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

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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. The regime’s legitimacy crisis 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.

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INTRODUCTION

Imagine a parallel universe 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 arbitral decisions. The government whose public-minded regulatory action prompted the complaint responds by appointing an arbitrator it believes most likely to absolve it of liability. A third arbitrator is then selected to chair the three-person panel by some 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 regulatory action forms the basis of the complaint.

The disputing parties then proceed to pay each of the three arbitrators a substantial daily fee 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, and the property owner can enforce a favorable award by attaching state assets in 147 countries around the world. Upon


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.WORLD BANK.ORG; https://icsid.worldbank.org/ICSID/ICSDocRH&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 parallel universe 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.5

Germany is currently facing a 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.6 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.7 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.8 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 a dozen such claims by foreign investors seeking compensation for an array of governmental measures ranging from a California environmental regulation9 to a Mississippi state jury verdict.10


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

5 The U.S. has already faced more than 20 investor-state claims under the North American Free Trade Agreement [hereinafter NAFTA], the Dominican Republic-Central America Free Trade Agreement [hereinafter DR-CAFTA], and select bilateral investment treaties.

6 Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (award pending).


8 Alyx Barker, Belgium Faces ICSID Claim from Chinese Investors, GLOB. ARB. REV. (Sep. 24, 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].
In fact, U.S. participation in the international investment law regime is especially deep. The U.S. was the driving force behind the regime’s creation and continues to serve as one of its foremost supporters upon the world stage. This is so notwithstanding the fact that U.S. domestic law contains more sophisticated and democratically legitimate means of handling conflicts between private investor rights and the broader public interest than farming them out to ephemeral international arbitration tribunals on a case-by-case basis.

International legal 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. 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 a skeletal support structure for the efficient settlement of private investment disputes.

What is curious about these approaches is that they both take the fundamental question facing the international investment law regime to be an existential one: is it a public regime or is it a private one? Divergent 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 existential 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?* (the existential 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 will proceed 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 the rudimentary existential 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 emphasizes 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 should the line between investor rights and non-investor rights (including, potentially, the “public interest”) be 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. 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 conclude by considering some future avenues for research suggested by the integrated systems approach to international investment law.

I. WHEREFORE 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. New Deal theorists and their state action doctrine progeny then demonstrated the unworkability of the divide insofar as it relates to state action versus inaction. Many eventually concluded, as Cass Sunstein put it, that “state action is always present.”

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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).


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

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

All of this is well known. 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.

One preliminary caveat bears stressing, however. 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 other considerations inevitably makes the presentation one-sided. There have been many examples of international investment disputes in which arbitral tribunals have avoided interpreting legal texts in ways that might have impacted negatively upon the public interest.²⁰ Likewise, several countries have made significant strides in recent years toward making their investment treaties more sensitive to public interest concerns.²¹

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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 main product.

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
These and other countervailing developments are important. As I argue in the third part of this paper, they 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 wealthy, developed country nationals against opportunistic expropriation by transitioning, post-colonial developing country governments. 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. This is not exactly how things have played out in practice.

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 contractual claims, resolved by ordinary international commercial arbitration. ICSID registered 26 cases of this kind between 1965 and 1990, none of which produced any notable public outcry.

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).


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
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 nimble competitors. Bilateral investment treaties granting generalized protections to broad classes of foreign investors stepped in to fill this gap.  

Between 1990 and 2010, the number of international treaties protecting foreign investors and their investments abroad rose from 385 to more than 3000.  

These fast-paced legal developments were soon followed by another profound shift in the global economy. Important developing and transitioning countries that were once viewed as likely recipients of capital (traditional “host states”) began transforming into major originators of investment. By 2010, their share of global FDI outflows had reached 29%, with $144 billion in outbound investment coming from China and Hong Kong alone.  

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.  


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.  


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
that once promoted sweeping investor protections in international investment treaties began finding themselves on the receiving end of the investor-state arbitration stick. In the first eighteen years of operation of the North American Free Trade Agreement (NAFTA), for example, the United States and Canada have each faced more investor-state arbitration claims than Mexico.\footnote{In the first eighteen years of operation of the North American Free Trade Agreement (NAFTA), for example, the United States and Canada have each faced more investor-state arbitration claims than Mexico. See NAFTA ch.11 disputes by country at: http://www.naftaclaims.com/disputes.htm.}

The pace of legal claims has also accelerated exponentially. Of the 390 reported investment treaty arbitrations initiated by foreign investors against states to-date, more than 87% have been brought in the past ten years.\footnote{UNCTAD – WIR 2011, supra note 27, Figure III.3, at 102 (showing 390 arbitrations filed as of the end of 2010, with fewer than 50 filed prior to 2000).} An increasing number of these claims have begun challenging 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.\footnote{An overview of recent controversial cases 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.} 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.\footnote{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 generated a public outcry. 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.\footnote{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...}
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.36 Much of the scholarly discourse characterizes the debate itself as a “backlash” against international investment law.37 Some observers wonder whether the modern system of international investment law is on the verge of collapse.38 Others actively call for the system’s abolition.39 Still others 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.40 Reasonable minds may well disagree, it seems.

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37 The Backlash Against Investment Arbitration: Perceptions and Reality, (Michael Waibel, ed. 2010).

