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Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

- January 25** Harlan Grant Cohen, *University of Georgia*
“Finding International Law, Part II: Our Fragmenting Legal Community”
- February 1** Anthea Roberts, *London School of Economics / Visiting Professor at Harvard University*
“Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System”
- February 8** Odette Lienau, *Cornell University*
“Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century”
- February 29** Nico Krisch, *Hertie School of Governance (Berlin) / Visiting Professor at Harvard University*
“Pluralism and Global Public Goods”
- March 21** Doreen Lustig, *New York University*
“History of Responsibility of Corporations in International Law”
- April 4** Martti Koskenniemi, *University of Helsinki / New York University / Visiting Professor at Columbia University*
[to be held in Pollack Colloquium Room, 9th Floor, Furman Hall, 245 Sullivan St.]
- April 17** Horatia Muir Watt, *Sciences Po*
“Global Governance and Private International Law”
[to be held, exceptionally, on a Tuesday at 4pm; location TBA]
- April 18** Armin von Bogdandy & Matthias Goldmann, *Max Planck Institut, University of Heidelberg / New York University*
“Sovereign Debt”

Clash of Paradigms:
Actors and Analogies Shaping
the Investment Treaty System

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I. INTRODUCTION

When the skin of an Australian platypus was first taken to England in the 1700s, scientists thought it was a fake. It looked like someone had sewn a duck's beak onto a beaver's body; one scientist even took a pair of scissors to the skin looking for stitches.¹ The animal had fur and was warm-blooded like a mammal, yet laid eggs and had webbed feet like a bird or a reptile.

¹ See <http://www.platypus.asn.au/>; <http://en.wikipedia.org/wiki/Platypus>.

Scientists struggled to fit this unusual creature within familiar taxonomies. Was it a bird, a mammal or a reptile? Or was it some strange hybrid of all three?

Categorizing the investment treaty system has proven just as problematic. At first glance, investment treaties are creatures of public international law: they are entered into by two or more states and are substantively governed by public international law. Yet most permit foreign investors to bring claims directly against states before *ad hoc* arbitral tribunals, whose rules of procedure and enforcement draw heavily from international commercial arbitration and arbitration under investor-state contracts. As the system grafts private international law dispute resolution mechanisms onto public international law treaties, one might conclude it is a hybrid of the two.²

But there are other ways to understand the beast based on the regulatory relationship it establishes between host states (as governors) and foreign investors (as governed). Like domestic public law, investment arbitrations permit foreign investors to challenge governmental conduct in a manner bearing some resemblance to judicial review.³ Like certain international human rights regimes, investment treaties are inter-state agreements that permit non-state actors to challenge governmental conduct occurring within those states.⁴ Like international trade law,

² Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 151-55 (2003); ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 6-10 (2009).

³ Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* (2008); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (2009), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1146&context=nyu_plltwp; Stephan W. Schill, *International Investment Law and Comparative Public Law: An Introduction*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 3 (Stephan W. Schill ed., 2010); SANTIAGO MONTT, *STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW IN THE BIT GENERATION* (2009).

⁴ Douglas, *supra* note 2, at 153-54; DOUGLAS, *supra* note 2, at 7-8; Karl-Heinz Böckstiegel, *Enterprise v. State: the New David and Goliath?*, 23 ARB. INT'L 93, 93, 104 (2007); Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 97, 98, 107 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009); Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 82, 94 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 202-07 (2010); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573, 576 (2011).

investment treaties are international economic law agreements that concern a state's right to regulate domestically and which implicate important non-economic concerns.⁵

Some may view these comparisons as interesting but irrelevant, reasoning that the investment treaty system is *sui generis*. According to Paulsson, for instance, investment treaty arbitration "is not a sub-genre of an existing discipline. It is dramatically different to anything previously known in the international sphere."⁶ Even so, the investment treaty system is immature and incompletely theorized, remaining bedeviled by disagreement on some of its most fundamental questions. Is investment treaty arbitration a form of public or private law? Do investment treaties grant investors procedural rights, substantive rights or mere benefits? What role can states play in interpretation given their dual roles as treaty parties and respondents in investor-state disputes? When is it appropriate for investment tribunals to second-guess regulatory decisions made by host states?

There is no authoritative voice to resolve such questions. The system is radically decentralized as it is based on thousands of bilateral treaties, which in turn are interpreted by hundreds of *ad hoc* tribunals rather than a single standing court. No appellate body exists that could function like a supreme court. The treaties themselves hardly provide answers, as they tend to be short and open-textured, leaving many gaps and ambiguities. This makes the field particularly susceptible to participants drawing analogies with other legal disciplines when resolving interpretive problems or making proposals for reform. As Thomas Wälde has observed, investment treaty arbitration is a "novel hybrid/mixed form" of dispute settlement that, during its infancy, has had frequent "recourse to other, external sources of law."⁷

This is a normal human reaction: people often seek to understand the new by reference to the old, working with existing conceptual tools and maps when charting new territory.⁸ Yet there is not just one set of tools and maps available to participants in the investment treaty system. Different participants, such as states, investors and NGOs, may favor different paradigms for

⁵ RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 2-5 (2008); Jürgen Kurtz, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EUR. J. INT'L LAW 749 (2009) [hereinafter Kurtz, *Use and Abuse*]; Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis* (2010) 59 INT'L & COMP. L.Q. 325, 337-41 [hereinafter Kurtz, *Adjudging the Exceptional*]; Walid Ben Hamida, *MFN Clause and Procedural Rights: Seeking Solutions from WTO Experience?*, 6 TRANSNAT'L DISP. MGMT 1 (2009); Nicholas Di Mascio & Joost Pauwelyn, *Non Discrimination in Trade and Investment Treaties: Two Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48 (2008). See generally *Intersections: Dissemblance or Convergence between International Trade and Investment Law*, 3 TRANSNAT'L DISP. MGMT SPECIAL (2011).

⁶ Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 256 (1995).

⁷ Thomas Wälde, *The Specific Nature of Investment Arbitration*, in NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 43, 118 (Philippe Kahn & Thomas Wälde eds., 2007).

⁸ Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT'L L. & POL'Y 67, 77-78 (2000) ("Metaphors and comparisons are essential to comprehend new concepts and organize thought").

understanding the system in light of their divergent interests. And lawyers with diverse backgrounds (for instance, in public international law, commercial arbitration or public law) may approach the system with different default templates. As a result, the investment field is a conceptual mess – not only is it under-theorized, but different participants adopt different paradigms for understanding the system and its decentralized nature results in these differences being multiplied rather than resolved.

In an effort to find a framework to understand the chaos, I identify distinct paradigms for approaching the system that operate explicitly or, more often, implicitly within the field. I contend that the process of drawing comparisons with other legal fields plays a critical role in reflecting and constituting different conceptualizations of the investment treaty system as, for instance, a sub-field of public international law, a type of international arbitration or a form of international judicial review. Each paradigm brings certain similarities into the foreground while relegating certain differences to the background; each highlights certain actors, interests and solutions over others. Choosing among these paradigms is therefore not value neutral but rather is imbued with politics as different approaches tend to reflect and promote divergent interests. In capturing and critiquing the “clash of paradigms” underlying the investment field, this Article makes three contributions.

First, it shines a spotlight onto the phenomenon of “choice of analogies” that occurs routinely – though often unreflectively – within the investment treaty field. When analyzing investment treaties, participants can draw analogies with a range of legal disciplines that often point to diverse solutions, but no meta-theory exists for resolving when to rely on any particular analogy. This is problematic because, as Dworkin argues, “analogy without theory is blind.”⁹ Without a theory about whether particular analogies are relevant and why one should be chosen over another, analogies becomes “a way of stating a conclusion, not a way of reaching one.”¹⁰ Since analogical reasoning relies upon a theory of “relevant” similarity and difference,¹¹ we cannot determine whether an intra-disciplinary analogy is appropriate unless we have a theory about the nature of the investment treaty system. Yet participants regularly rely on analogies with other legal fields in order to shed light on that very question, thereby implicitly assuming or advocating for a particular theory of relevance.

Second, this Article provides an original analytical schema for understanding the clash of paradigms underlying the investment treaty system. Analogies to other legal fields frequently point to diverse solutions as a result of differences in the structures, assumptions and normative commitments of their underlying paradigms. A major contribution of this piece is that it provides an architectural framework for understanding different theoretical approaches to the system

⁹ Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 371 (1997).

¹⁰ *Id.*

¹¹ Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) (“For analogical reasoning to operate properly, we have to know that A and B are ‘relevantly’ similar, and that there are no ‘relevant’ differences between them.”). See also Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 933 (1996).

based on intra-disciplinary comparisons with public international law, international commercial arbitration, public law, trade law and human rights law.¹² Of these, only the public law approach has been explicitly identified as an interpretive paradigm, yet it has been subject to little critique. The public international law and commercial arbitration paradigms are discernable in the field but often operate implicitly. The trade law and human rights paradigms, meanwhile, have barely been conceptualized. In each case, I dissect these paradigms to show what they highlight and obscure about the investment treaty system and where they converge and diverge.

Third, this Article examines the political drivers behind and consequences flowing from the adoption of different paradigms. We cannot understand the clash of paradigms underlying the investment treaty system without examining the role that particular actors play in perpetuating different paradigms. These actors include the states, investors and NGOs who appear in investment treaty arbitrations, as well as the arbitrators and academics that facilitate and critique the system. Drawing on interest-based and sociological analyses, I explain how these interpretive paradigms both reflect and help to shape power dynamics within the field. I contend that the investment treaty system is in the early stages of a major recalibration that will result in a significant reevaluation of the importance of different paradigms for understanding the field. Public international law and public law paradigms that focus attention on the state as a treaty party and regulatory sovereign are rising in significance, while paradigms that emphasize the system's private law origins or which treat investor rights as akin to human rights are declining in importance. These changes partly represent a reaction to earlier interpretive approaches in the field and partly result from significant changes in the world economy.

Ultimately, I argue that, working within the existing investment treaty system, we should not expect one interpretive paradigm to prevail above all of the others, even if the relative importance of different approaches is likely to shift over time. As each paradigm reveals certain aspects of the investment treaty system while obscuring others, and each serves the interests of some of participants but not others, solutions that narrowly endorse a single paradigm are likely to be unstable as they will be readily open to critique from other perspectives. Those wishing to work within the current system to forge more stable, long term solutions should focus their energies on crafting approaches to controversial issues that draw inspiration from multiple paradigms, using each one to identify blind spots and unarticulated assumptions in the others. Accordingly, as the investment treaty system matures from its infancy and awkward adolescence, we can expect "between the poles" solutions to be developed that draw on a range of intra-disciplinary analogies instead of narrowly endorsing any single paradigm.

¹² While these paradigms are the most frequently adopted ones at present, others could also be imagined. For instance, lawyers from developing countries could characterize the system through "contract of adhesion" or "consumer protection" models, arguing that investment treaties represent asymmetrical, standard form bargains between fundamentally unequal parties (capital exporting states and capital importing states) and thus the system should borrow ideas from these fields in order to safeguard the interests of the weaker party (the capital importing state which is most likely to appear as the respondent state). I am indebted to Duncan Kennedy for this suggested model.

II. CHOICE OF ANALOGIES: WHY IT OCCURS AND WHY IT MATTERS

While the “choice of analogies” phenomenon is not unique to the investment treaty field,¹³ a number of factors about the system and its actors combine to make this practice particularly noteworthy in the investment context.

A. Analyzing the System

The use of analogies with other legal disciplines is pronounced in the investment treaty system because the field is new and hybridized, the treaties tend to be short and open-textured, and both the field’s underlying treaties and *ad hoc* method of dispute resolution are decentralized.

1. New and Hybridized

The investment treaty system is a *sui generis* field of recent origin. Although the first bilateral investment treaty was entered into in 1959, the vast majority of investment treaties were not signed until the 1990s and 2000s. By 1990, 385 investment treaties had been signed, compared to 1,857 by 2000¹⁴ and almost 3,000 today.¹⁵ Moreover, the majority of investment treaties did not involve a pre-commitment to investor-state arbitration until well into the 1990s.¹⁶ This explosion of treaties was followed by a similar, though slightly delayed, explosion in investor-state arbitrations. By the end of 1995, ICSID had registered 32 cases. It has now registered more than ten times that amount.¹⁷ When a field is young, it is common for many issues to remain unresolved, leading participants to draw analogies with more established legal disciplines in seeking to provide content and form to the new field.¹⁸

Such borrowing is particularly likely when the field derives from, or represents a hybrid of, more mature legal disciplines. Prior to the emergence of investment treaties, foreign investors

¹³ For discussion of the use of analogies within public international law more generally, see Silja Vöneky, *Analogy in International Law*, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (2008).

¹⁴ UN Conference on Trade & Development [UNCTAD], *Bilateral Investment Treaties 1959-1999*, at 1 (2000).

¹⁵ UN Conference on Trade & Development [UNCTAD], *World Investment Report 2011*, at 100 (2011) (2,807 BITs).

¹⁶ Jason W. Yackee, *Bilateral Investment Treaties, Credible Commitments, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC’Y REV. 805, 815 (2008).

¹⁷ International Centre for Settlement of Investment Disputes [ICSID], *The ICSID Caseload – Statistics 7* (Issue 2011-1).

¹⁸ For example, the newer and less theorized field of the law of non-international armed conflict has been given content largely based on the assumption that the laws applicable in international armed conflict apply by way of analogy. See Sandesh Sivakumaran, *Re-envisioning the International Law of Internal Armed Conflict*, 22 EUR. J. INT’L L. 219 (2011). Attempts to give content to economic and social rights often involve drawing analogies to more established rights, such as property rights and civil and political rights. See KATHARINE G. YOUNG, *THE TRANSFORMATION OF ECONOMIC AND SOCIAL RIGHTS* (forthcoming 2012).

whose property was taken or who were otherwise treated unfavorably had three main options for redress. Investors could seek judicial review of the governmental action under the host state's domestic law through that state's domestic courts. Failing a satisfactory outcome, they could seek diplomatic protection from their home states. In these circumstances, a domestic wrong against the investor was re-characterized as an international wrong against the home state, which then had complete discretion as to whether to bring a claim against the host state, how to prosecute it and whether and when to settle.¹⁹ These claims were based on international standards of protection found in customary international law and/or treaties of friendship, commerce and navigation (FCN treaties). Or foreign investors could seek to protect themselves by entering into an investor-state contract that permitted them to bring international arbitral claims in the event of certain wrongdoing by the host state.

In light of the inadequacies of these options, states began negotiating investment treaties on a bilateral basis. Investment treaties typically have two key features: each treaty party promises to provide certain substantive protections to investors who are nationals of the other treaty party; and these investors are given the ability to bring arbitral claims directly against these host states for perceived breaches. In terms of origin, these treaties are public international law agreements that are entered into by states acting in their public capacities. In terms of dispute resolution, investment treaties typically permit investors to bring arbitral claims directly against states based on procedural rules closely resembling those developed in the arbitration of commercial and investor-state contracts. In terms of function, these treaties permit adjudication going to the heart of states' regulatory powers in a manner that evokes comparisons with domestic public law. And in terms of subject matter, these treaties involve a sensitive balancing of individual rights against societal interests, and economic interests against non-economic goals, in a manner reminiscent of human rights law and trade law treaties.

The investment treaty system thus emerged as a new – and arguably hybridized – field, which to some extent draws on and to some extent replaces a variety of existing fields. Intra-disciplinary analogizing tends to be particularly pronounced when the emerging field exists at the intersection of a number of existing fields, as is evident with other fused systems like international criminal law.²⁰ Investment treaties also lie at the fault line of many problematic dichotomies, such as public and private law and international and domestic law, thus providing considerable scope for drawing analogies with a wide range of legal disciplines.

2. Short and Open-Textured

Investment treaties have traditionally been brief and broadly worded, leaving many gaps, uncertainties and ambiguities that pave the way for intra-disciplinary analogies. Substantively, investment treaties are creatures of public international law because they are inter-state

¹⁹ *Barcelona Traction, Light and Power Co. (Belg. v. Sp.)*, 1970 ICJ Rep. 3, 44, paras. 78-79 (Feb. 5).

²⁰ International criminal law represents a convergence of the more established fields of public international law and domestic criminal law, which led to frequent recourse to analogies from both during the field's infancy. *See* Roy Schondorf, *A Theory of Supra-National Criminal Law* (unpublished J.S.D. thesis).

agreements that must be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT).²¹ Procedurally, most investment treaties permit investors to bring arbitral claims directly against states based on rules developed largely in the context of international commercial arbitration and investor-state contracts. Accordingly, many substantive and interpretive rules developed in public international law, and many procedural rules developed in private international law, apply in the investment treaty system directly rather than by way of analogy. However, even when applying these rules, considerable scope remains for analogical reasoning.

According to Article 31(1) of the VCLT, investment treaties must be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The treaty terms or procedural rules will sometimes be clear, leaving little or no room to draw analogies. But dictionary definitions provide little assistance in determining the ordinary meaning of many investment provisions, such as the obligation to ensure that foreign investments “shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security.” And resort to object and purpose provides little help as debates continue about whether investment treaties exist to protect investors and investments as an end in itself (which might suggest that ambiguities should be resolved in favor of investors) or simply as a means to the end of promoting foreign investment and public welfare more generally (which would require investment protections to be weighed against other policy goals).²²

Article 31(3) of the VCLT requires interpreters to take into account (a) any subsequent agreements between the treaty parties on interpretation, (b) any subsequent practice of the treaty parties that evidences such an agreement and (c) “any relevant rules of international law applicable in the relations between the parties.” This last provision encourages “systemic integration” as the treaty parties are taken to incorporate customary international law and general principles of law for all questions that the treaty does not itself resolve.²³ For instance, investment treaties typically do not deal with secondary rules of state attribution, so these tend to be imported from customary international law. This approach is complicated when investment treaties and general international law overlap (as occurs with rules on diplomatic protection) and

²¹ Vienna Convention on the Law of Treaties arts. 1, 2(1)(a), 31 and 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT rules on interpretation are generally accepted as reflecting customary international law. *See Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 ICJ Rep. 12, 37-38, para. 83 (Mar. 31); *Golder v. United Kingdom*, Eur. Ct. H.R., App. No. 4451/70, para. 29 (Feb. 21, 1975).

²² *Compare SGS Société Générale de Surveillance S.A. v. Philippines (ICSID)*, Case No. ARB/02/6, Decision on Jurisdiction, para. 116 (Jan. 29, 2004) *with SGS Société Générale de Surveillance S.A. v. Pakistan (ICSID)*, Case No. ARB/01/13, Decision on Jurisdiction, para. 171 (Aug. 6, 2003) *and Saluka Investments BV v. Czech Republic (UNCITRAL)*, Partial Award, para. 300 (Mar. 17, 2006).

