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IS INVESTOR-STATE ARBITRATION ‘PUBLIC’?
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I. Introduction

For those following debates on the merits of the investment chapters within the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP), the answer to the titular question is obvious. Investor-State Dispute Settlement (ISDS) is undoubtedly a mechanism to resolve ‘public law’ disputes. This is a major reason why many, from the EU to the UN’s Independent Expert on the Promotion of a Democratic and Equitable International Order, want to replace ISDS with an international investment court,¹ and also why U.S. Senator Elizabeth Warren was able to find one hundred U.S. law professors to sign a public letter in support of the view that ISDS is such a wrong-headed attempt to ‘privatize’ what should stay in the ‘public’ domain that it violates the rule of law.² The public nature of the international investment regime, including ISDS, is taken for granted, particularly since there is no doubt that investor-state arbitrators apply public international law and that the international investment regime shares numerous points of intersection with other public international law

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¹ See e.g., Aline Robert, ‘Parliament Backs TTIP, Rejects ISDS’ (*Euroactive*, 9 July 2015) <www.euractiv.com/sections/global-europe/european-parliament-backs-ttip-rejects-isds-316142>; UNGA, ‘Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice de Zayas’ (14 July 2015) UN Doc A/HRC/30/44 (de Zayas Report). In this report, Mr de Zayas argues that conflicting investment agreements or arbitral awards: are incompatible with international *ordre public* and invalid as *contra bonos mores* (de Zayas Report, summary 1); constitute a “corporate move against the fundamentals of state sovereignty” (de Zayas Report, para 27); are akin to an effort to “create a new legal order beyond the Charter of the United Nations” or a “*legibus solutus* . . . exempt from the rule of law, general principles of law and basic codes of conduct” (de Zayas Report, para 56); that “anti-democratic” ISDS can be and should be terminated and replaced by either national courts or a special international investment court (de Zayas Report, paras 41 and 62), and that in the meantime state victims of “*contra bonos mores* investor-state dispute settlement should . . . jointly refuse implementation” of the underlying agreements (de Zayas Report, para 62). This report also includes an extensive bibliography of the abundant literature criticizing ISDS from the academy, practitioners, and NGOs (de Zayas Report, 45–50). For the text of the EU proposal for an international investment court, see European Commission, *Draft Text, Transatlantic Trade and Investment Partnership Trade in Services, Investment and E-Commerce*. Chapter II Investment, Arts. 9 and 10 (proposing a Tribunal of First Instance and an Appeal Tribunal) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf>. Thus far, only two known investment protection agreements resort to an investment court over ISDS, see Canada-European Union: *Comprehensive Economic and Trade Agreement (CETA)* <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng>; European Commission, *EU-Vietnam Free Trade Agreement: Agreed Text as of January 2016* <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>>.

² See text of letter at <www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf>. For an earlier comparable effort, signed by many academics both in and outside of law schools and the United States, see Osgoode Hall Public Statement on the International Investment Regime, 31 August 2010, <www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010>.

regimes.³ This essay critically examines the consensus that ISDS is ‘public’ and what is commonly meant by that characterization. It concludes that, for purposes of description and prescription, ISDS, and the regime of which it is a part, should best be seen as a hybrid between public and private.

II. The Top Ten Descriptive Claims

If one uses as a guide Anthea Roberts’s enumeration of the “clash of paradigms” that bedevils scholarly debates about the nature of ISDS and competing lines of investor-state arbitral caselaw, it is possible to tease out ten reasons why ISDS, notwithstanding its reliance on the procedural rules and enforcement mechanisms developed in the context of private commercial arbitration, is a system of ‘public law’.⁴ The elements of what Roberts calls the “public law paradigm” in investment law include the following. ISDS or the international investment regime is public:

1. Because it is based on a regulatory relationship between states as governors and foreign investors as the governed.⁵
2. Because it is not about mere contractual disputes between private parties but governmental decisions that involve the public interest, such as whether Mexico can refuse construction of a hazardous waste disposal plant without paying compensation to a foreign investor who believed he had permission to build such a plant.⁶
3. Because the regime is a creature of public international law, namely primary rules generated by over 3400 treaties that are governed by the secondary rules of public international law, such as the customary rules of treaty interpretation and the Articles of State Responsibility.⁷
4. Because investor-state arbitrators effectively engage in forms of review over public national law that resemble in form and outcome the quintessentially public constitutional or ‘judicial review’ undertaken by supreme courts around the world.⁸
5. Because ISDS does not simply settle discrete commercial disputes; it generates a form of ‘global governance’ or, as certain NYU-based scholars would put it, ‘global administrative law’ (GAL) that *de facto* regulates states.⁹

³ See e.g., José E. Alvarez, *The Public International Law Regime Governing International Investment* (Brill 2011) at 406–457 (enumerating ten such points of intersection).

⁴ Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107 *American Journal of International Law* 45. Notably, in this article, as well as in her other work, Roberts herself does not draw the conclusion that ISDS is a ‘public law’ regime; she suggests that it is best seen as “*sui generis*”. *ibid* 94. In other work, Roberts argues for the “hybrid” nature of investment treaties, see ‘State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority’ (2014) 55 *Harvard International Law Journal* 1; ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56(2) *Harvard International Law Journal* 353.

⁵ Roberts, ‘Clash of Paradigms’ (n 4) 45.

⁶ *ibid* 45–46, and 78 (citing ‘regulatory decisions’ challenged in decisions such as the NAFTA’s *Metalclad*).

⁷ See generally *ibid* 50–52 (discussing the role of the Vienna Convention on the Law of Treaties and other public international law regimes).

⁸ *ibid* 46, 58–63.

⁹ *ibid* 65–66. See also de Zayas Report (n 2).

6. Because the structure of investor-state claims—suits by individual claimants directed against state action based on rights proclaimed in treaties—closely resembles other public international legal regimes, namely regional and global mechanisms to protect human rights.¹⁰
7. Because what ISDS arbitrators typically do—strike a ‘balance’ between the economic and non-economic interests of states—resembles what another public international law regime, the trade regime, does.¹¹
8. Because—despite bilateral appearances—the structure, contents, and remedies provided under international investment protection agreements are not those of tit-for-tat reciprocal deals. The regime produces multilateral effects comparable to those generated by formally multilateral regimes; it aspires to create common rights of public international law.¹²
9. Because ISDS arbitrators are disproportionately members of Oscar Schachter’s ‘invisible college’ who share a common outlook and expertise; that is, because its arbitrators are public international lawyers.¹³
10. Because ISDS generates and relies on public caselaw, thereby engendering expectations for *jurisprudence constante*, unlike the private awards usually generated under commercial arbitration.¹⁴

These reasons for ascribing the public label to ISDS are often accompanied by ten reasons why this matters normatively. The ten descriptions above are commonly accompanied by some or all of the ten prescriptions below.

III. The Top Ten Public Prescriptions

1. The public law nature of the regime means that public law analogies are appropriate for filling gaps or resolving interpretative ambiguities in investment law.¹⁵

¹⁰ Roberts, ‘Clash of Paradigms’ (n 4) 69–74. Thus, de Zayas’s contention that ISDS is a “major threat” to a “democratic and equitable international order” rests on the view that its arbitrators “act as if they were above the international human rights regime” even though they are “not natural guardians of the public interest.” de Zayas Report (n 2) para 15.

¹¹ Roberts, ‘Clash of Paradigms’ (n 4) 69–74. This helps to explain the common tendency, often praised, to draw from WTO law in the interpretation of investment law. See e.g., Valentina Vadi, *Analogies in International Investment Law and Arbitration* (CUP 2016) at 209–217.

¹² Roberts, ‘Clash of Paradigms’ (n 4) 52–53 (citing to Stephen Schill’s *The Multilateralization of International Investment Law* (CUP 2009)).

¹³ *ibid* 54–55 (discussing the role of distinct epistemic communities of lawyers involved).

¹⁴ *ibid* 53 and 62.

¹⁵ *ibid* 47 and 66. Roberts argues that ISDS arbitrators face distinct choices among analogies based on seeing investment law as a subfield within public international law, as a species of international arbitration, or as a form of internationalized judicial review. *ibid* 47 (also noting that the choice among analogies can determine, for example, whether a losing party should pay its own costs in investor-state arbitration, as suggested by one arbitrator’s view in *Thunderbird* that since states defray their own costs under the European Convention of Human Rights, that should be the solution under the NAFTA as well). For a slightly different formulation of the competing ‘paradigms’, see Vadi (n 11) 179–182.

2. The public law paradigm reflects and reaffirms the core understanding that states continue to ‘own’ the treaty regime that they have established. It justifies interpretations of the law that, in case of doubt, side with maintaining the control of the state ‘principals’ of this regime, including over their arbitrator ‘agents’.¹⁶ This view, consistent with seeing ISDS as simply an application of diplomatic espousal, also suggests that states retain the power to waive or settle their nationals’ investment claims at any time, take countermeasures, or reach for state-to-state arbitration in lieu of ISDS.¹⁷
3. The public nature of the regime has clear implications for desirable public law reforms for ISDS going forward.¹⁸ These include prescriptions endorsed by GAL or ‘public law’ scholars, as well as by self-identified ‘progressive’ NGOs such as the Canadian-based Institute for Sustainable Development. The public law agenda for reform includes greater transparency, amicus participation, processes for review of initial arbitral awards, heightened reason-giving, and increased resort to ‘proportionality balancing’ to better respect sovereign policy space.¹⁹ As noted, diehard public law enthusiasts urge replacing ISDS with a fully judicialized mechanism (such as an international investment court) to avoid outsourcing to private parties the resolution of public disputes.
4. Investor-state arbitrators should adopt techniques for avoiding judicial law-making. These include adoption of the so-called ‘passive virtues’ favoring restraint, such as narrow conceptions of standing or ripeness. This prescription would encourage the dismissal of investor claims by, for example, strict interpretations of any pre-conditions imposed on the bringing of investment claims and narrow conceptions of ‘covered investment’ or ‘investment disputes’. It may also suggest that it is appropriate to take a narrow view of permissible remedies often sought by investor claimants, such as arbitral orders for interim measures.
5. Since the public law paradigm “depends on ongoing interactions between treaty parties (as law-givers) and tribunals (as law-apppliers),”²⁰ changes to international investment agreements (IIAs) and practice need to encourage such interactions. The publicness of the regime suggests the need to maintain a sovereign ‘check’ on arbitral discretion by, for example, including mechanisms in investment treaties that enable state-issued binding understandings to trump the views of ISDS

¹⁶ *ibid* 59–61. For the view that the most effective supranational forms of adjudication operationalize a principal-agent function between state principals and their adjudicator agents, see Eric Posner and John Yoo, ‘A Theory of International Adjudication’ (2005) 93 *California Law Review* 1.

¹⁷ See generally Roberts, ‘Clash of Paradigms’ (n 4) 64 and 70–74 (discussing whether investor claimants are accorded their own independent rights).

¹⁸ *ibid* 63–68.

¹⁹ See e.g. Benedict Kingsbury and Stephan Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’ in Benedict Kingsbury and Richard B Stewart (eds), *El Nuevo Derecho Administrativo Global en América Latina* (RPA 2009).

²⁰ Roberts, ‘Clash of Paradigms’ (n 4) 62.

arbitrators (even if these affect the merits of pending investor claims).²¹ The need to encourage or enhance state-ISDS interactions may suggest greater roles for national courts, perhaps by insistence on exhaustion of local remedies prior to resort to ISDS and/or enhanced judicial review over the enforcement of arbitral awards. The next generation of international investment treaties, in short, needs to remain acutely sensitive to the desires of states, just as the evolving interpretations of treaties need to remain responsive to the subsequent practice of their state parties.

6. The public law paradigm suggests that investor-state arbitrators should emphasize standards of review that are deferential to sovereigns.²² Public law proponents differ on how this ought to be done. For some it means displacing, within ISDS, the concept of equality of arms, a ‘private law’ notion used in commercial arbitration that wrongly assumes that the two litigating parties are subject to equal treatment, with more appropriate ‘public law’ principles such as *in dubio mitius*, the margin of appreciation, and subsidiarity.²³
7. Because ISDS is not reducible to mere ‘dispute settlement’ but is a form of public adjudication that needs to remain attentive to the broader implications of decisions that affect the rights of the community of states (and not just the particular litigants) going forward, it needs to be an agent for the de-fragmentation of public international law. Investor-state arbitrators should take seriously the fact that the investment regime is not a self-contained public law regime.²⁴ For some this means a particularly fulsome application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) to permit, for example, recourse to even ‘soft’ human rights norms when interpreting international investment agreements.²⁵ Seeing the investment regime as a public regime means that, wherever possible, investor-state arbitrators should borrow the law of other public international law regimes such as those dealing with human rights or trade.²⁶
8. Adopting a public law frame means accepting ISDS as a caselaw /precedent driven enterprise that is attentive to comparable public law rulings issued by other national and international courts, particularly the ICJ, but also those rendered by the European Court of Human Rights and the

²¹ *ibid* at 82–83 (discussing a number of methods to shift power away from the arbitrators and back to states).

²² *ibid* 66–67.

²³ *ibid* 55 and 64. But see Stephan W. Schill, ‘Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review’ (2012) 3:3 *Journal of International Dispute Resolution* 577 (agreeing that *in dubio mitus* would be heresy in the context of commercial arbitration since it would violate the principle of the equality of the parties but rejecting it as inconsistent with textual demands of IIAs).

²⁴ See e.g., Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 *European Journal of International Law* 483.

²⁵ See e.g., Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology,’ in Christina Binder and others (eds) *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer* (OUP 2009). For the view that this part of the VCT should be used as such a tool for de-fragmentation, see Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International Law and Comparative Law Quarterly* 279.

²⁶ Roberts ‘Clash of Paradigms’ (n 4) 69–74.

WTO Appellate Body.²⁷ Investor-state arbitrators should embrace their juris-generative responsibilities and respect relevant precedents; they should not behave as if they are mere settlers of disputes, one case at a time.

9. The public law paradigm suggests the relevance of (and the priority to be given to) principles initially deployed by national constitutional courts, particularly the principle of proportionality. This core ‘general principle of law’ should be imported from the practice of national and international courts to ISDS as it is needed to strike the appropriate balance between regulatory autonomy (or the protection of public policy goals) and investors’ rights.²⁸
10. Adopting a public law frame means that it is presumptively proper to reach for other public law principles developed under national law. It is desirable, for example, to adopt solutions on the basis of a comparative law survey of public administrative laws or “general principles of public law”.²⁹

The descriptive and prescriptive lists above reflect widely accepted views within the academy and international civil society. Most believe: that commercial and investor state arbitration are two clearly distinguishable ‘species’ of adjudication;³⁰ that while commercial arbitration is an alternative form of dispute resolution that is attractive to private parties, ISDS, especially when it emerges from a state’s advance treaty commitment, is a unique form of privity-less adjudication triggering unique concerns;³¹ and that a bumper crop of normative prescriptions follow from these public/private distinctions. It is also widely accepted that the failure to recognize the links between the two lists—that is, the contrary insistence that ISDS is either private or some kind of unique ‘hybrid’—makes the investment regime

²⁷ See Roberts ‘Clash of Paradigms’ (n 4) 62.

²⁸ To Roberts, the contrasting public/private paradigms can be illustrated by the difference between giving due consideration to the legitimate expectations of both investors and states (which may be part of proportionality balancing) versus the application of private law principles like promissory estoppel. *ibid.* 66 (contrasting the ruling in *Tecmed* that took into account the expectations of the particular foreign investor (promissory estoppel) versus *Saluka*, whose more public law approach was illustrated in its conclusion that “no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged”). For a strong defense of proportionality balancing as a general principle of law applicable in ISDS, see Alex Stone Sweet and Giacinto della Cananea, ‘Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez’ (2014) 46 *NYU Journal of International Law and Policy* 911.

²⁹ Roberts ‘Clash of Paradigms’ (n 4) 58–75. See e.g., Stephan W. Schill, ‘International Investment Law and Comparative Public Law—An Introduction’ in Stephan W. Schill, *International Investment Law and Comparative Public Law* 3, at 29-35 (CUP 2009).

