

Beware: Boundary Crossings (draft: Mar. 19, 2013) (citations omitted) (forthcoming as a chapter in Tsvi Kahana and Anat Schnicov, eds., Boundaries of Rights, Boundaries of State)

José E. Alvarez¹

Introduction

It has long been widely accepted that international treaty regimes, such as those governing trade, investment, or human rights, are not wholly self-contained silos separate from the rest of international law. This is clear from the references to general international law contained in the underlying treaties that give rise to such regimes as well as from the reliance on such non-treaty sources in the adjudicative “case law” produced under many of them.

Thus, the WTO’s Dispute Settlement Understanding specifically licenses WTO panelists and Appellate Body members to consult “customary rules of interpretation of public international law,”² and accordingly, WTO arbitral decisions have relied on Articles 31 and 32 of the Vienna Convention on the Law of Treaties in interpreting WTO members’ treaty obligations.³ Similarly, the roughly 3000 bilateral or regional investment protection agreements that establish the regime governing international investment often reference general customary rules concerning the treatment of aliens and the resulting case law is filled with references to that law.⁴ BITs usually enable foreign investors to claim the benefits of the “international minimum standard” (including claims for “denial of justice” should foreign investors fail to be treated with due process in a host state’s courts), for example. BITs may also incorporate references to another general source of international law, namely general principles of law as reflected in the municipal laws of countries around the world.⁵ Human rights treaties, such as the International Covenant on Civil and Political Rights, contain a rich interlay of open-ended treaty and customary law standards. Such treaties anticipate that their interpreters will read a guarantee such as the Covenant’s insistence that the “inherent right to life” be “protected by law” and not be subject to “arbitrary” deprivation, for instance, in light of pre-existing custom, namely how state practice and *opinio juris* has generally interpreted such terms.⁶ The continuous interaction between many human rights treaty instruments and customary law is reflected in the close overlap between the rights in the Covenant and those in the earlier Universal

Declaration of Human Rights (many of whose rights are widely considered to be customary and applicable to all).⁷ Human rights treaties are also widely interpreted in the context of general principles of law reflected in municipal law, so that, for example, the Covenant's prohibition on the "arbitrary" deprivation of life may be interpreted in light of what municipal law would deem to be "arbitrary."

For these reasons, Bruno Simma, former ICJ judge, has argued that the prospect that any international legal regime, no matter how detailed its own treaty rules, has no need to resort to non-treaty general sources of international law is unlikely since, thus far, none of them has managed to avoid them.⁸ Entirely self-sufficient treaty regimes, disconnected from the general rules governing treaty interpretation or the rules governing state responsibility, while conceivable, do not appear to exist. This is true because treaty negotiators find it more convenient to simply rely on existing general rules rather than seek to negotiate them from whole cloth and because all treaty regimes – and one suspects all forms of law – can scarcely anticipate the future or how new facts will reveal gaps in coverage never anticipated even by the most far-seeing treaty drafter.

For those charged with interpreting such treaties, whether members of the WTO's Appellate Body, investor-state arbitrators under BITs, or judges on regional human rights courts, the need to resort to non-treaty sources is further strengthened by the fundamental injunction under which they all operate: thou shall not render a judgment of non-liquet.⁹ International adjudicators are discouraged (if not barred) from finding that "no law" applies to a dispute or a claim properly before them. What this means is that given the innumerable legal gaps in all treaties, their interpreters must often reach outside their four corners to settle disputes. Such gap-filling is also required in order to *explain* or *justify* what they are doing. This is especially true of international adjudicators, from judges in the International Criminal Court to arbitrators presiding over investor-state claims, since they operate under the equally fundamental rule requiring issuance of "reasoned" opinions. The need for well-reasoned opinions encourages some "boundary crossings" across international legal regimes and even the occasional foray into national legal orders, if only to explain why gaps in the international rule of law do not exist. If members of the WTO

Appellate Body could not resort to the customary rules of treaty interpretation (as they are urged to do under the WTO's Dispute Settlement Understanding)¹⁰, the alternatives are limited and unattractive: they would either have to refuse to settle a dispute due to the absence of such rules or make these up as they go along, thereby encouraging predictable charges of activist "law-making" by those at the losing end of their decisions.

International adjudicators cross inter-regime boundaries, in short, because circumstances – rudimentary treaty regimes, a shared aversion to judicial findings of non-liquet, and the requirement of explaining themselves – require them to do so. They engage in cross-regime pollination for normative reasons as well. If regimes such as trade or investment were truly "self-contained" and therefore subject to gaps in coverage, this could undermine confidence in the peaceful resort to dispute settlement on which such regimes rely, while also undermining the prospects for expanding international law's reach through orderly case law development.