38 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 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.


But more to the point, we should expect them to do so when they have only recently begun working through a complex and 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.\(^4\) 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 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.)\(^4\) With more than 3000 bilateral and regional investment

\(^4\) See especially Van Harten and Schneiderman, both supra note 11.
\(^4\) 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.
treaties now in existence, 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. 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, international investment law has nevertheless effectively gone global. 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. Witness, for example, the 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 international investment treaties. The majority of contemporary investment treaties protect, as illustrated by the 2012 U.S. Model BIT, “every asset that an investor owns or controls, directly or indirectly”. This includes, in particular, but not exclusively: stocks, bonds, debentures, claims to money, tangible and intangible property, intellectual property, contract rights, and more. The standard definition is broad enough to encompass not only so-called “greenfield” investments but also cross-

43 UNCTAD – WIR, supra note 32, at 100 (reporting a total of 2807 are bilateral investment treaties and 309 are “other” international investment agreements, such as regional trade agreements with investment chapters).
44 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 156–158 and accompanying text. For a sociological account of the international commercial arbitration world, see Yves Dezalay & Bryant Garth, Dealing in Virtue (1996).
45 For a catalog of the multiple failed attempts, see Van Harten, supra note 11 at pp. 18–23.
47 U.S. Model BIT 2012, supra note 21, at art. 1.
48 Id. arts. 1(a)–(h).
border mergers and acquisitions and, unless explicitly excluded, portfolio investments.\footnote{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.}

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;\footnote{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.} shareholders who would have no derivative cause of action for a loss in share value brought about by governmental regulatory measures under domestic law can claim compensation from states under international law;\footnote{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.} foreign investments can benefit from broad international legal protection irrespective of whether they contribute anything of lasting value to the host state or its economy;\footnote{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 Construttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Award, ¶ 52 (Jul. 23, 2001), 42 ILM 609 (2003).} and now, after a recent jurisdictional decision that went against Argentina,\footnote{Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4 2011), [hereinafter Abaclat – Jurisdiction].} foreign speculators in sovereign bond markets may enjoy special guarantees against sovereign default while domestic bondholders (and other, non-covered foreign bondholders) must accept “haircuts” in the form of debt restructuring deals.

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 the word\footnote{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.} in order to...
qualify for protection under contemporary international investment law, 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. By contrast, there is ample evidence – in the form of numerous damages awards – that the treaties can impose significant costs on host states. This empirical lopsidedness supplies yet another reason for the growing perception that international investment law privileges “private” investor rights over all other “public” interests.

3. Vague treaty standards and the arbitral 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: 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 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

55 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.

56 Of course, there are just as many cases wherein investors receive no compensation. (See supra note 34.) 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.

57 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.
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? Can a series of small measures, like progressive tax increases, add up to a “creeping expropriation?”

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? Domestic law? Customary practice? The arbitrator’s own personal sense of fairness?

This latter question 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 imbibes the words of the treaty with meaning derived from his or her own experience. An American trained arbitrator may implicitly read ideas drawn from the U.S. constitutional takings jurisprudence into an expropriation analysis, while a German trained arbitrator may read-in German and perhaps also European law understandings. Small wonder, then, that the same treaty standards are sometimes interpreted by different arbitral tribunals in diametrically opposed ways.

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58 For a discussion of these questions, see Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2008), pp. 89-118.

59 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 58, pp. 119-32.

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

61 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.

62 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 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).

63 Franck refers to this as “privatizing public international law through inconsistent decisions.” Franck, supra note 40. For an analysis of inconsistent interpretations of most-favored nation clauses, see Julie A. Maupin, MFN-based Jurisdiction in Investor-
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)?

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. 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. This again fuels the concern that the regime favors private investor rights over competing public interest concerns.

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

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65 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].

66 For an arbitral refutation of the tendency to accept investor perceptions as law, see Daimler, supra note 51 at ¶ 246.
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 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. 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.

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 with some frequency. I have reservations as to the accuracy of such incentive arguments. Nevertheless, when one adds to the suggestion of

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67 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 UNCITRAL arbitration rules) that are used in most “ad hoc” (meaning not institutionally administered) investor-state arbitrations.

68 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).

69 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.

70 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 might happen because the appointing parties did a good job of
biased decision-making the facts that: 1) investor-state disputes may impact upon matters of public concern, 2) the decisions of investment arbitrators are generally not reviewable in domestic courts,71 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,72 it becomes easy to see why the regime is described as suffering from a legitimacy crisis.73

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.

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

1. A private concession in public infrastructure services: Suez et al v. Argentina74

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

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71 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.

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

73 See references cited supra note 40.

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 an 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 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.75

A notable feature of the Suez dispute is the degree to which it is typical of many investor-state arbitration claims. A large number of foreign direct investments are made in sectors which provide essential services to the

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75 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).
general public. According to the most recent 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.\(^76\)

2. Private financing of public debt: *Abaclat v. Argentina*\(^77\)

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.”\(^78\) 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 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.\(^79\)

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

\(^76\) ICSID CASELOAD – 2012, *supra* note 19, 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.

\(^77\) *Abaclat* – Jurisdiction, *supra* note 53.

\(^78\) *Id.*, at ¶66.