²³ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group* (Martti Koskenniemi), paras. 17-19, UN Doc A/CN.4/L.682 (Apr. 13 2006) [hereinafter *ILC Fragmentation Report*].

it is unclear to what extent the former codifies, ousts or exists alongside the latter.²⁴ It is also problematic when general international law rules govern inter-state relationships but it is not clear whether and, if so, how they might apply to investor-state relations.²⁵

As the VCLT rules often provide little help in resolving interpretive difficulties,²⁶ investment tribunals routinely draw on analogies with other legal disciplines when seeking to fill gaps, provide content and resolve ambiguities. For instance:

- In defining the obligation to treat foreigner investors no less favorably than nationals “in like circumstances,” the *SD Myers* Tribunal drew comparisons with trade law jurisprudence on “like products.”²⁷
- In determining the scope of the minimum standard of treatment under NAFTA, the *Mondev* Tribunal examined the case law of the European Court of Human Rights concerning the “right to a court” as providing possible “guidance by analogy.”²⁸
- In interpreting the concept of “legitimate expectations,” the *Total* Tribunal conducted a comparative analysis of domestic public law, European Human Rights law, European Union law and public international law.²⁹
- In determining whether inter-state countermeasures were a permissible defense in investor-state disputes, the *Corn Products* Tribunal drew comparisons with the

²⁴ For example, in *Loewen*, the Tribunal found that the duty to exhaust local remedies under customary international law continued to apply as a substantive requirement under the treaty concept of denial of justice, while others have argued that this requirement was impliedly ousted by the nature of investment treaties because they granted investors a direct right to bring arbitral claims. *Compare* *Loewen Group, Inc. & Raymond L. Loewen v. United States* (ICSID-NAFTA Ch. 11), Case No. ARB(AF)/98/3, Award on Merits, paras. 142-57 (Jun. 26, 2003) *with* CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 229-33 (2007).

²⁵ For example, Part III of the Articles on State Responsibility sets out the customary rules on the content of the international responsibility of a state but provides that these are “without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.” Articles on State Responsibility, Art 33(2); International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* Art 33 (2001) [hereinafter SR Commentary].

²⁶ Interpreters may also, in certain circumstances, look to the treaty’s *travaux préparatoires*, but these are rarely available or helpful in the investment context given that most negotiations work off model BITs that operate somewhat as standard form contracts. VCLT, *supra* note 21, art. 32.

²⁷ *Compare* *S.D. Myers, Inc. v. Canada* (UNCITRAL-NAFTA Ch. 11), First Partial Award, paras. 243-51 (Nov. 13, 2000) (drawing on GATT and WTO jurisprudence in conceptualizing “likeness”) *with* *Methanex Corp. v. United States* (UNCITRAL-NAFTA Ch. 11), Final Award, Part IV-Ch. B-Pp. 14-18, paras. 29-35 (Aug. 3, 2005) (rejecting the relevance of trade law jurisprudence).

²⁸ *Mondev Int’l Ltd. v. United States* (ICSID-NAFTA Ch. 11), Case No. ARB(AF)/99/2, Award, para. 144 (Oct. 11, 2002).

²⁹ *Total S.A. v. Argentina* (ICSID), Case No. ARB/04/1, Award, paras. 128-34 (Dec. 27, 2010).

prohibition on countermeasures affecting the rights of third states under customary international law.³⁰

- In determining whether to accept amicus submissions, the *Methanex* Tribunal drew analogies with the practice of other international tribunals, such as the Iran-US Claims Tribunal and WTO panels, and domestic courts that accept such submissions.³¹

These principles and cases are not “relevant rules of international law applicable in the relations between the parties,” even when they originate in public international law.³² When invoking such analogies, participants are not claiming that these principles and cases cross-apply to the investment treaty system as a matter of law. Rather, they are arguing that textual or functional similarities between these fields make it instructive to draw comparisons when resolving difficult issues. This explains why intra-disciplinary analogies are drawn with other areas of public international law (like trade and human rights), as well as fields outside of public international law (such as commercial arbitration and public law).³³

3. *Bilateral and Decentralized*

Agreement over the appropriate choice of analogies is likely to take longer to coalesce in the investment field than in many other systems due to its bilateral treaty basis and decentralized dispute resolution mechanism. The investment treaty system is based on thousands of (mostly bilateral) treaties rather than one or a handful of multilateral treaties. Some important investment treaties are multilateral, but these tend to be regional, such as NAFTA, or sectoral, such as the Energy Charter Treaty. Numerous attempts to draft a multilateral treaty have failed over the decades, including most recently the OECD’s effort in the 1990s to draft a Multilateral Agreement on Investment, which was disbanded after provoking strong opposition by both developing states and NGOs within developed states.³⁴ Although most investment treaties

³⁰ *Corn Products Int’l, Inc. v. Mexico* (ICSID-NAFTA Ch. 11), Case No. ARB(AF)/04/01, Decision on Responsibility, paras. 161-79 (Jan. 15, 2008).

³¹ *Methanex Corp. v. United States* (UNCITRAL-NAFTA Ch. 11), Decision on Amici Curiae, paras. 29-34 (Jan. 15, 2001).

³² While Art 31(3)(c) permits interpreters to consider how investment treaty rules interact with rules from other specialized international regimes (such as human rights, environmental and trade law), investment tribunals do not have plenary jurisdiction to decide matters arising under these related regimes. See generally Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279 (2005).

³³ Whether the principle of systemic interpretation requires the former to be privileged over the latter based on the value of seeking coherence within public international law more generally is open to debate. For disagreement over the extent to which Article 31(3)(c) permits recourse to rules and principles of public international law, see the separate and dissenting opinions of Buergenthal, Simma, Higgins and Kooijmans in *Oil Platforms (Iran v. U.S.)*, 2003 ICJ Rep. 161 (Nov. 6).

³⁴ For a summary of failed attempts to reach a multilateral agreement, see VAN HARTEN, *supra* note 3, at 18-23.

contain broadly similar provisions, many differ in their details, making convergence on a single set of accepted analogies harder to achieve.

This phenomenon is exacerbated by the *ad hoc* and horizontal nature of investment treaty dispute resolution. Unlike other areas of international law, the investment field does not have a standing court or appellate body capable of resolving interpretive differences. Most investment treaties permit investors to bring claims against states, which are then heard by *ad hoc* arbitral tribunals constituted by the disputing parties (the investor and the host state) and, in some instances, an appointing institution (such as ICSID). The decisions of one tribunal are not binding on any other tribunal, nor are they subject to any centralized form of appeal or review. As a field of public international law, interpretive authority in the investment context is also shared between the treaty parties and investment tribunals, leading to a further splintering of interpretive authority.

While the absence of multilateral rules and the decentralized nature of the system's dispute resolution mechanism opens the field to a myriad of competing analogies and slows down the process by which certain analogies come to be accepted over time, some convergence is still likely to occur. Most investment treaties were negotiated from a relatively small set of model BITs that were very similar, so they are often bilateral in form but more multilateral in substance.³⁵ Investment treaties typically contain a most-favored-nations clause that operates to extend the greatest protection offered by a state in any single treaty to the beneficiaries of all of its treaties.³⁶ And *ad hoc* tribunals routinely draw on case law developed by other tribunals in interpreting the same or similar provisions in other investment treaties, leading to the existence of a persuasive but non-binding *de facto* body of precedent or *jurisprudence constante*.³⁷

As a result, the investment treaty system exists somewhere between bilateralism and multilateralism, and between *ad hoc* and systemic dispute resolution. The risks of this in-between approach are inconsistency and confusion, while the rewards are diversity and dynamism. While resort to intra-disciplinary analogies is likely to be rife during the field's infancy, we should expect some convergence on appropriate analogies to occur over time. As the field's case law becomes more developed, we are likely to witness greater recourse to internal quasi-precedents and lesser resort to external analogies. However, recognizing and analyzing the process of drawing intra-disciplinary analogies remains important because: early analogies can

³⁵ See STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 65-106 (2009).

³⁶ *Id.* at 121-96.

³⁷ See Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* 265 (Colin Picker, Isabella Bunn & Douglas Arner eds., 2008); Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3(5) *TRANSNAT'L DISP. MGMT.* (Dec. 2006); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 1188, 1189-91 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); Gabriele Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *ARB. INT'L* 357 (2007).

have an important impact on shaping what later becomes the field's *jurisprudence constante*; the decentralized nature of the investment treaty system makes consensus easier to destabilize through the introduction of new analogies; and intra-disciplinary analogies are likely to continue to be drawn when dealing with new issues.

B. Analyzing the Actors

Analogies do not draw themselves; rather, they are drawn by particular participants and tend to support some actors, interests and solutions over others. As the investment treaty system lies at the fault line of public and private law, and international and domestic law, considerable scope exists for borrowing from and drawing comparisons with a wide range of legal fields. Once a particular analogy or paradigm has been invoked, the answer to a problem often appears obvious, but that is because the real work is done in choosing the relevant comparison and that choice – along with the assumptions and value judgments it contains – is rarely analyzed.

The investment treaty field represents a site of conflict and competition among different actors which invoke diverse analogies and paradigms in light of their different interests and backgrounds. To help explain this process, this section analyzes the way in which (1) the different interests of states, investors and NGOs affect the comparisons they invoke and (2) the different backgrounds of the lawyers who shape and critique the system as arbitrators and academics impact upon their choice of analogies and paradigms. As the nature, interests and relative power of different participants in the field change over time, so too will understandings of the most appropriate paradigm or paradigms for analyzing the investment treaty system.

1. The Relevance of Different Interests

Where one “sits” in the investment treaty field can affect where one “stands” in terms of one’s choice of analogies or paradigm. This occurs on a micro-level with different analogies being invoked by participants on an issue-by-issue or case-by-case basis in investor-state arbitrations. But it also occurs at a macro-level with different paradigms being used to understand or shape the architecture of the field more generally. Some repeat players, like states, may have an interest in supporting certain systemic paradigms even if these count against their interests or preferred analogy in a particular case.³⁸ Accordingly, we need to be aware of the politics behind the choice of particular analogies or paradigms because these choices have different distributional results.

On a micro-level, choices of analogy within investor-state arbitrations are political because different analogies often lead to different results. For a substantive example, consider interpretations of the provision in the US-Argentina BIT permitting states to take measures that

³⁸ As investment awards often become public and contribute to the emerging jurisprudence that is shaping the field, potential repeat players have some incentive to consider whether the analogies they invoke in a particular case would benefit or prejudice their interests in the longer term. In particular, states have to be careful about adopting positions of convenience in particular cases as their pleadings count as subsequent state practice, which may be relevant to the interpretation of their investment treaties more generally. See Roberts, *supra* note 4, at 217-19.

are “necessary” to protect essential security interests or to maintain public order. The *Enron* Tribunal interpreted this provision by reference to the very strict test for “necessity” as a circumstance precluding wrongfulness under public international law – a test that Argentina failed.³⁹ The *Continental Casualty* Tribunal, by contrast, interpreted this provision by reference to the less stringent test for “necessary” governmental measures developed in international trade law – a test that Argentina passed.⁴⁰

For a procedural example, consider the wide discretion afforded to arbitral tribunals under the ICSID Convention and other rules to determine costs.⁴¹ If a respondent state prevails in an arbitration, should it be required to pay its own costs or should these be borne by the unsuccessful claimant investor? In the *Thunderbird* case, Wälde concluded that the state should bear its own costs on the basis that “[t]he judicial practice most comparable to treaty-based investor-state arbitration is the judicial recourse available to individuals against states under the European Convention on Human Rights” where “states have to defray their own legal representation expenditures, even if they prevail.”⁴² In other cases, tribunals have endorsed the principle that “the successful party should have its costs paid by the unsuccessful party, as adopted in commercial arbitration.”⁴³

On a macro-level, different paradigms for approaching the investment treaty system have the potential to mold our understandings of the field and its development. In his work on fragmentation, Martii Koskenniemi argues that political intervention in public international law often takes the form of attempting to define a situation or problem in a particular way (as, for example, a problem of human rights or humanitarian law) as this opens the door to applying a particular area of specialization that has its own vocabulary and structural bias.⁴⁴ As with choices of paradigm, these choices are not neutral as:

Each such vocabulary is likely to highlight some solutions, some actors, some interests. None of them is any ‘truer’ than the others. Each renders some aspect of the carriage visible, while pushing other aspects into the background, preferring certain ways to deal with it, at the cost of other ways. What is being put forward as significant and what gets pushed into darkness is determined by the choice of the language through which the

³⁹ *Enron Corp. & Ponderosa Assets, L.P. v. Argentina* (ICSID), Case No. ARB/01/3, Award, paras. 322-45, esp. 334 (May 22, 2007).

⁴⁰ *Continental Casualty Co. v. Argentina* (ICSID), Case No ARB/03.9, Award, paras. 189-230, esp. 192 (Sept. 5, 2008).

⁴¹ See Vadi, *supra* note 8, at 85-86.

⁴² *Int’l Thunderbird Gaming Corp. v. Mexico* (UNCITRAL-NAFTA Ch. 11), Award, Separate Opinion of Thomas Wälde (Jan. 26, 2006).

⁴³ *ADC Affiliate Ltd. & ADC & ADMC Mgmt. Ltd. v. Hungary* (ICSID), Case No. ARB/03/16, Award, para. 532 (Sept. 27, 2006) (internal citations omitted).

⁴⁴ Martii Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT’L L. 7, 11 (2009).

matter is looked at *That this choice is not usually seen as such – that is as a choice – by the vocabularies, but instead something natural, renders them ideological.*⁴⁵

Different paradigms for understanding the investment treaty system – as, for instance, a sub-field of public international law, a form of international arbitration, or a type of international judicial review – work to shape understandings of the system’s nature and its development by emphasizing certain features and empowering particular actors. Consider, for example, debates about whether investment arbitrations should be presumptively confidential and closed and, if so, whose consent should be required to overcome these presumptions. The paradigm adopted not only influences the answer to this particular question, but helps to shape the system as being, for example, more public or private law in nature, and more in the control of the disputing or treaty parties.

Two of the hallmarks of commercial arbitration are confidentiality and party autonomy. Adopting this paradigm, we might reason that investment arbitrations should remain confidential and closed unless the disputing parties agree otherwise.⁴⁶ If one were to adopt a public international law framework, by contrast, the inter-state treaty basis of investment arbitrations would come into sharp focus, suggesting that these questions should be determined by the intentions or wishes of the treaty parties, regardless of the disputing parties’ views.⁴⁷ Meanwhile, adopting a public law paradigm would result in emphasizing the public nature of investment disputes, supporting the conclusion that the arbitrations be presumptively public and open to participation by interested parties, such as NGOs, regardless of the wishes of the disputing parties or treaty parties.⁴⁸

Paradigms have politics. They do not choose themselves and their consequences are not neutral. By shining light onto some aspects of the system as significant, and pushing others into the background as insignificant, different paradigms promote different visions of the investment treaty field which are likely to privilege certain interests and participants over others.

2. *The Importance of Different Backgrounds*

Comparisons to other legal fields do not simply reflect the interests of actual and potential participants in investment treaty arbitrations. They also result from the convergence of different

⁴⁵ *Id.* at 11 (emphasis added).

⁴⁶ Jorge E. Vinuales, *Amicus Intervention in Investor-State Arbitration*, DISP. RESOL. J., Nov. 2006–Jan. 2007, at 72, 75 (2006); Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT’L & COMP. L.Q. 373, 375 (2010); Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT’L 131 (1999).

⁴⁷ See NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx>.

⁴⁸ Ross P. Buckley & Paul Blyschak, *Guarding the Open Door: Non-party Participation before the International Centre for Settlement of Investment Disputes*, 22 BANKING & FIN. L. REV. 353, 355.

epistemic communities of lawyers that characterizes the investment treaty field.⁴⁹ Here, paradigms do not simply reflect underlying interests, but represent conceptual approaches that consciously or unconsciously shape approaches to the field.

Arbitrators, advocates and academics in the investment treaty field often have a background in, or dual specialization with, a related area of law, such as commercial arbitration or public international law. Certainly, not everyone coming to the investment treaty field from a particular background will share the same approach to the system. Nor will all actors come from a single background only; many participants in the investment field can plausibly claim to be experts in two or more related fields. However, acknowledging the problems of simplification and stereotyping involved in such generalizations, it seems likely that the analogies and paradigms invoked by arbitrators and academics⁵⁰ are influenced (though not necessarily determined) by their backgrounds, training and interests.⁵¹

The unique marriage of public international law as the applicable law with dispute resolution rules resembling those in international commercial arbitration means that the field was historically populated by two, very different, professional communities: one from the side of public international law and inter-state dispute resolution, and the other from the side of private law and commercial arbitration.⁵² The result was a “veritable culture clash” between these epistemic communities:

⁴⁹ On the role of epistemic communities more generally, see Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1, 3 (1992) (defining epistemic communities as “networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue area”). On the role of the epistemic community of investment treaty lawyers, scholars, jurists and arbitrators, see Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427, 465-66 (2010).

⁵⁰ The background, training and interests of practicing lawyers also play some role in their choice of analogies but such selections are also significantly influenced by the interests of their clients. As it is difficult to disaggregate these phenomena, I do not address this issue here.

⁵¹ As an empirical matter, it is very difficult to prove what impact, if any, arbitrators’ backgrounds will have on their approach to investor-state disputes. Whether and to what extent arbitrators’ backgrounds or personal views play a role in their decision-making may vary between hard and easy cases. Different aspects of arbitrators’ backgrounds may pull them in different directions. For some early empirical work on the influence of arbitrators’ backgrounds on their decisions, see Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435 (2009); Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* (draft, on file with author). But for criticism that we do not yet have sufficient data from which to draw reliable statistical conclusions, see Gus Van Harten, *Fairness and independence in investment arbitration: A critique of “Development and Outcomes of Investment Treaty Arbitration,”* INVESTMENT TREATY NEWS (December 16, 2010).

⁵² Stephan W. Schill, *W(h)ither fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 875, 888 (2011); see also Charles N. Brower, *W(h)ither International Commercial Arbitration?*, 24 ARB. INT’L 181, 190 (2008).