³⁰ See e.g., Jan Paulsson, ‘International Arbitration is not Arbitration’ (2008) 2 *Stockholm International Arbitration Review* 1; Gus Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims Against the State’ (2007) 56 *International and Comparative Law Quarterly* 372; Toby Landau, ‘Remarks’ in *Proceedings of the 103rd Annual Meeting, American Society of International Law* (ASIL 2009). See generally Vadi (n 11) 57–64, 82–84.

³¹ See e.g., Jan Paulsson, ‘Arbitration without Privity’ (1995) 10 *ICSID Review* 232. See e.g., Schill (n 29) ‘An Introduction’; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007). For a view that the absence of privity is the “original sin” of the investment regime, see M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 139 (CUP 2015).

vulnerable to continued legitimacy challenges.³² A principal goal of the ample ‘public law’ literature is precisely to make sure that ISDS becomes more responsive to ‘public rule of law’ values.³³

This essay does not attempt to answer current debates about the best ways to reform ISDS. Nor does it address whether it should be replaced by an international investment court. It assumes that irrespective of the outcome of the TTIP negotiations, ISDS will continue to be a fixture within the broader investment regime and that its ‘nature’ will remain a live issue.³⁴

The essay concludes that it is difficult to find a jurisprudentially consistent basis for treating commercial arbitration and ISDS as two distinct ‘species’ of arbitration in part because the public/private divide is itself a construct that is in tension with reality. ISDS continues to share a number of connections with commercial arbitration (not all of them merely ‘procedural’), as it does with public international law regimes. To the extent ‘public’ and ‘private’ remain useful analytical or descriptive categories, ISDS has both private and public features and, therefore, is most properly described as a hybrid.

The argument here is not that ISDS has no public law features. As is suggested by the first list of descriptive claims above, ISDS shares many features with other public law regimes. It is a creature of public international law and its arbitrators generally apply public international law sources. But, as a hybrid, ISDS is ill-suited to the stark public/private dichotomy that leads some public law advocates to defend the ten highly misleading, often contradictory, or outright erroneous prescriptions in the second list above.

IV. What’s Right about the Ten Descriptive Claims

It is obviously true that ISDS invariably involves a government as the respondent whereas international commercial arbitration only sometimes does, that ISDS claims often implicate regulatory issues of wide public interest while commercial arbitrations only rarely do, and that some investor-state awards may have greater effects on the public fisc than do some commercial arbitration awards.³⁵ While

³² See e.g., Gus Van Harten, ‘Commentary: A Case for an International Investment Court,’ (*Investment Treaty News*, 7 August 2008) <www.iisd.org/itn/2008/08/07/commentary-a-case-for-an-international-investment-court>. But see a leading defense of the ‘hybrid’ thesis: Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitrations’ (2003) 74 *British Yearbook International Law* 151.

³³ See e.g., Kingsbury and Schill (n 19); Stephan W. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ (2011) 52 *Virginia Journal of International Law* 57.

³⁴ This is because, despite the well-known backlash against ISDS, it remains a fixture in the universe of IIAs. Thus, according to UNCTAD’s online database permitting a search of 1456 IIAs, only 28 do not contain ISDS. See UNCTAD, ‘IIA Mapping Project’ <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenuWrapper>> (accessed 11 July 2016). In addition, the use of ISDS reached a record high in 2015, with 70 investor-state claims filed, for a total number of publicly known ISDS claims of nearly 700 as of 1 January 2016. UNCTAD, ‘Investment Dispute Navigator’ <<http://investmentpolicyhub.unctad.org/ISDS>>.

³⁵ But empirical studies suggest the need for caution with respect to common assertions that states lose most ISDS claims, that the amounts awarded to investors usually exceed many millions of dollars, or that the most common venue for ISDS, ICSID, is especially favorable to investor claimants. See e.g., Susan D. Franck, ‘Empirically Evaluating Claims about Investment Treaty Arbitration’ (2007) 80 *North Carolina Law Review* 1; Susan D. Franck,

specific instances of ISDS-caused ‘regulatory chill’ remain anecdotal, it is also true that some investor-state rulings entail prescriptive or regulatory consequences for losing respondent states. Those who see ISDS as a tool for GAL governance comparable to, for example, the World Bank Group’s various Good Governance and Rule of Law indices, are not wrong. Indeed, there is a strong case to be made that some ISDS rulings and these indices share a common ideology and point states in the same market-friendly direction.³⁶ It is also true that certain key paragraphs within ISDS rulings, such as those purporting to distill the elements of fair and equitable treatment (FET), are cited with the same frequency (and perhaps wrong-headed reverence) as other common nostrums urged upon states in order to enhance the rule of law.³⁷ Constitutional scholars are not wrong to see some ISDS disputes as emulating the form and impact of constitutional adjudication.³⁸ In the language of a recent law review article (not addressing arbitration) by Jack Goldsmith and Daryl Levinson, investment arbitration might be seen as enforcing “law for states” no less than other forms of public law that Goldsmith and Levinson address, namely constitutional law and general public international law.³⁹

There is also no doubt that ISDS has generated a legitimacy debate all its own. Resort to commercial arbitration has not generated comparable pressures for greater transparency, the admissibility of amicus briefs, or the establishment of a formal appellate arbitral body to review the findings of an original arbitral tribunal. Despite perennial dissatisfactions with commercial arbitration (particularly if forced upon innocent consumers under *de facto* contracts of adhesion), no one is calling for replacing it entirely with a permanent international court. Commercial arbitration has not produced the same level of anxiety with respect to whether its arbitral rulings are consistent over time or whether these rulings cohere with the decisions of the International Court of Justice or the European Court of Human Rights. Commercial arbitration has not generated comparable opprobrium given prospects for forum-shopping.⁴⁰

As is further discussed below, the different reactions prompted by the two forms of arbitration stem from the relative absence of publicly available commercial arbitral awards. With some exceptions (such as sports law arbitrators), those who arbitrate commercial disputes focus on settling the dispute before them; they pay less attention to prior arbitral awards in large part because there are fewer such

‘The ICSID Effect? Considering Potential Variations in Arbitration Awards’ (2011) 51 *Virginia Journal of International Law* 977.

³⁶ For an assessment of the impact of global indicators by a number of international organizations, see Kevin E. Davis and others (eds) *Governance by Indicators* (OUP 2012).

³⁷ See e.g., Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* 130–132 (OUP 2008) (citing elaborations of the FET standard in *TECMID and Waste Management*). This reflects the strong emphasis on producing ISDS *jurisprudence constante*. See e.g., Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 *Arbitration International* 357; Vadi (n 11) 92–96.

³⁸ This point has been acknowledged even by those who do not define themselves as ‘public law’ scholars. See e.g., Rudolf Dolzer, ‘The Impact of International Investment Treaties on Domestic Administrative Law’ (2006) 37 *NYU Journal of International Law and Policy* 953.

³⁹ Jack Goldsmith and Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’ (2009) 122 *Harvard Law Review* 1791.

⁴⁰ For a survey of anxieties about ISDS, see José E. Alvarez and others (eds) *The Evolving International Investment Regime* (OUP 2011); Claire Balchin and others (eds) *The Backlash Against Investment Arbitration* (Kluwer 2010).

awards to refer to. The lack of transparency of much commercial arbitral ‘caselaw’ makes any effort to engage in or produce *jurisprudence constante* unlikely. By contrast, Stephan Schill is probably correct that the combination of forum-shopping, consequences of MFN guarantees, and reliance on arbitral precedent tends to produce a *de facto* multilateral investment regime of some kind, and not simply bric-a-brac rulings applying disparate treaties.⁴¹

V. But is ISDS really a public breed apart?

The accuracy of the first list of ten above rests on contentions that ISDS or its arbitrators are a bit *more likely* to be X than are commercial arbitrators. The *relative publicness* of ISDS as compared to commercial arbitration does not support the general conclusion that the former is a distinct and wholly public regime. Those who claim that investment arbitration is distinguishably ‘public’ have not offered a consistent rationale for the distinction, even though such a rationale appears crucial to the ten public law prescriptions that allegedly follow from it.

Some suggest that the publicness of ISDS rests on the fact that a state is on one side of the ‘v’ in the heading of a dispute. But just because a state is a respondent does not mean that it is a ‘governor’ and the claimant is the ‘governed’ for purposes of an arbitration. Sometimes they are exactly what the ‘v’ implies: two parties to a contract or some other kind of promise. The suggestion that whenever a state is one of the disputants in arbitration, the dispute (and resulting award) is ‘public’, while easy to apply, does not serve to credibly distinguish the two ostensible ‘species’ of arbitration. This would turn any ‘commercial’ arbitral claim (say between an oil supplier and a state oil company) into a ‘public’ dispute. Although in both cases a private party is forcing a sovereign to litigate a dispute outside its own courts, why exactly does resort to international arbitration against a state, whether based on consent given in advance in a contract or a BIT, turn such disputes into ‘public’ litigation? Is it really the case that a dispute over a breach of contract by a state utility company is a form of ‘public’ adjudication? If it is, we should be worrying much more about how those non-BIT/FTA claims are being handled or settled and by whom. If the distinction is about the ostensible lack of privity (as Paulsson would put it)⁴² under a BIT, why is the consent offered by a state in a BIT not sufficient for ‘privity’ and, if so, why are we fetishizing about that? There would not appear to be a jurisprudentially relevant difference between a contractual dispute and one based on a treaty when, as is sometimes the case, both emerge from a state’s alleged breach of a contractual or comparable state promise (as in a license).

The fact that investor-state disputes alleging breach of contractual or comparable state promises are not conceptually distinct from typical commercial arbitration disputes between two private parties is important. As is suggested by the fact that many of the highly charged ISDS claims against Argentina

⁴¹ See e.g., Stephan Schill, ‘System-Building in Investment Treaty Arbitration and Lawmaking,’ in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012) at 139–141.

⁴² Paulsson (n 31).

over the past decade stemmed from investor complaints that Argentina had violated specific promises made to them (as in licenses issued to foreign gas companies),⁴³ there is no basis to assume that disputes involving alleged breaches of ‘legitimate expectations’—whether arising from a written contract, a government issued license, or some other form of state assurances—do not raise highly charged questions about intrusions into ‘sovereign policy space’. Indeed, some of the most controversial investor-state rulings involve a dispute about the nature of the “expectations” generated by the parties’ interactions.⁴⁴ According to a recent report from UNCTAD, the two types of state conduct most commonly challenged by ISDS claimants in 2014 were “cancellations or alleged violations of contracts and revocations of denials of licenses.”⁴⁵

But if many commercial and ISDS disputes arise from alleged breaches of an explicit or implicit state promise, is ISDS distinguishably ‘public’ because it rests on a BIT or FTA? Such a distinction seems oddly formalistic since even commercial arbitration relies on the New York Convention or comparable treaties that enable enforcement or license review. Moreover, as many arbitrators have suggested, an investor-state contract, say between an oil company and a government granting a concession to drill, is itself a species of ‘public’ contract subject to *pacta sunt servanda* no less than a treaty.⁴⁶ The principle that states have to abide by their contracts with foreign investors, as well as by their treaties with other states, is based on comparable rationales: the need to respect one’s promises. Arbitral decisions that have required states to respect their contracts with foreign investors not arising under BITs or FTAs, such as those emerging from Libya’s nationalization of its oil industry, have long been relevant to public international lawyers.⁴⁷

Nor does it make sense to contend that a dispute somehow becomes ‘public’—thereby triggering all the public law concerns identified above—only when one interprets a BIT’s umbrella clause broadly so

⁴³ See e.g., José E. Alvarez and Kathryn Khamsi, ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’ in Karl P. Sauvant (ed), *Yearbook of International Investment Law and Policy 2008–2009* (OUP 2010).

⁴⁴ Compare, for example, the majority and dissenting opinions filed in *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015. While the focus of NGO ire in the Bilcon case is that NAFTA’s tribunal’s daring intrusion into how Canada should conduct an environmental impact assessment (and whether that review should have been conducted in a more lawyerly fashion), it is hard to disentangle that controversial finding from the majority’s other finding that the welcoming statements made by local officials constituted assurances given to the investor. *ibid*, dissent by arbitrator Donald M. McRae.

⁴⁵ UNCTAD, IIA Issues Note No 2 (May 2015) < <http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx> >.

⁴⁶ See generally Vadi (n 11) 183–184. Of course, the use of an umbrella clause in a BIT may transform an investor’s contractual right into a treaty right.

⁴⁷ See e.g., Jeffrey Dunoff and others (eds), *International Law Norms, Actors, Process* (4th edn, Aspen 2015) at 84–89 (including excerpts from the TOPCO award and the Sedco award in the Iran-U.S. Claims Tribunal as part of evidentiary sources for determining customary international law). But see Muthucumaraswamy Sornarajah, ‘The Return of the NIEO and the Retreat of Neo-Liberal International Law’, in Sharif Blaniyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossain* 32 (Brill 2014) (arguing that redefinition of foreign investment contracts as a species of “economic development agreement” subject to international law reflects an erroneous turn to “private” sources of power and “low order sources of international law—the decisions of judicial tribunals and the writings of highly qualified publicists”).

that it includes promises made by a state in a license to a privatized utility company as opposed to promises made by a government in a ‘private’ contract with that company. Is an umbrella clause claim under a BIT a ‘public’ dispute only because of the form in which the state made its promise to the private party? That seems an altogether prosaic reason on which to build the premise that ISDS is a public species apart. Moreover, why exactly is an investor-state dispute ‘public’ because a state regulation, as opposed to a contract, is at issue? If the central question is whether an arbitration challenges public policy, a government’s core regulatory concerns may be challenged when an investor seeks to enforce even a standard form contract used by a government. This seems likely given a recent IFC study that documents the surprising extent to which state-investor contracts continue to contain controversial stabilization clauses that prevent states from changing their laws to the detriment of the investor.⁴⁸ A commercial arbitration involving enforcement of such a clause is likely to raise as many ‘sovereign’ concerns as would a claim based on a state’s breach of a license or regulation—or any other claim based on an investment protection treaty.⁴⁹

Nor is it plausible to suggest that ‘publicness’ turns on the nature of the government’s breach of its promises. It is, to be sure, more threatening to governments when an investor challenges a government’s breach undertaken through legislation or regulation—as opposed to a mere governmental refusal to pay a sum due. Such distinctions have been used by U.S. courts when considering the application of sovereign immunity or the act of state doctrine.⁵⁰ On this view, a claim based on breach of a BIT’s umbrella clause only becomes ‘public’ if the alleged breach involves a government’s explicit invocation of its sovereign authority. Some investor-state arbitral awards are in accord with this view and have narrowed the meaning of BIT umbrella clauses so that these extend only to ‘governmental’ breaches—but others have not.⁵¹ But, of course, if the language of a BIT or FTA (including its umbrella clause) is clear enough, it could well reach even ‘commercial’ breaches by a state.⁵² It seems bizarre and arbitrary to contend that an ISDS claim based on such a treaty is not ‘public’ but those involving allegations of truly ‘sovereign’ breaches are. While this would be consistent with some act of state cases in U.S. courts, this particular view of the act of state doctrine, even assuming that doctrine is a creature of public international law, may not be generalizable. Deploying this test would also not satisfy those who criticize investor-state arbitrations precisely because these expand the rights of private investors vis-à-vis the state. A BIT or FTA that reaches even commercial breaches of a contract by a state expands the ambit of ISDS exponentially. Bringing such claims within the domain of ICSID is likely to be seen as

⁴⁸ International Finance Corporation, ‘Stabilization Clauses and Human Rights’ 27 May 2009 <<http://www.business-humanrights.org/media/documents/stabilization-clauses-and-human-rights-27-may-2009.pdf>>.

⁴⁹ See e.g., Paul Kuruk, ‘Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience’ (1991) 13 Michigan Journal of International Law 43.

⁵⁰ See e.g., *Alfred Dunhill v Republic of Cuba*, 425 U.S. 682 (1976) (finding that the concept of an act of state does not extend to the repudiation of a purely commercial obligation owed by a foreign sovereign).