\(^79\) 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 53, Dissenting Opinion, Georges Abi-Saab.
claims against Greece\textsuperscript{80} 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.\textsuperscript{81} 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.\textsuperscript{82}

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: \textit{Philip Morris v. Australia}\textsuperscript{83}

\textsuperscript{80} Kyriaki Karadelis, \textit{Greece: a new Argentina?}, 7(3) GLOBAL ARB. REV., (June 12, 2012) (noting at least one German law firm has already announced plans to bring a treaty claim against Greece on behalf of some German holders of restructured Greek bonds).

\textsuperscript{81} 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”].


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” by “prohibit[ing] the use of trade marks, symbols, graphics or images on or in relation to tobacco products and packaging.” 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. 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” and “undermin[ing] the economic rationale of the investments”. It further claims that the Act violates the treaty’s fair and equitable treatment guarantee by frustrating 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 legislation 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.” Uruguay is facing a similar claim by Philip Morris, and the company has threatened parallel suits against other countries debating the merits of plain packaging legislation.

84 Philip Morris – Response to Notice of Arbitration, supra note 67, ¶ 25 (quoting a submission of the World Health Organization) (internal citations omitted).
85 Philip Morris – Notice of Arbitration, supra note 6, ¶ 4.12.
86 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.
87 Philip Morris – Notice of Arbitration, supra note 6, ¶ 7.3(b).
88 Id., ¶ 7.3(a).
89 Id., ¶ 8.2.
90 Id., ¶ 8.3.
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 that, 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, e.g. 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. The Big Tobacco disputes are multi-billion dollar claims, as is the recent claim by Swedish energy company Vattenfall against Germany. Of course, investors don’t always win these challenges, and even when they do, they rarely recover the full amount of their claims. Still, the financial implications for states 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. This amounted to the equivalent of its national healthcare budget for that year. Argentina has faced 41 investor-state claims as a result of its 2001 financial crisis, 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. Returning to Philip Morris, the Marlboro brand alone has an

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93 Vattenfall, supra note 6.
94 Frank, supra note 92 at 58–9.
97 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).
estimated worldwide value of $73.6 billion.\textsuperscript{98} This surpasses the annual GDP of all but the top 18 richest countries in the world.\textsuperscript{99}

Does all of this mean that international investment law makes each state’s ability to regulate harmful substances 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?

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.\textsuperscript{100} I am investigating the veracity of these claims from an empirical perspective in other ongoing work. 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.\textsuperscript{101}

D. Existential 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

\textsuperscript{98} 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).


\textsuperscript{100} 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?”, INVESTMENT TREATY NEWS (July 12, 2011) (stating that the RJ Reynolds Tobacco Company’s 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/.

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.  

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. 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 job of resolving conflict of rights problems than the other. Before turning to 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 akin to ordinary commercial arbitration. This perspective emanates primarily from practitioners and scholars of international commercial arbitration. It remains underdeveloped as a theoretical account of the international investment law regime, 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 that the process by which investor-state disputes are decided is modeled on

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102 See discussion supra, notes 14–19 and accompanying text.
103 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.
104 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.
105 See references cited supra, note 12.
106 Indeed, there is a paucity of theoretical scholarship on international arbitration more broadly. For one attempt at theorizing the field, see EMANUEAU GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L’ARBITRAGE INTERNATIONAL (2008).
commercial arbitration, and around two-thirds of known investment arbitrators hail from a commercial arbitration background.107

Adherents of the private dispute settlement paradigm 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.108 E.g. a tribunal may claim that it has no jurisdiction to consider, say, a human rights argument in relation to an alleged investment treaty violation, because to do so would constitute an *excès de pouvoir*.109 I label this method a smokescreen because it raises a conundrum well-known to followers of the ongoing fragmentation debate within international law.110 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 law.

The second common method for handling conflicts between putatively public and private 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

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107 Waibel & Wu, *supra* note 62, 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) (stating the current pool of investment arbitrators is “rooted in international commercial arbitration”).

108 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. For this reason, there is a presumption that the outcome of commercial arbitral awards should not impact upon non-parties to the dispute (with some exceptions for sub-contracting parties, subrogated entities in interest, etc.).

109 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 challenge arising out of South Africa’s black economic empowerment legislation lacked competence to consider the human rights purposes of the legislation or the content of South Africa’s international human rights treaty commitments).

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.\footnote{Suez – Award, supra note 74 ¶ 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.”.).} 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.\footnote{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.}

So applied, this second method becomes as much of a mirage as the first. The shallowness of the two methods also explains 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 “private” (understood as investor) and “public” (non-investor) rights and interests.

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 on a transnational scale. Gus van Harten laid the groundwork for this approach with his 2007 book, Investment Treaty Arbitration and Public Law.\footnote{VAN HARTEN, supra note 11.} 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”.\footnote{SCHNEIDERMAN, supra note 11.} Santiago Montt followed with a 2009 book presenting international investment law as a form of spontaneously emerging global administrative law.\footnote{MONTT, supra note 11.} And most recently, Stephan Schill has been advancing the notion of international investment law as “comparative public law”\footnote{Schill (ed) – IIL & COMPARATIVE PUBLIC LAW, supra note 11.} or
“international public law” (not to be confused with public international law), also stressing the regulatory review function of the regime. 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. What is most striking about this strand of scholarship, however, given the remarkably similar way in which its authors conceive of the investment 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 “public” and “private” rights. In fact, it may do no better than the private dispute settlement characterization of the regime on this score. The end result would seem to depend upon which particular approach to “public governance” is adopted.

