on their negotiating agendas.

Even piecemeal centralization proposals have met with resounding rejection in recent years. When the ICSID Secretariat floated the idea of creating an ICSID Appellate Body in order to bring some consistency to the splintered ICSID arbitral jurisprudence,²⁶² the proposal was widely rejected²⁶³ and quickly withdrawn.²⁶⁴ The difficulty is that states with

²⁶⁰ On this point, I note that some scholars are advancing what I consider to be a corollary to the status quo alternative which may be deemed the "change in mindset" alternative. On this view, any necessary adjustments to the regime could be made simply by changing the mindset of the arbitrators who decide investor-state disputes, for example by convincing them to adopt a comparative public law perspective. (See Schill (ed) – IIL & COMPARATIVE PUBLIC LAW and Schill – *New Public Law Approach*, both *supra* note 11.) While I see the appeal of this approach in terms of its ease of implementation, there is little evidence to-date to suggest that arbitrators have the necessary incentives to adopt a changed mindset – at least not in the absence of some kind of structural reform which goes beyond the usual social compliance norms of the arbitrator community. See e.g. David Schneiderman, Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?, *Oñati Socio-Legal Series*, v. 1, n. 4 (2011), *Socio-Legal Aspects of Adjudication of International Economic Disputes*, ISSN: 2079-5971, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832564 (concluding that the arbitrator community has not reflexively responded to major public interest critiques of the system); Van Harten – Arbitrator Behaviour, *supra* note 72 (arguing that arbitrators lack the incentives to restrain their own behavior).

²⁶¹ For an overview of the multiple failed attempts to create a multilateral agreement to-date, see VAN HARTEN, *supra* note 9, at 18–23.

²⁶² ICSID Secretariat Discussion Paper, *Possible Improvement of the Framework for ICSID Arbitration*, Oct. 22, 2004, Part VI.

²⁶³ For one critique, see Gabrielle Kaufmann-Kohler, *In Search of Transparency and Consistency*, 2(5) *TRANSNAT'L DISP. MGMT.* (2005).

²⁶⁴ Interestingly, the U.S.-Chile, U.S.-Morocco, U.S.-Singapore, and U.S.-DR-CAFTA Free Trade Agreements all contain a provision requiring the contracting parties to each

different political structures and at differing levels of development can't seem to agree on what the overarching values governing any kind of multilateral regime should be. This disagreement, after all, is why the "investment law as transnational public governance system" and "investment law as private dispute settlement system" approaches I described above have little hope of solving the existing regime's major problems. They begin from opposite starting points, and there is no super-legislator, no global constitution, from whence to derive the super-values necessary to prefer one over the other.²⁶⁵

3. The abolition alternative

Finally, I come to the million dollar question (or billion dollar question, if you're standing in Australia's, Germany's, or Belgium's shoes): why should we keep this strange system in which foreign arbitrators sit in judgment over domestic regulatory actions at all? Why not just abolish the regime altogether, as some have proposed?

My answer is a pragmatic one. Notwithstanding all of the regime's well-known problems, it is still not clear whether it is doing more harm or good, on balance. What has become increasingly clear is that international investment treaties do not seem to increase investment flows to the countries that sign them.²⁶⁶ Thus, a major justification for the investment treaty regime's creation does not hold water. But investment treaties may have other salutary effects that have not yet been sufficiently explored. For example, they may contribute to the rule of law by inducing governments with less than exemplary track records to respect due process requirements when enacting new regulatory measures or carrying out expropriations.²⁶⁷ Such process improvements could spill over into other areas, thereby promoting good governance and improving respect for human rights – to the benefit of domestic constituencies and foreigners alike.²⁶⁸

treaty to enter into negotiations concerning the possible establishment of a bilateral (regional, in the case of DR-CAFTA) appellate mechanisms within a certain period of time after the entry into force of the treaties. A similar provision was found in the 2004 U.S. Model BIT, but it was dropped from the recently released 2012 U.S. Model BIT.