⁵¹ See e.g., Dolzer and Schreuer (n 37) 153–162.

⁵² *ibid.*

more, not less, controversial to ISDS critics. Of course, depending on the facts and the particular language in an investment protection treaty, even a ‘commercial’ contractual breach by a state may constitute plausible violations under that treaty’s guarantees against arbitrary or discriminatory treatment, FET, full protection and security, or clauses ensuring ‘effective remedies’ in domestic court. For all these reasons, this distinction is as arbitrary as others. Of course, if everything turns on the ‘public’ nature of the breach that is being alleged to have been committed by the state, the dividing line is not between investor-state and commercial arbitration, as advocates of the public/private distinction emphasize, but between some BIT or FTA claims and others.

Other recent developments show that the line between commercial and investor-state arbitration is more permeable than a sharp public/private divide presumes. Decisions on sovereign debt claims, such as the jurisdictional ruling in *Abaclat* that those contractual claims may constitute ‘investment’ under BITs and the ICSID convention, may be a harbinger of things to come.⁵³ Another line of cases have involved claimants who resort to investor-state treaty arbitration to enforce commercial arbitral awards. *Saipem v. Bangladesh*, *Romak v. Uzbekistan*, *GEA Group and Ukraine, Kaliningrad (Russia) v. Lithuania*, and *White Industries Australia Limited v. India* involved claims that a national court’s setting aside, annulment of or failure to enforce a commercial arbitral award was itself a violation of a BIT.⁵⁴ In three of those cases, the claimants failed, for different reasons, in their effort to use particular BITs to secure recognition or enforcement of their underlying commercial arbitral award, but in *Saipem* and in *White Industries* the claimants won their respective BIT claims.⁵⁵ As these cases illustrate, there are new possibilities for enforcement of ICC or other routine commercial arbitration awards through ISDS or, as a number of other recent decisions indicate, before the European Court of Human Rights.⁵⁶ The ostensible sharp lines between commercial and ISDS (and national court decisions addressing either or both)—if they ever existed—would seem to be blurring.

Some of those who adhere to the public/private arbitral divide may be confusing resemblance with equivalence. That ISDS sometimes resembles or has the effects of ‘judicial review’ does not mean that it *is* constitutional review. Given how difficult it may be to secure effective compliance with an ICSID ruling, it seems a bit of a stretch to build an entire ‘public law’ frame on the premise that ad hoc arbitral tribunals, established to resolve a single dispute subject to no stare decisis effect, are sufficiently like the U.S. Supreme Court or other constitutional courts. (Of course, such comparisons need to be

⁵³ *Abaclat and Others and the Argentine Republic*, SE No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 Aug 2011.

⁵⁴ See e.g., José E. Alvarez, ‘Crossing the Public/Private Divide: *Saipem v. Bangladesh* and other “Crossover” Cases’ in Albert Jan Van den Berg (ed), *International Arbitration The Coming of a New Age?* (ICCA Congress Series No 17, 2013) at 400.

⁵⁵ *ibid.*

⁵⁶ *ibid.* See e.g., European Court of Human Rights, *Stran Greek Refineries and Stratis Andreadis v Greece*, Case No 22/1993/417/496, Judgment, 9 Dec 1994, Series A, no 335-A; European Court of Human Rights, *Kin-Stib LLC (Democratic Republic of Congo v Milorad Majkic (Serbia))*, 20 April 2010; *Regent Company v. Ukraine*; *Sedelmayer v Germany* (also citing Art. 6(1) and Protocol 1, Art. 1 of the ECHR).

sensitive to the distinct powers enjoyed by most constitutional courts, as compared to the much narrower remedies accorded to ISDS tribunals.) Moreover, even accepting the premise that a single ICSID ruling—as in *Waste Management* or *TECMED*—sometimes casts wide ‘governance’ or normative ripples, states retain considerable power over the impact of those ripples. As respondent states have reacted to what they see as adverse or threatening ISDS rulings, it has become evident that they are not quite in the same position as are investor claimants despite the ‘equality of arms’. Those respondent states hold considerably more cards than do private parties that lose constitutional cases before the U.S. Supreme Court. From the defense of sovereign immunity to the capacity to change the meaning of their investment treaties over time, states are, as George Orwell’s animals would put it, ‘more equal’ than others under ISDS.⁵⁷

Other difficulties with the ostensible public/private divide are illustrated by the German effort to delimit the term ‘public law governance’ to regimes involving ‘public authorities’.⁵⁸ That admirable scholarly attempt to make public law analogies more meaningful runs into difficulties when it encounters the many forms of governance today that result from the actions of entities that are not traditional inter-state organizations like those of the UN system or even trans-national networks of particular government actors like the Basel Committee of central bankers. States and their nationals are now being regulated to different degrees by even wholly private (non-state) entities, such as the World Anti-Doping Agency, powerful NGOs like Human Rights First, the International Organization for Standardization (ISO), the Bill and Melinda Gates Foundation, ICANN, or the Court of Arbitration for Sport. As a number of scholars have documented, the activities of such entities resemble forms of constitutional review, regulation, or global administrative law.⁵⁹ This fact is acknowledged by public law scholars themselves; indeed, two leading public law scholars have noted that the “more complex private law regimes become, the more they resemble public law”.⁶⁰ If true, public law analogies are essentially tautologies: we call something ‘public’ because it fits a preconceived notion of what that means.⁶¹ Indeed, as Jenny Martinez

⁵⁷ George Orwell, *Animal Farm* (Secker and Warburg, 1945) (“All animals are equal but some are more equal than others”). See generally José E. Alvarez, ‘The Return of the State’ (2011) 20 *Minnesota Journal of International Law* 223.

⁵⁸ See Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010), in particular, Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, *ibid* 1, 13–16 (restricting their analysis to institutions that exercise authority attributed to them by political collectivities and excluding the actions for private commercial entities, like Volkswagen, whose exercises of authority are done under contract, and where the enterprise is constituted under private law and is not formally charged with performing public tasks).

⁵⁹ See generally Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) *Law and Contemporary Problems* 15.

⁶⁰ Armin von Bogdandy and Ingo Venzke, ‘Beyond Dispute: International Judicial Institutions as Lawmakers,’ in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012) at 32. But see Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) (arguing that all efforts (formal or informal and whether involving public or private entities) to engage in regulatory functions constitute “global governance” requiring the discipline of global administrative law).

⁶¹ See e.g., von Bogdandy, Dann, and Goldmann (n 58) at 16 (“any exercise of international public authority requires a public law framework”). For an interesting analysis of the differing starting points of those examining forms of

has documented, for much of recorded history there was no public/private distinction in either national or international law, perhaps because we were at the time more ready to accept that proposition that powerful private enterprises, whether the Dutch East India Company or United Fruit (and their lawyers, including Grotius), could themselves develop the law of nations.⁶²

And what of the claim that the roughly 3400 IIAs now in effect constitute an emerging multilateral ‘system’? Even if one assumes, along with Schill, that despite the differences among these treaties (including with respect to ISDS), an international investment regime does exist, why is that regime or system necessarily ‘public’ and not the hybrid it has always been? Multilateral private law regimes exist after all.

Another alleged distinction between commercial and investment arbitration looks to supposed differences in the content of the legal rules applied under each. Some have suggested that the ‘public’ problems with the investment regime stem from the open-ended and vague treaty rights accorded to foreign investors and the comparable open-ended discretion accorded to ISDS arbitrators.⁶³ For Gus Van Harten, for example, the very malleability of a clause like FET poses a public law challenge.⁶⁴ While intriguing, this assessment is both over and under inclusive. While some investment guarantees, like FET, are vague, others, like national treatment, are less so, and yet others, like the right to free transfers, are very precise, but presumably no less controversial from the standpoint of a respondent state. The relatively precise BIT provision ensuring that the investor should be free to export its profits in hard currency presents a clear ‘public policy’ challenge to a state that adopted, as did Argentina in the wake of its 2001–2002 economic crisis, a pesification policy.⁶⁵ Moreover, the assertion that investment treaty guarantees are imprecise ignores the prospect that, like other treaties subject to iterative interpretation, the meaning of treaty provisions can become clearer or more refined over time.⁶⁶ If FET or the meaning of the expropriation guarantee were to become clearer over time (either because of evolving BIT/FTA provisions or *jurisprudence constante*) and the discretion accorded to arbitrators with respect to the meaning of either narrower, would the regime be less ‘public’? Of course, vagueness is a matter of degree. Some commercial disputes may also involve the interpretation of highly subjective and vague contracts or

global governance including with respect to their treatment of the public/private divide, see Philipp Dann and Marie von Engelhardt, ‘Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared’ in Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012).

⁶² Jenny Martinez, ‘Corporations, International Law and the Public/Private Distinction’ Working Paper presented at NYU Law, March 2015 (copy on file with author, cited with author’s permission).

⁶³ For discussion of the “vagueness” of investor rights, see e.g., Schill (n 41) at 49–151.

⁶⁴ See e.g., Van Harten (n 31) at 89.

⁶⁵ See e.g., *Continental Casualty Co v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008.

⁶⁶ As Schill acknowledges, see Schill (n 41) 154–155. See also José E. Alvarez and Gustavo Topalian, ‘The Paradoxical Argentina Cases’ (2012) 6 *World Arbitration and Mediation Review* 491 (arguing that the Argentina rulings achieved, over time, a certain coherence with respect to the meaning of a number of substantive investment rights). Of course, the international investment regime is hardly the only international legal regime which needs to secure coherence in the absence of a single hierarchically superior international court.

national laws. Investor-state arbitrators do not have a monopoly over vague standards subjectively applied.

Other alleged distinctions between commercial and investor-state arbitrators—that the latter invariably involve greater sums of money, undermine sovereign regulatory prerogatives, or are more one-sided or biased in favor of private interests than the former—are contentious judgment calls.⁶⁷ Even if some investor-state awards could bankrupt a state or severely embarrass its executives, the evidence that we have suggests that even when respondent states lose, *most* public ISDS awards do not present such financial challenges.⁶⁸ As for the prospect of ISDS-induced regulatory chill, that possibility exists even with respect to commercial arbitration. Depending on the scope and nature of the investor-state contract that is at issue in a commercial arbitration, such a claim could also constrain a state’s regulatory prerogatives in the future—as where the commercial contract being arbitrated contains a stabilization clause. Nor is it clear why, even if ISDS is skewed from the outset in favor of investors and investment protection, this necessarily makes the regime ‘public’.⁶⁹

And what of the claim that ISDS is ‘public’ because it relies more often on arbitrators who are trained in public international law? Joost Pauwelyn has done extensive work on the background of ICSID versus WTO trade arbitrators.⁷⁰ He concludes that WTO panelists and ICSID arbitrators are quite different in terms of background. While his data suggests that ICSID arbitrators are more likely to be public international lawyers than WTO panelists (if only because the former are more likely to be lawyers in the first place), this is not the most significant distinction between these two sets of adjudicators.⁷¹

Pauwelyn’s work suggests that divides *among* public international law adjudicators can be as significant (if not more so) than between those who arbitrate commercial versus investment claims. Indeed, it would not be surprising if there is more overlap in the backgrounds of commercial and investor-state arbitrators (many of whom come from private practice) than between WTO and investor-state adjudicators. Moreover, given the forum shopping that now occurs with respect to claims that can be brought both in the WTO or under ISDS, the decision to invoke one or the other of these relatively distinct adjudicators may be far more consequential than the alleged divide between those arbitrating commercial and investment disputes. Pauwelyn’s work also suggests that while the background of a regime’s arbitrators matters, this is not an immutable characteristic. The academic or other backgrounds

⁶⁷ See n 35.

⁶⁸ *ibid.* In addition, instances in which investor or other private claimants (including those in Abaclat type situations) present such basic financial dilemmas for states might be better addressed by establishing better rules for the handling of ‘odious debt’ or other mechanisms for the functional equivalent of state bankruptcies.

⁶⁹ This confuses the effect of a public law regime with the definition for it. For suggestions that regimes, public or private or in-between, that adversely affect the public should be treated as public, see generally Benvenisti (n 60).

⁷⁰ Joost Pauwelyn, ‘The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus’ (2015) 109 *American Journal of International Law* 761.

⁷¹ According to Pauwelyn’s data, WTO panelists are more homogeneous in terms of nationality than ICSID arbitrators with the former subject to fewer reappointments, far more likely to be “faceless” bureaucrats appointed by a neutral secretariat; ICSID arbitrators are more likely to come from a closed network (heavily featuring EU/US experience) and likely to involve “star” arbitrators from academe or private practice. *ibid.*

of ISDS arbitrators can change over time either because of conscious efforts or due to other realities. It seems short-sighted to build a public law jurisprudential frame around such changeable conditions.

The last descriptive claim in the list above is ultimately the most persuasive. ISDS rulings are distinct from those issued under commercial arbitration insofar as they rely for authority on caselaw or precedent.⁷² If this is true, the ostensible public/private arbitral divide emerges not so much from the nature of the disputes, the alleged vagueness of the law being applied, or who is suing whom over what. It rests in substantial part on what happens to the investor-state award once it is issued.⁷³

ISDS is increasingly seen as ‘public’ because many of the most influential stakeholders in the regime—from states as respondents, to investor claimants, to the arbitrators, to scholars, to NGOs and leaders of business—have come to insist on transparency with respect to the contents (and sometimes even the negotiation) of IIAs, the arbitral process, and arbitral awards.⁷⁴ ISDS is increasingly perceived as ‘public’ because leading states in the regime, particularly Canada and the United States and their leadership in the NAFTA (as well as public law advocates in both countries), elevated the need for and significance of transparency.⁷⁵ ISDS is increasingly perceived as public adjudication because its awards—and increasingly much else in the arbitration—from briefs to expert opinions to (in some cases) the transcripts of oral proceedings⁷⁶—are public, because the relevant arbitral rules make it so or even when these are silent arbitrators exercise their discretion to this effect, the litigating parties agree, or because at least one of the litigants leaks the relevant documents. Predictably, there is increasing resort to this material by litigants, amicus and arbitrators. We are increasingly turning investor-state arbitrators into *de facto* common law judges who are expected to produce and rely on public *jurisprudence constante*. Indeed, some ISDS arbitrators now argue that they have a duty to abide by prior arbitral decisions that cannot be distinguished from the case at hand.⁷⁷ If investor-state arbitrators had a bumper-sticker on their cars, it would say

⁷² Statistical studies confirm just how much investor-state arbitrators evince a marked preference for precedents and that ICSID awards have clearly become more self-referential over time. See Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals—An Empirical Analysis’ (2008) 19 *European Journal of International Law* 301; Jeffery P Commission, ‘An Analysis of a Developing Jurisprudence in International Investment Law—What Investment Treaty Tribunals Are Saying and Doing’ (2009) 6 *Transnational Dispute Management* 1.

⁷³ Schill is probably right when he argues that ISDS precedent is the “catalyst and cause” of the normative expectations for the regime. Schill (n 41) 173.

⁷⁴ See e.g., James D. Fry and Odysseas G. Repousis, ‘Towards a New World For Investor-State Arbitration Through Transparency’ (2016) 48 *NYU Journal of International Law & Politics* 795 (2016). The many different varieties of publicness are nicely seen when comparing what the PCA publishes in the different proceedings: <https://pca-cpa.org/en/cases/>.

⁷⁵ *ibid* (discussing what the authors call the “NAFTA *acquis* on transparency” and its impact on thousands of IIAs, changes in arbitration rules, and the Mauritius Convention).

⁷⁶ See e.g., Trans-Pacific Partnership, Investment Chapter, Art. 9.24. The text of the TPP, not yet ratified, is available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

⁷⁷ See e.g., *Saipem v Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 67 (“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the

something like ‘I am public arbitrator because I have a preference for precedents’. But if this is the key distinction between commercial arbitration and ISDS, it is important to acknowledge that this, like the nature of arbitrators in ISDS, is a constructed distinction and that not all ISDS arbitrators, parties to IIAs, or writers of amicus agree.⁷⁸ Resting the ‘publicness’ of ISDS on this fact —ISDS is a public regime because many have insisted that it be so—risks circularity.