The likelihood of self-contained regimes is also discouraged, at least to some extent, by the ordinary rules of treaty interpretation themselves. As is well known, those rules emphasize (under VCT Art. 31(1)) interpretations based on the plain meaning of treaties, including their particular "context" and the "object and purpose" intended by their drafters.¹¹ By emphasizing their text, and even to some extent their distinct negotiating histories,¹² these rules encourage interpretations that are unique to the treaty in question. The plain meaning rule does not encourage generalized interpretations across treaty regimes; it presumes, on the contrary, that each treaty ought to be interpreted in light of its text, its context, and its own particular negotiation history.

At the same time, the rules of treaty interpretation are Janus-faced. They go beyond the plain meaning rule to require (under VCT Art. 31(3)(c)) treaty interpreters to consult "relevant rules of international law applicable among the parties."¹³ This rule is admittedly vague insofar as it does not define what is "relevant," what is a "rule" (as opposed to a norm or practice), what is meant by

“applicable” (as opposed to “binding”), or what is intended by allowing references to rules that apply “among” the parties (as opposed to rules that apply “between” them). But whatever its ambiguities, Art. 31(3)(c) clearly licenses the use of sources outside the treaty in question.

In addition, certain traditional canons of treaty interpretation point toward boundary crossings, such as the principle that, unless a treaty expressly so states, certain “fundamental” principles of international law (such as the backdrop rules of state attribution, applicable remedies when wrongful acts occur, or even specific rules such as those requiring exhaustion of domestic remedies prior to resort to international ones) should be presumed to continue to apply.¹⁴ The rules governing *lex specialis* also encourage boundary crossings. According to the International Law Commission’s oft-cited Articles of State Responsibility (which are reportedly a codification of customary rules), general rules give way to boundary demarcating *lex specialis* only when “special rules of international law” apply.¹⁵ *Lex specialis* does not apply merely because a treaty provision exists that deals with the same subject as one that is the concern of a general rule of custom or general principles. Treaty interpreters are not to presume that a treaty intends to cut off inquiry into those general rules only because it deals with the same subject as those rules. According to the ILC’s commentaries, a treaty clause is not considered to provide for *lex specialis* unless it explicitly provides for a contrary rule or specifically indicates an intent to derogate from the presumptively applicable general rule.¹⁶ Thus, arbitral or judicial rulings that a particular treaty stands apart from the general secondary rules that govern the responsibility or liability of states, for example, are rare.

To be sure, these open-ended and vague rules of treaty interpretation neither ensure nor, of course, require boundary crossings. Indeed, the plain meaning rule reflected in Article 31(1) of the VCT and its possible tool for more systemic integration, Article 31(3)(c), point in opposite directions. Neither the rules of treaty interpretation, vague as they are, nor the presumption against interpretations in violations of “fundamental” principles lead to uniform judgments about whether, for example, the precautionary principle found in international environmental instruments should be applicable to the

interpretation of the GATT covered agreements.¹⁷ Moreover, as Martti Koskenniemi has pointed out, the *lex specialis* rule is subject to a variable geometry. As he points out, there is considerable lack of clarity in the distinctions that *lex specialis* requires since every “general” rule is particular (depending on what it is compared to) and every “special” rule is general in comparable relational terms.¹⁸

As international treaty regimes have proliferated, along with adjudicative mechanisms,¹⁹ many international lawyers have grown increasingly dissatisfied with these standard approaches to treaty interpretation, and alarmed about the “fragmented” law that these rules fail to prevent.²⁰ Although what is meant by the term differs, “fragmentation” generally refers to normative conflicts involving differing interpretations of general international law (such as distinct views as to the applicable rules governing state attribution), conflicts between the general law and a particular rule that claims to exist as an exception to it (such as competing views as to whether the rules governing valid treaty reservations operate differently when it comes to reservations to human rights treaties), or differences among rules generated by different legal regimes.²¹ Many international lawyers fear the prospect of inconsistent legal conclusions among international regimes or courts.

The reasons for such fears are not hard to find. More than one President of the ICJ has suggested that international tribunals have proliferated “in an anarchic manner” with unfortunate consequences, including forum shopping, conflicting decisions, and “fragmented” law.²² Although, as some have suggested, the complaints from ICJ judges have more than a whiff of special pleading by a Court that fears losing its relevance and its control over the interpretative field of international law,²³ fears of fragmentation, particularly as a result of inconsistent decisions by international adjudicators, are hardly surprising for a field that, at least since the 19th century, has sought to instill order within an “anarchic” system precisely by appealing to inter-dependence, and the harmony of interests and global values shared by a single “international community.”²⁴ Those “present at the creation” of international institutions like the UN and the ICJ, sought, after all, to use “public” law subject to “public values” to tame or manage sovereigns. It is hardly surprising if they thought the “taming” requires consistent rules predictably

applied to all. To followers of international law's familiar progress narrative – for whom the more law the better – the prospect that increased legalization has actually produced *competing* normative systems responsive to distinct stakeholders and not a single “international community,” and subject to no overall plan or hierarchy of values or institutions, seems perverse or pathological.²⁵ Fragmenting interpretations of international law threaten, in the words of one UN report, the “credibility, reliability, and consequently, the authority of international law.”²⁶ Others, like George Downs and Eyal Benvenisti, argue that fragmented law leads to (and is the product of) inequitable law since institutional forum shopping, entailing choices as to whether to resort to “hard” or “soft” rules or “hard” or “soft” forms of enforcement, privileges richer states with the technical and other resources to engage in it.²⁷