118 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).
119 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).
120 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 40. 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).
121 An illuminating side-by-side comparison of public international law and private international law conflict resolution techniques can be found in Ralf Michaels & Joost
Does one perspective nevertheless take better account of the competing stakeholders’ interests than the other? 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 narrow, self-interested reasons. They seek to obtain individual satisfaction of their grievances. They do not typically concern themselves with the broader societal reverberations of their claims. A view of international investment law which focuses on its role as an efficient means for settling specific disputes comports well with their objectives as investor-claimants.122

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 domestic and international law. The public governance view thus incorporates civil society concerns to a much greater degree than the private dispute settlement story.

What about states’ interests within the regime? At first blush, it might appear that the public governance framing of international investment law also does a good job of taking these into account. If states are viewed as faithful representatives of the domestic “public” – 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,123 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 in domestic regulatory review regimes and in investor-state

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122 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.

123 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).
disputes. 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.\(^{124}\) International relations scholars have long argued that power differentials among states play a key role in the making and sometimes breaking of international law.\(^{125}\) 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 existential debate seems to fully capture the interests of states.\(^{126}\)

All of this begs the question whether the tension is really about “public” versus “private” 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.

II. FROM RHETORIC TO 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

\(^{124}\) 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.


\(^{126}\) At least not when viewed from a rational choice perspective.
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 statues are enacted unilaterally by domestic governments (public). Investor-state contracts are negotiated between specific investors and specific states (private-public). 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, and then only if the state/non-state usage is adopted. The individual/collective usage has no obvious relevance to the investment lawmaking process.

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

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127 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.

128 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.
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 state 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 one percent of transnational corporations worldwide, but their outward investment accounted for 11% of global FDI in 2010. 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. 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, it is entirely possible to have state actors on both sides of the dispute. The arbitration community, at least, appears to accept that this is so.

Conversely, it is also possible to have non-state actors 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. Here the international law principles on attribution

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129 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.


131 Many Middle Eastern treaties even expressly include them.

132 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 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).


134 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,
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.\textsuperscript{135} All of these scenarios seem to undermine the utility of the strict state/non-state distinction between public and private in international investment disputes.\textsuperscript{136}

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. But in the Abaclat matter, 180,000 claimants participated in the initial filing. If international investment law has now entered an era 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.\textsuperscript{137} 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


\textsuperscript{136} 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).

turn stimulate their economies and improve the general welfare of their populations. Unfortunately, empiricists have found little support for the first leg in this chain of assumptions.

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 commentator has noted:

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

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. The next section examines whether the distinction between public international law and private international law might do so.

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138 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.

139 See Yackee, supra note 55 and references cited therein.

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

Public international law has historically referred to the set of norms “having their source in the international community of States”. 141 It includes norms binding upon states in their relations with one another 142 and by extension norms binding as between states and the international organizations created by states. 143 It also extends to norms applicable in the relations between states and individuals in circumstances where these norms derive either from international treaties 144 or from customary international law. 145

By contrast, private international law – or international conflict of laws, as it is referred to in some jurisdictions 146 – 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.” 147 These rules may derive either from domestic or international law. 148

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. 149 In considering the three classes, the first (treaty-based claims) clearly

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144 International human rights treaties and international investment treaties both fall within this class.
145 This is the case, for example, of the international customary law minimum standard of treatment for aliens, which has been identified as 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.
146 See e.g. ALBERT V. DICEY, CONFLICT OF LAWS (2d ed. 1908).
147 Stevenson, supra note 141 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.
148 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).
149 The latter two possibilities are the ones that were 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).
 originates in public international law; the second (contract-based claims) 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 governance side of the debate have done, 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. 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. There, several NGOs invoked 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. The principal 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

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150 In many treaty-based investment 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”.
152 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.
153 See Suez – Award, supra note 74 and accompanying discussion.
154 Vienna Convention, supra note 81, arts. 31–32.
settlement model while civil society pundits decried its negative public health impact.\textsuperscript{155}

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? To answer this question, one need only imagine what the \textit{Suez} dispute might have looked like had it proceeded as a contract-based arbitration rather than as a treaty-based one.\textsuperscript{156} This alternate scenario would involve the same facts, the same contractual rights, and the same set of public policy concerns emerging in the wake of Argentina’s economic crisis. The legal claims and defenses of the disputing parties would differ, however. The investors would be limited to bringing claims for breach of contract,\textsuperscript{157} since the tribunal would have no jurisdiction to decide claims of expropriation and the like. The government, for its part, could take advantage of additional contract-based defenses that were unavailable to it in the treaty setting, such as impossibility or changed circumstances.\textsuperscript{158}

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 regimes 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

\textsuperscript{155} 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.

\textsuperscript{156} 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.\textsuperscript{157} And perhaps some ancillary claims arising by reason of the contract, such as unjust enrichment or tortious conversion of property.