ISDS is also not novel in its pragmatic reliance on prior adjudicative rulings. Investor-state arbitrators resort to the prior views of their colleagues for many of the same reasons that drive sports arbitrators, members of UN human rights treaty committees, judges on the ICJ, or international criminal judges to prior ‘caselaw’. In all such cases, the adjudicators are operating within regimes that rely on expectations of third parties for predictable, more or less stable, rules. There are also other pragmatic rationales: because prior adjudicative rulings are a convenient (and relatively objective) source for the analogies that are essential to legal reasoning, because prior decisions are a convenient place to find reasons to justify the relevant rule applications, and because reliance on such rulings deflect charges of improper or activist lawmaking-cum-judging.⁷⁹ Of course, states and investors have long been interested in developing reasonably harmonious rules to govern their investment disputes, even prior to the rise of ISDS or the turn to ICSID as the favorite venue for investor claims. This has been true even when such disputes were brought under contracts or pursuant to special agreements to establish ad hoc bodies such as the Iran-U.S. Claims Tribunal or, for that matter, the much older Mexican-U.S. Claims Commission.⁸⁰ Indeed, some of the products of those processes (such as the famous Neer decision) are still cited today in investor-state awards as precedents for determining the meaning of the international minimum standard or denial of justice.⁸¹ The extraordinary level of deference paid by all such bodies to the 1928 opinion of the Permanent Court of International Justice in the Chorzow Factory Case is only the most prominent example of the preference for precedents on this topic, irrespective of type of forum (claims commission,

legitimate expectations of the community of States and investors towards certainty of the rule of law”). See also Schill (n 41) 162 (noting virtually identical statements in almost all cases in which Gabrielle-Kaufmann-Kohler has participated as an arbitrator).

⁷⁸ Arbitral rulings, after all, are not bound by precedent and any ISDS panel can choose to depart from any prior ruling or a series of them. For an arbitral ruling that appears to take issue with reliance on *jurisprudence constante* for some purposes, see *Glamis Gold, Ltd v United States*, UNCITRAL, Award, 8 June 2009, paras 605–616 (stressing the need to find customary international law on the basis of actual state practice and *opinio juris* and not on the basis of prior arbitral awards). Fry and Repusis also point out that ASEAN states, which “do not belong to the small group of states that championed transparency . . . have generally refrained from including any transparency provisions in their previous investment treaties.” Fry and Repusis (n 74) 799.

⁷⁹ See e.g., Schill (n 41) 156; Marc Jacob, ‘Precedents: Lawmaking Through International Adjudication’ in von Bogdandy and Venzke (n 59). On the necessary role of analogies to legal reasoning, see Vadi (n 11).

⁸⁰ See e.g., Patrick M. Norton, ‘A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation’ (1991) 85 *American Journal of International Law* 474 (discussing the appeal of precedent and ‘consolidated jurisprudence’ in the practice of the Iran-U.S. Claims Tribunal).

⁸¹ See e.g., *Glamis Gold* (n 78) paras 612–16.

national court, permanent international tribunal, or arbitration panel) and whether or not a modern investment protection treaty is in play.⁸²

VI. The Problematic PUBLIC Prescriptions

But if the ten reasons for describing ISDS as ‘public’ raise some cautionary flags, these are models of precise thought as compared to the second list of ten common public law prescriptions above. Every one of these purported recipes for action raises more questions than it answers. The contention that investor-state arbitrators need to turn to ‘public law analogies’ presumes that there is general agreement on what these are but the examples of such analogies cited are contestable. Take the proposition that the state always defrays its own costs even if it prevails, cited by one tribunal as a ‘public law principle’ drawn from the practice of the European Court of Human Rights.⁸³ Other ISDS tribunals have applied the loser pays principle instead, drawing from commercial arbitration.⁸⁴ If either rule invariably applies in the public law adjudication, evidence for that is scant.⁸⁵ In any case, to be consistent with another public law prescription in the second list of ten above, one would expect any investor-state arbitrator relying on the alleged rule that respondent states always pay for their own costs to clearly explain why that rule should apply irrespective of the treaty text at issue, the rights being litigated, or other circumstances. The mere fact that the principle has been applied by some international courts, like the European Court of Human Rights, does not satisfy the public law (or GAL) demand for a well-reasoned opinion. A reasoned explanation for applying the principle would also presumably explain why—inspired by private law inquiries—the applicable default rule should not be whatever rule normally applies in the jurisdiction where the arbitration is taking place, whatever rule is suggested by the relevant arbitration rules, or whatever rule is suggested by application of any relevant conflict of laws principles. As to choosing between ostensibly public or private analogies on this or other issues, one would have thought it would be appropriate to consider whether a particular rule, public or private, would better comply with the legitimate expectations of the litigants in the particular context.

Similarly, public law scholars who have urged resort to the ‘public’ law principle of proportionality have not yet answered serious doubts about the normative, ideological or other values that the application of this principle imports and whether those values are consistent with either ISDS generally or with the particular BIT/FTA being interpreted.⁸⁶ Moreover, advocates of the ostensible ‘general principle of proportionality’ need to explain which principle they have in mind—the various balancing tests deployed by U.S. courts (from strict scrutiny to rational basis scrutiny), the three tiered

⁸² See e.g., Norton (n 80).

⁸³ See Roberts ‘Clash of Paradigms’ (n 4) 47 (citing the Thunderbird case).

⁸⁴ See e.g., Vadi (n 11) 160 (citing the Europe Cement case)

⁸⁵ Compare TPP, Investment Chapter (n 76), Art 9.29(3) (permitting the tribunal to determine how and by whom costs for the arbitration and attorney’s fees shall be paid in accordance with applicable arbitration rules) and Art 9.29(4) (permitting the tribunal to award the respondent state costs if it deems a claim to be frivolous).

⁸⁶ See e.g., Vadi (n 11) 195–207.

inquiry for indirect takings deployed by the U.S. Supreme Court in its Penn Central decision (now specifically included in *some* investment treaties), or other balancing tests (including the margin of appreciation combined with subsidiarity) drawn from European court practice?⁸⁷ And even assuming that public law scholars can agree on which proportionality rule to apply, one would expect a clear rationale and explanation for when it is suitable for proportionality to be applied. It surely cannot be the case that it applies with respect to every part of a particular investment treaty irrespective of its text—from its FET guarantee to its ‘measures not precluded’ clause.⁸⁸ It is not plausible to expect that the state drafters of BITs or FTAs have delegated to investor-state arbitrators the power to ‘balance’ every aspect of such treaties.

Other allegedly ‘public law’ concepts raise comparable inquiries. It is not clear why the principle of equality of arms should be considered, for this purpose, a private law concept that needs to give way to the supposedly public principle of *in dubio mitius*.⁸⁹ Except for those who believe that the Lotus Principle is still the governing principle of international law, most international lawyers have long cast doubt on *in dubio mitius* as a viable general canon of treaty interpretation. Indeed, invocations of that principle appear to have been in abeyance even in the WTO where it was once cited.⁹⁰ Caution is also warranted when public law scholars leap from the need to apply public law to distinct conclusions regarding the application of public international law, as in the contention that the Articles of State Responsibility should invariably apply to resolve interpretative disputes arising in the course of ISDS. Public international law does not itself require that those inter-state articles should apply to non-state actors, such as investors. On the contrary, public international law has long accepted that there may be differences among the rights and responsibilities of international legal persons. The personhood of states is not necessarily the touchstone for the rights and responsibilities of even international organizations—much less private parties such as investors.⁹¹ It is unwarranted to presume that all of the Articles of *State* Responsibility—from its

⁸⁷ Compare Sweet and Cananea (n 28) (defending proportionality as a general principle of law) to José E. Alvarez, “Beware: Boundary Crossings”—A Critical Appraisal of Public Law Approaches to International Investment Law’ (2016) 17 *Journal of World Investment and Trade* 171, 220–222 (critiquing this “Euro-centric” approach). See also Schill ‘An Introduction’ (n 29) 34. (encouraging a comparative law approach to investment treaty interpretation involving cross-regime comparison with other international regimes, including human rights, European administrative, law, and the jurisprudence of the WTO); Stephan W Schill, ‘Deference in Investor-State Arbitration’ (2012) 3 *Journal of International Dispute Settlement* 577, 592–594 (urging a comparative law approach to adopting standards of scrutiny because, despite differences in how the levels of scrutiny are cast, these reflect comparable “separation of powers” concerns). With all due respect, the prospect that diverse states from all over the world share a comparable conception of the principle of “separation of powers”, a principle that in the U.S. has resulted in three distinct tiers of constitutional scrutiny, does not seem to be a very likely possibility.

⁸⁸ See e.g., Alvarez (n 87).

⁸⁹ See Roberts ‘Clash of Paradigms’ (n 4) at 55.

⁹⁰ See Schill ‘Deference’ (n 87) at 581 (noting how the majority of international decisions have “rightly” rejected the *in dubio mitius* principle). The proposition that *in dubio mitius* is a principle that public international lawyers should naturally be inclined to support is akin to the absurd contention that international lawyers must always support whatever position nations happen to favor from time to time.

⁹¹ See e.g., Alvarez (n 87) at 208–215. The contention made by this author that the measures not precluded clause in the U.S.-Argentina BIT should be read in light of the customary defense of necessity now contained in Art. 25 of the

principles of attribution to its remedies for international wrongful acts to its permissible defenses—*must* apply to the relationship between states and investors, irrespective of the terms, object and purpose, and negotiating history of particular investment treaties.

While there is no question that investment treaties leave many interpretative gaps to be filled, telling arbitrators that they should fill them through ‘public law analogies’ is akin to telling them to find a rule that suits an outcome that they are otherwise inclined to reach. There is a lively debate concerning, for example, whether IIAs as a whole or some of them are mere applications (or derivations) of diplomatic espousal. The practice of investment arbitration—and the rule in the ICSID Convention that states may no longer espouse the claims of their nationals once an arbitration claim is submitted—makes it plausible to see investors as vindicating their own rights. It is entirely possible to see the rights of investors, at least under some BITs and FTAs, as not dependent on the rights of their host states; it is possible to see some ISDS claims as enjoying the same kind of autonomy from state control as that enjoyed by human rights claimants under human rights treaties.⁹² (Indeed, under at least one of the public law prescriptions above, drawing connections between the public investment regime and public human rights regimes is encouraged.)

There are distinct interpretative choices to be made and explained. The substantive and procedural rights enjoyed under ISDS by investors might be seen as entirely dependent on the rights of their home states as is the case under diplomatic espousal, as autonomous from the rights of the state treaty makers, as based on some kind of third party beneficiary status not duplicative of those enjoyed by aliens under traditional diplomatic espousal, or as dependent on the particular text of the BIT/FTA in question (as where a treaty explicitly states that applicable rights are owed directly to investors). To presume that diplomatic espousal is the applicable rule based on the ‘public analogy’ prematurely terminates such inquiries and presumes that a single correct answer is appropriate for all IIAs and for all questions arising under them.⁹³

Such an assumption appeared to be made by the NAFTA arbitrators who rendered the controversial ruling in *Loewen* dismissing the personal claims of Raymond Loewen on the basis that his

Articles of State Responsibility was based on the text, context, and negotiating history of that particular treaty. See Alvarez and Khamisi (n 43).

⁹² For distinct views on this point, see e.g., Douglas (n 32) 282; Martins Paporinskis, ‘Investment Treaty Arbitration and the (New) Law on State Responsibility’ (2013) 24 *European Journal of International Law* 617; Anthea Roberts, ‘State-State Investment Treaty Arbitration’ (2014) 55 *Harvard International Law Journal* 1, 39; Caroline Foster, ‘A New Stratosphere? Investment Treaty Arbitration as Internationalized Public Law’ (2015) 64 *International and Comparative Law Quarterly* 461, 475–480.

⁹³ See e.g., Martins Paporinskis, ‘Analogies and Other Regimes of International Law,’ in Zachary Douglas, Joost Pauwelyn, and J.E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) (discussing the relevance of three models for understanding investment law: direct rights, beneficiary rights, and agency). See also Douglas (n 32). Such questions remain even if we assume that under Articles 25–27 of the ICSID Convention, states retain the right to dispose of their nationals’ claims only before they commence an ICSID arbitration. See e.g., Stephan W. Schill, *The Multilateralization of International Investment Law* (CUP 2009) 253.

company lacked continuous nationality.⁹⁴ That conclusion, which has been criticized as inequitable, stemmed from those arbitrators' decision to prefer what they deemed to be the 'public law' rule over the 'private law' alternative.⁹⁵ That tribunal found that "[t]here is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven, read in the context of the Treaty as a whole, and for the purpose which it sets out to achieve".⁹⁶ In this case, in the absence of explicit treaty language directly on point, the arbitrators decided that ISDS was simply a matter of "convenience" and not a remedy with greater substantive import.⁹⁷

Right or wrong, this part of the Loewen ruling was consistent with a number of the public law prescriptions above. In so ruling, the Loewen arbitrators applied 'public' customary rules (diplomatic espousal and the specific rule of continuous nationality) as defragmentation tools of systematic integration, shrank the domain of investment claims in deference to sovereignty, and reaffirmed that states remain in control of the NAFTA's investment chapter. At the same time this part of Loewen drew a firm line between the treatment of the right to property in an investment treaty and the comparable right (to "possessions") in the European Convention of Human Rights. In the latter case, that right is seen by the European Court as a human right like others in the European Convention which, like many rights, needs to be weighed against the government's right to regulate in the public interest but does not simply disappear at the discretion of states—as is suggested by the Loewen ruling's reliance on the analogy to diplomatic espousal.

The Loewen ruling highlights the internal tensions between some of the ten 'public' prescriptions above. Few would argue that the state parties to the European Convention of Human Rights must be treated as retaining 'control' over their treaty—in the same way that some apparently do with respect to that other 'public' law regime, the NAFTA—and yet that is another public law regime that the public law prescriptions suggest ought to be emulated in the course of ISDS.

As is also suggested by the Loewen example, short-circuiting the examination of treaty texts, object and purpose, context, and negotiating history by reaching to on-the-shelf 'public law' solutions disservices other rules of public law, namely the customary rules of treaty interpretation. It presumes that

⁹⁴ *The Loewen Group and Raymond L. Loewen v United States*, ICSID Case No ARB (AF)/98, Award, 26 June 2003.

⁹⁵ *Loewen* (n 94) para 233. That tribunal noted that the "private lawyer might well exclaim that the uncovenanted benefit to the defendant would produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and neither exists". *ibid*, para 232. It rejected this contention noting that "[r]ights of action under private law arise from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts," whereas NAFTA claims stem "from a corner of public international law" that are "distinct from and exclusive of the remedies for wrongful acts under private law". *ibid*, para 233.

⁹⁶ *ibid*, para 233.

⁹⁷ See *ibid*, para 226 (determining that the customary rule requiring continuous nationality applied even though the NAFTA contained no language demanding its application).

the dozens of (mostly) bilateral pairings of states that have concluded BITs over more than 30 years shared a uniform intent: that is, that all investment treaties are mere vehicles for old-fashioned diplomatic espousal and not novel tools to enable host states to get out of the politicized espousal business altogether.