Private commercial and public international lawyers often have different perspectives on and different philosophies about the role of law, the State, and the function of dispute resolution. Also, their audiences and conceptual approaches are often different. Whereas public international lawyers embed international investment law firmly in general international law and approach the topic against that background, commercial arbitral lawyers focus on dispute settlement and see investment treaty arbitration as a subset of international (commercial) arbitration.⁵³

Wälde, for instance, identifies two approaches to the treatment of states in international arbitrations. The first, hailing from international commercial arbitration, is equality of arms: the “fundamental equality that is inherent in consent to arbitration” means that arbitration law and tribunals should not accord states certain privileges or deference unless clearly required by the governing law.⁵⁴ The second, derived from public law and public international law, is deference to the state: the sovereign state is superior to private actors and thus should be accorded certain privileges in arbitration law and a level of deference by arbitral tribunals.⁵⁵ Individual participants often locate themselves firmly on one side of the divide; for example, Wälde concludes that the first approach must prevail because equality of arms is a “foundational principle of investment arbitration procedure.”⁵⁶

Differences in backgrounds can affect the approaches taken by different arbitrators.⁵⁷ Arbitrators who specialize in international commercial and investment arbitration often treat commercial arbitration as a “default template” for investment treaty arbitration, readily transporting principles from one area to the other, whether on confidentiality or costs.⁵⁸ Similar points could be made about arbitrators with backgrounds in other areas. For instance, the

⁵³ Schill, *supra* note 52.

⁵⁴ Thomas W. Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals’ Duty to Ensure, Pro-actively, the Equality of Arms*, 26 *ARB. INT’L* 3, 4-5 (2010).

⁵⁵ *Id.* at 5-10.

⁵⁶ *Id.* at 38. In Wälde’s view, the sovereign nature of states and the unequal nature of investor-state relationships is not a justification for tribunals according states some measure of deference, but a risk factor for one disputing party (the state) unjustifiably interfering with the rights of the other disputing party (the investor). Thus tribunals have a duty to restore any imbalance that exists between investor claimants and state respondents, particularly where the state abuses its dual role as both an equal disputing party and a sovereign state.

⁵⁷ For example, Paulsson argues that some commercial arbitrators have an insufficient grounding in public international law and appreciation that they are no longer refereeing a match that concerns only the disputing parties, while some public international lawyers have an inadequate grasp on economic, commercial law and how to conduct proceedings. Jan Paulsson, *Avoiding Unintended Consequences, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 241, 262-63 (K. Sauvart ed., 2008). See also Schill, *supra* note 52, at 888.

⁵⁸ Barton Legum, *Investment Treaty Arbitration’s Contribution to International Commercial Arbitration*, 60 *DISP. RESOL. J.* 71, 73 (2005). See also Brower, *supra* note 52, at 192-93.

President in *Corn Products* was a prominent professor of public international law (and is now a Judge on the International Court of Justice) and the award drew extensively on international law jurisprudence,⁵⁹ while the President in *Continental Casualty* was a member of the WTO Appellate Body and the award drew extensively on trade law jurisprudence.⁶⁰

As the regulatory impact of investment treaties and investor-state arbitrations has become more evident over time, the system has provoked greater interest and controversy. One result of this is that other professional communities are now joining the field, including those with backgrounds in public law, international human rights law, environmental law and trade law. This is particularly evident in the academic sphere where numerous scholars are articulating approaches to the investment field built upon related areas with which they are familiar, such as constitutional law, global administrative law, international economic law and human rights law.⁶¹ As the investment regime touches new domains, like European Union law, we can expect other professional communities to join the field, bringing their analogies and paradigms with them.⁶²

At least two reasons might be proffered as to why the backgrounds and training of arbitrators and academics are likely to influence their choice of analogies. First, familiarity breeds content, so lawyers with a background in a related area have ready access to analogies from that area when analyzing thorny investment treaty issues. One's training can affect one's approach to dispute resolution and problem solving.⁶³ Different types of legal training encourage participants to focus on certain issues, be sensitive to particular concerns and ask certain questions, which all work to highlight some problems and obscure others.⁶⁴ This has been observed in other hybrid areas, such as international criminal law, where public international lawyers and domestic criminal lawyers converged on a new field.⁶⁵ Links between arbitrators' professional experiences

⁵⁹ *Corn Products*, *supra* note 30 (Christopher Greenwood, President).

⁶⁰ *Continental Casualty*, *supra* note 40 (Giorgio Sacerdoti, President).

⁶¹ See, e.g., SCHNEIDERMAN, *supra* note 3 (constitutional law); Kingsbury, *supra* note 3 (global administrative law); Kurtz, *supra* note 5 (international economic law); Simma, *supra* note 4 (public international law and human rights).

⁶² See, e.g., STEFFEN HINDELANG, *THE FREE MOVEMENT OF CAPITAL AND FOREIGN DIRECT INVESTMENT: THE SCOPE OF PROTECTION IN EU LAW* (2009); *Special Issue: International Investment Law and EU Law*, EUR. Y.B. INT'L ECON. L. (2011).

⁶³ On the formative effect of legal education in general, see Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982). On the impact of the different backgrounds of diplomats and lawyers on the evolution of dispute resolution under GATT and the WTO, see J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats*, 35 J. WORLD TRADE 191, 194-197 (2001).

⁶⁴ On the effect of different types of expertise, including varying legal specialties, on the approaches of participants, see David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463, 478-80 (2001); David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY J. INT'L L. 1, 3, 13-14, 18-19 (2005).

⁶⁵ This merger of legal disciplines and professional groups resulted in conceptual collisions given that public international law is consensual, created by states and deferential to the idea of state sovereignty whereas criminal law is coercive, focused on the individual, and often suspicious of state action due to its

and their awards have also been identified in other areas, such as employment and labor arbitration.⁶⁶

Second, the clash between different analogies and paradigms may also reflect a struggle between competing claims to expertise. Pierre Bourdieu uses the notion of “symbolic capital” – which includes factors such as education, career, knowledge, reputation and expertise – to explain the relative power of different participants within a given field.⁶⁷ How participants understand and characterize the investment treaty field, including through their choice of analogies, can influence the distribution of symbolic capital within the field. If the investment treaty system is understood as being part of public international law, those with expertise in that area will enjoy greater “symbolic capital” than if the system were understood as being part of international arbitration, international economic law or public law. The more one is able to shape the investment treaty system in the likeness of a related legal discipline with which one is an expert, the greater one’s comparative advantage.

While much has been written about the problem of fragmentation in public international law, the investment treaty field is arguably undergoing a reverse process whereby those with different backgrounds are converging on the system and conflicts are breaking out as a result.⁶⁸ The field

focus on abuses of power. See Louise Arbour, *Emerging Systems of International Justice*, Unpublished Lecture (June 26, 2000).

⁶⁶ See, e.g., Brian S. Klaas, Douglas Mahoney & Hoyt N. Wheeler, *Decision-Making about Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators and Jurors*, 45 INDUS. REL. 68 (2006); Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671 (2000); Stephen M. Crow & James W. Logan, *Arbitrators’ Characteristics and Decision-Making Records, Gender of Arbitrators and Grievants, and the Presence of Legal Counsel as Predictors of Arbitral Outcomes*, 7 EMP. RESP. & RTS. J. 169, 183 (1994); Sharon L. Oswald, *Students as Arbitrators: An Empirical Investigation*, 30 INDUS. REL. 286 (1991); Sharon L. Oswald & Steven B. Caudill, *Experimental Evidence of Gender Effects in Arbitration Decisions*, 4 EMP. RESP. & RTS. J. 271 (1991); Brian Bemmels, *Gender Effects in Grievance Arbitration*, 29 INDUS. REL. 513 (1990); Nels E. Nelson & Earl M. Curry, Jr., *Arbitrator Characteristics & Arbitral Decisions*, 20 INDUS. REL. 312 (1981). In the field of securities arbitration, concerns that professional experience might lead to bias recently led to a change in the arbitration rules permitting claimants to request that the arbitral tribunal not have any members with a background in the securities industry. See Securities & Exchange Comm’n [SEC], Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Amendments to the Panel Composition Rule, and Related Rules, of the Code of Arbitration Procedure for Customer Disputes, Jan. 31, 2011, 76 Fed. Reg. 6500 (Feb. 4, 2011); see also Barbara Black, *When Perceptions Change Reality: An Empirical Study of Investors’ Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RES. 349, 400.

⁶⁷ See Richard Terdiman, Translator’s Introduction, to Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 812 (1987); YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 10, 18-29, 34-42 (1996).

⁶⁸ See generally INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? (R. Hofmann & Christian J. Tams eds., 2011).

used to be narrowly populated by practitioners and academics primarily from commercial arbitration and secondarily public international law,⁶⁹ but is now garnering the interest of a much broader and more diverse group of lawyers. The perception that investment treaty law used to be a field of “exotic and highly specialized knowledge”⁷⁰ but is now “rapidly moving mainstream”⁷¹ begs the question of which mainstream, if any, the system is joining. Characterizations of the system as a sub-field of public international law, a form of international arbitration or a type of domestic or international public law represent different attempts at seizing institutional power by “empowering particular types of expertise, systems of knowledge and value, institutional preference and bias.”⁷² These mainstreaming efforts are important because participants tend to treat intra-systemic analogies and expertise as more persuasive and valuable than extra-systemic ones.⁷³

III. CLASH OF PARADIGMS: WHAT IS REVEALED AND OBSCURED

As the above section demonstrates, in seeking to resolve difficult issues in the investment treaty system, participants in the field frequently draw on a wide range of analogies with related legal disciplines. Yet the invocation of particular analogies is far from neutral: these analogies point to diverse solutions as a result of differences in the structures, assumptions and normative commitments of their underlying paradigms. In this Part, I present a schema of five paradigms for approaching the investment treaty system based on comparisons between the system and the fields of public international law (focusing on inter-state rights and obligations), private international law (focusing on international commercial arbitration), domestic public law, and international trade and human rights law (which I group together as forms of international public law).

Stripping these fields back permits important meta-comparisons to be made but inevitably involves simplification and generalizations that a more in-depth study of any single paradigm would avoid. Acknowledging this general limitation, I compare the dominant features of these fields to what we know about investment treaties: they are agreements entered into by states acting in their public capacity; they contain substantive obligations about the treatment of foreign investors, without generally specifying whether these obligations create substantive rights or mere benefits for investors; and they create a procedural mechanism whereby foreign investors

⁶⁹ Schill, *supra* note 52, at 880 (“Although a significant number of public international lawyers are involved in the practice of investment treaty arbitration, most members of this specialized bar have a background in commercial arbitration”). See *infra* Part IV.A.

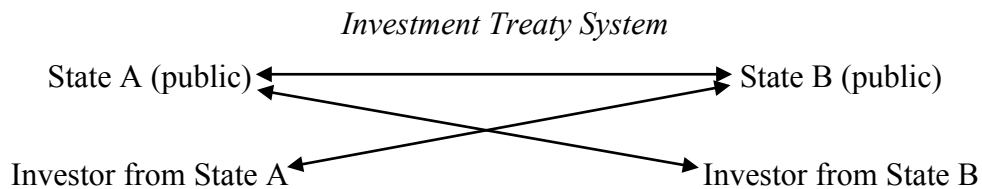
⁷⁰ *ILC Fragmentation Report*, *supra* note 23, para. 8.

⁷¹ Schill, *supra* note 52, at 875.

⁷² Martti Koskeniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY 47, 51(2010).

⁷³ Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475, 526 (2008) (“All other things being equal, decision-making institutions should give the greatest weight to decisions emanating from their own regime. Institutions are embedded within regimes, and have a duty to advance the ends of the regime. Prior decisions by those institutions reflect those goals better than extraregime decisions.”).

are permitted to bring arbitral claims directly against host states. In graphic format, the structure of the system can be represented as follows:



Identifying which of these elements each paradigm brings into the foreground – and which each paradigm relegates to the background – allows us to critique individual paradigms and to see when and why they are likely to be in tension with one another. In comparing these paradigms, this section primarily focuses on the nature of the parties (state/non-state), the nature of the cases (public/private) and the nature of the adjudicatory function (agency/trusteeship and dispute resolution/law making). Due to space constraints, I leave for another day comparisons on remedies and enforcement options. While the selection of any criteria for comparison inevitably involves some normative choices, my primary aim is to expose the structures and assumptions underlying these paradigms rather than to endorse a particular paradigm or combination thereof.

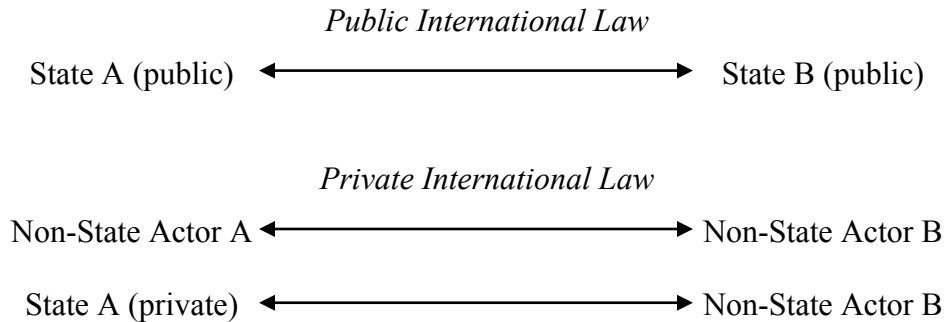
A. The Clash of the Public and Private International Law Paradigms

The investment treaty system represents a curious hybrid of public international law as a matter of substance and private international law (in the form of international commercial arbitration) as a matter of process. There have been good analyses of how investment arbitration does not fit neatly within either category,⁷⁴ but less attention has been paid to how these paradigms might function as interpretive approaches that pull in different directions.⁷⁵ I contend that these differences can be traced to the public international law paradigm's focus on the inter-state treaty basis of the system, and the private international law paradigm's focus on the investor-state disputing relationship. (I deal separately below with regimes where treaties create rights or benefits for non-state actors, such as human rights and trade.)

Both paradigms are premised on a horizontal relationship between equals, represented as follows:

⁷⁴ See David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 105–07, 156 (1990); Douglas, *supra* note 2, at 151-55; DOUGLAS, *supra* note 2, at 6-10.

⁷⁵ For the best exceptions, see VAN HARTEN, *supra* note 3, at 124-36, and Schill, *supra* note 52, at 887-90.



As the diagrams emphasize, the two paradigms focus on different horizontal relationships: the public international law paradigm concentrates on the equality of the treaty parties, while the private international law paradigm concentrates on the equality of the disputing parties. In doing so, each approach provides important insights into a key aspect of the investment treaty system but neither captures the structure's complexity as a whole. In addition to the different horizontal relationships highlighted, the two paradigms are also distinct in that the former is understood as a form of public law while the latter is identified as a form of private law. These differences in structure and nature result in tensions on a number of key issues, including the interpretive power of the treaty parties, the origins of investment tribunals' powers, and the appropriate functions of such tribunals.

The first of these tensions arises because the two paradigms have diverging implications for the authority of states parties to an investment treaty to interpret that treaty, especially after an investor has relied upon the treaty by making an investment or bringing a claim. This issue was brought into sharp relief when the NAFTA states issued a joint interpretative statement under the auspices of the Free Trade Commission (FTC) in response to what they perceived as overly expansive interpretations adopted by several NAFTA tribunals.⁷⁶ Should such interpretive statements be viewed as persuasive or even binding given that states are treaty parties with a legitimate interest in interpreting their own treaties? Or should they be treated with suspicion on the ground that states are actual or potential disputing parties which may be adopting interpretations with a view to avoiding liability?

In analyzing this issue, some tribunals have adopted a private international law paradigm, focusing on the disputing parties as the relevant actors and their relationship of procedural equality. Under this approach, the respondent state could not effectively rewrite the rights and obligations of the underlying treaty without the investor's consent. In *Pope & Talbot*, for instance, the Tribunal viewed the FTC's interpretation as an illegitimate attempt to amend the treaty retroactively in order to interfere with an ongoing case.⁷⁷ The Tribunal asked pointed questions about the propriety of Canada participating in FTC deliberations while it was a party to

⁷⁶ *Notes of Interpretation*, *supra* note 47.

⁷⁷ *Pope & Talbot Inc. v. Canada* (UNCITRAL-NAFTA Ch. 11), Damages, para. 47 (May 31, 2002), 41 I.L.M. 1347 (2002).

a dispute and how Canada taking such a role could be squared with the “rule of international law that no-one shall be a judge in his own cause” or the purpose of the arbitral mechanism to “assure due process before an impartial tribunal.”⁷⁸

Other tribunals have adopted a public international law paradigm, focusing on the states as masters of their own treaties with expansive powers to define and redefine their treaty obligations. Article 31(3) of the VCLT provides that subsequent agreements by and practices of the treaty parties shall be taken into account in interpreting the treaty.⁷⁹ This is supplemented in the NAFTA context by a provision that the FTC has responsibility for resolving “disputes that may arise regarding [the treaty’s] interpretation or application” and that its interpretations are binding on NAFTA tribunals.⁸⁰ The *ADF* Tribunal, for example, accepted the FTC’s interpretation on the basis that “we have the Parties themselves – all the Parties – speaking to the Tribunal” and “[n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.”⁸¹

The private international law approach is problematic because it treats states as though their only role is being actual or potential respondents in investor-state disputes, imputing to them the sole motivation of seeking to avoid liability in ongoing or future cases. The public international law approach provides a counter-balance in this regard because it focuses attention on the role of states as treaty parties with a legitimate and ongoing interest in interpreting their own treaty obligations. However, this paradigm is also problematic because it does not account for the legitimate expectations of investors. Under public international law, courts and tribunals have taken a broad approach to subsequent agreements and practice, allowing both interpretations and *de facto* amendments under the guise of interpretations.⁸² This is relatively unproblematic when dealing with treaties that create rights and benefits for the treaty parties only, for all of the treaty parties will have consented to the interpretation and thus are able to protect their own interests. But transplanting the same approach to the investment sphere is problematic because the treaties create rights or benefits for investors, which may be constrained by the interpretation without their consent.

⁷⁸ *Id.* paras. 11–16.

⁷⁹ VCLT, *supra* note 21, arts. 31(3)(a)-(b).

⁸⁰ North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 8, 11, 14, & 17, 1992, 32 ILM 289 & 605 (1993), arts. 1131(2), 2001(1), 2001(2)(c).

⁸¹ *ADF Group Inc. v. United States* (ICSID-NAFTA Ch. 11), Case No. ARB (AF)/00/1, Award, ¶177 (Jan. 9, 2003).

⁸² *See, e.g.*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, 22, para. 22 (June 21); *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, 2009 ICJ Rep. 213, 242, para. 64 (July 13); *Interpretation of the Air Transport Services Agreement of 27 March 1946 (Fr. v. U.S.)*, 16 RIAA 5, 60-68 (1963); *Interpretation of the Air Transport Services Agreement of 6 February 1948 (Italy v. U.S.)*, 16 RIAA 75, 99-101 (1965); *Location of Boundary Markers in Taba (Egypt v. Isr.)*, 20 RIAA 3 (1988).