\textsuperscript{158} 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.
Enforcement of Foreign Arbitral Awards plays this backstop role. Like the ICSID Convention, which serves a similar function in the treaty-based investment arbitration setting, 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 without regard to 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.

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 difference between these two types of law, though on the basis of different legal philosophies.

In the civil law tradition, comprising most continental European, many Latin American, and some Asian jurisdictions, the division between public law and private law is traced at latest to the Corpus Juris Civilis of Justinian. Private law consisted of “that area of law in which the sole function of government was the recognition and enforcement of private rights.” 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.

The driving consideration behind public law, on the other hand, “was the effectuation of the public interest by state action.” As explained by Merriman and Peréz-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 –

\[\text{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.}
\[\text{JOHN HENRY MERRIMAN & ROGELIO PERÉZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA, 92 (3rd ed. 2007).}
\[\text{Id.}
\[\text{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 subject matters differently.}
\[\text{Id.}
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.¹⁶⁴

Does this classical civil law portrayal of public law as involving the “public interest” and private law as involving only “private interests” lend itself well to a binary characterization of the nature of the international investment law regime? Unfortunately, it does not. The classical civil law distinction between public law and private law has confronted important theoretical and practical difficulties over time. 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 the civil code but by their circumscription by public law principles.¹⁶⁵ 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.

Meanwhile, trends such as the participation of governments in market-based economic activities have undermined the traditional assumption that all government action necessarily occurs within the public law domain;¹⁶⁶ this accordingly questions the entitlement of governments to a superior status in all legal proceedings. For example, as mentioned above, in disputes concerning simple contractual transactions to which the government is a party, the government may be viewed as wearing a private “hat” – that is, functioning de facto as a private party and therefore subject to the same status as any other individual party under private law. These challenges and others have forced civil law scholars to propose doctrinal modifications to the traditional public law/private law division,¹⁶⁷ with the result that it no longer corresponds tightly to the distinction between personal and societal rights.

¹⁶⁴ *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.

¹⁶⁵ *See id.* at 94–96 (exploring five challenges to the distinction and concluding that “dichotomies like public law and private law seem to lose their utility”).

¹⁶⁶ *Id.*

¹⁶⁷ 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). Whatever the merits of the various doctrinal proposals within domestic jurisdictions, even such modified civil law distinctions between public law and private law are difficult to square with the nature of
Common law conceptions of public law and private law appear to have undergone a similar evolution over time, but with different origins and end results. In English law, private law rights included rights to property, rights in contract, and rights of personal security and personal liberty.\textsuperscript{168} Blackstone described them as absolute rights “inherent in every Englishmen”,\textsuperscript{169} 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 by individuals.”\textsuperscript{170} Since these rights were viewed as absolute, they were held to pre-exist statutory (or codified) law, deriving instead from the common law. It is noteworthy that this early definition of private rights under the common law seems to have encompassed many of the rights now classified in contemporary nomenclature as human rights. This understanding of private law rights was subsequently transferred to American law as well.\textsuperscript{171}

19\textsuperscript{th} century Anglo-American jurists conceived of public law rights, on the other hand, as “claims that were owned by the government – the sovereign people as a whole – rather than in persons’ individual capacities.”\textsuperscript{172} Regulatory claims by individuals against the government did not originally fall under the domain of public law. This understanding slowly morphed, however, such that by the late 20\textsuperscript{th} 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.”\textsuperscript{173} Thus, in the contemporary Anglo-American understanding, the government no longer holds a monopoly over public

\textsuperscript{168} WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND, 125, 130, 134. The first two categories would have included many rights that we now identify as human rights (and consequently associate with public law).

\textsuperscript{169} \textit{Id.} at 125.

\textsuperscript{170} \textit{Id.} at 134.

\textsuperscript{171} Ann Woolhandler, \textit{Public Rights, Private Rights, and Statutory Retroactivity}, 94 GEO. L.J. 1015, 1020 (April 2006) (internal citations omitted). \textit{See also id.} at 1021 (listing five classes of rights falling within the 19\textsuperscript{th} century conception of public rights).

\textsuperscript{172} \textit{See, e.g.}, \textit{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.”).

\textsuperscript{173} \textit{Id.} at p. 1021 (citing Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 HARV. L. REV. 1281, 1284, 1316 (1976)).
law. Individual citizens and groups of citizens may now assert public law claims against the government or against other private citizens.  

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. 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.

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.

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.” Indeed, it may be that the modern American concept of public interest law is the idea that best corresponds to the ongoing debate over reconciling public and private interests within international investment law.

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174 Woolhandler *supra* note 172, 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).


176 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 distention between private and public law as artificial in the pejorative sense of that term”).


178 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/.

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 the 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.

To sum up, 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.\textsuperscript{180}

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? There are several possible explanations. The most
prominent one advanced to date centers on the sociologically fractured
epistemic community of international investment lawyers.\textsuperscript{181} Since the

\textsuperscript{180} 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. \textit{See e.g.} Harry
221.