The widely endorsed GAL recipe book for improving the investment regime recommending enhanced transparency, participation, reason-giving, and review is also a contestable product of ISDS's 'publicness'. It is not true that all legitimate public law regimes evince these characteristics. As a number of trade scholars have pointed out, the vast bulk of trade disputes are resolved before a WTO panel is formed—when trade disputes are quietly settled without either transparency or participation by third parties (or even assurance that the underlying rules of the trade regime are being faithfully applied). Despite the sharp turn to legalization after the Uruguay Round, the WTO adheres to a 'club' model for decision-making that relies on the effectiveness of confidential diplomatic negotiations. Some other international regimes adhere to similar models. While some have condemned the club model precisely because it does not seem faithful to the 'rule of law', there is no doubt that the WTO's reliance on 'informal consultations' for setting standards and for resolving disputes (as in its trade committees) prior to formal adjudication continues to draw the support of many states, including developing ones.⁹⁸ Indeed, it is the more formal (and more public) treaty negotiations, or trade rounds, that have been the WTO's Achilles Heel in recent years, not the way that organization mediates, conciliates, or settles day-to-day trade disputes. The relative lack of transparency of pre-panel decision making is a reason why the more transparent, formal WTO dispute settlement is as viable and successful as it is. Of course, quiet settlements or other diplomatic resolutions rendered in the shadow of any of the other permanent international courts presumably do not satisfy the reason-giving or review requirements of GAL either.⁹⁹

The recommendation that investor-state arbitrators need to do a better job of providing reasons for their decisions presumes that other public international adjudicators do better on this score. This is questionable given, for example, the terse judgments issued by the European Court of Justice (ECJ). That court's cryptic "Cartesian" rulings "with [their] pretense of logical reasoning and inevitability of results" have drawn criticism; they are considerably less reasoned than many ISDS rulings, including some of the most heavily criticized arbitral rulings directed against Argentina.¹⁰⁰ Are we to draw from the comparison that the ECJ is as much in need of GAL reforms as is ISDS? If so, does the GAL insistence on reasoned adjudicative decisions require a fundamental restructuring of the European Court of Human Rights as well—as to enable that body to issue individual opinions signed by particular judges along with separately

⁹⁸ See e.g., Benvenisti (n 60) 165–166.

⁹⁹ See generally Karen Alter, *The New Terrain of International Law* (Princeton 2014) (exploring the "altered politics" created by the shadow of possible claims before such courts as well as by rulings).

¹⁰⁰ See Joseph H. H. Weiler, 'Epilogue: The Judicial Après Nice' in Gráinne De Burca and Joseph H. H. Weiler (eds) *The European Court of Justice* (OUP 2002). Compare, for example, the judicial reasoning in Joined Cases C-402 & 415/05P, *Kadi v Council* [2008] ECR I-6351, paras 248–330 (Kadi I); Joined Cases C-584/10 & 593/10P, *Comm'n v Kadi* [2013] ECR I-0000 (Kadi II) to *Enron v Argentine Republic*, ICSID Case No ARB/01/3, 22 May 2007.

signed dissents and concurring opinions? If, as many suggest, signed individualized opinions enhance the amount and quantity of reason-giving, does it mean it ought to be favored for all public adjudicators? Or is it possible that enhanced reason-giving may sometimes need to be counter-balanced by other desirable qualities—such as the need to adhere to canons of interpretation that facilitate judicial minimalism (another quality favored by the public prescriptions above)? Similarly, the GAL insistence on processes for appeal or review says nothing about counterweighing factors that might lead designers of international dispute mechanisms (including ICSID) to favor a single forum subject only to annulment, or why the most highly visible international court of all, the ICJ, seems legitimate without a process for appeal.

Moreover, even if one accepts the GAL premise that transparency, participation, reason-giving, and review are *generally* desirable features of international inter-state adjudication, these generic recommendations have limited value, particularly if they assume that these accountability methods will coalesce around an agreed ‘formula’. As states develop ever more refined investment treaties containing increasingly detailed provisions for ISDS,¹⁰¹ the real questions are how much transparency and when, whether to build in less transparent, less participatory methods to permit quiet settlements in the shadow of litigation, which kinds of amicus briefs or levels of third participation are appropriate with respect to particular matters or involving states with distinct traditions on these matters, or how much reason-giving to expect to avoid ICSID annulment or denial of enforcement under the New York Convention. The GAL formula for reform does not tell us whether, given all of the novel features that may be in a particular BIT or FTA (including provisions for dismissing frivolous claims, opportunities for the parties to comment on a first draft of an arbitral ruling, or clauses permitting the consolidation of claims), it is worth the added cost and time of building atop that particular treaty some kind of appellate review.¹⁰² And even assuming that formal appellate review in a particular BIT or FTA is both desirable and practicable, other questions loom large: how should that review be structured, does it permit entirely *de novo* reviews of both fact and law, does the review need to be done by a permanent body, and how should any such review be tailored to existing mechanisms (such as ICSID annulment or anticipated national enforcement proceedings, as under UNCITRAL). These important questions are not (nor should be) amenable to uniform ‘public law’ responses.

Finally, the contention that GAL or ‘public law’ yields ready recipes for those seeking to reform their international investment treaties or ISDS is misleading and condescending. It presumes, first, that any and all efforts to re-calibrate investment agreements fall on the ‘public law’ side of the ledger or that the re-balancing of IIAs makes resolving investor-state disputes more ‘public’.¹⁰³ Efforts to narrow

¹⁰¹ See e.g., the TPP’s Investment Chapter’s provisions for ISDS (n 76) Arts 9.18–9.30.

¹⁰² See generally José E. Alvarez, ‘Is the Trans-Pacific Partnership’s Investment Chapter the New “Gold Standard”?’ (2016) IILJ MegaReg Forum Paper 2016/3 <www.iilj.org/research/MegaReg.asp.

¹⁰³ Thus, Stephan Schill states that the TPP’s much reformed investment chapter, which largely reflects reforms incorporated in recent U.S. treaty practice, stresses “public law” reforms. Stephan Schill, ‘The European Commission’s Proposal of an “Investment Court System” for TTIP: Stepping Stone or Stumbling Block for

investors' rights and expand the rights of respondent states in modern IIAs—from those of the TPP's investment chapter to those contained in India's newly released model BIT—essentially reduce the scope of treaty protections and the role of investor-state arbitrators and restore the role of national law and national courts.¹⁰⁴ These reforms, which are reminiscent of efforts to narrow the scope of commercial arbitration, are intended to restore the role of the *private and public laws* that would normally govern such disputes. Such reforms are, in other words, also a hybrid and have hybrid efforts. In some cases, the result, depending on where these disputes are resolved and how, may be less transparency, participation, reason-giving, and review in exchange for greater 'democratic' legitimacy.

Second, it is wrong to describe contemporary changes in IIAs as coalescing around 'public law' solutions (even assuming one can agree on what that category is). States are not uniformly adhering to the GAL recipe book in their recent IIAs. States at the forefront of the re-calibration of such treaties, including the United States, are, to be sure, pursuing some GAL prescriptions (particularly enhanced transparency and amicus participation but not yet enhanced reason-giving or review).¹⁰⁵ But other countries are narrowing the scope of investor rights or of ISDS without enhancing transparency or participation rights within ISDS, and yet others are still concluding strongly investor-protective BITs comparable to those concluded in the early 1990s.¹⁰⁶ The trend towards re-calibrated IIAs has been accompanied, in many instances, by an increase in those treaties' investment protections.¹⁰⁷ While it is

Multilateralizing International Law?' (*ASIL Insight*, 22 April 2016)

<www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>.

¹⁰⁴ On the TPP and its debt to U.S. "re-calibration" efforts, see Alvarez (n 102). The recently released India Model BIT, for example, requires investors to first submit their claims to "relevant domestic courts or administrative bodies" to pursue "domestic remedies." Model Text for the India Bilateral Investment Agreement, Art. 14.3, <www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> .

¹⁰⁵ See e.g., Alvarez (n 102).

¹⁰⁶ Examples of the latter phenomenon include BITs concluded after 2000 by Ethiopia, Pakistan, Cambodia, and Cuba. See <<http://investmentpolicyhub.unctad.org/IIA/CountryBits>>. These are not isolated examples. A 2010 survey of South-South IIAs concludes that, just as UNCTAD had concluded in 2005, South-South BITs, which now approach 30 percent of all IIAs, "remain tied to the old BIT template developed by Northern countries in the 1950s and 1960s to protect their investments, with its broad definition of investment and investor, and traditionally broad guarantees of fair and equitable treatment, full protection and security, national treatment, MFN treatment, compensation for expropriation and, most importantly, broad offers to arbitrate all disputes with investors. For the most part, there is little new or exotic in the South-South dynamic." Mahnaz Malik, "South-South Bilateral Investment Treaties: The Same Old Story?" (27-29 Oct. 2010) Annual Forum for Developing Country Investment Negotiators, <www.iisd.org/pdf/2011/dci_2010_south_bits.pdf>; see also Mahnaz Malik, "South-South Investment Treaties: Governments Beware" (*This is Africa*, 6 Mar. 2013) (drawing same conclusion), <www.thisisafrikaonline.com/Analysis/South-South-investment-treaties-Governments-beware>. Another study of 303 South-South BITs concluded from 1994 to 2006 concludes that while many of these treaties cut back on the scope of national treatment and free transfers, the practical impact of these changes is considerably reduced by the operation of the MFN clauses contained in the same treaties. Lauge Skovgaard Poulsen, "The Politics of South-South Bilateral Investment Treaties" in T. Broude and others (eds) *The Politics of International Economic Law* (CUP 2016). See also Fry and Repousis (n 74) (noting ASEAN states' less than enthusiastic embrace of a key determinant of 'publicness': transparency).

¹⁰⁷ Thus, the BITs concluded by one of the leading participants in the investment regime, China, have included a mix of re-calibration techniques often inspired by current trends in U.S. practice, but also an increased receptiveness to ISDS and broader acceptance of investment guarantees, including pre-establishment national treatment. See e.g.,

possible that some states still concluding relatively old-fashioned BITs are simply ignorant about the public values that they are threatening, it is also possible that some of these are doing so because, given the economic constraints that they face or reputational concerns that they believe that they need to overcome, this is the best way to attract FDI.¹⁰⁸ It seems presumptuous to argue that these states (or in cases of democracies, the peoples' representatives) are wrong if they determine that the public interest demands that they prioritize increased capital flows over making sure that all ISDS awards are public, amicus briefs are always accepted, and all arbitral awards are thoroughly reasoned and appealable exemplars worthy of being included in investment law textbooks. There may be, in short, good reasons for some financially strapped countries to opt for assuring foreign investors that their rights will be respected and if needed enforced through expeditious arbitration. It is also important to recognize that despite the widespread re-calibration of IIAs, even those re-balanced agreements continue to be motivated by the need to provide investment protection, rely on hybrid ISDS, and avoid changes that would enable states to initiate treaty claims against investors. With rare exception states have not turned to an international investment court as an alternative to ISDS and they have avoided turning ISDS into all-purpose venues for hearing all forms of 'public' disputes brought by states against investors. Despite the touted sovereign backlash against it, ISDS (and its hybridity) retains the support of most states.

The different ways that states continue to participate in the spaghetti bowl of IIAs correspond to competing versions of what the international rule of law demands.¹⁰⁹ Those who argue that a state that continues to permit foreign investors to reach for the less transparent ICC or Stockholm arbitration rules is in violation of the international rule of law would appear to be subscribing to a particularly crimped version of it. It is also puzzling that many of those advocating for these public prescriptions in order to enhance the 'rule of law' endorse both GAL values *and* interpretative principles that defer to the state. Given the sad history of state abuse of power and of ineffectual international legal efforts to limit that abuse, it is paradoxical to suggest that public international lawyers should be, for purposes of ISDS, on the side of an interpretative principle like *in dubio mitius* or one that favors turning to national administrative law notwithstanding the established public international law principle that internal law needs to give way

Qianwen Zhang, 'China's "New Normal" in International Investment Agreements,' Columbia FDI Perspectives, No. 174, 23 May 2016; Jing Tao, 'Integration into the Liberal International Economic Order: China's Changing Policies on Legalized Bilateral Investment Treaties,' Working Paper presented at NYU Law, Nov. 2015 (copy on file with author).

¹⁰⁸ In some cases, countries may opt for a trade off with respect to the substantive content of BIT rights, such as the inclusion of a greater number of 'sustainable development' provisions in exchange for including pre-establishment commitments. See e.g., UNCTAD, 'Recent Trends in IIAs and ISDS' (Feb. 2015) 3 (noting the rise of both exceptions to permit "sustainable development" government actions and pre-establishment commitments).

¹⁰⁹ See e.g., Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315; Jeremy Waldron, 'The Rule of International Law' (2006) 30 *Harvard Journal of Law and Public Policy* 15; Kenneth J. Keith, 'The International Rule of Law' (2015) 28 *Leiden Journal of International Law* 403; Simon Chesterman, 'An International Rule of Law' (2008) 56 *American Journal of Comparative Law* 331.

to international obligations.¹¹⁰ Arguments in favor of deferring to ‘the state’ on the basis of the public nature of the regime or the needs of the rule of law also appear to assume that the state is a monolithic unit—and that it makes no difference whether the government action under challenge was undertaken by the legislative or executive branch.¹¹¹ But, as even advocates of ‘public law’ interpretative principles acknowledge, the level of deference that international tribunals owe to state action varies with the ‘public’ interest at stake and many other factors, including whether that deference is being given to duly elected legislatures or to less ‘accountable’ forms of government action. Telling states to follow public law solutions does not provide useful guidance when nuanced questions of this kind arise.¹¹²

To suggest that investor-state arbitrators—even those appointed by states—should see themselves as the *agents* of their state principals adopts one of two distinct perspectives on the proper role and function of international adjudicators. It is consistent with Posner and Yoo’s principal-agent view of international adjudication¹¹³ and at odds with the opposing view, namely that international adjudicators are best seen as impartial “trustees”.¹¹⁴ The latter is more consistent with those who have long seen ISDS as intended to offer investors the assurance that their rights will be examined in good faith and without the governmental bias inherent in settling investor-state disputes by agent-diplomats.¹¹⁵ Critics of the

¹¹⁰ See e.g., Waldron ‘Are Sovereigns’ (n 109) (suggesting that the international rule of law should not be seen as rule in favor of the rights of sovereigns).

¹¹¹ This seems particularly important if it is true that majority of ISDS claims involve challenges to actions taken by the executive. Jeremy Caddel and Nathan M. Jensen, ‘Which Host Country Government Actors are Most Involved in Disputes with Foreign Investors?’ Columbia FDI Perspectives, No 120, 28 April 2014.

¹¹² See e.g., Benvenisti (n 60) 232–239 (suggesting that less deference is owed to a state when the rights of foreigners or minorities are at stake). See also Schill ‘Deference’ (n 87) 14–16 (recognizing differences among international tribunals and rejecting “a one-to-one transposition of standards of review” among them). But see Schill’s claim that since ISDS disputes “are mainly concerned with resolving what are in essence public law disputes,” investor-state arbitrators need to turn to public law for general principles of state deference that are antithetical to commercial arbitrators who operate under the doctrine of equality of arms. *ibid* 10–12. The contractual disputes often involved in both ISDS and commercial arbitrations may both involve defenses by a state that its law (emergency law or other) permitted its breach. Such a defense does not (or need not) fundamentally transform those disputes into ‘public’ ones. In both instances, it may appropriate to defer to the respondent state. In either instance, a commercial or an investor-state arbitrator may find it necessary to defer to the state’s existing laws, particularly if there is some indication in the contract that it is governed by national law. Indeed, when that is the case, even an ISDS arbitrator may be better off relying on such a rationale rather than relying on some tenuous general principle concerning the appropriate level of deference to state authority. Of course, if a state passes emergency laws not contemplated in its contract with an investor, that is a different case. But even in such cases, an investor-state arbitrator may not need to make a sweeping decision about the level of deference owed to a state. See e.g., Alvarez and Khamsi (n 43) (discussing how in *CMS v Argentina* the original panel could have relied entirely on the promise made by Argentina that it would negotiate any changes in those tariffs and that Argentina’s breach of that promise could alone have been the basis for the tribunal’s ruling).

¹¹³ Posner and Yoo (n 16).

¹¹⁴ See e.g., Alter (n 99). See also Kenneth W. Abbott and Duncan Snidal, ‘Why States Act through Formal International Organizations’ (1998) 42 *Journal of Conflict Resolution* 3 (arguing that states turn to international institutions, including courts, because they need tools for both centralization and independence).