A second tension arises because the two paradigms draw attention to different aspects of the origins of investment tribunals' powers, which derive from the general authorization granted by the treaty parties but come into existence in a particular case in the context of the relationship between the disputing parties. As before, each paradigm focuses on only part of this story.

The public international law paradigm tends to emphasize the role of the treaty parties as delegating principals, drawing parallels between investment treaty tribunals and other international courts and tribunals. However, international courts are typically standing adjudicatory bodies that are created and empowered by the treaty parties as a whole. The disputing parties, which may be one or more of the treaty parties or other parties altogether (such as a prosecutor and defendant), may choose to bring cases before the court, but the court's powers are defined and delimited by the treaty parties. The judges also tend to be appointed by the treaty parties, although one or more disputing party may be given the right to appoint an *ad hoc* judge in a particular case. The close connection between the treaty parties and most international courts and tribunals helps to explain the frequent recourse to principal-agent theory to explain their relationship.

The suggestion that investment tribunals are the agents of the treaty parties is more tenuous than with most other international courts and tribunals. Although investment tribunals are empowered by the treaty parties in general terms, they are constituted in specific cases by the disputing parties and their arbitrators are typically appointed by the disputing parties and/or an appointing institution. This means that the treaty parties play a lesser role in determining the appointment and re-appointment of investment arbitrators compared with most judges on international courts and tribunals. The treaty parties also lack a number of control mechanisms that they enjoy with respect to many other international courts and tribunals, such as the ability to starve investment tribunals of future cases. Accordingly, investment tribunals are unlikely to view themselves solely (or even primarily) as agents of the treaty parties and investment tribunals may have greater freedom than many international courts and tribunals to act against the treaty parties' wishes.

The private international law paradigm, by contrast, captures the role that disputing parties play in constituting investment tribunals and appointing arbitrators, drawing parallels with international commercial arbitration. Commercial arbitral tribunals are typically considered to be agents of the disputing parties that constitute them and empower them to resolve a specific dispute, which helps to explain the strong emphasis on notions such as party autonomy. In the commercial context, however, the contracting parties that authorize future arbitration are usually the same parties that later invoke that authorization in order to constitute a particular tribunal to settle a dispute. This means that there is rarely a need to parse whether, and to what extent, commercial arbitral tribunals should be understood as agents of the contracting parties and/or agents of the disputing parties as there is generally no daylight between the two.

Investment tribunals differ from this commercial model because they are authorized by the treaty parties but constituted by the disputing parties. Investment tribunals cannot be viewed as agents of the disputing parties only because the disputing parties' rights and the investment tribunal's powers are defined and delimited by the treaty's grant of power. This explains why some concepts that are of central importance in commercial arbitration, such as the autonomy of

the disputing parties, are problematic when imported unmodified into the investment treaty context.⁸³ However, investment tribunals also cannot be viewed solely as agents of the treaty parties because they are tasked with impartially resolving disputes between investors and states and enhancing the credibility of the treaty parties' commitments. In order to fulfill these roles, investment tribunals must be given a meaningful degree of independence from the treaty parties.

A third tension between the two paradigms arises from their different models for understanding the function of investment tribunals. Following the private international law approach typified by international commercial arbitration, the sole or at least primary function of arbitral tribunals is the resolution of a particular dispute between the disputing parties, not the development of a substantive body of law. In international commercial arbitration, the substantive terms of the contracts vary considerably, as does the governing law. The decisions also tend not to be published. As a result, there is very little opportunity for commercial arbitral tribunals to engage in lawmaking through the creation of a body of quasi-precedent.

The situation is different when the functions of investment tribunals are viewed through a public international law paradigm. International courts and tribunals are usually given the power to resolve a particular dispute or type of disputes, though some also have advisory functions. The orthodox position under public international law is that states create international law while international courts merely interpret and apply that law.⁸⁴ In practice, however, it is generally accepted that international courts play a critical role in developing the law through its interpretation and application.⁸⁵ Judicial decisions are routinely looked to – by states, by other courts, by academics – as evidence of the content of international law. Although international law does not recognize a doctrine of precedent,⁸⁶ an informal doctrine tends to operate because most decisions become publicly available and many concern the interpretation and application of common obligations.

The public international law perspective helps to explain the development of a non-binding body of precedent in the investment treaty field. It makes clear why some issues are contentious in the investment context though unproblematic in the commercial context, such as the same individuals appearing as counsel in one case and arbitrator in the next. It also explains why the development of investment treaty law depends on ongoing interactions between treaty parties (as law givers) and tribunals (as law appliers).⁸⁷ But this interaction is more complicated in the

⁸³ See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 492–93 (2009); VAN HARTEN, *supra* note 3, at 126.

⁸⁴ This is reflected in the traditional theory of sources, according to which states and states alone make the law while judicial decisions are a subsidiary means of identifying the law rather than a source of law. See Statute of the International Court of Justice art. 38 [hereinafter ICJ Statute].

⁸⁵ See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 268 (2007); JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW MAKERS* 545–68 (2005).

⁸⁶ See ICJ Statute, *supra* note 84, arts. 38(1)(d), 59.

⁸⁷ See Roberts, *supra* note 4, at 185–95; Jan Paulsson, *supra* note 57, at 244.

investment context than in the typical public international law scenario because of the *ad hoc* and decentralized nature of investment arbitral tribunals. Questions are also raised about the fairness of disputing parties having to pay for *ad hoc* tribunals' forays into broader jurisprudential questions, particularly when these are unnecessary for resolving the dispute at hand.

Finally, as their names suggest, the public and private international law paradigms sit on opposite sides of the public/private law divide. States entering into treaties are assumed to be acting in their public capacity as this is a uniquely sovereign act. Commercial contracts giving rise to international arbitration, by contrast, typically deal with the private rights and obligations of the parties only. They are generally entered into by two or more private parties, such as individuals and companies, and when states do enter into such contracts (for example, for the purchase of computers or gardening services), they are understood to be acting in their private capacity. Debate exists over whether investment treaty arbitration is more appropriately characterized as a form of public or private international law given its treaty basis and arbitral dispute resolution mechanism.⁸⁸ The rise of the public law critique has added new fuel to the fire.

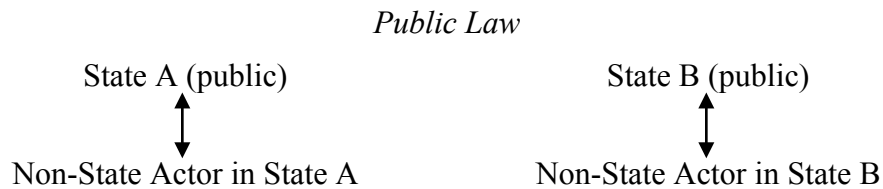
B. The Rise of the Public Law Paradigm

Since the mid-2000s, a number of authors have argued that the investment treaty system should be understood through a public law paradigm.⁸⁹ To the extent that arbitrators and academics have approached the investment treaty system through a public or private international law paradigm, these approaches tend to be implicit rather than explicit. The public law approach, by contrast, has been clearly acknowledged as a paradigm adopted with the express purposes of influencing conceptions of and approaches to the investment treaty system. However, this important critique of the investment treaty system has not yet itself been subject to much critique – a deficiency this section aims to remedy.

In essence, the public law paradigm characterizes investment treaty arbitration as a form of international judicial review, analogous to domestic administrative or constitutional law review. Many align the public law and public international law paradigms because both fall on the same side of the public/private divide. While that is true, the public law paradigm also differs from both of the above paradigms because it focuses on vertical relationships between unequal parties (a state acting in its public capacity and a private actor subject to that state's regulatory power) (see diagram below) instead of horizontal relationships between equal parties (either two states, two private actors, or a private party and a state acting in its private capacity). This paradigm provides many important insights into the investment treaty system, but also obscures the system's underlying treaty basis and marginalizes the choice of arbitration as its dispute resolution mechanism.

⁸⁸ Even in 2009, Alvarez noted resistance in the Hague Academy of International Law to characterizing the investment treaty system through a public rather than private international law framework. See JOSÉ ENRIQUE ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* (2009), in 344 *COLLECTED COURSES HAGUE ACAD. INT'L L.* 193 (2011).

⁸⁹ See, e.g., VAN HARTEN, *supra* note 3; SCHNEIDERMAN, *supra* note 3; MONTT, *supra* note 3.



First, the public law and private international law approaches to the investment treaty system differ on whether these arbitrations should be understood as public or private, and whether the underlying state-investor relationships are vertical or horizontal.

Following a private international law approach, the disputing parties in investment treaty arbitrations are viewed as having a horizontal, private law relationship even if one of them is a state and the other is a private party. The state is viewed as having acted in its private capacity when agreeing to arbitrate with a non-state actor as an equal disputing party. Where investment arbitrations are based on investor-state contracts, these are viewed as akin to commercial contracts for the sale of goods or services. Where such arbitrations are based on investment treaties, the host state is understood to have made a standing offer to arbitrate with foreign investors according to the substantive and procedural terms contained in the investment treaty. When the foreign investor accepts that offer by bringing a claim, a contract-like relationship is formed between them as equal disputing parties.

The public law paradigm, by contrast, distinguishes between the underlying substantive relationship between states and investors (which it characterizes as vertical because it is between a host state that governs and an investor that is governed)⁹⁰ and the procedural disputing relationship (which it characterizes as more horizontal because both parties are treated as equal disputants, subject to some limits based on their unequal substantive relationship). Views differ, however, on why investment treaty arbitration should be understood as a form of public law.

One theory, which I term the public action theory, relies upon traditional understandings of public and private state action developed in contexts such as sovereign immunity. According to this bright line test, disputes involving a state are public if they arise under an agreement entered into by the state in its public capacity. Thus, investment treaty arbitrations are public law disputes because the state acted in its public capacity when entering into the treaty; accordingly, liability for treaty breaches should also be understood as public.⁹¹ Investor-state contractual disputes, on the other hand, are private in nature because the state acted in its private capacity when entering into the contract; contractual liability is similarly understood to be private.

⁹⁰ See Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, and Privatization*, 54 AM. J. COMP. L. 843, 849 (2006) (“[P]rivate law is characterized by horizontal relations of equality; public law is characterized by a vertical relation of subordination and dominance.”); Schill, *supra* note 3, at 15.

⁹¹ See, e.g., VAN HARTEN, *supra* note 3, at 45-71; Van Harten & Loughlin, *supra* note 3, at 145-50; Kingsbury & Schill, *supra* note 3, at 1.

Although attractive for its simplicity, this theory is complicated somewhat by the existence of umbrella clauses in treaties (which upgrade certain contractual obligations into treaty obligations) and stabilization clauses in contracts (which require contractual compensation for certain regulatory acts), as both muddy the public/private distinction.⁹²

According to another theory, which I term the public interest theory, the key to distinguishing public and private arbitrations is not their treaty/contract basis but whether they involve significant matters of public concern that transcend the private rights and obligations of the disputing parties. Debate exists over which factors are relevant for identifying a case as a matter of public concern and whether these factors should be treated as alternatives or cumulative. Potential candidates include where: (1) liability turns on an underlying regulatory act, such as a governmental action taken to protect broader public interests like the environment, human rights or the economy; (2) the dispute concerns the provision of important public services that have often been privatized or contracted out by the government, such as the provision of water and electricity; and/or (3) the damages claim is large enough to have serious implications for the public purse.⁹³ This approach would encompass some investor-state contractual disputes as well as many investment treaty disputes.

The public-versus-private nature of investment treaty and commercial arbitration explains why these paradigms pull in opposite directions when it comes to issues such as transparency and the participation of third parties. International commercial arbitrations are generally confidential and closed rather than public and open to third party participation because they are typically understood as involving private law matters that are only of relevance to the disputing parties. Investment treaty arbitration, by contrast, arguably involves public law obligations (because it is based on the breach of a treaty rather than a contract) and may raise significant

⁹² Certain investment treaties contain umbrella clauses through which states promise, as a matter of public treaty law, to abide by their obligations, potentially including those entered into under private contract law. Here, the proximate cause of action is a treaty breach (public liability) but it is based on an underlying breach of contract (private action). Meanwhile, certain investment contracts contain stabilization clauses through which states promise, as a matter of private contract law, not to make certain changes to their laws or policies or to compensate the private party if they do, both of which may implicate the states' public powers. Here, the proximate cause of action is a contractual breach (private liability) but it is based on an underlying regulatory act (public action). See James Crawford, *Treaty and Contract in Investment Arbitration*, 6 TRANSNAT'L DISP. MGMT 1 (2009).

⁹³ See, e.g., José E. Alvarez, Book Review, *Investment Treaty Arbitration and Public Law*, 102 AM. J. INT'L L. 909, 911-12 (2008); Schill, *supra* note 3, at 10-17; William W. Burke-White & Andreas von Staden, *Private Litigation in the Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 287-95; Nathalie Bernasconi-Osterwalder & Lise Johnson, International Institute for Sustainable Development, *Comments on Draft Rules on Transparency in Investor-State Arbitration* 3 (2011), available at <http://www.iisd.org/publications/pub.aspx?id=1495>; Fiona Marshall & Howard Mann, International Institute for Sustainable Development, *Revision of the UNCITRAL Arbitration Rules, Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required* 2-3 (2006), available at http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf.

issues of public concern (because, for instance, many cases turn on the state's right to regulate, including regulating to protect the environment, the economy, health and safety, and human rights). These differences help to explain the push towards transparency and the participation of civil society as *amici curiae* in the investment field.⁹⁴

Second, by characterizing the substantive relationship between host states and foreign investors as unequal and the nature of investment treaty arbitration as a form of judicial review, the public law paradigm suggests a number of important substantive, structural and procedural consequences.

Substantively, public law rules of state liability differ significantly from private law rules of contractual and tort liability. Under public law, the regulatory state generally has the power to change its laws and practices, even when this causes harm to those within its territory, subject to certain limited restrictions. According to Santiago Montt:

The state possesses the constitutional power to redefine and readjust the relationship between private interests and the public interest. Put differently, it has the constitutional duty to allocate burdens and benefits across society in its permanent quest for the public good. The constant upsetting of the status quo, hence, is part of the essence of the regulatory state

This legitimate power to harm – which may surprise those not trained in public law – constitutes a fundamental aspect of state liability [B]ecause administrative decisions can legally encroach on citizens' rights, harm alone cannot therefore be sufficient to establish liability. Something more than a demonstration of economic damages is needed in order to successfully demand that the government pay compensation.⁹⁵

Accordingly, the public law paradigm takes as its premise that investors' rights are not absolute, that investors cannot expect there to be no changes in the regulatory framework after making their investments, and that states must retain certain rights to regulate in the interests of the public welfare.

The public law paradigm suggests the relevance of public law principles (such as proportionality and legitimate expectations) for determining an appropriate balance between investor rights and other public policy goals. These should not be confused with private law doctrines, such as estoppel. A private party may be estopped from departing from a previous representation if another has relied upon the representation to its detriment, whereas a state is presumed to have the power to change its law and policies subject to the much less constraining doctrine of legitimate expectations.⁹⁶ The influence of private law notions like estoppel may

⁹⁴ VAN HARTEN, *supra* note 3, at 159-64; Hirsch, *supra* note 4, at 110-11.

⁹⁵ MONTT, *supra* note 3, at 7-8 (internal quotes omitted).

⁹⁶ Disputes exist over whether the doctrine of legitimate expectations protects procedural expectations only (given the general sovereign right of states to change their laws and policies) or whether it can also protect substantive expectations in narrow circumstances (such as when a specific representation is made

explain why some tribunals have treated the doctrine of legitimate expectations as though it effectively freezes the regulatory framework that applied at the time the investment were made. For instance, the *Tecmed* Tribunal held that treaty parties have to afford investments “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment,” whereas the *Saluka* Tribunal stated that “[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”⁹⁷

Structurally, the public law paradigm creates a model for thinking about issues such as standards of review and deference.⁹⁸ Investment treaty cases often turn on the appropriate balance between investor protection and the pursuit of competing public interests, such as the protection of the environment, the promotion of human rights and securing a stable economy. In adjudicating upon such issues, should arbitral tribunals defer to the decisions of defendant states about which public policy goals are legitimate and how these should best be achieved, should they review these decisions *de novo*, or should they adopt some standard of review in between? Here, the private international law and public law paradigms pull in opposite directions.

Following a private international law paradigm, according deference to a disputing party could be viewed as an “arbitral heresy.”⁹⁹ “Equality of arms” is a central tenet in international commercial arbitration,¹⁰⁰ whereas concepts such as “deference” and “standard of review” do not even appear in the main international commercial arbitration treatises and awards.¹⁰¹ The idea of deferential standards of review originates in the domestic concept of separation of powers and concerns the extent to which courts should sit in judgment of the other arms of government. As international commercial arbitration is viewed as a form of private dispute resolution between equal, private parties, the issue of deference does not even arise. Adopting this paradigm would tend against investment tribunals’ exercising deference when reviewing governmental conduct.

By contrast, if investment tribunals are understood to be performing a judicial review function analogous to that performed by domestic courts, appropriate guidance on standards of review might be drawn from a comparative analysis of public law. Constitutional democracies

to a narrow class). See, e.g., PAUL CRAIG, *EU ADMINISTRATIVE LAW* 635–37 (2006); SØREN SCHØNBERG, *LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW* (2001).

⁹⁷ Compare *Técnicas Medioambientales Tecmed, S.A. v. Mexico* (ICSID), Case No. ARB (AF)/00/2, Award, para. 154 (May 29, 2003) with *Saluka*, *supra* note 22, para. 305.

⁹⁸ Anthea Roberts, *The Next Battleground: Standards of Review in Investment Treaty Arbitration*, ICCA Congress Series 2011 (forthcoming).

⁹⁹ Stephan W. Schill, *Deference in Investor-State Arbitration: Conceptualizing Standards of Review* (unpublished manuscript, on file with author).

¹⁰⁰ See Thomas W. Wälde, “Equality of Arms” in *Investment Arbitration: Procedural Challenges*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* 161 (Katia Yannaca-Small ed., 2010). Pierre Lalive noted that a state or state-controlled entity may have “difficulties to accept a basic tenet of arbitral procedure, i.e. the principle of equality of the parties.” Pierre Lalive, *Some Threats to International Investment Arbitration*, 1 ICSID REV. 26, 37 (1986).