The perceived threats posed by forum shopping are not limited to public international lawyers. The “evils” of forum shopping and the benefits of preventing it, namely more predictable, stable, and certain rules, have been self-evident to the legal mind. They have motivated U.S. judges and legislators (who sought to limit forum shopping through, for example, the *Erie* doctrine requiring the application of state substantive law even federal courts exercise diversity jurisdiction), European regulators (who sought to unify private international law by avoiding forum shopping through certain European regulations), and private international lawyers (who sought to reduce the search for a forum with the most favorable law through certain provisions in the 1980 UN Convention on Contracts for the International Sale of Goods).²⁸ For many national and international lawyers fragmented law seems inconsistent with the rule of law itself.

Given the stakes, international lawyers have increasingly reacted to the ever rising density of the international legal space with attempts to redress what they see as the adverse consequences of proliferation and forum shopping. This has included efforts to encourage more systematic interpretations of existing international legal regimes. To many, the continued legitimacy of international law requires more boundary crossings between its regimes, including but not limited to greater efforts to use the general law to interpret the specific. Fears that the generality of the rules of treaty interpretation,

including the rules governing *lex specialis*, might not be enough to stem the prospects of fragmentation help to explain the ILC's recently concluded Study on Fragmentation.²⁹ This Study seeks to promote de-fragmentation by providing backdrop interpretative rules that would help prevent the further splintering of the international legal system. That Study encourages boundary crossings by deploying the interpretative rules noted above where possible to achieve harmonized international law across distinct sub-regimes.

Thus, the ILC urges treaty interpreters to use customary rules where possible as unifying gap-fillers where the traditional rules of treaty interpretation so permit.³⁰ More specifically, the Study recommends three ways to engage in boundary crossings in the course of treaty interpretation. It recommends that (i) where a treaty is silent on a matter, the customary rule should presumptively apply (*fall-back*); (ii) where the treaty is not silent, but the terms used are unclear and yet have a recognized meaning in customary international law, one is encouraged to interpret the treaty rule consistently with the customary rule (*harmonized fall-back*); and (iii) only where the treaty is clear and leads to a different result to the customary rule should one apply the treaty rule to the exclusion of that rule (*contract-out*).³¹ According to the ILC, these canons of treaty interpretation emerge from a faithful application of the existing interpretative principles that we have, including the requisites for applying true *lex specialis* as well as the injunction contained in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.³² According to the ILC, an apparent conflict between a treaty and a customary international rule is insufficient to rebut the “strong presumption” in favor of interpreting these two sources of international obligations consistently.³³ Adhering to this principle of harmonized interpretation is also appropriate, the Study contends, where the relevant customary rule is more specific or more clearly defined than that in the treaty, because otherwise the interpreter “would have to carry the burden of justifying that the intention of the parties was to waive these outstanding features of the customary rule when such intention is not expressly stated in the treaty.”³⁴

The ILC's Fragmentation Study also indicates that it is sometimes appropriate to apply Article 31(3)(c) of the Vienna Convention on the Law of Treaties as a basis for considering other relevant treaties

among the parties such as to arrive at a “consistent meaning” among them.³⁵ The ILC indicates that “[s]uch other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or *expresses customary international law* or where they provide evidence of the *common understanding of the parties as to the object and purpose of the treaty under interpretation* or as to the meaning of a particular term.”³⁶

“Public Law” Frameworks for Boundary Crossings

For some, the ILC’s defragmentation recommendations do not go far enough. Thus, Bruno Simma and others have recently proposed that the VCT’s Art. 31(3)(c) should be given greater scope as a real tool of systemic integration.³⁷ Bruno Simma and Theodore Kill have argued, for example, that this rule should be applied, in the context of the interpretation of a bilateral investment treaty, to license the application of not only those human rights treaty obligations to which a state host to foreign investment is subject, but also to incorporate more general (including softer) human rights “rules” that might be deemed generally “applicable” not only to the specific BIT party but “among” states generally.³⁸

A number of contemporary academic projects within the international law field can also be seen as efforts designed (at least in part) to encourage boundary crossings.