¹¹⁵ This is certainly the view of those who see the turn to ISDS as driven by states’ dissatisfaction with the procedures and outcomes of diplomatic espousal. See e.g., O. Thomas Johnson Jr and Jonathan Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’ in Karl P. Sauvant (ed), *Yearbook of International Investment Law and Policy 2010–2011* (OUP 2012). Note that even if one assumes that some party-appointed ISDS arbitrators see themselves as agents or advocates for the party that appointed them, this is not supposed to be the case for the third, critical vote in the arbitration. See generally Susan D. Franck, ‘International

agency account of arbitral behavior argue, with some justice, that it is not clear how urging state appointed arbitrators to act as the agents of those who appointed them would enhance the legitimacy of ISDS or improve the likelihood that states' regulatory concerns are properly reflected in any majority award. An arbitrator who is seen as a rubber stamp for the party that appoints him or her is likely to be delegitimized in the eyes of relevant stakeholders. If a member of an arbitral panel is perceived, because of their current or past behavior, as less than independent of the party that appointed her, such behavior not only risks a successful challenge to that person's continuing participation in the arbitration—it is also the surest recipe for undermining their credibility within the arbitral panel itself. An arbitrator who sees herself as merely the agent of one side of the litigation, even if not successfully challenged, is more likely, in other words, to be filing a dissent at the end of day. And yet, as commentators (including Roberts) have noted, the interpretation of IIAs incorporates features of both the agency and trusteeship models; while ISDS arbitrators or at least the presidents of arbitral tribunals are expected to act as impartial trustees, the interpretation of IIAs also rests on the actions (and possible inter-state interpretations) of their state parties and when that occurs arbitrators have no choice but to render decisions that reflect the views of those state parties.¹¹⁶ The interpretation of IIAs, in other words, is a “hybrid of agency and trusteeship models”.¹¹⁷ Ignoring this hybridity by opting for an agency model of ISDS ignores reality.

The suggestion that the relevant rules for treaty interpretation, and specifically Article 31(3)(c) of the VCT, license investor-state arbitrations to reach for other public international legal regimes, such as trade or human rights, in interpreting a BIT or FTA is not particularly useful. As Roberts suggests, the real question is how to deploy the malleable rules of interpretation, including that ostensible rule of ‘systemic integration.’ Many interpretative debates concern *which* boundary crossings among international legal regimes are appropriate for investor-state arbitrators to make and in what contexts.¹¹⁸ As Article 31(3)(c) puts it, the question is which rules are truly “relevant” among the parties. The real question is often *which* public international law regime should govern or which part of it, not whether the investment regime itself or the one from which guidance is sought is more or less ‘public’ or ‘private.’ That both the trade and investment regimes are ‘public’ tells us nothing about whether, for example, national treatment “in like circumstances” (as some BITs provide) should mean the same thing as “like product” (as in the WTO) or whether the ‘measures not precluded’ clause in the U.S.-Argentina BIT means the same thing as Article XX of the GATT.¹¹⁹ The remedial and other structural differences among the investment, trade, and human rights regimes need to be taken into account when one tries to extrapolate law from one

Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs? The Role of International Arbitrators’ (2006) 12 ILSA Journal of International & Comparative Law 499.

¹¹⁶ States can, of course, change their investment treaty commitments over time by, for example, amending them or issuing binding treaty interpretations. See e.g., Roberts, ‘Clash of Paradigms’ (n 4) at 60–63; Andreas Kulick, ‘Investment Arbitration, Investment Treaty Interpretation, and Democracy’ (2015) 4 Cambridge Journal of International & Comparative Law 441, 451.

¹¹⁷ Kulick (n 116) at 451.

¹¹⁸ Roberts ‘Clash of Paradigms’ (n 4); see also Alvarez (n 87); Vadi (n 11).

¹¹⁹ See e.g., Alvarez (n 87) 195–203 (discussing the flaws in the Continental Casualty case).

regime to the others.¹²⁰ (Indeed, it is striking how few IIAs actually incorporate, without significant change and in full, the language of GATT's public policy exceptions in its Article XX.)¹²¹

Given the differences in treaty text and regime intent and context, 'horizontal boundary crossings' need to be undertaken with the same caution one would apply when attempting to export a principle of national law to the international context. While all can agree that no international law regime is in principle 'self-contained,' that does not mean even similarly stated rights can be ripped from their institutional context and applied to another regime. That another international law regime is 'public' tells us little about whether borrowing its law for application in ISDS is appropriate.

Consider the widely praised Methanex decision under the NAFTA.¹²² That tribunal rejected a multi-million-dollar claim by the world's largest producer of methanol, a key ingredient in MTBE, a gasoline additive that had been banned by California because of the threat it posed to drinking water. An important element of Methanex's claim was that the California measures discriminated against it in favor of locally produced ethanol.¹²³ Methanex and its experts relied for this argument on WTO rulings that had found violations of national treatment based on unequal treatment of 'like products' in the sense of

¹²⁰ *ibid.*

¹²¹ According to UNCTAD's IIA Mapping Project (n 34), just 153 IIAs out of 1456 in its database contain an exception for "public health and the environment"; if one adds "other public policy exceptions" to the search (as would be expected of any treaty that adopts a GATT Art. XX exception), the total drops to 85. Even among those 85, few IIAs appear to replicate the full exceptions contained in Art. XX.

¹²² *Methanex Corp v United States*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 Aug 2005 (*Methanex*). This decision has been praised as a "watershed moment in transparency in investor-state disputes" because of its impactful decision to permit for the first time in an UNCITRAL arbitration third parties to participate as amicus. Julia Salasky and Corinne Montineri, 'UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (2013) 31 *ASA Bulletin* 774; see also OECD, 'Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures', (2005) OECD Working Papers on International Investment 2005/01 <<http://dx.doi.org/10.1787/524613550768>>. Perhaps in part because of its contribution to greater transparency, the result in the case and its receptiveness to environmental regulation, was praised, particularly but not only by environmental NGOs, as a "salutary contribution to the development of international investment law," "common sense point of view," and as a "critical point in the evolution of NAFTA jurisprudence" insofar as it applies a "modern regulatory approach to the police powers concept." Howard Mann, 'The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles' (August 2005) <www.iisd.org/pdf/2005/commentary_methanex.pdf>; see also Kara Dougherty, 'Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation,' (2006-2007) 27 *NW. Journal of International Law & Business* 735; David L. Gunton, 'Liability Begins at Home: An Alternative Compensation Scheme for NAFTA Expropriations' (2007) 40 *NYU Journal of International Law & Politics* 219; Pedro J. Martinez-Fraga, 'Juridical Convergence in International Dispute Resolution: Developing A Substantive Principle of Transparency and Transnational Evidence Gathering' (2012) 10 *Loyola University Chicago International Law Review* 37; Theodore H. Moran, 'Toward a Development-Friendly International Regulatory Framework for Foreign Direct Investment,' in Zdenek Drabek (ed), *Is the World Trade Organization Attractive Enough For Emerging Economies?* (Palgrave 2010). Indeed, even commentators who have been more critical of certain aspects of the ruling in Methanex ruling do not disagree with the central point addressed here: namely that the interpretation of IIAs needs to be sensitive to the very different contexts of the trade and investment regimes, including the absence of GATT Art. XX-type exceptions in most IIAs. See generally Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents' (2009) 20 *European Journal of International Law* 749, and Robert Howse and Efraim Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz' (2010) 20 *European Journal of International Law* 1087.

¹²³ *Methanex* (n 122) pt III, ch A, 16–18; pt IV, ch E, 4–8.

products that compete for the same customers.¹²⁴ Methanex argued that methanol producers were in like circumstances with U.S. domestic ethanol producers because they both produce oxygenates used in manufacturing reformulated gasoline and because they both compete for customers in the oxygenate market.¹²⁵ Methanex also relied on WTO law with respect to Article XX of the GATT; it contended that once it had shown that it had suffered from less favorable treatment, the burden was on the United States to prove the four elements of proof that WTO panels required under Article XX.¹²⁶ It sought to convince the NAFTA tribunal to turn to WTO caselaw to require the United States to prove that California's measures were necessary to fulfill an environmental objective, were proportionate, were the least restrictive possible, and did not constitute a disguised restriction on trade in a like product.¹²⁷

Among the reasons for rejecting Methanex's claims was the NAFTA's tribunal's finding that the NAFTA's national treatment guarantee could not be reduced to an inquiry about whether a foreign investor produces a directly substitutable good as determined by the end use made of the product by consumers.¹²⁸ In distinguishing WTO law, the tribunal praised the "carefully reasoned Amicus submission" filed by the International Institute for Sustainable Development (IISD) in that case.¹²⁹ The tribunal also appeared to rely on that amicus in rejecting Methanex's attempt to draw from Article XX of the GATT and the relevant trade caselaw interpreting it. While that amicus brief relied on trade law for a number of other contentions, it stressed the significance of the NAFTA's failure to include a provision comparable to Article XX.¹³⁰ For the amicus, as for the tribunal, it was inappropriate to import Article XX's caselaw and accordingly, Methanex's contentions as to what the U.S. needed to prove as respondent were rejected. Instead, the tribunal appeared to find that the United States could rely on a general residual right to regulate given the product. The U.S. was not expected to prove a particular legitimate regulatory purpose, had leeway to define what constituted 'like circumstance', and did not have to prove that it pursued the least restrictive alternative.¹³¹

One of the reasons that the Methanex arbitrators reached the right 'progressive' result was, in short, because, unlike at least one investor-state tribunal, they were wise enough *not* to simply export, irrespective of context, WTO jurisprudence on national treatment (or 'likeness') or GATT Article XX when neither the facts of that case nor the text of the investment treaty in question justified it.¹³² Even if

¹²⁴ *ibid.*, pt IV, ch B, 2–4.

¹²⁵ *ibid.*

¹²⁶ *ibid.*, pt IV, ch B, 5.

¹²⁷ *ibid.*

¹²⁸ *ibid.*, pt IV, ch B, 14–18.

¹²⁹ *ibid.*, pt IV, ch B, 13 (para. 27).

¹³⁰ Amicus Curia Submission, International Institute for Sustainable Development, *Methanex v United States*, paras 8, 64–69, 9 March 2004.

¹³¹ *Methanex* (n 122), pt IV, ch B, 19.

¹³² See e.g., Howse and Chalamish (n 122) at 1090 (agreeing that "[n]orms apparently common both to investor protection law and the multi-lateral trading system, such as National Treatment and Most-Favoured-Nation, are understood in a different contextual and textual space when used in the investment law regime."). See also Alvarez

one thinks that the Methanex tribunal misread or misapplied trade law (as with respect to whether the relevant products in that case were in direct competition), the larger lesson provided by that ruling is that an ‘environmentally friendly’ result does not require borrowing ‘public law’ developed in another international regime. The Methanex ruling also suggests that while WTO jurisprudence has often been deployed in the ISDS context, the use of trade law (or other ‘public law’) analogies need to be explained and grounded in the texts, purposes, and histories of the treaties at issue.¹³³ The Methanex case illustrates that those looking for guidance on the increasingly nuanced interpretative questions faced by ISDS tribunals will not be satisfied by the crude public law prescriptions contained in the second list above. A general recommendation to ‘apply public law liberally’ is not a wise, practical, or viable recipe for legitimate investment law interpretation, and it is not the only way to reach a result that is appropriately respectful of ‘sovereign policy space’.

The contention that the public nature of ISDS should prompt a search for and application of ‘general principles of public law’ drawn from national laws and practices merits critical scrutiny as well. ISDS tribunals have, of course, a license to apply general principles of law to the extent these are, for example, “relevant rules of international law” under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.¹³⁴ For public law advocates, general principles of public law are obviously relevant to the public international investment regime and are particularly desirable insofar as their use will promote less international law fragmentation between public law regimes. Thus, Schill argues that “general principles of public law” can and should influence the interpretation of investment treaties as well as the interpretation of any relevant rules of customary law insofar as these principles permit deducing “institutional and procedural requirements from comparable domestic and international standards for a context-specific interpretation of the investor’s right in question.”¹³⁵ Schill has argued that such general principles of public law can assist ISDS tribunals in terms of determining liability for representations made by government officials, for taxes they impose on property, or for resolving tensions between the right to property and a government’s duty to protect cultural heritage, for example.¹³⁶

Schill’s examples imply a considerable expansion of this third source in Article 38 of the Statute of the ICJ. As explained by, for example, Oscar Schachter, general principles of law have been based on different sources or rationales. For some, these principles are found and are based on legal norms in the

(n 87) (critiquing *Continental Casualty v Argentina* for resorting to Art. XX caselaw for purposes of interpreting the ‘measures not precluded’ clause of the U.S.-Argentina BIT).

¹³³ Compare Vadi (n 11) 148–158, 209–217 (defending *Continental Casualty*’s resort to GATT Art. XX jurisprudence) to Alvarez (n 87) (criticizing the same). It matters, for example, that some international investment agreements draw only partially on the GATT’s Art. XX, see e.g., Canada’s 2004 Model Investment Protection Agreement, Art. 10(1) <www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>, while most contain either nothing comparable to Art. XX, such as the ‘measures not precluded’ clause seen in Art. XI of the U.S.-Argentina BIT (n 119) or no such exception at all. See n 121.

¹³⁴ See e.g., Vadi (n 11) at 118–119.

¹³⁵ Schill, ‘An Introduction’ (n 29) at 33.

¹³⁶ *ibid* 36.

municipal legal orders of “civilized” nations that would be appropriate to apply to inter-state relations; for others, these principles are “derived from the specific nature of the international community”, while yet other scholars have sought to find concepts “intrinsic to the idea of law” or the rule of law.¹³⁷ These diverse and inconsistent conceptions of general principles reflect the differing opinions of those involved in the drafting of Article 38(1)(c) of the ICJ’s Statute.¹³⁸ These disagreements have not been clearly resolved by the judgments of the ICJ over time since that Court has applied general principles sparingly.¹³⁹ The small list of general principles grounded in these (not entirely consistent) conceptions, as enumerated in most international law treatises, include laches, forms of estoppel, the duty to mitigate damages, an injunction against adjudicative findings of non-liquet, and doctrines drawn from Roman law such as *lex posterior derogat priori*, *nemo plus iuris transferre potest quam ipse habet*, *res judicata*, *lex specialis derogate generalis*, and *ex injuria jus non oritur*.¹⁴⁰ More controversial (and more recent) additions to the general principles list, have included resort to alleged “general principles of international law applicable to arbitration”¹⁴¹; “general principles of criminal law” (encompassing such matters as *nullem crimen sine lege*, *nulla poena sine lege*, non-retroactivity, definitions of individual criminal responsibility (including forms of joint and accomplice responsibility), grounds for responsibility of commanders and other superiors, required mental elements, accepted defenses from responsibility, and definition of superior orders)¹⁴²; and an ostensible general principle of balancing or proportionality.¹⁴³

Neither the general definitions on offer for general principles of law nor the specific examples of these that are most commonly deployed seem suited to answering the more directed property rights/regulatory concerns that Schill identifies. International investment treaties were negotiated because, with the exception of certain (and perhaps still contested) customary rules (such as those based on the international minimum standard or the Hull Rule), truly generalizable principles that resolve the difference between a legitimate tax measure and a compensable taking of property or that enable distinctions

¹³⁷ Oscar Schachter, *International Law in Theory and Practice*, 50–55 (Springer 1991).

¹³⁸ See e.g., Vadi (n 11) at 119–127; Neha Jain, ‘Judicial Lawmaking and General Principles of Law in International Criminal Law’ (2016) 57 *Harvard International Law Journal* 111, 119–120.

¹³⁹ See e.g., Jain (n 138) at 120 (noting that while that ICJ has noted that general principles must be supported by a sufficiently large number of states, neither that Court nor other international courts have engaged in actual surveys of national legal systems to determine whether particular principles exist).

¹⁴⁰ For a thorough analysis and critique of these competing conceptions of general principles and the problems that ensue when adjudicators attempt to apply them, see *ibid* 117–132. For criticisms of how arbitrators or judges have applied even well-established general principles such as the principle of unclean hands or estoppel, see Andreas Kulick, ‘About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals’ (2016) 27 *European Journal of International Law* 107; Patrick Dumberry, ‘State of Confusion: The Doctrine of “Clean Hands” in Investment Arbitration After the Yukos Award’ (2016) 17 *Journal of World Investment and Trade* 229. See also Ori Pomson and Yonatan Horvits, ‘Humanitarian Intervention and the Clean Hands Doctrine in International Law’ (2015) 48 *Israel Law Review* 219.