¹⁰¹ Schill, *supra* note 99.

are premised on a separation of powers between the legislature, executive and judiciary. Even when the judiciary is empowered to review the acts of the legislature and executive, there are typically calls for it to adopt some level of deference, given the greater democratic legitimacy of the legislature and the greater expertise of the executive. Accordingly, when undertaking judicial review functions, investment tribunals should arguably exercise some deference to the regulatory actions of defendant states as “courts in virtually all domestic legal orders exercise some deference vis-à-vis the acts of the legislator and acts of domestic regulatory agencies.”¹⁰²

Exercising deference does not amount to a failure to review governmental conduct, nor does it necessitate a finding of no liability in investor-state arbitrations. Domestic systems frequently recognize different levels of scrutiny – such as strict scrutiny, intermediate scrutiny and rational basis review – with the appropriate level for a particular case depending on a number of factors, including the nature of the individual right, the purpose of the governmental measure and the relative expertise of the governmental decision-makers and adjudicatory body. The degree of deference adopted is relevant to determining how strictly tribunals will scrutinize governmental conduct and how readily they will substitute their views for those of respondent states. The greater the level of deference, the more latitude states will have to exercise their governance functions; the lower the level of deference, the more power tribunals will assume and the greater will be their governance functions. That is why “standards of review adopted by arbitral panels directly reflect – or more precisely, define – the distribution of powers that must inevitably exist between those tribunals and the national bodies under [their] control.”¹⁰³

Procedurally, the public law paradigm provides a template for states and private parties simultaneously having a vertical substantive relationship (as between governor and governed) and a horizontal procedural one (as between equal disputing parties). The tensions caused by this possibility are missed in both the public and private international law paradigms because they are based on horizontal substantive and procedural relationships between equal treaty parties or equal contracting parties. Tribunals will need to ensure that states do not abuse their sovereign powers in order to make it more difficult for individuals and investors to prosecute their claims, which amounts to protection for the subordinate party. But they may also need to make certain allowances for sovereign interests, such as by protecting state secrets from disclosure, which amounts to recognition of certain privileges for the superior party.

Although the public law paradigm provides many insights into the investment treaty system, it elides and obscures other aspects. To begin with, it ignores or underemphasizes the state-state treaty relationships that underlie the system because it focuses primarily on the state-investor regulatory relationship. This means that it does not address public international law issues, such as the role of treaty parties in interpreting their own agreements. Proponents of this approach also play a bit fast and loose with the interpretive approaches of the VCLT. For instance, some argue that because investment tribunals perform the same function as domestic courts exercising

¹⁰² Schill, *supra* note 99.

¹⁰³ MONTT, *supra* note 3, at 15.

judicial review they should accordingly apply similar principles and be subject to similar constraints. But there is no evidence that states understood this to be the object and purpose of investment treaties when they entered into them. Nor are attempts to classify these public law principles as “general principles of law” convincing given their decidedly Western origins.

It is also not clear whether and how certain public law principles can and should be applied to the international context. For instance, the domestic justification for deferential standards of review by courts towards legislatures is based on the greater democratic legitimacy of the latter compared with the former. Yet this rationale does not cross-apply comfortably to the investment treaty realm where respondent states may not be democratic, either at all or robustly.¹⁰⁴ Even when respondent states are democratic, investment treaties might have been signed to give protections to foreign investors precisely because they are not adequately protected by democratic processes, which may qualify the applicability of notions such as deference.¹⁰⁵ And given the rise of South-South BITs, does it make sense to interpret investment treaties by reference to standards developed in North American and Western European public law?

Those drawing the public law paradigm also tend to overlook the importance of the treaty parties’ choice of arbitration as the dispute resolution mechanism. The procedural rules governing investment treaty arbitration are identical to or bear strong resemblance with those developed in international commercial arbitration rather than those developed in public law adjudication. Investment arbitration and public law may both permit non-state actors to challenge governmental conduct, but investment treaty arbitration also permits those non-state actors to constitute the adjudicatory body and play a role in appointing its members. This undoubtedly affects who is appointed to such tribunals and how they approach cases. Instead of assuming that these results were foreseen or foreseeable by the treaty parties, those favoring a public law paradigm tend to assume that the choice of arbitration was not intended to import any private law concepts or approaches into the field or, if it was, that this was a mistake that should be rectified by the introduction of a standing international investment court.¹⁰⁶

C. The Emergence of International Public Law Paradigms

The traditional public international law paradigm concerns rights and obligations running between states only. However, international law is increasingly concerned with restrictions on the ability of states to act and regulate domestically, particularly with respect to non-state actors. It should not be surprising, then, that comparisons are frequently drawn between the investment treaty system and two other modern sub-fields of public international law that concern domestic actions and regulation: human rights and trade law. To some extent, all three areas enjoy common origins in FCN treaties. Despite this, the trade and human rights paradigms have not received much independent analysis.¹⁰⁷ However, a key advantage of these frameworks is that they encompass insights from both public international law (because of their inter-state treaty

¹⁰⁴ See Roberts, *supra* note 98; Schill, *supra* note 99.

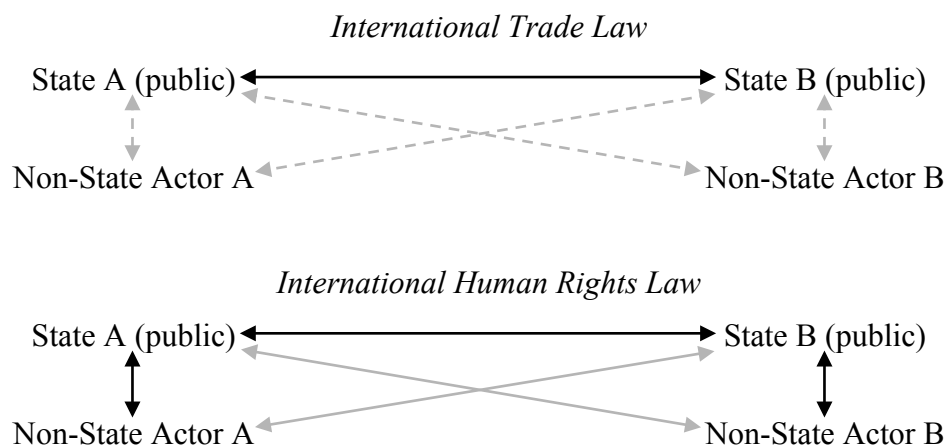
¹⁰⁵ See Ratner, *supra* note 73, at 483; Roberts, *supra* note 98.

¹⁰⁶ VAN HARTEN, *supra* note 3, at 129, 180-84.

¹⁰⁷ See, e.g., Schill, *supra* note 3, at 24-25.

basis) and public law (because they concern a state's right to act or regulate domestically). To capture these twin influences, I characterize these paradigms under a distinct International Public Law framework.

Although comparisons with trade and human rights law may be instructive, significant differences exist between the three systems. Investment treaties affect the ability of states to act and regulate domestically, but whether they create substantive and/or procedural rights for investors remains an open question.¹⁰⁸ Comparisons with trade law have the potential to assume the non-existence of investor rights because that system does not grant non-state actors procedural or substantive rights, at least on the international plane. Comparisons with human rights law, meanwhile, run the risk of assuming the existence, and overselling the nature, of investor rights because that regime grants non-state actors substantive rights (many of which are *jus cogens* or *erga omnes*) and sometimes procedural rights. These differences may play a critical role in the resolution of certain issues, such as countermeasures.



As illustrated by these diagrams, both the trade and human rights fields are based on inter-state agreements, so comparisons with these regimes focus attention on the horizontal inter-state relationships underlying the investment treaty system. As with the public international law paradigm, these comparisons encourage attention to be paid to the role of states as treaty parties. They reinforce the importance of VCLT interpretive approaches and situate their narrow body of rules within a broader field of public international law. Although dispute resolution in the trade system remains inter-state, it is often driven (behind the scenes) by powerful non-state actors. The role of non-state actors is more evident in the human rights sphere, however, as many such treaties grant individuals substantive and sometimes procedural rights of their own. For this reason, the human rights paradigm may be helpful in illuminating some of the tensions caused by

¹⁰⁸ See Roberts, *supra* note 4, at 184; Douglas, *supra* note 2, at 162-64; DOUGLAS, *supra* note 2, at 10-32.

the dual and sometimes conflicting roles of states as treaty parties and actual or potential respondents in investor-state disputes.

The international human rights paradigm encompasses: a horizontal inter-state treaty relationship between states as sovereign equals; and a vertical substantive relationship between states (as governors) and non-state actors operating within their territory or subject to their control (as governed). Some human rights regimes, such as the European Convention on Human Rights (ECHR), also permit individuals to bring claims directly against states before an international tribunal like the European Court of Human Rights (ECtHR). These regimes thus establish a horizontal procedural relationship between non-state actors (as claimants) and states (as respondents). A clear advantage of using this paradigm is that it speaks to the multiple relationships that exist within the investment treaty system, which are sometimes in tension with one another, in a way that is missed by paradigms that focus only on the inter-state treaty relationship or the investor-state disputing relationship.

The structural similarity between the human rights and investment treaty regimes makes this paradigm useful in analyzing certain controversial issues, such as the interpretive relevance of subsequent agreements and practice. The ECtHR, for example, routinely looks to subsequent practice by the treaty parties in interpreting how broad rights should be applied in particular circumstances, but it treats such evidence as highly persuasive rather than binding.¹⁰⁹ This approach permits it to play a gate-keeping function as it is significantly guided, but not constrained, by the treaty parties' views on interpretation. Accordingly, the Court strikes a balance between being a simple agent (which is completely deferential to the views and actions of the treaty parties) and a pure trustee (which makes decisions completely independently of the treaty parties).¹¹⁰ This allows it to be responsive to the ongoing interest of the treaty parties in the interpretation of their own obligations, but gives it room to provide a check on these practices where they appear to infringe upon the rights or legitimate expectations of the non-state actors granted rights or benefits under the treaty regime. In this way, the human rights paradigm might provide a useful model for investment tribunals trying to negotiate their own role with respect to subsequent agreements and practices.

Second, the trade and human rights fields require adjudicators to pass judgment on the domestic acts and regulations of states, so these comparisons focus attention on the vertical state-investor relationship underlying the investment treaty system. These fields take concerns that underlie public law, such as the appropriate balance of power between the domestic courts, legislatures and executives, and reapply them in an international context. The issue becomes the appropriate balance of power between international adjudicators and sovereign states when adjudicating upon sensitive matters of domestic regulation, such as environmental protection, health and safety, the economy and public morality. Here, domestic notions of deference and

¹⁰⁹ Roberts, *supra* note 4, at 202-06.

¹¹⁰ For the distinction between agents and trustees, see generally Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT'L REL. 33, 38-40 (2008).

judicial restraint are adapted through familiar concepts, such as standards of review, or recast under newer doctrines, such as margin of appreciation.

In the trade context, there is no express provision on general standards of review in the GATT or the WTO Agreements, but the Appellate Body has adopted a general standard based on Article 11 of the Dispute Settlement Understanding, which requires panels to make an “objective assessment” of the matters before them.¹¹¹ In determining the applicability of exceptions to GATT obligations for sanitary and phytosanitary measures taken by a member state, the Appellate Body has held that the standard of review it adopts “must reflect the balance established . . . between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”¹¹² Accordingly, it has endorsed a middle level of review that did not amount to either *de novo* review (where the panel could substitute its findings for that of national authorities) or total deference (where the panel totally deferred to the findings of national authorities).¹¹³

In the human rights context, courts such as the ECtHR have adopted a margin of appreciation when assessing governmental conduct even though it is not expressly provided for in the ECHR’s text. This doctrine embodies two principles: *judicial deference*, meaning that international tribunals should exercise a certain degree of judicial restraint when evaluating the actions of national authorities, giving some deference to their decisions rather than undertaking full, *de novo* evaluations; and *normative flexibility*, meaning that some international norms are sufficiently open ended or uncertain that they can be met in a variety of ways, giving states a certain “zone of legality” in which they are free to act.¹¹⁴ William Burke-White and Andreas von Staden argue that investor-state tribunals should borrow this doctrine from the human rights context given the public nature of investment disputes and the limited institutional capacity of arbitral tribunals.¹¹⁵

¹¹¹ See Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Part V, WT/DS26/AB/R (Jan. 16, 1998).

¹¹² *Id.*

¹¹³ See, e.g., Stefan Zleptnig, *The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, 6 European Integration online Papers, no. 17; Mads Andenas & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective*, 20 CAMBRIDGE REV. INT’L AFF. 71 (2007); MATTHAIS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION (2003); J. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 J. INT’L ECON. L. 125 (2003); S.P. Croley & J.H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 194 (1996); C.-D. Ehlermann & N. Lockhart, *Standard of Review in WTO Law*, 7 J. INT’L ECON. AFF. 493 (2004); Michael M. Du, *Standard of Review under the SPS Agreement After EC-Hormones II*, 59 INT’L & COMP. L.Q. 441 (2010).

¹¹⁴ Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, 16 EUR. J. INT’L L. 907, 909-10 (2005).

¹¹⁵ Burke-White & von Staden, *supra* note 93, at 287-89, 337 (arguing that arbitrators rarely have public law expertise (so they are poorly equipped to adjudicate upon public law issues) and are not embedded

Third, the different approaches of the trade and human rights regime to the existence of substantive and procedural rights for non-state actors can have important implications for understanding the way in which treaty parties may or may not prejudice rights or benefits granted to non-state actors under those treaties. This issue is best exemplified by the divergent views expressed on the relevance of inter-state countermeasures to investment treaty arbitration. If, for example, the United States violates its NAFTA obligations owed to Mexico, may Mexico lawfully enact countermeasures against the US where doing so would violate its NAFTA obligations with respect to US investors? Here, assumptions underlying the trade and human rights paradigms have important implications for the investment treaty system.

Under public international law, State A is permitted to take measures that would otherwise be contrary to the international obligations it owes to State B if those measures were taken in response to an internationally wrongful act by State B.¹¹⁶ Accordingly, Mexico could take lawful countermeasures with respect to the United States in response to a previous wrongful act by the United States. However, as the ILC's Commentary on the Draft Articles on State Responsibility explains: "Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded against the third State."¹¹⁷ This means that Mexico could not rely on its countermeasures against the United States to excuse a NAFTA violation impacting upon Canada.

However, as the ILCs Commentary explains, the prohibition on countermeasures affecting the rights of third states "does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties."¹¹⁸ The Commentary continues:

[I]f the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt.¹¹⁹

Thus, while countermeasures cannot prejudice rights owed to third states, they can affect mere benefits enjoyed by third states or other third parties, such as individuals and companies. This raises the question in the investment context of whether inter-state countermeasures can be pled as a defense in investor-state disputes, which in turn depends on how we understand the existence and nature of investors' rights.

Tribunals have split on this issue, often as a result of the explicit or implicit adoption of different paradigms. If one were to adopt a trade law paradigm, this could support the argument

within the national environment in which these decisions are made (so they lack a full appreciation of the context and their decisions may be viewed as illegitimate)).

¹¹⁶ Articles on State Responsibility, art. 49(1).

¹¹⁷ SR Commentary, *supra* note 25, at 130, para. 4.

¹¹⁸ *Id.* at 130, para. 5.

¹¹⁹ *Id.*

that inter-state countermeasures remain permissible because investment treaties create substantive rights and obligations for the treaty parties only, while investors are mere beneficiaries of those agreements. For instance, the *ADM* Tribunal accepted that Mexico could, in principle, rely on inter-state countermeasures as a defense in an investor-state dispute because NAFTA granted substantive rights to the treaty parties only, even if it granted procedural rights and substantive benefits to their investors.¹²⁰ By contrast, in *Corn Products* and *Cargill*, the Tribunals held that Mexico could not rely on inter-state countermeasures as a defense because NAFTA granted investors substantive and procedural rights akin to the rights enjoyed by third states under public international law.¹²¹

Adopting a human rights law paradigm might suggest a different approach yet again. Article 50 of the Draft Articles on State Responsibility provides that countermeasures shall not affect “obligations for the protection of fundamental human rights.”¹²² As the ILC Commentaries explain, “for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable” because such obligations have a “non-reciprocal character and are not only due to other States but to the individuals themselves.”¹²³ Debates could then be waged on at least two levels. First, do investment treaties, like human rights treaties, grant investors substantive rights? Second, if they do, are inter-state countermeasures inconceivable in this situation because the rights are non-reciprocal and owed to investors themselves? Or are they conceivable because the rights remain reciprocal and rarely, if ever, rise to the level of “fundamental” human rights?

These paradigms provide useful starting points for analysis but raise many more questions than they answer. They do not provide a model for a system that might grant investors procedural but not substantive rights. Even if investment treaties grant investors substantive rights, the human rights paradigm may incorrectly suggest that these rights should be viewed on par with human rights.¹²⁴ Human rights are typically understood as a good in their own right, whereas investor rights are a means to the end of increasing foreign investment. Unlike investment treaties, human rights treaties give rise to obligations *erga omnes* and some protections have *jus cogens* status.¹²⁵ Human rights treaties most frequently concern a state’s vertical relationship with its own nationals, whereas investment treaties by definition concern a

¹²⁰ *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico* (ICSID-NAFTA Ch. 11), Case No. ARB (AF)/04/5, Award, paras. 178-79 (Nov. 21, 2007).

¹²¹ *Corn Products*, *supra* note 30, paras. 165, 167, 169; *Cargill, Inc. v. Mexico* (ICSID-NAFTA Ch. 11), Case No. ARB(AF)/05/2, Award, para. 422 (Sept. 18, 2009).

¹²² Articles on State Responsibility, art. 50(1)(b).

¹²³ SR Commentary, *supra* note 25, at 129, para. 5.

¹²⁴ See VAN HARTEN, *supra* note 3, at 136-43; M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES*, *supra* note 57, at 39, 48-49.

¹²⁵ See Hirsch, *supra* note 4, at 109; Roberts, *supra* note 4, at 205.

state's diagonal relationship with foreign nationals.¹²⁶ And when human rights obligations are owed to non-nationals, this is not on a reciprocal, *quid pro quo* basis, which arguably differs from the investment context.¹²⁷

D. Parsing the Politics of the Paradigms

Adopting a particular public or private international law paradigm is not inevitably outcome determinative. The above paradigms are broad enough that investors, states and NGOs can often find analogies within them to suit their purposes in individual cases. However, by emphasizing some aspects of the system as significant and de-emphasizing others as insignificant, these paradigms promote different visions of the investment treaty system. They also focus attention on different actors and relationships, which has the effect of privileging certain participants over others, such as the treaty parties, the disputing parties, or the public at large. Having dissected these paradigms in detail, it is worth summarizing in broad brush strokes the different distributional consequences of the various paradigms.