\textsuperscript{181} \textit{See, e.g.}, Roberts, \textit{supra} note 103; Stephan Schill, \textit{Whither Fragmentation? On the}
Literature and Sociology of International Investment Law, 22(3) EUR. J. INT’L L. 875
(2011); Moshe Hirsch, \textit{The Sociology of International Investment Law, in Conceptual
Foundations of International Investment Law}, (Douglas, Pauwelyn, Vinuales,
ed., forthcoming 2013) (on file with author); David Schneiderman, \textit{Judicial Politics and
majority of investment 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. 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 do not take sufficient account of other key
segments of the investment regime’s epistemic community, 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.

The civil society angle is particularly instructive for purposes of the
present analysis. Civil society advocates primarily invoke the public/private rhetoric for its emotive value. 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.

Of course, industry groups are civil society organizations too. They,
too, can deploy public/private rhetoric as an emotional subtext to help
them achieve their objectives. After all, if private businesses serve the

182 See, e.g., Roberts, supra note 103.
183 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
Transparency].
184 Examples of civil society arguments can be found in the references cited supra, note 35, Error! Bookmark not defined.. Most of the amicus briefs that have been filed in
investor-state disputes can be downloaded on the Investment Treaty Arbitration website,
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 fairness alarms, 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.185

One could levy a whole host of criticisms against the idea of applying public/private 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 public/private 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.186 It benefits investors by streamlining negotiations over lucrative state contracts without the hassle

185 See generally, Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press, 2005).
186 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.
of having to stop and consider how potential public/private conflicts might impact the operation 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 own 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. Small wonder, then, that investor-state arbitration tribunals have become the major object of attack from all quarters. Woe to the arbitrators, one might say! Yet herein lies the rub. Investment arbitrators tend to be accomplished individuals of recognized integrity who strive to render decisions in a manner that is consistent with their own personal values. 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 rhetorical 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 – nor between public governance and private dispute settlement – within international investment law; the operative value decisions inhere in the labeling exercise itself. As Karl Llewellyn put it in his discussion of the use of precedent in the 1930s (presaging


188 Indeed, the majority are likely appointed precisely because of their values, or at least their known viewpoints. See discussion, infra, at 13–14.
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. 189

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.” 190

Effectuating this recognition requires international investment lawyers to move beyond the circular public/private 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. What is the integrated systems approach, and why is it apposite here?

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. 191 Bertalanffy criticized the traditional method of biological study, which tended to “equate the 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”. 192 In place of this limiting view, Bertalanffy made the

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190 Id. at 1253.
191 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).
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. Bertalanffy’s invitation has since been taken up with enthusiasm, albeit with varying degrees of success, by scholars in numerous fields, including legal scholars.

My present aim, of course, is not to provide a definitive exposition of systems theory or to debate its merits at an abstract level. Rather, I take loose inspiration from the theory in order to explore its potential practical utility in analyzing international investment law. 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 a living organism, all of these moving parts display internal organization and wholeness. The regime’s substantive 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 can choose to enforce or not enforce the award (under the New York Convention) or the executive branch of the host state can choose to comply or not comply with the award (under the ICSID

194 Most famously, in law, by Niklas Luhmann. See NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (1985); NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Klaus A. Ziegert trans., 2003).
195 For an extensive critique of the theory and its application, see BLAUBERG, SADOVSKY, & YUDIN, supra note 192, Part II.
196 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.
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, and arbitrators to change interpretive methodologies. In short, the international investment law regime’s many layers are systemically organized and thickly interconnected via multidirectional feedback loops.

Third, each of the international investment law system’s constituent sub-parts is active, not static, 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, 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, narrowing the scope of their treaty-based substantive obligations, terminating existing bilateral investment treaties, or moving to exclude investor-state arbitration from future investment agreements.

Prominent arbitrators, in turn, are reacting to these developments in a proactive manner. It is not uncommon nowadays to see arbitrators

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197 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.

198 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.

199 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.

200 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 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 64.

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

lambasting other arbitrators in the form of scathing dissents, public speeches, or scholarly articles 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.

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/private existential 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 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

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

203 Arbitrator Pedro Nikken wrote a pointed dissent from the above-discussed Suez award, for example. See Suez – Dissenting Opinion, supra, note 65.
204 See, e.g. Brower, supra note 13.
207 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).
obligations toward a particular foreign investor under the treaty.\textsuperscript{208} Several commentators have stressed that articles 31 and 32 of the Vienna Convention on the Law of Treaties provide guidance in this matter.\textsuperscript{209} However, as the discussion in the first part of this paper made clear, the Vienna Convention has proven insufficient to ensure much consistency of approach in practice.\textsuperscript{210}

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

\textit{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 must:

1) have regard for any conflicts as may arise, on the facts of the dispute, between the host State’s obligations toward the investor under this treaty and its concomitant legal obligations toward parties other than the investor arising out of: a) the provisions of this treaty; b) other international agreements to which the host State is a party, or c) the fundamental rights provisions contained in the host State’s highest domestic law, as interpreted and applied by its highest judicial authority; and

2) apply any compensation obligation arising out 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 investor under this treaty and its obligations to other parties 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 \textit{Suez v. Argentina} water privatization dispute profiled above?\textsuperscript{211} Quite evidently, a tribunal applying this clause would be precluded from resolving the dispute in the superficial “no actual conflict” manner actually adopted by the \textit{Suez

\textsuperscript{208} Some, like the U.S. Model BIT 2012, \textit{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.