¹⁴¹ See e.g., the TPP’s Investment Chapter (n 76) Art 9.22.7 (indicating that investor claimant has the “burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration”).

¹⁴² See also the Rome Statute for the International Criminal Court, Arts. 22–33 <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>.

¹⁴³ Sweet and Cananea (n 28).

between those governmental representations to private parties that can be renounced without liability and those that generate compensable legitimate expectations cannot be readily discerned. Agreement with respect to how the property interests of foreigners should be respected continues to elude states. Today's spaghetti soup of over 3400 bilateral and regional investment treaties, built on the wreckage of prior attempts to secure multilateral agreement on the protection of property, is the result of the fact that the national public laws regarding property rights are notoriously context-dependent and driven by cultural and other social values.¹⁴⁴ Indeed, some have questioned the viability of a general human right to property on precisely such grounds.¹⁴⁵ Even within the states of Europe—whose shared values have enabled them to agree on the common set of human rights contained in the European Convention on Human Rights—that treaty's right to “possessions” is subject to vague qualifications that reflect the differences in how European states address the balance struck between the right to property and sovereigns' right to regulate.¹⁴⁶ The same, it has been suggested, holds true even with respect to the United States and Canada, despite those nations' historical and cultural affinities and ties. Indeed, the allegedly distinct ways those two countries have answered some of the questions that Schill expects general principles to answer (see text at note 136 above) has produced enduring critiques of the NAFTA's investment chapter, and particularly its application to regulatory takings.¹⁴⁷ If differences exist as between Canada and the United States on such issues, the prospects of finding general public law principles to resolve such matters among the one hundred and eighty states that are parties to at least one IIA or (the 161 that are parties to the ICSID Convention), which include a great deal of variance with respect to the relationship between state and market, would appear to be scant indeed.

Given these realities, the texts of IIAs, with rare exception, do not authorize a renvoi to national law in terms of the substantive protections accorded to foreign investors. In lieu of turning to national law for this purpose, the drafters of IIAs turned to autonomous treaty obligations—from national treatment to FET to the international minimum standard. They understood that such rights, like all international legal obligations, would apply irrespective of internal law.¹⁴⁸ Presumably, those urging resort to general principles of public law in the interpretation of these treaty guarantees would not disagree with these basic precepts. Presumably, they are also aware that other international courts that are required to

¹⁴⁴ See generally Ronald A. Cass, 'Property Rights Systems and the Rule of Law' (2003) Boston University School of Law, Working Paper Series, Public Law and Legal Theory, Working Paper No 03–06.

¹⁴⁵ See generally Tim Hayward, 'Human Rights vs Property Rights' (2013) Just World Institute Working Paper No 2013/04.

¹⁴⁶ But see Letsas (n 149). For a survey of the diverse forms of property covered by international legal instruments, including the European Convention, see John G. Sprankling, *The International Law of Property* (OUP 2014).

¹⁴⁷ See e.g., David Schneiderman, *Constitutionalization Economic Globalization: Investment Rules and Democracy's Promise* (CUP 2008) (arguing that the NAFTA's protections against indirect takings of property reflects a conception of the public regulation of property that has far more in common with U.S. constitutional law than it does with Canadian jurisprudence). These difficulties help explain both states' more recent efforts to severely limit investor challenges based on indirect or regulatory takings. See e.g., 2004 Canadian Model BIT Annex B13(1) <www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>; 2012 US Model Bilateral Investment Treaty, Annex B, <www.state.gov/documents/organization/188371.pdf>.

¹⁴⁸ See e.g., VCLT, Art. 27.

apply autonomous treaty rights or standards, such as the European Court of Human Rights which is required to protect the right to possessions, have also endeavored to interpret these as having a separate or distinct meaning independent from domestic law.¹⁴⁹ Of course, as students of property rights know, even national courts charged with enforcing constitutional rights to compensation for governmental takings—guarantees which undoubtedly inspired the takings guarantees in many IIAs—have long been aware of the need to avoid the “positivist trap”, namely the error of turning to national legislation to define the limits of constitutional safeguards from abusive government action, including legislation.¹⁵⁰ As is well known as well, resort to general standards of treatment—like FET, the international minimum standard, full protection and security, and the need for prompt, adequate and effective compensation for government takings—and to international arbitration to enforce these, were specifically directed at those, like Carlos Calvo, who had argued that international law required foreign investors only to be treated like national investors and, like them, only have recourse to national remedies.

But even assuming that the prescription to apply general principles of public law does not intend to challenge these fundamental tenets of most IIAs, adjudicative efforts to apply general principles of law provide other reasons to be skeptical about this proposed remedy for producing more coherent (and more legitimate) international investment law. As Neha Jain has demonstrated, international criminal judges’ attempts to draw on general principles of law are problematic.¹⁵¹ As she indicates, the competing conceptions of general principles of law explain some of the difficulties.¹⁵² Given extensive debates about the meaning of the rule of law or the ‘nature’ of the international legal system, one can hardly expect agreement on useful general principles that go significantly beyond a small set of rules to promote equitable results.¹⁵³

As even proponents of deeper engagement with general principles of law acknowledge, the techniques for finding genuinely *general* general principles require sophisticated engagement with comparative law techniques, not amateur comparativism.¹⁵⁴ As Jain indicates, where international judges have resorted to such general principles, they have often done so impressionistically, that is, by finding commonalities among those legal systems that are “practically accessible” to them.¹⁵⁵ This kind of ‘convenience sampling’ has drawn the ire of both sophisticated comparativists as well as armchair ones

¹⁴⁹ See e.g., George Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’ (2004) 15 *European Journal of International Law* 279 (discussing the ways that the ECHR system has characterized as autonomous a significant number of concepts such as criminal charge, civil rights and obligation, possessions, association, victim, civil servant, lawful detention, and home despite the demands of a European consensus imposed under the margin of appreciation).

¹⁵⁰ See Thomas W. Merrill, ‘The Landscape of Constitutional Property,’ (2000) 86 *Virginia Law Review* 885, at 892, 922, and 934–942.

¹⁵¹ Jain (n 138).

¹⁵² *ibid* 116–120.

¹⁵³ See accompanying text and note 109.

¹⁵⁴ See Jain (n 138); see also Vadi (n 11) at 69–78 and 119–127.

¹⁵⁵ Jain (n 138) at 133.

(such as Justice Scalia of the U.S. Supreme Court).¹⁵⁶ It presents multiple opportunities for enhancing the discretion of adjudicators, while permitting them to engage in a lack of comparative rigor that encourages cherry-picking and lack of representativeness.

Schill's suggestion that investor-state arbitrators reach for general principles of *public* law presumes that it is reasonably clear what that category is. As is suggested by the fraught 'public law' descriptions of ISDS discussed above, it is not clear that states have reached uniform agreement on the categories of public or private law or even on which national laws or practices are applicable only for purposes of commercial versus investment arbitration. Under the circumstances, it should not surprise anyone that the category of general principles of public law remains fraught.¹⁵⁷ And even assuming that there is agreement on what are the comparable public laws that need to be examined as a baseline for determining such general principles, which subpart of 193 states' public laws need to be considered to identify the needed generality? Convenience sampling for this purpose seems strikingly inappropriate in a regime in which nearly all of them are parties to at least one investment protection treaty. Comparative law exercises involving the usual suspects (e.g., typically involving a look at only a handful of European states and perhaps Canada and the United States) tells us very little if we are attempting to interpret, for example, one of the many BITs between China and its African BIT partners.¹⁵⁸ Of course, an arbitral decision that purports to rely on general principles derived only from the practices or laws of Western European states risks undermining another primary goal of public law scholars: enhancing the ultimate legitimacy of ISDS through well-reasoned opinions that do not principally advance the interests of rich states' investors.

Alternatives, such as selecting a sufficiently representative sampling of the world's legal systems,¹⁵⁹ raises serious questions concerning how to determine the applicable legal families whose public laws ought to be examined.¹⁶⁰ Advocates of the legal families comparative approach argue that if the right group is selected, this will capture much of the world's legal practices insofar as we can assume that those states that were colonized and inherited the (mostly European) legal family in question continue to adhere to that tradition. This, of course, ignores the agency of post-colonial states and their tendency, particularly

¹⁵⁶ See e.g., Vadi (n 11) 164. See e.g., Justice Scalia, Dissenting, in *Lawrence v Texas*, 478 US 186 (1986).

¹⁵⁷ Some prominent commentators have argued, for example, that rules demanding transparent government regulations and the concept of "legitimate expectations," are "generally recognized principle[s] of comparative administrative law of the principal legal systems of well governed countries... meant to keep the state from abusing its dual power as both seller/contract party and as sovereign regulator in undoing the terms of deals agreed upon freely." Thomas Wälde and Abba Kolo, 'Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty' (2007) 35 *Intertex* 424, 448. As this example suggests, those who propose resort to general principles of public law, on the assumption that these will further governments' regulatory space to protect the public interest or lessen the discretion accorded to ISDS arbitrators may be disappointed. But see Vadi (n 11) at 137–174 (discussing the many forms of "micro-comparisons" to other legal systems being made by ISDS arbitrators and praising these, at 174, as tools for "preventing arbitral law-making").

¹⁵⁸ Such a risk would appear to be especially great if, as Pauwelyn suggests (n 70), the world of ISDS arbitrators is dominated by prominent repeat arbitrators from Europe and the United States.

¹⁵⁹ See e.g., Jain (n 138) 134–137; Vadi (n 11) 163.

¹⁶⁰ See e.g., Jain (n 138) 134–137.

on sensitive matters regarding property rights protections, to develop laws and practices that do not replicate those of their colonial rulers. Post-colonial states, particularly but not only those who achieved their full independence after some revolutionary turmoil, are likely to have re-examined the balances between private property rights and the rights of states to regulate in the public interest that they inherited from their former colonial masters.

The difficulties of uncovering applicable general principles of public law become all the more manifest when we consider options within the legal families approach. As Jain indicates, the options here include Rene David's four families (Romano-Germanic, Socialist, common law, and a residual 'other' category that apparently includes everything from Hindu to Muslim) and Zweigert and Kötz's eight (Romanic, Germanic, Nordic, Common law, socialist, far eastern, Islamic, Hindu).¹⁶¹ As she indicates, the legal families formula for discovering general principles paints with a broad brush, errs on the side of 'macro-comparisons' between legal systems in lieu of 'micro-comparisons' on specific legal issues or institutions, and ignores rival ways of distinguishing among legal systems.¹⁶² It also tends to make the comparative law search for universal standards manageable by ignoring the institutional context in which the law lives and breathes.¹⁶³ Critics of such approaches, such as Pierre Legrand and Radolfo Sacco, among others, have noted the need to be exceptionally cautious about extracting rules without attention to such context.¹⁶⁴ Those who aspire to find general principles of public law need to acknowledge that this is a difficult exercise involving three formidable steps: accurate identification of the legal rule in local context, accurately abstracting the legal general principle on which that rule is based, and accurately transporting it to the international plane where it can be properly considered in the course of interpreting a particular BIT or FTA (given its particular text, context, and negotiating history).¹⁶⁵

Given the difficulties and the prospects for accusations of bias, investor-state arbitrators, particularly those willing to engage in sophisticated comparativism, are likely to continue to find relatively few general public law principles that they can use to address the specific property rights issues that Schill identifies. That source of law is likely to remain the narrow gap-filler to achieve equity and avoid findings of *non liquet* that it now is. Careless comparativism, on the other hand, in which alleged general principles of property rights protections are found to displace investment treaty guarantees, could become a politically charged route for a *de facto* (and unauthorized) return to the Calvo Clause.¹⁶⁶

¹⁶¹ *ibid* 134–135.

¹⁶² *ibid* 133–137.

¹⁶³ *ibid* 137–139.

¹⁶⁴ *ibid*.

¹⁶⁵ See e.g., *ibid* 139–142 (discussing the challenges involved in transplanting municipal concepts to the international level).

¹⁶⁶ Compare *ibid* 150 (coming to comparable conclusions with respect to international criminal judges). See also *ibid* 74 (noting that analogical or comparative reasoning that fails to comply with international law “may contribute to the ‘legitimacy crisis’ of investment treaty arbitration”).

VII. Ten Lessons

It is appropriate that an essay that begins with two lists purporting to describe ISDS and to prescribe reforms for it going forward, should draw its own list of ten cautionary lessons from those preceding lists.

1. Debates over the ‘public’ nature of the international investment regime or ISDS in particular are not purely academic exercises. Descriptions of ISDS as ‘public’ lead to prescriptions for arbitrators to use in interpreting investment treaties and for states to deploy in reforming those treaties going forward. Whether or not directly influenced by the public law literature, certain investor-state arbitral awards, as noted, resort to public law analogies. The allegedly public nature of ISDS encourages horizontal and vertical ‘boundary crossings’—that is, analogies, right or wrong, across to other international public law regimes as well as downward comparative law searches into national legal orders—whether or not these are justified by the treaties being interpreted. Many states are following allegedly public law formulas for changing their model BITs or concluded FTAs.¹⁶⁷ Inspired by the turn towards transparency in the NAFTA and under pressure from international civil society, states have changed some of the underlying arbitration rules to provide for greater transparency and to enhance the potential for non-state participation through the acceptance of amicus briefs. More contemporary investment treaties, such as the TPP’s investment chapter, reflect post-NAFTA changes in U.S. model BITs.¹⁶⁸ Whether or not the re-calibrations of IIAs actually lead to greater protection of public law values, these efforts are widely seen as tilting the regime in a more ‘public’ direction.
2. As scholars have long argued, the public/private divide in law is a historical artifact that national and international lawyers have constructed, often for normative purposes.¹⁶⁹ It is wrong to attribute this construct to ‘natural’ or inevitable demarcations resulting from the Westphalian system of states and the need for states to protect their sovereign rights. Even as constructed, the public/private divide is built on gradations of *relative* publicness. Even assuming that the categorization of public versus private is sometimes descriptively useful, it is important to keep in mind that such descriptions are not based on objective criteria capable of uniform application but, as Toby Landau has implied, are most likely based on *perceptions* that some arbitral disputes raise ‘public’ policy concerns—and therefore require transparency and *jurisprudence constante*.¹⁷⁰ If ISDS is today perceived to be more public than commercial arbitration, this is, in large measure,

¹⁶⁷ See e.g., José E. Alvarez, ‘Why Are We “Re-Calibrating” Our Investment Treaties?’ (2010) 4 World Arbitration and Mediation Review 143.

¹⁶⁸ See e.g., Alvarez (n 102) (discussing the TPP’s many provisions to remedy ISDS’s perceived ‘rule of law’ flaws).

¹⁶⁹ See e.g., Martinez (n 62) (discussing critiques of the public/private distinction by diverse scholars, including Morton Horwitz, Duncan Kennedy, and Catherine A. MacKinnon).

¹⁷⁰ Landau (n 30).

because we have insisted on ever more public arbitral awards and a certain kind of arbitrators likely to resort to these—but what is so constructed can, of course, be deconstructed if relevant stakeholders so choose. The public/private divide is, in short, what we make of it.

3. Even if one were to accept the proposition that commercial arbitration is private and ISDS is public, this public/private divide needs multiple bridges enabling ‘crossover’ access. This is especially true with respect to disputes dealing with investor-state contracts, sovereign debt, or attempts to use ISDS to enforce commercial arbitral rulings. These ‘crossover’ cases raise crossover concerns to those who practice in or study either commercial arbitration or ISDS. The construction of implacable barriers between these two forms of arbitration, both dealing essentially with property disputes, are barriers to mutual understanding of common concerns.
4. Many (but not all) of the public law prescriptions for the investment regime, for ISDS, or for particular BITs or FTAs exalt continued legalization. Public needs for transparency, participation, greater reason-giving, and enhanced review are likely to lead to ever more legalized forms of dispute settlement. But, as was once suggested by critiques of the ‘legalized’ WTO dispute settlement scheme, there are costs associated with greater formalization of arbitration, doubts about whether it enhances compliance, and some potential for some forms of counter-productive backlash in its wake.¹⁷¹ A rival list of ‘private law’ prescriptions based on the traditional virtues of arbitration—expeditious resolution of disputes at low cost—may be useful to elaborate, particularly if the goal of ISDS reforms is to protect or enhance the legitimacy of the mechanism and not adopt ‘public’ prescriptions for their own sake.¹⁷² With respect to ongoing negotiations on BITs and FTAs, states should remain free to exercise their ‘exit and voice’ options, including with respect to GAL/public law prescriptions. States that want relatively simple investor-protective treaties resembling those concluded in the 1990s and that seek to avoid the TPP investment chapter’s GAL-type provisions should be free to negotiate them. Some states may wish to adopt reforms that might be seen as more characteristic of private commercial arbitration—such as carving out certain matters from ISDS¹⁷³—rather than avowedly public law techniques that tend to empower arbitrators such as authorizations to apply malleable principles like *in dubio mitius*, general principles of proportionality, or the margin of appreciation. One of the

¹⁷¹ Skeptics of the WTO’s turn to more formal dispute settlement include, most prominently Robert Hudec. See e.g., Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth 1993).