The public international law paradigm privileges the role of states because it focuses on the system's treaty basis. Instead of seeing states primarily or exclusively as actual or potential respondents in investor-state disputes, this approach focuses attention on their role as treaty parties that entered into the substantive treaty and delegated enforcement powers to investment tribunals. Accordingly, it places states at a position of relative superiority to both investors (who are not treaty parties) and investment tribunals (who are presented as agents of the treaty parties). This paradigm also locates investment treaty arbitration on the public side of the public/private divide and firmly situates it within a broader corpus of international legal rules, paving the way for the introduction of public international law rules and analogies, including from trade, human rights and environment law.

The private international law paradigm, by contrast, focuses attention on the disputing parties rather than the treaty parties, which has the effect of downgrading the relative significance of states and upgrading that of investors. Investment treaties empower investors to seek arbitration to resolve disputes with the host state, with the result that both the investor and host state take on the role of disputing parties before an impartial tribunal. By concentrating on the investor and host state as equal disputing parties, and not entities that exist on different planes, this approach has a leveling effect on the investor-state relationship. As a result, it obscures the interest of home states in interpretation (as they are not disputing parties) and casts suspicion on the

¹²⁶ While human rights treaties may create obligations on a state with respect to foreigners within its territory, and sometimes also for citizens and foreigners outside its territory but subject to its control, these treaties usually concerns relations between a state and its own nationals within its territory. This is represented in the diagram by the use of black lines for the common vertical relationship and grey lines for the less common diagonal relationship. On the diagonal nature of the investment treaty dispute resolution mechanism, see Paulsson, *supra* note 6, at 5-6.

¹²⁷ Even when State A owes human rights obligations to a national of State B who is on its territory or subject to its control, this is not based on a reciprocal relationship, i.e., these obligations are assumed by State A alone and are not a *quid pro quo* for State B agreeing to owe the same obligations to citizens of State A.

motivations of host states seeking to interpret their treaties through subsequent agreements and practice (as they are viewed solely as treaty parties). This paradigm also portrays investment tribunals as the agents of the disputing parties, rather than the treaty parties, as they are tasked with impartially resolving investor-state disputes rather than being beholden to the treaty parties' interests.

The private international law paradigm also treats investment treaty arbitration as a form of private dispute resolution that is of interest to the disputing parties only. The public law paradigm, by contrast, presents investment arbitration as a form of public law adjudication that is of interest to the public at large, not just to the treaty or disputing parties. To date, this approach has been primarily invoked by those wishing to: carve out more regulatory space for states to act in the interests of the general public; ensure greater deference by arbitral tribunals to regulatory decision-making by states; create a more open and transparent arbitral process, including permitting a role for civil society; and impose more stringent requirements on decision-making by arbitral tribunals in terms of consistency and reason-giving. For these reasons, the public law analogy has frequently been deployed by respondent states, NGOs and academics.¹²⁸

However, the public law paradigm is not one-sided and it has also been used to protect investors and the role of investment tribunals. Some have drawn on this paradigm to suggest that investment tribunals function as quasi-constitutional courts empowered to review the actions of states for conformity with their investment treaty commitments.¹²⁹ According to this view, the sovereign nature of states and the unequal nature of investor-state relationships is not a justification for tribunals affording states some measure of deference, but a risk factor for one disputing party (the state) unjustifiably interfering with the rights of the other disputing party (the investor).¹³⁰ Others rely on public law concepts, such as due process, good faith and legitimate expectations, to give meaning to the obligations to treat investors fairly and equitably and not indirectly expropriate their property. These doctrines work to protect investors against abusive uses of a state's sovereign powers.

¹²⁸ For instance, in *Glamis Gold v. United States*, the United States drew on comparative public law when arguing that its legislative and regulatory actions were entitled to a significant degree of deference by investment tribunals. See *Glamis Gold, Ltd. v. United States* (UNCITRAL-NAFTA Ch. 11), Counter-Memorial of Respondent (Sept. 19, 2006), available at <http://www.state.gov/documents/organization/73686.pdf>, at 217, 227, 229-30, 242; *Glamis Gold, Ltd. v. United States* (UNCITRAL-NAFTA Ch. 11), Rejoinder of Respondent (Mar. 15, 2007), available at <http://www.state.gov/documents/organization/82700.pdf>, at 188-93, 207-11, 212-13, 220, 223-24. NGOs and academics routinely rely on this analogy when advocating for investment treaty pleadings, hearings and awards to be made public and for NGOs to be given a role in submitting amicus briefs and participating in oral arguments. See, e.g., VAN HARTEN, *supra* note 3, at 164-67.

¹²⁹ Wälde, *supra* note 54, at 9; Thomas Wälde & Abba Kolo, *Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law*, 50 INT'L & COMP. L.Q. 811, 814, 822 (2001).

¹³⁰ Wälde & Kolo, *supra* note 129, at 3, 41.

Like the public law paradigm, the international public law paradigms focus on the regulatory dimension of investment treaties, but like the public international law paradigm, they also speak to the system's inter-state treaty basis. Beyond these similarities, there are also differences between the trade and human rights approaches. The trade law paradigm downplays the existence or significance of investors being granted substantive and/or procedural rights given that no comparable rights are granted in the trade sphere. This has the effect of privileging the role of states over investors. This paradigm also provides a model for protecting economic rights without doing so to the exclusion of other societal goals, such as protection of the environment and health and safety. However, whether the trade regime strikes an appropriate balance between these competing interests and whether it is an appropriate model for the investment context remain open to debate.

The politics of the human rights paradigm is perhaps the most divided. Investors and those supportive of investor rights tend to endorse what I term a *narrow* human rights paradigm. Just as individuals are granted substantive and procedural rights under human rights treaties in order to protect them from abuses of sovereign powers, so too, according to this approach, are investors granted such rights under investment treaties.¹³¹ This comparison paves the way for arguments such as that: the object and purpose of investment treaties is to protect investors, so gaps and ambiguities should be resolved in their favor; inter-state countermeasures cannot be used as a defense in investor-state disputes because investors have independent rights; and it is appropriate to define investors' property and due process rights by reference to human rights jurisprudence.¹³² This paradigm also suggests that investment tribunals do not function as mere agents of the treaty parties, but as trustees entrusted with protecting the rights of the non-state beneficiaries.¹³³

Those supportive of the rights of states and interests of the broader community, by contrast, invoke what I term a *broad* human rights paradigm. Instead of focusing on investor rights as human rights, this approach focuses on investor rights in opposition to human rights. Any rights or benefits granted to investors must be weighed against human rights belonging to other affected parties, such as the right of local populations to clean water.¹³⁴ Instead of viewing

¹³¹ See Böckstiegel, *supra* note 4, at 93, 104.

¹³² Luke Eric Peterson, International Centre for Human Rights and Democratic Development, *Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration* 23-26 (2009), available at http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf.

¹³³ Roberts, *supra* note 4, at 187, 202-07.

¹³⁴ ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 107 (2009) (noting that although human rights law has been invoked by claimant investors, "[m]ore often, however, human rights law may be invoked by respondent states to justify the measures complained of, and thus as defences against liability"); *Glamis Gold, Ltd. v. United States* (UNCITRAL-NAFTA Ch. 11), Non-Party Supplemental Submission: Submission of the Quechan Indian Nation (Oct. 16, 2006), available at <http://www.state.gov/documents/organization/75016.pdf> (drawing on a wide range of human rights materials in support of the interests of the indigenous peoples affected by the case).

investor rights as trumps, this approach encourages tribunals to draw on principles frequently used in the human rights context, such as proportionality, to balance competing rights.¹³⁵ And approaches such as the margin of appreciation doctrine are suggested as models for the way in which investment tribunals should accord greater deference to decision-making by respondent states.¹³⁶

IV. THE TRAJECTORY OF THE INVESTMENT TREATY SYSTEM

One's choice of paradigm is political because different paradigms favor certain actors, interests and solutions over others. Given the present existence of multiple paradigms, what is the likely future direction of the investment treaty field? So long as the system remains based on thousands of bilateral investment treaties and awards from a myriad of *ad hoc* tribunals, we will continue to see conflicting analogies based on diverse paradigms for understanding the system's nature. However, although we should not expect any single paradigm to prevail over all of the others, we can expect the relative importance of different paradigms to shift over time. As we move from the system's infancy to its adolescence, we are likely to witness a decrease in the perceived value of private international law and narrow human rights paradigms and an increase in the perceived significance of public international law, public law, trade law and broad human rights paradigms. In terms of the field's future adulthood, this is likely to take the form of "between the poles" solutions.

A. *The System's Infancy*

Three factors played a key role in shaping the development of investment treaty law in the early days of the system: the shift of interpretive power from treaty parties to investment tribunals; the commercial background of the majority of investment treaty advocates and arbitrators; and narrow framings and understandings of the object and purpose of investment treaties.

First, investment treaties traditionally coupled short and broadly worded obligations with strong enforcement mechanisms. In the language of legalization theories, these investment treaties involved a high level of obligation and delegation, because they established legally binding commitments and delegated enforcement power to tribunals, but a low level of precision, because the commitments themselves are broad and vague (for example, the promise to treat investors fairly and equitably).¹³⁷ Imprecision is normally associated with state discretion, but

¹³⁵ Tecmed, *supra* note 97, para. 122 (relying on case law from the ECtHR to support the application of a proportionality principle in determinations of whether an expropriation has occurred).

¹³⁶ Vadi, *supra* note 8, at 70.

¹³⁷ According to the concept of legalization, international commitments can be defined by reference to three characteristics: obligation (whether or not a commitment is binding); precision (how precise the legal commitment is on the rules-to-standards spectrum); and delegation (whether a third party, like a court or tribunal, has been granted authority to interpret and apply the law). Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401, 401-02 (2000).

when coupled with a high degree of obligation and delegation, the opposite is true: the tribunal charged with interpreting and applying the standard is given wide discretion.¹³⁸ The net result was a considerable shift of interpretive power away from the treaty parties and towards investment tribunals, leading to much investment treaty law being developed through a body of *de facto* precedents.

Second, the community of lawyers who took part in the first generation of investment treaty disputes as advocates and arbitrators was relatively small, with a majority having a background in international commercial arbitration and a minority being specialists in public international law.¹³⁹ The strong influence of participants with a commercial background resulted in an over-reliance on an international commercial arbitration paradigm, without adequate consideration of the differences between the systems, leading to observations that the commercial arbitration community had taken over investment treaty arbitration and was running it as a new form of commercial arbitration business.¹⁴⁰ It was also noted that the significant commercial arbitration experience of many of the top investment arbitrators had deeply ingrained commercial paradigms in their mindsets.¹⁴¹ According to Barton Legum, former Chief of the US NAFTA Arbitration Division:

[F]or most international practitioners today, private international commercial arbitration is the only form of the genre they have ever known. The private international arbitration model, thus, has naturally become the default template for all kinds of international arbitration today – including investment treaty arbitration.¹⁴²

The commercial background of many investment treaty lawyers likely contributed to the lack of awareness of and sensitivity to the public international law and, in particular, public law dimensions of investment treaty arbitration in many early awards. For example, I have argued that the commercial orientation of many investment arbitrators resulted in a failure to appreciate the dual role of states as both actual or potential respondents *and* treaty parties, leading many

¹³⁸ See *id.* at 415; Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 461–62 (2000); Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 335 (1999); Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT’L ECON. L. 507, 519 (2009).

¹³⁹ Waibel & Wu, *supra* note 51 (noting that more than 60% of the arbitrators in ICSID cases are in full-time private practice and slightly less than one third are specialists in public international law); Schill, *supra* note 52, at 880; Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate*, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME 174, 186 (Jose E. Alvarez & Karl P. Sauvant eds., 2011) (noting that the current roster of investment treaty arbitrators is “rooted in international commercial arbitration”).

¹⁴⁰ See Thomas W. Wälde, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, in NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW, *supra* note 7, at 63, 114-15.

¹⁴¹ See David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT’L L. & BUS. 383 (2010).

¹⁴² Legum, *supra* note 58, at 73.

tribunals to overlook or undervalue the relevance of subsequent agreements and practice to treaty interpretation.¹⁴³ Burke-White and von Staden have complained that few ICSID arbitrators have a background in public or constitutional law, which may have contributed to a lack of appropriate deference being given to states.¹⁴⁴ And Bruno Simma has lamented the failure of investment tribunals to consider human rights arguments adequately, observing that this might be because a “large majority of [arbitrators] has a private or commercial law rather than a public law or public international law background.”¹⁴⁵

Third, these early investment treaties did not provide much guidance about their object and purpose, other than that they were intended to protect and promote foreign investment. Even though investment treaties were commonly justified as a means towards the public welfare end of increasing foreign investment, many did not specify this in their preambles, leading to a perception that foreign investment was being protected as an end in itself instead of as a means to an end. As a result, it was common to find parallels being drawn between investment treaties protecting investors’ rights and human rights treaties protecting human rights.¹⁴⁶ Some tribunals also relied upon this narrow understanding of the object and purpose of investment treaties to justifying resolving gaps and ambiguities in favor of the investor. For example, in *SGS v. Philippines*, the Tribunal found that the treaty was intended to “create and maintain favorable conditions for investments,” and thus it was “legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments.”¹⁴⁷

These early treaties gave few textual clues as to the relevance of analogies with public law and other fields of public international law that seek to balance economic and non-economic goals, such as trade law. Most of these treaties did not avert in their preambles or substantive terms to the need to balance investor protections against other public policy goals, such as protection of the environment, the economy, health and safety, and human rights. The narrow drafting of these treaties, which did not highlight the role of the state as a treaty party or regulatory sovereign, tended to reinforce the private law or rights-based focus of many investment tribunals. This often manifested itself in investment treaty protections being treated

¹⁴³ Roberts, *supra* note 4, at 179-81, 207.

¹⁴⁴ Burke-White & von Staden, *supra* note 93, at 330.

¹⁴⁵ Simma, *supra* note 4, at 576. See also James Harrison, *Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 4, at 396, 416 (“Investment arbitrators inevitably have limited expertise in human rights law.”).

¹⁴⁶ See, e.g., Paulsson, *supra* note 6, at 256 n.48; Böckstiegel, *supra* note 4, at 93, 104; Douglas, *supra* note 2, at 153-54; DOUGLAS, *supra* note 2, at 7-8.

¹⁴⁷ *SGS v. Philippines*, *supra* note 22, para. 116; see also *Ecuador v. Occidental (No.2)* [2007] 1 Lloyd’s Rep 64, para. 28 (arguing that as the treaty’s object and purpose was to provide “effective protection for investors,” “it is permissible to resolve uncertainties in its interpretation in favor of the investor”). For criticism of this approach to treaty interpretation as being “cavalier,” see Michael Waibel, *International Investment Law and Treaty Interpretation*, in INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW, *supra* note 68, at 29, 39-40.

as akin to contractual obligations between the disputing parties, rather than treaty obligations between states or good governance regimes between a state and those within its territory.¹⁴⁸

B. The System's Adolescence

I believe that we are in the early stages of a major recalibration of the investment treaty system that is going to lead to a significant reevaluation of the importance of different analogies. Paradigms and analogies that focus attention on the state as a treaty party and regulatory sovereign will ascend in relative value, while those that draw comparisons with private law or which narrowly focus on the importance of investor protections will decline in relative value. Although this recalibration has many causes, two developments have been particularly important.

First, a number of early cases dramatically demonstrated the public law implications of investment treaty arbitration. Unlike commercial arbitrations, which typically resolve private law disputes between private parties, investment treaty arbitrations invariably involve a state respondent and frequently concern that state's right to regulate with respect to the economy, public utilities, environmental protection, health and safety, and the protection of human rights. The cases arising out of Argentina's economic crisis and various NAFTA cases that turned on environmental and public health measures are cases in point.¹⁴⁹ The number of claims brought against some states (such as Argentina) along with the magnitude of the damages claimed and/or awarded in particular cases demonstrated the potential for investment treaty arbitration to have a significant effect on a state's economy and future regulatory choices.¹⁵⁰

Second, the interests of states entering into investment treaties appear to be converging, at least to some extent. Historically, investment treaties were typically signed between developed (capital-exporting) states and developing (capital-importing) states, with most cases being brought by investors from developed states against developing states. As such, these treaties were symmetrical in structure but asymmetrical in application. As developed states viewed these treaties as exclusively or primarily aimed at protecting the rights of their investors abroad, they demonstrated little concern about the breadth of interpretive authority being delegated to investment tribunals or the absence of clear language protecting the right of sovereigns to regulate in the public interest. The distinct interests of capital-exporting and capital-importing states made it less likely that the treaty parties would have sufficient commonality of interests to provide greater specificity to their treaty obligations or to agree on subsequent interpretations.

Yet recent developments are leading to a greater convergence of states' interests. Significant levels of foreign direct investment now flow from (not just to) developing states and to (not just

¹⁴⁸ See Hirsch, *supra* note 4, at 108-09.

¹⁴⁹ See, e.g., *Metalclad Corp. v. Mexico* (ICSID-NAFTA Ch. 11), Case No. ARB(AF)/97/1, Award (Aug. 30, 2000); *Methanex*, Final Award, *supra* note 27; *CMS Gas Transmission Co. v. Argentina* (ICSID), Case No. ARB/01/8, Award (May 12, 2005).

¹⁵⁰ See, e.g., *CME Czech Republic BV v. Czech Republic* (UNCITRAL), Final Award (Mar. 14, 2003) (damages award of approx. US\$ 353 million).

from) developed states.¹⁵¹ The number of investment treaties between developing states is now significant and developing countries like China are becoming increasingly interested in protecting their investors abroad.¹⁵² And a number of early and notorious cases have been brought against developed states, including the United States, Canada and Australia, giving them an increased appreciation of the need to protect the regulatory freedom of host states and to limit arbitral discretion.¹⁵³ With developed states increasingly being fearful of being respondents in investor-state disputes, and developing states increasingly being interested in protecting their investors abroad, we can expect greater convergence in the interests of these states over time.¹⁵⁴

These changes are likely to result in: (1) a shift in interpretive power away from tribunals and towards treaty parties, coupled with a recalibration of the appropriate balance to be struck between protecting investment and non-investment goals; (2) an increasing public awareness of and involvement in investment treaty arbitration, resulting in additional pressure being placed on states and arbitral tribunals to recognize and protect public interests; and (3) a shift in the interests of investment tribunals. These developments will affect the prevalence and currency of different paradigms, resulting in a general trend away from certain comparisons (such as private

¹⁵¹ In 2010, foreign direct investment inflows and outflows for developed states stood at \$601 billion and \$935 billion, while inflows and outflows for the developing states were \$574 billion and \$328 billion. UNCTAD, *World Investment Report 2011*, *supra* note 15, at 187, Annex table I.1 FDI flows, by region and economy 2005-2010.