²⁶⁵ This has long been the major criticism of the global constitutionalism and global administrative law literatures more broadly. *See e.g.* Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527 (2003).

²⁶⁶ *See* Yackee, *supra* note 56 and the empirical studies summarized therein.

²⁶⁷ This justification seems more plausible as applied to host States that have already made a political commitment to improve their internal rule of law (Mexico, Argentina). Investment treaties do not seem to deter countries that have not made this commitment from maltreating both foreigners and citizens (Venezuela, Zimbabwe, Ecuador).

²⁶⁸ For other possible justifications, *see* Stephan W. Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION, ch. 2 (Michael Waibel et al, eds., 2010).

Moreover, as I have emphasized here, the international investment law regime does not start and stop with treaties. Surveys of multinational companies suggest that legal certainty is one of the top ten factors taken into account in making foreign investment decisions. If this self-reporting is accurate, then countries with under-developed legal systems would likely find themselves unable to attract much-needed foreign investment in the absence of some alternative means of backing up their domestic legal guarantees. One wonders how much investment the newly created countries of North and South Sudan could attract, for example, if the only recourse available to foreign investors in the event of bad government behavior lay with the domestic Sudanese courts.²⁶⁹ Investment treaties, contracts, and statutes were devised to address a real problem in need of a real solution. To abolish the entire system on the grounds that parts of it are objectionable – without first attempting more targeted fixes – would be to throw the baby out with the bath water.

Finally, even if the process could be set in motion today, it would take decades to completely dismantle the present system and would entail massive transition costs. States would first need to go through the formal steps required to terminate over 3000 treaties under international law.²⁷⁰ Then, since many of the treaties contain survival clauses, investors would still be able to bring investor-state claims for an additional ten years after the official date of termination. If the last ten years is any indication, one might expect to see another 350 claims in that period – many of which would still raise the kinds of complex regulatory questions described in this paper.

By contrast, the integrated systems perspective I have proposed offers up a ready-made toolkit with which policymakers, treaty negotiators, lawmakers, arbitrators, institutional employees, civil society advocates, scholars, and others can begin addressing the underlying causes of the international investment law regime's "legitimacy crisis" straight away.²⁷¹ For this reason, I submit, it promises to be at once more effective and more practicable than more drastic alternatives.

CONCLUSION

This paper has put the debate over international investment law's systemic nature into context. It has shown that the regime's public/private problematic is really a microcosm of a fundamental problem running throughout all areas of the law. To ponder whether the international investment regime is a transnational public governance regime or a private dispute settlement system is to ask the wrong question. International

²⁶⁹ Indeed, South Sudan is already facing its first ICSID claim. See, *South Sudan Hit with ICSID Claim from the North*, GLOBAL ARB. REV. (Sep. 6, 2012).

²⁷⁰ This process is governed by articles 54–60 of the Vienna Convention, *supra* note 83.

²⁷¹ On the regime's legitimacy crisis, see the discussion *supra*, notes 34 to 41 and accompanying text.

investment law is at once neither and both of these things. They are two sides of the same coin, and each shapes and defines the other. The better question, therefore, is to consider how the investment regime and its many decision-makers should go about handling the inevitable conflicts of rights, interests, and values that must arise within a complex regime that serves and impacts upon so many diverse stakeholders.

I have argued that the best method of analyzing this problem is through an integrated systems perspective. Applying this perspective paves the way for the conceptualization of experimental, incremental reforms that can be introduced at multiple levels of the regime. It supplies means of shifting the overall equilibrium between investor and non-investor rights through a dynamic, iterative process that is open to input from stakeholders and decision-makers espousing diverse views and operating at numerous different pressure points. This openness, in itself, makes it possible to begin reducing the international investment law regime's legitimacy and accountability deficits in the near term. Given the impracticability of more sweeping alternatives at present, it may be that this constitutes not only the best but also the only way forward. If seized upon with a little bit of tenacity and creativity, the integrated systems approach just might end up producing a regime that both investors and non-investors can live with.