\textsuperscript{210} On the regime’s jurisprudential inconsistency problems, see Franck, \textit{supra} note 40; Maupin, \textit{supra} note 63.

\textsuperscript{211} \textit{See infra}, at 15–16.
tribunal. At the very least, the tribunal would be obliged to explain how Argentina could have satisfied its obligation to ensure uninterrupted access to water to the citizens of Buenos Aires without mandating at least a temporary reduction in the investor’s original, pre-financial crisis rate of return under the concession contract. And if, as the dissenting arbitrator in *Suez* argued, the financial crisis rendered Argentina incapable of directly subsidizing the price differential under the original contract terms, the tribunal would have been forced to adjust its compensation award accordingly.²¹² At the dispute resolution level of the international investment law regime, then, this type of interpretive clause would result in shifting the balance struck between investor 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, it could well lead to a decrease in the percentage of annulment requests by states under the ICSID Convention and/or set aside requests under the New York Convention.²¹³ It could also increase pay-out rates on awards by reducing the political cost of compliance for the respondent state.²¹⁴ It might even soften civil society opposition to the regime, thereby reducing the pressure on states to either abandon the regime or drastically decrease their substantive legal commitments to foreign investors. All three of these developments would then move the balance back toward the investor side of the equation.

### 2. An institutional reform

One difficulty with the textual reform just proposed is that it could only be implemented comprehensively by amending or replacing some 3000 existing treaties – a difficult and lengthy process. The major arbitral institutions, on the other hand, do not face the same kinds of collective action and bargaining power dilemmas faced by treaty negotiators. ICSID

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²¹² This is precisely what dissenting arbitrator Pedro Nikken, a human rights lawyer by background, suggested the tribunal should have done. *Suez* – Dissenting Opinion, supra note 65, ¶¶ 35-44.

²¹³ 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 19, 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.

²¹⁴ 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 the Argentine executive branch has so far refused to pay any of them, possibly because to do so would be to commit political suicide.
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.\(^{215}\)

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 all of the potential conflicts of law 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 non-investor parties arising out of the bodies of law specified in my 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 Industrial Property.\(^{216}\) 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,\(^{217}\) including through the use of tobacco packaging regulations.\(^{218}\)


\(^{216}\) As pointed out by the claimants, *Philip Morris* – Notice of Arbitration, supra note 7, at ¶ 6.6.

\(^{217}\) 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
Needless to say, such a secretarial memo 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 parties 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. 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 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. Here again, this scenario might prove more investor-friendly than the alternative, since an award that is overly dismissive of non-investor rights may be more susceptible of annulment.

There could also be some inter-institutional competition effects. If ICSID were to adopt this practice, investors who are given a choice under an investment treaty might opt for ad hoc UNCITRAL arbitration or some other arbitral forum instead. Would civil society advocates respond by dropping their opposition to ICSID and re-directing their lobbying efforts

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.”).  
218 Id., art. 8.
219 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).
220 These are two of the most frequently cited grounds for annulment under the ICSID Convention.
221 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.
222 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 183.
against non-ICSID arbitral forums? If so, could this prompt states to eliminate from their treaties the provisions that allow investors to choose among forums? It is impossible to predict precisely what new equilibrium between investor and non-investor rights this proposal would generate. What is clear, however, is that it could effectuate a significant realignment in the system no less than the more cumbersome textual reform route posited above.

3. An enforcement reform

As a third possibility, suppose the prior institutional reform led investors to prefer instituting arbitration proceedings in non-ICSID forums over ICSID. Suppose, further, that at least some states proved unable to persuade their treaty partners to excise the unilateral investor forum choice provision from their existing treaties. Or suppose, alternatively, that ICSID refused to enact any kind of institutional reform at all. Would this mark the end of the story, making any textual or institutional proposal dead in the water? Not necessarily. States still control multiple levers within the system, and they can press on these at any time.223

A state that is unhappy with ICSID can withdraw unilaterally from the ICSID Convention – as Venezuela, Ecuador, and Bolivia have all done.224 This move leaves the exiting state with other powerful options. It can directly pressure the arbitration-related institutions that are intergovernmental in nature to reform their procedural practices, perhaps along the lines of the secretarial memo just described above. This strategy could, for example, present an effective means of reshaping the way in which investor-state disputes are resolved under the UNCITRAL or Permanent Court of Arbitration rules. It is not a viable option, however, for institutions like the Swedish Chamber of Commerce, International Chamber of Commerce, or London Court of International Arbitration, since these cater to the commercial interests of industry groups and have no direct accountability to governments.

Even so, what all of the major arbitration institutions have in common is that their awards are subject to enforcement under the New York Convention. Unlike the ICSID Convention, the New York Convention allows its contracting states to refuse to recognize or enforce a foreign arbitral award if it violates the public policy of the enforcing state.225 Domestic courts in enforcing states could therefore choose to review the awards of investor-state tribunals more closely, on public policy grounds,

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223 Which implies, of course, that civil society groups can pressure them to do so.
224 See supra note 199.
225 New York Convention, supra note 2, art.V. Much of the existing scholarship on the two conventions either 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 in investment law is an analysis of the interplay between the two enforcement systems.
wherever the institutional process underlying the award did not ensure that the tribunal took due account of the respondent state’s simultaneous obligations to non-investors. Finally, if the courts decline to do so – perhaps due to a longstanding tradition of respecting the finality of arbitral awards for reasons of commercial efficiency\(^\text{226}\) – then domestic legislatures could amend the implementing legislation through which the New York Convention is domestically enacted, so as to require a different type of public policy review for investor-state (as opposed to commercial-commercial) arbitration awards.\(^\text{227}\) This, in turn, would likely prompt arbitrators to take more care of public policy concerns when drafting awards.