Humanity’s Law

In this volume and elsewhere, Ruti Teitel and Rob Howse articulate a vision of how boundary crossings occur among international adjudicators as well as the normative justifications for them.³⁹ Their efforts are compatible with Simma’s and Kill’s recommendations. They argue that international judges and arbitrators regularly cross regime boundaries because of a conscious or subconscious desire to affirm human rights values.⁴⁰ Teitel and Howse laud such “progressive” interpretations and praise international and national judges who reach for such interpretations even when rendered by courts or tribunals dealing with non-human rights topics (such as trade or investment) embedded in distinct legal institutions. They see such transnational judicial communications as enabling an understanding of international law, namely

as a field that protects “humanity’s law.”⁴¹ Teitel’s and Howse’s descriptive account of what international adjudicators are doing is not inconsistent with the motivations of those who are threatened by fragmentation. If, as suggested above, many international lawyers aspire to developing progressively more harmonious global values through consistent law, judges with a background in public international law may favor boundary crossings for these reasons as well as to advance human rights values. The trans-regime judicial communications that Teitel and Howse (and others) describe (and encourage) may be motivated by a shared view among the epistemic community of international adjudicators of what it takes to promote certainty and encourage stable expectations under the “rule of law.”

Global Administrative Law (GAL)

This last theme – boundary crossings justified under the rubric of promotion of “public” values – is taken up by a number of other contemporary frameworks for understanding international law in the age of globalization. Thus, the Global Administrative Law (GAL) Project, which originated among some of my colleagues at New York University School of Law, describes a world of global “inter-public” law, where states are regulated outside the confines of the traditional “sources of international law,” much like agencies regulate within the nation state, whether through formal international organizations, collective action by transnational networks of government officials, hybrid public/private partnerships, or private institutions with regulatory functions.⁴² The prescriptive side of GAL touts the shared principles shared by all “public law,” namely the values of legality, rationality, proportionality, and fundamental rights, as well as the procedural requirements associated with “rule of law,” namely transparency, participation, reason-giving, and forms of review and accountability (including judicial review). As befits a framework that depicts myriad international regimes under a single “administrative” rubric, GAL stresses the need to view diverse international regimes, formal and informal, as addressing matters of common concern to the (international) society as a whole.

Thus, Kingsbury and Schill suggest that the international investment regime, consisting of mostly bilateral investment treaties and ad hoc investor-state arbitrations, should be seen as a *multilateral* system that seeks not only to protect investors and promote economic growth, but that should also protect “democratic accountability and participation,” promote “good and orderly state administration,” and protect “rights and other deserving interests.”⁴³ Under GAL, treaty interpreters within the investment regime ought to render BIT interpretations that are compatible and consistent with those in other relevant regimes; their statement of what values that “multilateral” regime should be seen as protecting also suggests *which* international legal regimes ought to be seen as relevant comparators by investor-state arbitrators.

GAL encourages multiple boundary crossings for international regulators, treaty negotiators, and international adjudicators. GAL argues that the continued legitimacy of investment law, including investor-state arbitral case law, as a form of “global administration” requires both horizontal and vertical boundary crossings. It emphasizes that the “good governance” and “rule of law” standards that are elaborated among investor-state arbitrators need to be consistent with those applied at the WTO, the international financial institutions, and in human rights regimes, and that these in turn should be consistent with those applied under national administrative law. The intuitions of GAL scholars are appealingly simple: *international regimes that seek to make states adhere to the “rule of law” need themselves to adhere to the rule of law*. A number of specific GAL prescriptions follow for the interpretation of investor rights as well as with respect to how investor-state arbitrations ought to be conducted. Specifically, GAL scholars applaud the cross-regime import of “proportionality” analysis, as seen in the WTO’s consideration of GATT Art. XX or in the ECJ and the “margin of appreciation” as applied in the ECHR. They urge greater harmonization of law through uniform application of the principle of transparency, that is, that investor-state arbitrators make public all arbitral pleadings and awards and admit amicus.⁴⁴ They recommend the issuance of more clearly reasoned investor-state arbitral opinions since these are required by “systemic legitimacy,” that is, the need for all adjudicators to accord

adequate consideration to prior relevant adjudicative decisions rendered in other forums and to spell out in detail the normative assumptions that they are making.⁴⁵

International Public Authority (IPA)

A comparable effort to promote cross-regime engagement appears in the Max Planck Institute's Project to examine the exercise of "international public authority" (IPA).⁴⁶ Like GAL, this project is explicitly grounded in a "public law" approach. Like GAL, it too reacts to the diverse forms of international regulation, whether or not the products are formally legally binding, not adequately described by the traditional sources of international law.⁴⁷ Like GAL, it too is concerned with the legitimacy of such efforts. But, as befits a project firmly grounded in the German public law tradition, the IPA projects limits its purview to entities (from formal and informal interstate organizations to hybrid public/private institutions) that include states as actors and play "an active and often crucial role in decision-making and policy implementation, sometimes even affecting individuals."⁴⁸