¹⁵² Of the 54 bilateral investment treaties signed in 2010, 20 were concluded between developing states. *Id.* at 100. See generally A. Vaughan Lowe, *Changing Dimensions of International Investment Law*, in COLLECTED COURSES OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW (Wenhua Shan, Penelope Simons & Dalvinder Singh eds., 2008).

¹⁵³ Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 393-400 (2003); William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1 (2006); Sornarajah, *supra* note 124, at 40-41.

¹⁵⁴ Alvarez likens the position of countries that are major capital importers and exports, like the United States and China, to that of the individual in John Rawls' original position who must decide upon a distribution of resources while under a veil of ignorance. As in Rawls' thought experiment, such countries are arguably more likely to seek treaty provisions that are fair to both investors and states as they do not know whether they will end up on the home or host state side of an investor-state dispute. See José E. Alvarez, *The Once and Future Foreign Investment Regime*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607, 634 (Mahnoush Arsanjani, Jacob Katz Cogan, Robert D. Sloane, & Siegfried Wiessner eds., 2011). This convergence of interests may account for the opposite tendencies of the US and Chinese Model BITs, with the former becoming more state-friendly over time and the latter becoming more investor-friendly. See Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007); Kenneth J. Vandavelde, *A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests*, 1 Y.B. INT'L INVESTMENT L. & POL'Y 283 (2008-2009); Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J INT'L ECON. L. 457 (2009).

international law analogies and narrow comparisons between investor rights and human rights) and towards others (such as those with public law and public international law fields like trade law).

1. Shift in the Interpretive Balance of Power

While the first generation of investment treaties were characterized by a considerable shift of interpretive power from the treaty parties to investment tribunals, the newly emerging second generation of investment treaties will be characterized by states seeking to recalibrate this balance of power by increasing the specificity of their treaty commitments and reasserting their interpretive rights as treaty parties. This shift in power is made possible by greater convergence of the interests of capital-importing and capital-exporting states, which now often have potential interests as home and host states. In exercising their interpretive powers, states are likely to clarify or change the content of these treaties in ways that increase the prevalence of analogies with public law and public international law.

The more “rule-like” a treaty prescription, the more treaty parties decide *ex ante* what categories of behavior are acceptable and unacceptable; the more “standard-like” a prescription, the more this determination is left to be made *ex post* by investment tribunals.¹⁵⁵ The rise in the number of investor-state arbitral disputes, coupled with the investor-friendly interpretations adopted in many investment awards, has led states to question the wisdom of delegating so much power to investment tribunals.¹⁵⁶ Some have responded by withdrawing from the ICSID system or investment treaties altogether,¹⁵⁷ while others have entered into new investment treaties that omit the possibility of investor-state arbitration.¹⁵⁸ The most common reactions, however, are likely to be (1) a new breed of investment treaties in which states spell out the extent and limits

¹⁵⁵ Abbott et al., *supra* note 137, at 413. See also VAN HARTEN, *supra* note 3, at 122–23; Trachtman, *supra* note 138, at 335, 350–55.

¹⁵⁶ See UN Conference on Trade & Development [UNCTAD], *Investor-State Dispute Settlement and Impact on Rulemaking* 92 (2007).

¹⁵⁷ For example, Bolivia and Ecuador have withdrawn from the ICSID Convention, and other states (such as Nicaragua and Venezuela) have considered doing likewise. See List of Contracting States and Other Signatories of the Convention (Jan. 7, 2010), available at <http://icsid.worldbank.org/ICSID/Index.jsp>. Some countries, including Ecuador and Venezuela, have reportedly withdrawn from or sought to renegotiate a number of their investment treaties. See UN Conference on Trade & Development [UNCTAD], *Recent Developments in International Investment Agreements (2007–June 2008)*, 2 IIA MONITOR 6 (2008). Others have suspended further negotiations of investment treaties pending reviews of their policy frameworks. See, e.g., Republic of South Africa, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper* 12 (June 2009), available at <http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf>.

¹⁵⁸ For example, the 2005 Australia-United States FTA does not include investor-state arbitration and in 2011, Australia announced that it would no longer include investor-state dispute settlement provisions in its future trade agreements due to concerns about sovereign risk. See Australia-United States Free Trade Agreement (2005); Gillard Government Trade Policy Statement: *Trading Our Way to More Jobs and Prosperity* 14 (Apr. 2011), available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

of their treaty obligations with much greater specificity and (2) states asserting their rights as treaty parties to adopt subsequent agreements about the meaning of particular provisions.

The actions of the United States provide a good example of these emerging phenomena. Following early arbitral decisions that interpreted the requirements of “fair and equitable treatment” and “full protection and security” as going beyond the customary international law minimum standard of treatment, the United States responded in two ways. In 2001, the NAFTA FTC adopted Notes of Interpretation that specified, among other points, that NAFTA’s minimum standard of treatment provision prescribes the customary international law standard of treatment of aliens and that the references to “fair and equitable treatment” and “full protection and security” did not require treatment above and beyond that standard.¹⁵⁹ In 2004, the US released a revised Model BIT, which is more than twice as long as earlier versions and provides much greater specificity on a number of obligations.¹⁶⁰ The new version included similar language about the relationship between the treaty protections and the customary international law standard, but also gave greater content to this standard.¹⁶¹

By increasing the specificity of their treaty commitments *ex ante* and providing interpretations or mechanisms for the interpretation of their treaty commitments *ex post*, treaty parties can enlarge their own interpretive role and thereby reduce the breadth of interpretive authority delegated to arbitral tribunals. In doing so, they will diminish opportunities for tribunals to draw on analogies with which they are familiar (such as private international law analogies) or sympathetic (such as analogies between investor rights and human rights). They will also increase the prospects for their own lawyers to draw on analogies with which they are familiar or that are favorable to states, such as public law, public international law, and trade law analogies. This latter trend is already evident in a number of recent developments.

First, an increasing number of investment treaties are including provisions in their preambles that make clear that investment promotion and protection is not to be achieved at the expense of other key values, such as protection of health, safety, labor standards and the environment.¹⁶²

¹⁵⁹ *Notes of Interpretation*, *supra* note 47.

¹⁶⁰ U.S. Dep’t of State, 2004 Model BIT [hereinafter 2004 U.S. Model BIT]. See generally Gilbert Gagné & Jean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. INT’L ECON. L. 357, 363 (2006); Stephen Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, 3(2) TRANSNAT’L DISP. MGMT. (Apr. 2006); Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments*, 21 J. INT’L ARB. 383, 385 (2004); ALVAREZ, *supra* note 88, at 151-62.

¹⁶¹ For example, the new version provides, among other things, that “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” 2004 U.S. Model BIT, *supra* note 160, art 2(a).

¹⁶² For example, the preamble of the 2002 BIT between the Republic of Korea and Trinidad & Tobago sets out the assumption that the objectives of investment protection and promotion “can be achieved without relaxing health, safety and environmental measures of general application,” while the preamble of the 2005 BIT between the United States and Uruguay sets out the desire of the treaty parties to “achieve

Similar provisions are also being included as substantive provisions, with an increasing number of investment treaties now providing that, except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, will not constitute indirect expropriations.¹⁶³ These clauses will enhance the relevance of public law and trade law paradigms (given similar efforts in those field to balance economic and non-economic goals) and diminish the relevance of narrow human rights law analogies (given that investment protection is not being presented as an absolute right or an end in itself).

Second, some states are beginning to introduce general exceptions clauses modeled on Article XX of GATT or Article XIV of GATS. For example, the 2004 Canadian Model BIT includes Article 10, entitled General Exceptions, which provides that:

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

(a) to protect human, animal or plant life or health;

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources.¹⁶⁴

Similar clauses have appeared in recent free trade agreements by Japan and Singapore that include provisions on investment protection.¹⁶⁵ Incorporating language and ideas developed in the trade context into investment treaties will increase the resort to trade law analogies in the interpretation of investment treaties. This form of cross-fertilization is particularly likely given

these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights.” See UN Conference on Trade & Development [UNCTAD], *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 3-5 (2007) (citing and discussing the quoted texts).

¹⁶³ See, e.g., 2004 U.S. Model BIT, *supra* note 160, Annex B, arts. 12, 13; 2004 Canada Model BIT art. 10; United States-Uruguay BIT, Annex B (2005); Australia-United States Free Trade Agreement, Annex 11-B (2005).

¹⁶⁴ 2004 Canada Model BIT, *supra* note 163, Annex B.13(1).

¹⁶⁵ Japan-Singapore Agreement for a New-Age Economic Partnership art. 83 (2002). See also India-Singapore Comprehensive Economic Cooperation Agreement arts. 6.10-6.12 (2005); Korea-Singapore Free Trade Agreement arts. 10.7(4), 10.12, 10.18 (2005). Certain other free trade agreements incorporate Article XX of GATT and/or Article XIV of GATS by reference. See, e.g., Japan-Malaysia Economic Partnership Agreement art. 10 (2005); Panama-Taiwan Free Trade Agreement art. 20.02 (2003); New Zealand-China Free Trade Agreement art. 200(1) (2008). See generally ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 500-03 (2009).

that investment protections are now often addressed within the context of free trade agreements and thus are negotiated by teams that include lawyers with backgrounds in trade law.¹⁶⁶

Third, states are starting to draw on constitutional and administrative law concepts in providing greater specificity about their investment treaty obligations.¹⁶⁷ For instance, the 2004 US Model BIT sets out a three-step test of factors that should be considered in determining whether there has been an indirect expropriation: (i) the economic impact of the government action; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.¹⁶⁸ This test is derived from a domestic US case on the takings clause called *Penn Central*.¹⁶⁹ By incorporating language from its domestic public law into its investment treaties, the United States has provided a hook for the introduction of further domestic law principles in the interpretation of its agreements.¹⁷⁰ As many other states treat developments in the US Model BIT practice as the gold standard for treaty developments, some have imported this test into their own treaties, thereby providing a hook for analogies with US public law rather than their own domestic public law.¹⁷¹

¹⁶⁶ Some states are including investment protections within bilateral and multilateral free trade agreements. *See, e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; Association of Southeast Asian Nations [ASEAN] Comprehensive Investment Agreement, Feb. 26, 2009 [hereinafter ACIA]. Some multilateral trade agreements are also incorporate provisions on investment. *See, e.g.*, Agreement on Trade-Related Investment Measures and General Agreement on Trade in Services, Apr. 15, 1994, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 143 (2000), reprinted in 33 I.L.M. 81 (1994); Marrakesh Agreement Establishing the World Trade Organization, Annexes IA & IB, Apr. 15, 1994, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 325 (2000), reprinted in 33 I.L.M. 1168 (1994).

¹⁶⁷ Several academics have also argued that tribunals should undertake a comparative assessment of domestic law principles in providing content to vague investment treaty norms. *See, e.g.* Wälde & Kolo, *supra* note 129, at 821; MONTT, *supra* note 3, at 22 and 76; Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in Schill, *supra* note 3, at 151, 175-76.

¹⁶⁸ 2004 U.S. Model BIT, *supra* note 160, Annex B.

¹⁶⁹ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

¹⁷⁰ This has led, for example, to the United States relying extensively on US and Canadian cases in order to give content to the meaning of international investment treaty law protections. *See, e.g.*, Glamis Counter-Memorial, *supra* note 128, at 195-96, 201-04, 210-11, 213-14, 234, 246; Glamis Rejoinder, *supra* note 128, at 189-92, 200, 203-04, 208-12, 225.

¹⁷¹ *See, e.g.*, 2004 Canada Model BIT, *supra* note 163, art. 10; ACIA, *supra* note 166, Annex 2. *See generally*, David Schneiderman, *NAFTA's Taking Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499 (1996); Jürgen Kurtz, State Recalibration of Investment Treaties: Causes, Embodiments and Implications, Presentation at the 2nd Singapore Conference on International Investment Arbitration – International Investment Agreements (IIAs) and Financial Crises (May 31, 2011).

As states begin drawing more heavily on the above paradigms, we can expect investors to respond in various ways. Investors will continue to champion paradigms that privilege their role (such as the commercial arbitration and narrow human rights paradigms) but will also promote analogies to suit their purposes within the more public-oriented paradigms (such as by developing concepts like due process, good faith and legitimate expectations). If they perceive certain systems, such as ICSID, as becoming too public, they may opt for dispute resolution under less public systems, such as the UNCITRAL and ICC Rules. If they view treaties as being too accommodating of state-sovereignty, they are likely to turn to investor-state contracts with stabilization clauses to protect their interests. Whether states would respond by, for example, only permitting ICSID arbitration or not agreeing to stabilization clauses, remains to be seen and may vary based on the interests and relative power of the particular state and investor in question.

2. Broadening and Diversification of Participants

In the early days, investment treaty arbitration was seen as a discrete area that was primarily of interest to states and investors as actual or potential disputing parties, on the one hand, and to a relatively small group of lawyers who appeared in those disputes as advocates and arbitrators, on the other. The arbitrators who hear these cases have traditionally come from a relatively narrow background with a majority coming from full time private practice (about 60%), a vast majority coming from North America and Western Europe (about 70%) and a super majority being men (about 97%).¹⁷² Many early articles within the field were published in practitioner rather than academic journals or were part of edited collections that arose from conferences dominated by practitioners. Although some important critiques were written from a North-South perspective,¹⁷³ there was relatively little critical engagement with the field by academics from other disciplines or by those not taking part in the practice of arbitration.¹⁷⁴

During the 2000s, academic engagement with the investment treaty system changed significantly. A number of books explored the public law dimensions of investment treaty arbitration, most notably Gus Van Harten (2007),¹⁷⁵ David Schneiderman (2008),¹⁷⁶ Montt

¹⁷² Waibel and Wu, *supra* note 51 (more than 60% of the arbitrators in ICSID cases are in full-time private practice); ICSID, *The ICSID Caseload – Statistics 16* (Issue 2011–2) (as of June 30, 2011, 70% of Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in ICSID Cases are from North America or Western Europe); Gus Van Harten, *The (lack of) women arbitrators in investment treaty arbitration*, FDI Perspective (2011, forthcoming) (of the 249 known investment treaty cases as of May 2010, only 3% of those who served as arbitrators were women).

¹⁷³ See, e.g., M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (3rd ed. 2010); Andrew Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

¹⁷⁴ Even in 2006, the ILC Fragmentation Report contrasted investment treaty law, which it described as an area of “exotic and highly specialized knowledge[.]” with other sub-specialties of public international law, such as trade law, human rights law, environmental law and law of the sea. *ILC Fragmentation Report*, *supra* note 23, para. 8.

¹⁷⁵ VAN HARTEN, *supra* note 3.

(2009)¹⁷⁷ and Stephen Schill (2010).¹⁷⁸ There has also been growing interest within public international law, international trade law and human rights law circles about their fields' connections with investment treaty law, leading to engagement by scholars such as José Alvarez, Jürgen Kurtz and Bruno Simma.¹⁷⁹ The diversification of the field's participants has led to a wider pool of analogies being invoked in analyzing the investment treaty system, with the relevance of any particular analogy being less likely to be assumed and more likely to be contested. In broad terms, this scholarship has challenged the appropriateness of defaulting to a private international law paradigm, but internal splits have arisen over which of the more publicly-oriented paradigms are appropriate in analyzing particular issues.¹⁸⁰

At the same time, the rise of public law and public international law paradigms within the academy has both reflected and reinforced concerns within the broader community (as articulated by journalists and NGOs) about the lack of transparency and third party participation in investment treaty arbitration.¹⁸¹ These criticisms came as a surprise to many investment treaty practitioners who were used to operating in an international commercial arbitration paradigm and who frequently assumed that confidentiality and privacy were simply hallmarks of arbitration.¹⁸²

¹⁷⁶ SCHNEIDERMAN, *supra* note 3.

¹⁷⁷ MONTT, *supra* note 3.

¹⁷⁸ INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 3.

¹⁷⁹ ALVAREZ, *supra* note 88; Kurtz, *Use and Abuse*, *supra* note 5; Simma, *supra* note 4.

¹⁸⁰ For instance, Alvarez and Brink have taken a critical look at the use of trade law analogies in interpreting the necessity test in investment treaty law, while Kurtz and Waibel have examined the difficulties in relying on a public international law analogy in the same context. Compare José E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty*, 2010-11 Y.B. INT'L INVESTMENT L. & POL'Y 315 with Kurtz, *Adjudging the Exceptional*, *supra* note 5, at 337-38, 341-47 and Michael Waibel, *Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E*, 20 LEIDEN J. INT'L L. 637, 640-41 (2007).

¹⁸¹ See, e.g., Anthony De Palma, *NAFTA's Powerful Little Secret*, N.Y. TIMES, Mar. 11, 2001, at C1; VAN HARTEN, *supra* note 3, at 152-75; Sarah Anderson & Sara Grusky, Institute for Policy Studies & Food & Water Watch, *Challenging Corporate Investor Rule: how the world bank's investment court, free trade agreements, and bilateral investment treaties have unleashed a new era of corporate power and what to do about it* (2007), available at <http://www.ips-dc.org/files/146/challenging%20Corporate%20Investor%20Rule%20-%20final.pdf>; Jeffery Atik, *Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process*, in NAFTA INVESTMENT LAW AND ARBITRATION 135 (Todd Weiler ed., 2004); Loukas A. Mistelis, *Confidentiality and Third Party Participation: UPS v. Canada and Methanex Corp v. United States*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION 169 (Todd Weiler ed., 2005).

¹⁸² See, e.g., Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?* 2009 AUSTRIAN ARB. Y.B. 483, 483 (describing how the author first became aware of the issue of "transparency" in investment arbitration in 2002 following a television documentary entitled "Trading Democracy"); Legum, *supra* note 58, at 73 (describing his 2001 remark that "for traditionally open and democratic governments like the United States, litigating issues of public concern in secret before an arbitral tribunal was simply unacceptable" as being "received as a radical manifesto" within the international arbitral community).

Yet these assumptions were squarely challenged by new participants who drew comparisons with public law, international trade law and international human rights law. The broadening and diversification of participants in the investment treaty field has resulted in two significant changes.