To summarize, then, treaty negotiators, arbitral institutions, domestic legislators, civil society advocates, and arbitrators all have it within their power to make moves that would 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, I argue that 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 at a given moment.

My own inclination, as revealed by the above three proposals, is to start by trying out different means of ensuring that important non-investment related public policy goals are not overshadowed by the public policy goal of protecting foreign investors. The *Suez*, *Abaclat*, and *Philip Morris* case studies all underscore that the need for recalibration on this point is pressing. I therefore advocate beginning the experimental process immediately. But because complex integrated systems can respond to slight stimuli in unpredictable ways, I suggest that 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 cautious integrated systems approach is preferable to each of the three major alternatives.

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

1. **The status quo alternative**

\(^{226}\) Such as the U.S. tradition.

\(^{227}\) In the U.S., this would need to be routed through the Federal Arbitration Act, 9 U.S.C. §§ 201–208. Different considerations would apply in more monist systems.
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 both from within and without. 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 on non-investor concerns. Moreover, the regime is already evolving at a rapid pace – albeit without much coherent guidance at present. 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.

2. The multilateralization alternative

The second alternative to the dynamic integrated systems approach would be to attempt to multilateralize the regime. Were it possible to replace the whole patchwork of overlapping investment instruments, arbitral institutions, enforcement conventions, 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, 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 investment 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 ICSID arbitral jurisprudence, the proposal was widely rejected.


229 Precisely as the integrated systems perspective would predict.

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


232 For one critique, see Gabrielle Kaufmann-Kohler, In Search of Transparency and Consistency, 2(5) TRANSNAT’L DISP. MGMT. (2005).
and quickly withdrawn. The difficulty is that states 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 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.

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 weird system in which private international arbitrators sit in judgment over important domestic regulatory policy questions 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. 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. Such process improvements could spill over into other areas, thereby promoting good governance, improving respect for human rights, etc. – all to the benefit of domestic constituencies and foreigners alike.

Moreover, the international investment law regime does not start and stop with treaties. Investor-state contracts can also raise the kinds of

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233 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 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.

234 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).

235 See Yackee, supra note 55 and the empirical studies summarized therein.

236 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).
investor versus non-investor rights problems I address here, as can unilaterally enacted domestic investment statutes. Surveys of multinational companies anecdotally 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 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.\textsuperscript{237}

What about a country like the U.S., which does have good domestic courts? Why does it continue to beam itself up into this parallel legal universe? There are at least three reasons. First, while the present international investment law regime is far from perfect, it has gained a great deal of momentum in recent years. It enjoys the staunch support of well-financed lobbies from within the investor community and the international arbitration community, which has kept it in favor not only with the U.S. government but with quite a few of the world’s most economically powerful states.\textsuperscript{238} In light of this support, proposals to abolish the system are probably not realizable at present, even if it could be definitively established that this was desirable.

Second, the U.S. government does not yet have sufficient incentive to abandon the regime. It has not yet lost an investor-state dispute – not even when it should have, on the facts of the case, and not even when it most likely would have, had it been a smaller, less powerful government.\textsuperscript{239} Given its unblemished record of defeating investor-state claims, the U.S. strategy of making regular but modest reforms to its forward-looking model bilateral investment treaty text makes good practical sense. The only real downside of maintaining the existing regime, from the U.S. perspective, has been the cost and annoyance involved in defending against a string of unsuccessful claims.

In the long term, of course, this might well change. If and when it does, it is certainly possible to envisage the U.S. softening its support for the existing regime, even against the wishes of the pro-investor lobby. By then, however, there might well be a new set of resolute stakeholders sitting atop the economic pyramid and opposing any radical departure from the status quo – Chinese investors, perhaps. China has already been aggressively expanding its investment treaty program, and it is difficult to

\textsuperscript{237} Indeed, South Sudan is already facing its first ICSID claim. \textit{See, South Sudan Hit with ICSID Claim from the North}, GLOBAL ARB. REV. (Sep. 6, 2012).

\textsuperscript{238} Including China, the U.S., and the E.U.

\textsuperscript{239} Many close observers of the regime have suggested that the \textit{Loewen} claim brought under chapter 11 of NAFTA would have succeeded had the respondent state been Mexico rather than the U.S. \textit{See Loewen Group – Award, supra note 8}. 
imagine why its growing investor lobby should prove any more willing than the current U.S.-based one to overthrow the entire regime.

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. 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 340 claims in that period – many of which would still raise the thorny 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. 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 existential 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 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 doing so is to analyze the regime from 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 present impracticability of more sweeping alternatives, it may be that this

240 This process is governed by articles 54–60 of the Vienna Convention, supra note 81.
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.