The scope of IAP is broader than GAL insofar as it includes those exercises of public authority that are "intergovernmental" as well as "administrative," but narrower insofar as it only includes formal or informal institutions in which states retain a role. IAP does not address purely private forms of regulation consisting of only multinational corporations or networks of NGOs, for example. IAP also takes what it calls an "internal" approach to law: it seeks to look at forms of public regulation that appear to have a legal impact and that therefore require normative justification, in order to make judgments about both its legality and legitimacy.⁴⁹ IAP scholars remain interested in traditional legal categories for addressing accountability and defining "law," including the principles of international legal personality and the traditional sources of international law, while also considering whether those categories require re-visiting and possibly expansion. As with GAL, the "public-ness" of the international actions examined – the fact that they may have a direct legal impact on individual rights, for example – suggest the appropriateness of certain boundary crossings. Thus, a number of the cross-cutting IAP studies identify

procedural rights that presumptively apply whenever or however the exercise of “public authority” occurs.⁵⁰ As with humanity’s law and GAL, IAP scholars are also very much concerned with whether the international exercises of public authority that they examine respect and abide by human rights.

Constitutionalization

Yet a third approach, led by mostly continental scholars, have described (and most often encouraged) international boundary crossings under the label of “constitutionalization.” These approaches tend to emphasize the inter-action between international and national legal orders and examine the legitimacy of the former through the lens of the constitutional or “rule of law” values evident in the latter (at least within liberal states in the Western legal tradition).⁵¹ Constitutionalists go beyond functionalist or realist explanations for international regimes to stress the importance of constitutional principles such as individual freedoms and collective self-determination.⁵² While some constitutionalists use this frame to explore the extent to which international legal regimes can be described as “constitutional” (because of the “constitutional” effects produced within national legal orders, for example), others use them to propose reforms for those regimes precisely to make them more like “constitutional” either in effect or in terms of procedures.⁵³ For yet others, constitutionalization is a tool of critique. Thus, David Schneidermann argues that the investment chapter of the NAFTA institutionalizes and prioritizes, as constitutions do, a particular political project, in this instance neo-liberalism (along with the peculiar property-protecting rules embedded in the U.S. legal order) – with decidedly mixed policy and democratic outcomes.⁵⁴ Schneidermann argues that the NAFTA uploads U.S. takings jurisprudence and downloads it onto polities for which it is inappropriate, namely Mexico and Canada.

A “Public Law” Recipe Book

A more recent multi-authored volume, edited by Stephan Schill, illustrates how all of these perspectives, from GAL to constitutionalization, are used to promote specific normative prescriptions for

boundary crossings within the international investment regime.⁵⁵ Consistent with the perspectives discussed above, this work is premised on the “multilateral” “public law” aspects of that regime, notwithstanding its grounding in a seemingly chaotic spaghetti soup of discrete treaties. As does GAL, this study stresses the need to distinguish “public” investor-state arbitration, for purposes of description and prescription, from “private” commercial arbitration. As do constitutionalists and IAP scholars, the authors of this work emphasize the need to treat this regime not as the product of motley group of bilateral quid pro quo treaty-contracts but as a multilateral system that ideally advances the interests of the entire international community.⁵⁶ This study agrees with GAL insofar as it sees investment protection treaties and investor-state arbitration as vehicles for the regulation of states, with constitutionalists since its authors also see the regime as constricting state actions as do constitutions, and with IAP scholars insofar as they also assume that the regime serves the public function of safeguarding a particular market ideology.⁵⁷ Accordingly, in the introduction to the study, Schill argues that international investment law needs to be reformed by drawing on insights from all of these jurisprudential frameworks.⁵⁸ He recommends that the international investment law and particularly investor-state arbitrators should seek to produce converging, not fragmenting, law that is attentive to general international law as well as the law produced by other multilateral regimes.

The specific boundary crossings recommended in this Study by its 28 authors are consistent with those elaborated by Schill and Kingsbury under GAL.⁵⁹ Generally, they recommend that investor-state arbitrators should be guided by comparable settings that engage in “international judicial review” over government action, as in the WTO and by European and Inter-American judges in regional human rights courts.⁶⁰ The study also recommends that investment lawyers and arbitrators take up the subject of “comparative public law,” to better enable other boundary crossings – not just horizontally across international regimes – but vertically, to seek comparative law insights from the administrative and constitutional law of the states where investors are located. Some of the studies suggest that national law should be taken as an interpretive guide for the meaning of vague BIT guarantees, such as guarantees of

non-discrimination or fair and equitable treatment; or that it should be used to give meaning to what constitutes a compensable regulatory taking.⁶¹