First, states and arbitral tribunals have responded to the above legitimacy critiques by adopting various reforms aimed at increasing the transparency of, and the potential for non-disputing party participation in, investment treaty arbitration. For instance, the first tribunal to allow amicus briefs, *Methanex v. United States*, did so after stressing the public nature of the dispute and drawing comparisons with the practice of the Iran-US Claims Tribunal, WTO panels and domestic courts.¹⁸³ The NAFTA states announced that they would publish all documents submitted to or issued by NAFTA tribunals and that they supported public participation in NAFTA arbitrations, recommending procedures for tribunals to adopt in dealing with submissions from non-participating parties.¹⁸⁴ The ICSID Arbitration Rules were amended to permit tribunals to accept submissions from non-disputing parties, to permit hearings to be opened (subject to the disputing parties' objections) and to require publication of excerpts of the legal reasoning of the awards.¹⁸⁵ By adopting mechanisms to increase public awareness of and participation in investment treaty arbitration, states have shifted perceptions of the system's nature along the private/public law spectrum and provided a solid platform for future public law arguments and critiques to be made within the context of arbitral disputes.

Second, the field is witnessing a battle between those currently perceived as forming the arbitration "in crowd" and those traditionally viewed as "outsiders." A good illustration of this clash can be found in reactions to a 2010 public statement issued by around 50 academics that was strongly critical of the existing investment treaty regime.¹⁸⁶ The signatories had diverse backgrounds ranging from public international law, public law, global administrative law and human rights law, on the one hand, to economics, political science, international relations, development studies and sociology, on the other. They argued, *inter alia*, that: investment protection is a means to the end of advancing public welfare and must not be treated as an end in itself (rejecting narrow human rights analogies); states have a fundamental right to regulate on behalf of the public welfare and that this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose (embracing public law analogies); and private citizens, local communities and civil society

¹⁸³ *Methanex*, Decision on Amicus Curiae, *supra* note 31, paras. 29-34.

¹⁸⁴ *Notes of Interpretation*, *supra* note 47; NAFTA Free Trade Commission, *Statement of the Free Trade Commission on non-disputing party participation* (Oct. 17, 2003).

¹⁸⁵ ICSID Arbitration Rules, Rules 32(2), 37(2), 48(4). Negotiations are also underway about whether the UNCITRAL Rules should be modified when applied to investor-state disputes. See UN Comm'n on Int'l Trade Law [UNCITRAL], *Settlement of Commercial Disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration: Note by the Secretariat*, U.N. Doc. A/CN.9/WG.II/WP.169 (Dec. 13, 2011).

¹⁸⁶ Public Statement on the International Investment Regime, Aug. 31, 2010, available at http://www.osgoode.yorku.ca/public_statement.

organizations should be able to participate in investment arbitrations that concern their rights and interests (embracing public law and international public law analogies).

This statement received a hostile reaction from many investment treaty arbitration lawyers, with a commonly voiced criticism being that the signatories lacked relevant expertise in investment treaty law and arbitral practice. For instance, Todd Weiler (an investment treaty arbitration specialist) stated that: “I’ve seen the list [of academics who signed the statement]. I see four professionals I recognize as having expertise in investment arbitration policy and only one who has substantive dispute settlement experience. I think that fact speaks for itself.”¹⁸⁷ But, as Van Harten (one of the signatories and a notable critic of the system) countered: “decisions of investment arbitrators warrant attention by ‘outsiders’ precisely because outsiders do not have a direct career interest in the system’s perpetuation and entrenchment.”¹⁸⁸ Moreover, he argued that there is a pressing need for experts in public health, public contracting, utilities regulation and development economics to turn their attention to the system because investment treaty disputes often implicate these issues, yet, “[i]n these and other areas of public policy, investment law practitioners too often have a limited background and perspective.”¹⁸⁹

This dispute starkly illustrates current debates within the field about what counts as relevant expertise and appropriate credentials for critiquing the investment treaty system: in depth knowledge of investment treaty law and involvement in investment treaty arbitration or broader knowledge of public policy issues implicated by investment treaties and financial independence from the arbitral system? This battle can be readily understood through Koskenniemi’s conception of competing claims to expertise¹⁹⁰ and Bourdieu’s conception of symbolic capital.¹⁹¹ But it also raises questions about strategic engagement with the field. This is because, although the public law perspective has proved highly fertile within academia, it has made less significant inroads into practice where public law expertise is not generally considered essential for either advocates or arbitrators.¹⁹²

¹⁸⁷ Statement of Todd Grierson Weiler, *quoted in* Tom Toulson, *Investment treaty arbitration is ‘unfair’, say academics*, GLOBAL ARB. REV., Sept. 10, 2010. Other examples appeared on OGEMID (Oil-Gas-Energy-Mining-Infrastructure Dispute Management) Listserv, Sept. 1, 2010, <http://www.transnational-dispute-management.com/ogemid/>, but the list-serve’s rules prevent me from repeating those observations here.

¹⁸⁸ Gus Van Harten, *Academic Experts Call for Reform to Investment Treaties*, TRIPLECRISIS, Oct. 1, 2010, <http://triplecrisis.com/reform-of-investment-treaties/>.

¹⁸⁹ *Id.*

¹⁹⁰ *See supra* note 72.

¹⁹¹ *See supra* note 67.

¹⁹² Stern, *supra* note 139, at 186 (arguing that the “roster [of investment treaty arbitrators] should comprise more academics, more lawyers with a public law background and, undoubtedly, more women . . . There should also be a greater number of lawyers from countries other than the member states of the Organization of Economic Co-operation and Development And why should arbitrators not come from the ranks of NGOs?”).

If public lawyers were able to successfully re-characterize the investment treaty system as a form of international judicial review, not only would public law principles assume greater importance within the field, but so too would those individuals who could credibly claim public law expertise. This would have a circular effect, representing either a virtuous or vicious cycle, depending on one's viewpoint. Imagine how different the investment treaty arbitration market would look if every team of advocates and every arbitral panel were perceived as requiring public law expertise. And then consider the potential impact of such expertise on the field's jurisprudence and how this, in turn, would affect the perceived importance of public law expertise in future cases and so on. In the long run, these scholar's current claims to authority based on their independence from the system may limit their ability to change the system from within by accepting positions as advocates and arbitrators.

3. *Changing Nature and Interests of Tribunals*

It is too early to tell if the field of arbitrators is diversifying. States have less control over who gets appointed to investment tribunals than they do for most international courts because the arbitrators are selected by the disputing parties and appointing institutions rather than the treaty parties. This may partly explain the high percentage of private practitioners appearing as investment arbitrators compared with other international courts and tribunals.¹⁹³ As the public international law and public law consequences of investment treaty arbitration become clearer over time, we can expect growing demand by states for the appointment of arbitrators with backgrounds in these areas. States can exert direct influence over whom they appoint as their party-appointed arbitrators, and they may also be able to exert indirect influence over who is perceived to be an appropriate "neutral" by appointing institutions such as ICSID. However, the arbitral community seems likely to remain significantly – and possibly predominantly – constituted by those with a commercial background for some time to come.

While many of these arbitrators may approach the field with a default commercial arbitration template, a critical mass of opposing perspectives now exists to challenge and critique these views. Moreover, arbitrators may have a strategic interest in trying to accommodate changing dynamics within the field.¹⁹⁴ Some commentators argue that arbitrators have an actual or perceived bias in favor of investors given the asymmetrical nature of investment treaty arbitration. For example, Van Harten notes that because arbitrators are not tenured, they are

¹⁹³ See José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields*, 1:4 OÑATI SOCIO-LEGAL SERIES (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832382.

¹⁹⁴ On the meaning of strategic action within judicial politics, see generally Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 626 (2000) (according to the strategic account: (1) judges make choices to achieve certain goals; (2) judges act strategically in the sense that their choices depend on their expectations about the choices of other actors; and (3) these choices are structured by the institutional setting in which they are made). On the application of this approach to investment arbitration, see David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 NW. J. INT'L L. & BUS. 383, 403-07 (2010).

dependent on future claims being brought by investors if there is to be continuing work for them in the field as advocates or arbitrators.¹⁹⁵ He contends that this creates an appearance of pro-investor bias because it is in the arbitrators' interests to rule broadly on jurisdictional issues and favorably to investors on merits and damages in order to increase the likelihood of future claims.¹⁹⁶ To the extent that certain paradigms are more likely to protect the interests of states than investors, some might predict that arbitral tribunals will be hostile to these approaches.

But the interests of arbitrators are complex. To start with, the incentives of arbitrators might differ depending on whether they have been appointed in a particular case, or wish to be appointed in future cases, by a claimant investor, respondent state or an appointing institution, and whether they are a relatively new or well-established arbitrator.¹⁹⁷ Leaving these intra-panel and personal dynamics to one side, even if arbitrators have a collective interest in the field growing over time, they would likely have a prior interest in the field continuing to exist.¹⁹⁸ Arguably, some developments within the field (for example, increased transparency, participation by non-disputing parties and a growing sensitivity to the need for states to have some measure of regulatory freedom) reflect mounting awareness by tribunals of the need to appreciate negative reactions by states and the public at large. If arbitrators perceive the threat of exit and recontracting by states to be significant, they will have increased incentives to accommodate states' preferences, including as to paradigms and analogies.

While the interests of arbitral tribunals may shift over time, this may not occur swiftly enough to satisfy states. Some arbitrators may be too imbedded in a commercial arbitration paradigm; others may value gaining short-term appointments over the system's longer-term viability. If states wish to more significantly affect the approaches taken by investment tribunals, they can do this not just by amending the substantive treaties, but also by changing the way in which these tribunals are constituted. The treaty parties could give themselves the power to appoint arbitrators, possibly subject to a veto by the disputing parties, or they could require the disputing parties to select arbitrators from a pre-approved list.¹⁹⁹ States could impose requirements on the appointment of arbitrators, such as specialized knowledge of investment arbitration, public international law, international economic law or public law.²⁰⁰ They could also

¹⁹⁵ VAN HARTEN, *supra* note 3, at 172.

¹⁹⁶ *Id.*

¹⁹⁷ See Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010).

¹⁹⁸ See Roberts, *supra* note 4, at 197-98.

¹⁹⁹ On the impact of different models for the selection of arbitrators, see Bruce L. Benson, *Arbitration*, ENCYCLOPEDIA OF LAW & ECONOMICS 159, 184-86, available at <http://encyclo.findlaw.com/7500book.pdf>.

²⁰⁰ For instance, recent ASEAN investment agreements require that any person appointed as an arbitrator "shall have expertise or experience in public international law, international trade or international investment rules." ACIA, *supra* note 166, art. 35(2); ASEAN-Australia-New Zealand Free Trade Agreement art. 23(2), Feb. 27, 2009. Analogous provisions exist for the ICJ and the WTO Appellate Body.

adopt more drastic changes, such as creating a pool of quasi-permanent arbitrators, a standing investment court or a WTO-style appellate body.²⁰¹ These changes could impact upon choices of paradigm by affecting who is selected as an arbitrator, what sort of background and training these arbitrators have, and whom they are likely to view as their delegating principals.

C. Approaching the System's Adulthood

If the system's infancy was characterized by a strong reliance on commercial arbitration and narrow human rights paradigms, and its adolescence by the ascension of public international and public law approaches, what does the field's adulthood hold? I contend that, even though the relative significance of different paradigms is likely to shift over time, we should not expect one interpretive paradigm to win out over all others. As each paradigm reveals certain aspects of the investment treaty system while obscuring others, and each serves the interests of some of participants but not others, solutions to controversial issues that narrowly endorse a single paradigm are likely to be unstable as they will remain readily open to critique from other perspectives.

As the investment treaty system matures from its infancy and awkward adolescence, we can expect "between the poles" solutions to be developed that draw on a range of intra-disciplinary analogies instead of narrowly endorsing any single paradigm. Views will differ on the best balance to be struck between various paradigms with respect to any particular issue, which in turn will depend on different theories about the system's purpose and how that purpose is best achieved. In general, however, those seeking to create stable, long-term solutions within the current system should use different paradigms to identify and remedy blind spots in any given approach.

Two examples of such "between the poles" approaches might help to illustrate the point. The first picks up on the participation of amici in investment treaty arbitrations. In a relatively short period of time, the system moved from having no amicus interventions (based on a commercial arbitration paradigm) to permitting some amicus interventions (based on public international and public law paradigms). But the shift is unlikely to be complete because, in contrast to most international and domestic courts, the cost of paying for the arbitrators' time is borne by the disputing parties alone rather than the treaty parties as a whole or the community at large. This structural feature, which derives from the private law origins of the system's dispute settlement mechanism, is likely to qualify the application of public and public international law principles in the investment context.

The second example concerns the permissibility of interpretive statements. The pure commercial arbitration paradigm is unstable because it views states only as actual or potential respondents, permitting no role for interpretive statements especially in ongoing disputes. The pure public international law paradigm is also unstable because it focuses on states only as treaty

²⁰¹ For instance, the US Model BIT contemplates the possibility of a future appellate body. 2004 U.S. Model BIT, *supra* note 160, Annex D. The European Commission has also suggested using quasi-permanent arbitrators or establishing an appellate mechanism. See European Commission, *Towards a comprehensive European international investment policy*, at 10, COM(2010)343 final (July 7, 2010).

parties, permitting interpretive statements even if they seek to amend the treaty during the course of an ongoing dispute. The human rights paradigm could provide some insights about how tribunals could mediate between the dual role of states as treaty parties and respondents. And the public law paradigm could suggest the relevance of particular doctrines, such as good faith, legitimate expectations and due process, to qualify the application of interpretive statements in particular cases.

Arguably, both states and arbitrators – the two main actors forging investment treaty law – have an interest in supporting “between the poles” solutions. Many states are seeking to balance their interests as capital exporters (with a desire to protect their investors abroad) and capital importers (with a desire to protect their sovereign prerogatives). Even states that see themselves primarily as capital importers must weigh their desire to signal their interest in attracting foreign investment against their interest in protecting a meaningful degree of regulatory freedom. These conflicting internal interests help to counterbalance each other, encouraging moderation. Similarly, arbitrators should have an interest in seeking to balance the interests of both investors and states as that will be the best way of ensuring the continuation of the system and, with it, the continuation of their employment. This means making the system attractive enough to investors so that claims continue to be brought and attractive enough to states so that they remain within the system. A desire to split the baby – a common critique of arbitration – could take the form of combining multiple paradigms instead of endorsing a single one.

V. CONCLUSION

Investment treaties are truly the platypus of international law. In terms of origin, they are public international law agreements entered into by states acting in their public capacities. In terms of procedure, they permit investors to bring arbitral claims directly against states based on rules closely resembling those developed in the private international law that governs international commercial arbitrations and investor-state contracts. In terms of function, they empower privately constituted arbitral tribunals to hear cases going to the heart of states’ public, regulatory powers. And in terms of subject matter, they require a sensitive balancing of individual rights against societal interests, and economic interests against non-economic goals, in a manner reminiscent of human rights law and trade law treaties.

As with the platypus, the investment treaty system may come to be seen as a *sui generis* system that defines its own category.²⁰² But its identity will have been forged in large part by comparisons being drawn between it and other legal disciplines. This Article captures and critiques the role that the five most common interpretive paradigms are playing in attempts to understand the nature of the investment treaty system. It provides a schema for analyzing what these approaches reveal and obscure about the system and how they can be combined in order to check each other’s blind spots or support certain proposals for reform. This Article provides an

²⁰² The platypus came to be identified as a monotreme, a rare type of mammal that lays eggs. See <http://en.wikipedia.org/wiki/Monotreme>.

architectural framework and interest-based analysis for understanding how the investment treaty system is being constructed through resort to intra-disciplinary paradigms.

In doing so, this Article serves a number of purposes. First, it aims to speak to people inside and outside the present investment treaty system. Participants within the field often adopt a particular paradigm as though it were self-evident, leading to a certain myopia and tendency for participants to talk past each other. By identifying multiple paradigms and exposing the assumptions underlying them, I hope to make those engaged in the field more self-conscious about their own approaches and the influence of their interests and backgrounds, as well as more able to see that the system can be viewed in other ways. To those who are currently not engaged with the system, I seek to show that the field has significant connections with a wide range of other legal areas and would benefit from the insights of a broader range of actors with more varied backgrounds.

Second, it demonstrates the analytical value of dissecting existing and future debates within the field by reference to an underlying clash of paradigms. I have sought to demonstrate that many splits on controversial issues reflect different underlying paradigms that participants unconsciously adopt or consciously espouse. The same analytical approach can be used when analyzing emerging controversies within the field, such as:

- Ecuador has recently launched one of the first state-state arbitrations under an investment treaty, seeking an interpretation of a provision previously interpreted by an investor-state tribunal.²⁰³ As with the public international law, commercial arbitration, human rights and trade paradigms, this case raises important questions about whether investment treaties grant substantive or procedural rights to investors or their home states. As with public international law and human rights paradigms, this development also raises the issue of how the nascent state-state dispute resolution mechanism should interact with the burgeoning investor-state one.
- Recent cases launched by Philip Morris against Uruguay and Australia with respect to legislation restricting the use of trademarks, and requiring graphic health warnings, on cigarette packaging raise the question of whether investment treaty arbitration can be used to seek public law remedies (such as a requirement not to pass certain legislation or not to implement it with respect to a particular investor) or whether the field is limited to granting private law remedies (such as damages).²⁰⁴ All of the paradigms could be brought to bear in analyzing this issue, which turns not just on what remedies may be awarded but which ones are likely to be enforceable.
- Heated debate exists over the ICSID annulment procedure, with some calling for extremely limited review of ICSID awards by annulment committees (in line with the value of finality prized in international commercial arbitration) and others seeking to turn the procedure into a quasi-form of appeal (in line with the value of correctness

²⁰³ Add cite.

²⁰⁴ Add cite.

prized in public law).²⁰⁵ Debate also exists about whether the annulment process should be used simply to determine whether a given award should be annulled or whether it is also appropriate for annulment committees to criticize the underlying reasoning of the award or approach of the arbitrators even if the problems identified do not warrant annulment.²⁰⁶ The public international law and international commercial arbitration paradigms could both be useful in analyzing these issues.

Third, this Article provides a platform for participants within the field to engage in normative arguments about how the investment treaty field might be reformed. This piece takes as its premise that the current system is platypus-like in nature, with different paradigms reflecting different aspects of the beast. But this approach does not foreclose the potential for others to argue that the system should be transfigured into some other animal altogether by excising certain features or adding others. Proposals for reform (such as, for example, getting rid of ad hoc arbitration and creating a standing investment court) are likely to take the form of suggestions that the system should be modified to be more like one paradigm and less like another. By creating a framework for understanding different approaches to the field, as well as identifying the distributive impact of these approaches, this Article aims to facilitate those sorts of debates.

²⁰⁵ Add cite.

²⁰⁶ Add cite.