¹⁷² Prescriptions that, for example, urge ISDS arbitrators to adopt the ‘passive virtues’ of judicial minimalism or to avoid overtly discursive rulings that purport to harmonize international investment law would be consistent with those ‘public law’ prescriptions that recommend less formal forms of dispute resolution, such as mediation and conciliation. They may also be advisable to the extent that some investors, if no longer satisfied with overly legalized ISDS, may seek such alternatives, including proceeding under less transparent arbitral rules.

¹⁷³ As Ruth Teitelbaum has pointed out, some states have rendered some matters, such as intellectual property rights under TRIPs or taxation measures alleged to be confiscatory, non-arbitrable under their more recent BITs. Ruth Teitelbaum, ‘A Look at the Public Interest in Investment Arbitration: Is it Unique? What Should We Do About It?’ (2010) 5 Berkeley Journal of International Law Publicist 54.

virtues of the hybrid international investment regime, after all, is that states parties to BITs and FTAs remain freer than do WTO parties to decide for themselves how to change investment law going forward, and whether, for example, to encourage only some vertical or horizontal boundary crossings. Some states may even want to explicitly discourage resorts to faux general principles of public law whose general acceptance is limited to some European countries. To the extent the public interest is best protected by enabling governments to decide what is best for their peoples, that interest might be best served by according sovereigns the discretion to avoid the potential pitfalls of what are perceived as ‘public law’ solutions with respect to the next generation of investment treaties.

5. Some public law prescriptions, such as recommending recourse to general principles of public law or reaching to ‘analogous’ public law regimes, may be neither practicable nor useful. It is doubtful that truly universal general principles of public law exist capable of answering many nuanced issues faced by investor-state arbitrators. Injunctions to reach for other international law regimes do not tell us which of those regimes should be preferred. Recommendations to enhance transparency, participation, review and reason-giving do not answer many of the real questions drafters of investment treaties face. Public law prescriptions that urge investor-state arbitrators to do contradictory things—e.g., to draft well-reasoned rulings that promote harmonious rules of treaty interpretation *and* also strive for horizontal and vertical boundary crossings—do not provide useful guidance. And some public law analogies, including an insistence that ISDS is a form of diplomatic espousal, undermine public international law by presuming standard answers to questions that in fact may differ depending on the particular investment treaty’s text, context, and negotiating history.
6. Public law prescriptions may not always produce the ‘progressive’ results their proponents intend. Generic recommendations to enhance ‘transparency’ and ‘participation’ may deter efforts to quietly settle disputes before they become contentious. General recommendations to defer to the preferences of states fail to consider: differences between the actions of different parts of a government (state/federal/executive/legislative/judicial), that internal law is not an excuse from an international legal obligation, or that much of international law is designed to prevent the abuse of sovereign authority. Recommendations to borrow from other public law regimes on the assumption that mutual ‘publicness’ ensures deference to sovereigns may be erroneous. ISDS rulings that, for example, rely on the GATT’s Article XX when no such provision appears in a BIT or FTA may force respondent states to attempt to fit their regulatory purposes within those enumerated in Article XX, to conform their defenses to evolving trade caselaw, and to satisfy the

trade regime's burdens of proof. ISDS respondent states may enjoy greater policy discretion if they can rely instead on a flexible and general residual right to regulate.¹⁷⁴

7. The claim that the investment regime or ISDS is 'public' is not equivalent to the proposition that either or both are governed by public international law.¹⁷⁵ No one doubts that ISDS is the product of treaty or that unless a specific BIT or FTA were to indicate otherwise, investor-state arbitrators are charged with interpreting these agreements in accord with the VCLT. There is also no doubt that as a regime governed by public international law, the international investment regime shares many common challenges and points of intersection with other public international legal regimes.¹⁷⁶ But the first list of descriptions and the second list of public law prescriptions at the beginning of this essay do not invariably follow from the proposition that the investment regime is governed by public international law. International lawyers would have some trouble identifying sources of public international law that would support the first descriptive list. Public international law sources, particularly the faithful application of the customary rules of treaty interpretation, would also be at odds with at least some of the public law prescriptions contained in the second.
8. Contentions based on the 'publicness' of the investment regime or ISDS often take the form that both are (or should be) *solely* 'public'. The hybridity of the regime or of ISDS is, from this perspective, something to be ignored or changed. Thus, Schill argues for the relevancy of general principles of public law; he does not address whether it is ever appropriate to apply any principles of private law or what happens when the two types of general principles conflict.¹⁷⁷ Similarly, the German school of public law scholars supports their recommendations for regime change on the basis that the investment regime is a scheme for 'public' governance.¹⁷⁸ They do not consider whether it is relevant to consider, for example, those aspects of the investment regime or ISDS that appear to rely on 'private' or market-based actors, as appears to be the case with respect to the imperfect scheme for enforcing ISDS awards. For public law scholars generally, the power of the most prominent private actors of ISDS, investor claimants—in choosing which claims to bring, which legal arguments to make, which arbitral mechanism to trigger, and which party appointed arbitrator to choose—are harms that need to be counter-balanced by enhancing the

¹⁷⁴ See e.g., Alvarez (n 87).

¹⁷⁵ See generally Vadi (n 11). But see Sornarajah (n 47) (suggesting that international investment law has been infested with resort to "private" "low sources," such as the views of Western scholars and prior arbitrators, rather than genuinely "public" sources such as General Assembly resolutions).

¹⁷⁶ See e.g., Alvarez (n 3).

¹⁷⁷ See e.g., Schill (n 29) at 10–17 (arguing that while international investment law might be seen as a hybrid, it is better to treat it as a form of public law and ISDS as a form of judicial, administrative, or constitutional review) and at 28–35 (arguing for the application of general principles of public law). But, as is clear from the choice of law applicable under the ICSID Convention, the law of the "Contracting State party to the dispute" (and not just its public law) as well as "such rules of international law as may be applicable", may need to be consulted. ICSID Convention, Art. 42.

¹⁷⁸ See e.g., von Bogdandy, Dann, and Goldmann (n 58).

power of states in conjunction with elements of civil society. For at least some of these scholars, ISDS's reliance on private claimants is a problem that needs to be resolved; that is, it is an indication that it is a 'wrongly privatized' scheme for the resolution of public disputes that should be resolved by public institutions—by turning to national courts, state-to-state arbitration, or a permanent international investment court (or some combination of the three). The contention that the role of such private actors or other private 'enforcers' of ISDS is a fundamental attribute that may account for the regime's relative successes escapes notice or is seen as profoundly misguided.

9. Public law scholars focus on the public forms of global governance. And yet governance has historically been produced as well by private actors, from the Dutch East India Company to United Fruit to today's powerful multinational corporations, whether acting alone or in association with governments.¹⁷⁹ 'Governance' does not exist only on the 'public' side. The rigid public/private divide encouraged by the two lists at the start of this essay makes it more difficult to perceive the ways that the investment regime and ISDS, like many other mechanisms of global law, straddles the governance divide.¹⁸⁰ The work of a number of scholars, such as Fabrizio Cafaggi, by contrast, indicates how much regulatory work is now being performed by transnational private rule making bodies.¹⁸¹ Moreover, the goals of ostensibly 'private' forms of governance have never been divorced from those pursued by governments. States have used their contracts with private parties to implement their public policies, for example, and both private and hybrid forms of standard setting regulate externalities such as environmental harms, product safety, and human rights violations that occur within today's global value chains.¹⁸² The very conception of what 'property' entitled to protection is seeks to determine not only the proper sphere of governmental activity (that is, the extent to which government can interfere with private property rights) but also the right property owners have to exclude other private parties—the sphere covered by 'private law.'¹⁸³ Similarly, scholars have addressed how other forms of private international law, including national law on jurisdiction, conflict of laws, and recognition and enforcement of judgments or arbitral awards, are also forms of regulation and have a deep

¹⁷⁹ See e.g., Martinez (n 62).

¹⁸⁰ See e.g., Pauwelyn, Wessel, and Wouters (n 61); Lorenzo Casini, "'Down the Rabbit-hole': The Projection of the Public/Private Distinction Beyond the State" (2014) 12 I-Con 402.

¹⁸¹ See e.g., Fabrizio Cafaggi, 'The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between *Leges Mercatoriae* and *Leges Regulatoriae*' (2015) 36 University of Pennsylvania Journal of International Law 101.

¹⁸² For a good discussion of why states resort to 'informal' law involving non-state actors as active participants, see Mark A. Pollack and Gregory C. Shaffer, 'The Interaction of Formal and Informal International Lawmaking' in Pauwelyn, Wessel, and Wouters (n 61) at 241.

¹⁸³ See e.g., Thomas W. Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 730.

impact on property rights and whether these are enforced.¹⁸⁴ The goals of these forms of ordering—public or private—are not entirely distinct: both seek to decrease the risks of opportunistic behavior. If a fundamental goal of public law scholars is to restore or safeguard only *governments' right to interfere with private rights to property*, that normative agenda needs to be made clear and justified. In the meantime, they should not ignore how much governance now occurs by private or hybrid means, and how much the very notion of property owes to both.

10. Public law descriptions and prescriptions tend to presume a linear narrative. Optimistic public law scholars, like Schill, see the regime as another one of public international law's familiar progress narratives. In this vision once the publicness of the investment regime and ISDS is accepted and taken seriously and public law prescriptions are adopted, the regime's legitimacy deficits will recede. For some public law scholars the long term viability of ISDS will be secured only when a fully 'public' and multilateral regime for investment law, ideally accompanied by a permanent dispute settlement system on the model of the WTO's, is secured.¹⁸⁵ In the meantime, avowedly 'public law prescriptions' as in the CETA (with its international investment court) are seen as incremental steps towards the eventual public-ification (along with formal multilateralization) of the regime.¹⁸⁶ Other public law scholars predict (or even eagerly await) the demise of ISDS because the contemplated public law reforms to it will prove to be too little too late to alter its fundamentally compromised nature.¹⁸⁷

These accounts of ISDS's past and future ignore the possibility that today's investment regime is best approached not as a linear narrative leading to either its eventual successful public-ification or deserved demise, but, like much else in international law, as the product of recursive interactions (or forms of 'contestations' and 'deference') between states and other actors, including business interests.¹⁸⁸ From a more political perspective, it may be that international investment law, like the regulatory welfare state generally, is the product of a historical dialectic. Karl Polanyi may well have been right when he argued in *The Great Transformation* that periods of utopian market liberalism tend to be followed by counter-

¹⁸⁴ For a literature survey, see Gregory Shaffer, 'Theorizing Transnational Legal Ordering' (2016) Legal Studies Research Paper Series No. 2016-06 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734318>.

¹⁸⁵ See e.g., Van Harten (n 30) and Van Harten (n 31).

¹⁸⁶ See e.g., Joachim Karl, 'The "Spaghetti Bowl" of IIAs: The End of History' Columbia FDI Perspectives, No 115, 17 February 2014 (discussing the common "dream" for a multilateral investment agreement); Schill (n 101) (expressing the hope that the EU proposal in the TTIP for an international investment court can be multilateralized). But see José E. Alvarez, 'To Court or Not to Court' (2016) IILJ MegaReg Forum Paper 2016/2 <www.iilj.org/research/MegaReg.asp> (expressing skepticism about the EU proposal for an investment court).

¹⁸⁷ See e.g., M. Sornarajah, 'Starting Anew in International Investment Law' Columbia FDI Perspectives, No 74, 16 July 2012.

¹⁸⁸ See e.g., Kriedrich Kratchwil, *The Status of Law in World Society: Mediations on the Role and Rule of Law* (CUP 2016) (discussing "praxis," namely how knowledge is produced by interactions between practical reasoning and decisions); see also the studies included in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels Contestations and Deference* (Hart 2016). See also Gregory Shaffer, 'How Business Shapes Law,' 42 Connecticut Law Review 147 (2009).

movements in favor of greater government regulation.¹⁸⁹ David Garland has seen a comparable dialectic operating with respect to the history of regulatory models of the welfare state.¹⁹⁰ These more cyclical visions of how states have approached the regulation of capital flows are at odds with some of the public law narratives of the investment regime and ISDS. The two lists that begin this essay have more in common with Frances Fukuyama's 'end of history' thesis than with Polanyi's or Garland's respective views.¹⁹¹

VIII. CONCLUSION

Seeing ISDS as exclusively 'public' tends to close off inquiries into its current state as well as its possible future. It closes off inquiries into the many ways that ISDS may differ from other forms of adjudication—from permanent international courts or commercial arbitration—that are unique or do not fall into familiar public/private conceptualizations.¹⁹² It fails to consider the different types of disputes that investor-state arbitrators resolve, including many that closely resemble in form those addressed in commercial arbitration. It presumes a progress narrative and not alternative, more cyclical visions of history. It endorses 'public' prescriptions that are not always consistent with one another or with the texts of IIAs and that ignore distinct possibilities for regime evolution associated with the 'private'. It takes insufficient account of the governance implications of the actions of a broad number of public, private, and hybrid actors.

Given the apparent scholarly consensus surrounding the two lists at the start of this essay, it is quite likely that there will be resistance to at least some of the ten lessons in Part VII, including some of those summarized in the paragraph above. Some of the controversy may reflect different views of the object and purpose of ISDS and the international investment regime. The public account of the investment regime tends to see it as the product of a struggle between the necessary evil of foreign investors and regulators striving to take back their capacity to protect the public interest from the negative externalities posed by foreign investment. It seeks to make investor-state arbitrators enablers of the state. The existing hybrid investment regime responds, to be sure, to that dynamic, but it also consists of many IIAs that recognize, as does the U.S. Constitution's Taking Clause, that some private property rights are entitled to international protection from the power of states and cannot simply be gutted by the public

¹⁸⁹ Karl Polanyi, *The Great Transformation* (Farrar & Rinehart 1944). See also Wälde and Kolo (n 157) at 426 (noting cycles to promote or discourage foreign investment).

¹⁹⁰ David Garland, *The Welfare State: A Very Short Introduction* (OUP 2016).

¹⁹¹ Francis Fukuyama, *The End of History and the Last Man* (Free Press 1992).

¹⁹² Some argue, for example, that ISDS presents uniquely asymmetrical challenges to states insofar as they need to keep track of its *jurisprudence constante* even when they were not parties to earlier rulings and cannot defend themselves as respondents as forcefully as do private lawyers for claimants given the distinct roles that they play in the system, including as sovereign protectors of their own national investors. Jeremy Sharpe, 'The Potential Impact on Investment Arbitration of the ILC's Work on Customary International Law' (*AJIL Unbound*, 23 Dec. 2014) <www.asil.org/blogs/potential-impact-investment-arbitration-ilc%E2%80%99s-work-customary-international-law>. It is not clear how characterizing ISDS as public helps to resolve such asymmetries.

power of governments. This essay assumes that, consistent with the rules of treaty interpretation, investor-state arbitrators should strive to achieve these hybrid objectives.

So, is ISDS ‘public’? Too often the answer has been that it is exclusively public. The answer to the titular question presented here is more nuanced: Since it is not clear what we mean by ‘public’, and that description threatens to be circular and produce problematic prescriptions, ISDS is more accurately described as a ‘hybrid’.