Schill's introduction argues, accordingly, that "comparative public law" (embracing both international and national public law) should become part of the "standard methodology of thinking about issues in international investment law."⁶² He contends that the resulting cross-pollination among all forms of public law would produce more nuanced solutions to interpretative questions. For Schill and many of the other authors in this study, boundary crossings justified by "comparative public law" offer many benefits and are undoubtedly progressive. The crossing of inter-regime boundaries would concretize vague investment protection treaty standards, re-balance the rights of investors and the rights of host states to regulate in the public interest, ensure consistent international investment law, ensure cross-regime consistency and mitigate the effects of fragmentation, and legitimize arbitral jurisprudence.⁶³

Schill's multi-authored study also recommends another strategy to promote boundary crossings: greater deployment of general principles of law. This third source of general international law, as is well known, is traditionally given little importance since it usually limited to a few vague injunctions drawn from the handling of tort, contract, or property claims by municipal courts. As befits a source of international obligation whose basis in the consent of states is at best tenuous and whose content is necessarily limited by the differences among systems of municipal law (and indeed the reluctance of some legal systems to consider the jurisprudence of courts as a source of law at all), most international lawyers' list of applicable general principles of law is relatively short. Most identify this category as including the some notion of laches, the principles of *nemo plus iuris, res judicata, lex posterior derogat priori, lex specialis derogat generalis*, estoppel, *ex injuria jus non oritur*, the duty to mitigate damages, and the general injunction against findings of *non-liquet*.⁶⁴

Schill and his co-authors urge us to go beyond these traditional private law categories to find more ample *general principles of public law* that can fill treaty gaps, provide an additional source of

substantive rights or obligations, or assist in the interpretation and further development of international investment law. They would urge arbitrators to find such general principles in law that may be applied between public authorities, between these and private legal subjects, as well as in the very nature of the “rule of law” itself.⁶⁵ As expanded, the general principles of public law can be used “not only to develop minimum but also maximum standards of investment protection;” the idea is that unless a BIT were to explicitly provide to the contrary, its investor guarantees would be interpreted as generally imposing duties on host states that are no more onerous than those that found under general principles of domestic public law, including the host state’s own public law.⁶⁶ General principles of international or national public law could also help settle other contentious questions that investor-state arbitrators face, such as the applicable standards and burdens of proof, standards of review over governmental action, questions of openness and transparency, and the scope of remedies. The emerging prescriptions would be comparable to those under GAL: public arbitral awards and briefs, the acceptance of amicus briefs, but also perhaps limits on arbitral remedies at least to the extent that national laws normally limit the scope of remedies available to private parties whose contracts have been breached by government action.⁶⁷

The stream of boundary crossings generated by the transformation of international investment law into a species of “public law” knows few bounds. As Schill states:

Once investment treaty standards are identified as specific public law concepts, a more refined comparative public law analysis can concretize the meaning of those concepts in specific contexts. This involves, for example, assessing to what extent domestic and international legal systems handle liability for representations made by government officials, what kind of limits the protection of property imposes on the tax legislator, or how the tensions between the protection of cultural heritage and the right to property are resolved in other public law systems. Ideally, this comparative public law approach results in the determination of general principles recognized in the principal public law systems that can be used as a source of international law in interpreting the standards contained in international investment treaties.⁶⁸

To Schill and other “public law” scholars, the resulting boundary crossings would channel investment law in “more mature” directions and render the regime “more legitimate and acceptable to states, investors, and civil society alike.”⁶⁹ As Teitel’s and Howse’s description of “humanity’s law”

suggests, these public law efforts are driven by a normative agenda: boundary crossings are needed to better protect human rights.

The rest of this chapter examines a few examples of boundary crossings gone awry and uses them to question many of the assumptions – and conclusions—reached by public law scholars.

Two Recent Investor-State Decisions

The largest group of investor-state arbitral decisions issued to date concern one state, Argentina. Most of the underlying investor claims against that state arose from measures taken by that state in the wake of its economic crisis in 2001-2002. A number of the cases arose under the 1991 U.S.-Argentina BIT. Among Argentina's defenses to these claims was its claim that all the measures that it had taken were justified under that treaty's "measures not precluded" clause which provides: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."⁷⁰ While only some BITs contain a comparable clause, investor-state decisions on the meaning of that clause have drawn considerable attention, not only because of its significance to the resolution of the Argentina cases but because of what resolution of that issue would mean for the potential for fragmentation. If that clause were interpreted as some arbitral decisions have suggested,⁷¹ as the functional equivalent of the customary defense of necessity, investor-state decisions on its meaning or application would potentially affect all international obligations unless these exclude that defense under *lex specialis*. But even if that clause were given a *lex specialis* meaning, as other arbitral decisions have suggested,⁷² should the meaning of that crucial defense – which may be relevant to other states that take measures in the wake of comparable economic crises – be read in light of comparable defenses raised by states in other regimes, such as under the WTO's Article XX?

Two recent arbitral decisions involving Argentina come to opposite conclusions on this score but are nonetheless inspired by the “public law” approaches enumerated above. In *Continental Casualty v. Argentina*, the arbitrators, apparently inspired by the need to render a “systemic” interpretation of Argentina’s defense, drew directly from WTO case law in their interpretation of the U.S.-Argentina BIT’s measures not precluded clause, its Art. XI.⁷³ The annulment ruling in *Enron v. Argentina*, on the other hand, while accepting that the same clause could be interpreted as the equivalent of the customary defense of necessity, was nonetheless inspired by the normative prescriptions of the public law approach in how it interpreted that defense.⁷⁴ In prior work, I have extensively critiqued the numerous flaws in these decisions.⁷⁵ Here I will only summarize the problems to indicate the risks of thoughtless boundary crossings, even when undertaken for “progressive” reasons.

Continental Casualty, a U.S. subsidiary of a leading financial services provider, owned and controlled CNA ART, one of Argentina’s leading providers of workers’ compensation insurance. Like other insurance companies, CNA Art maintained a portfolio of investments, including cash deposits, treasury bills, and government bonds, in Argentina. Continental claimed that as a result of Argentina’s Capital Control Regime, introduced in the wake of its financial crisis, it suffered losses in these assets totaling \$46.4 million.⁷⁶ In response to Argentina’s defense based on Art. XI of the U.S.-Argentina BIT, the *Continental* tribunal found that this treaty clause stated a “primary rule” that when correctly applied by a state, absolves it from any liability under the BIT.⁷⁷ It also found that since the text of Art. XI “derives from the parallel model clause of the U.S. FCN [friendship, commerce and navigation] treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947” it was “more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity . . . rather than refer to the requirement of necessity under customary international law.”⁷⁸ It therefore rejected the claimant’s contention that the ordinary dictionary meaning of the word “necessary,” i.e., something that was indispensable, was applicable in favor of the proportionality or balancing tests favored by WTO cases in applying GATT Art. XX in cases such as *Korea-Beef*.⁷⁹ Consistent with the

“public law” prescriptions noted above, that tribunal engaged in a balancing of a number of considerations, including the relative importance of the end pursued by Argentina and the contribution of the means to that end. The *Continental* tribunal determined that Art. XI should be read, as is GATT Art. XX, as absolving a state from a treaty violation if it took the “least inconsistent alternative;” that is, a state would not be able to benefit from Art. XI only if the claimant could demonstrate that the measure that it chose to take failed to make a “material or decisive contribution” to protect its essential security interests or if the state had ignored a reasonably available alternative that would either have prevented the essential security threat or had yielded equivalent relief to the measures actually taken.⁸⁰ The tribunal found that Argentina’s measures indeed had the genuine relationship of ends and means and that the claimant had failed to demonstrate that Argentina had reasonable alternatives to violating the BIT. Based on this reasoning, the tribunal denied the claimant all relief with the exception of actions that Argentina had taken with respect to treasury bills after its crisis had ended.⁸¹

Continental applied the wrong law in interpreting Article XI.⁸² The “least restrictive alternative” balancing test which *Continental* imports from the WTO is not, as that tribunal itself appears to acknowledge, either a rule of customary law or, absent considerable reimagining of the concept, a general principle of law. This is a case of regime-borrowing or boundary crossing that cannot be justified by the traditional gap-filling interpretative rules discussed at the beginning of this chapter or by the gap-filling interpretative canons outlined by the ILC’s in its Study on Fragmentation. Unlike the customary defense of necessity, the trade regime’s balancing test is not a “relevant rule” that an interpreter of the BIT is entitled to consult under Article 31(3) (c) of the Vienna Convention on the Law of Treaties.⁸³ Nor is it a fundamental rule of international law presumed to be applicable in the absence of treaty language expressly derogating from it.⁸⁴ As *Continental* appears to acknowledge, the WTO balancing test only applies in the specific context of the GATT’s unique general exceptions clause, namely its Article XX, a provision that reflects the specific object and purpose of the trade system. The GATT’s Article XX has nothing to do with the U.S.-Argentina BIT’s Article XI, and these two provisions serve radically different

purposes within the context of two very different treaty regimes subject to strikingly disparate remedial schemes.

Moreover, the sole reason offered in *Continental* (quoted above), for turning to the balancing test in WTO law is based on a serious misreading of history. While it is true that the drafters of the U.S. Model BIT (used as the basis for the U.S.-Argentina BIT) were aware of the exceptions clauses in FCNs and in the GATT, they intentionally departed from those clauses, and particularly from the GATT's approach to exceptions, when drafting the measures not precluded clause in the U.S. BIT.⁸⁵ This is evident from even the most cursory examination of the different treaty texts at issue. Article XI was not based on Article XX of the GATT which bears no resemblance to its text and which covers entirely different subject matter. Further, the text of Article XI draws from only one *sub-part* of the typical FCN's longer list of general exceptions, namely Article XX (d) of the typical modern FCN.⁸⁶ Both of those provisions address state obligations for the maintenance of international peace and security; both indicate that the underlying measures need to be shown to be "necessary" for a party to protect "its essential security interests." Those provisions resemble not the GATT's Article XX but its Article XXI, which also deals with essential security matters,⁸⁷ and which *Continental* scarcely mentions.

The only justifications that can be offered for *Continental*'s leap to trade law in the interpretation of Art. XI – one that had previously not been undertaken by any investor-state tribunal despite the frequent considerations of Art. XI in prior Argentina cases – are those offered by the public law theorists noted above: the ostensible need for cross-regime borrowings to promote systemic and harmonious law. This prescription does not consider however, the powerful reasons that can be arrayed against this conclusion. The trade case law that inspires *Continental*'s peculiarly deferential standard of proof arose under GATT Article XX, a provision that provides, in relevant part, that so long as a state does not apply its measures as a means of arbitrary or unjustifiable discrimination, it can take "necessary" measures to protect public morals or human, animal, plant life, or health or are "necessary to secure compliance with laws or regulations . . . including with respect to customs enforcement, the enforcement of monopolies . . .

the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.”⁸⁸

Article XX goes on to identify a large number of other legitimate regulatory interests far afield from essential security, including state measures to protect prison labor and obligations under commodity agreements.

GATT Article XX is akin to a provision authorizing GATT parties to regulate in the general public interest so long as they do not engage in trade protectionism. This is not at all what Article XI of the U.S.-Argentina BIT is about. The GATT jurisprudence interpreting the meaning of the word “necessary” that is deployed by the *Continental* has not been concerned with the essential security measures or actions taken pursuant to a state’s police powers that are the subject of Article XI of the U.S. BIT. The “least restrictive alternative” balancing test that *Continental* draws from GATT Article XX jurisprudence has nothing to do with security concerns and would not even be applied within the WTO itself to such matters since those matters are covered by the GATT’s very different Article XXI.⁸⁹ Indeed, GATT or WTO jurisprudence is a singularly inappropriate place to turn for guidance on how an objective measures not precluded clause like the U.S.-Argentina BIT’s Article XI should be interpreted. Given the self-judging nature of essential security determinations in the GATT, there is no WTO case law on GATT Article XXI.⁹⁰ While one other recent annulment ruling (*Sempra*) specifically found that Article XI and the customary defense were distinct defenses,⁹¹ *Continental* is the only decision rendered to date that has resorted to WTO law to interpret Article XI. Presumably no prior tribunal has made this interpretative leap because it seems obvious why drafters of the U.S. BIT consciously omitted a “general exceptions” clause like the GATT’s Article XX or even the full exceptions included in the FCN’s Article XXI. Unlike the GATT or even FCNs (which largely focus on trade in goods), the protections extended by U.S. BITs extend far beyond discouraging protectionist measures that discriminate against traders of goods. The guarantees of fair and equitable treatment, full protection and security, the international minimum standard and other protections owed aliens under customary international law, the umbrella clause, the free transfers guarantee, and the right to prompt, adequate and effective compensation upon expropriation,

all provided to investors in U.S. BITs, are absolute (non-relative) guarantees that may be violated even if these actions are not discriminatory. Avoiding discriminatory actions are only one goal of BITs. By contrast, the GATT's Article XX attempts only to discourage government actions that discriminate against foreigners. In the context of the GATT, it makes sense to attempt to carve out general types of non-protectionist regulation. It makes no sense, however, to have a general exception for public policy measures applicable to the U.S. BIT as a whole because such a general exception would be inconsistent with respect to a number of the BIT's substantive provisions. It simply makes no sense, for example, to preclude liability for a governmental expropriation simply because a government takes a measure that is on balance, necessary, to serve a public purpose under Art. XI when the same treaty provides that governments must pay prompt, adequate and effective compensation even for takings that serve a public purpose.⁹²

Continental's error in turning to WTO law is made worse by a second mistake of law. It concludes, based on a dictum rendered in the course of another recent annulment ruling, that Article XI is a "primary" rule obviating consideration of any of the substantive provisions of the BIT.⁹³ The sole rationale offered for this extraordinary conclusion is a simplistic side-by-side comparison of the texts of Article XI versus that of Article 25 of the Rules of State Responsibility (which codifies the customary defense of necessity).⁹⁴ In doing so, the *Continental* ruling ignores the traditional rules of treaty interpretation requiring an effort to parse the actual language, context, and object and purpose of Article XI and the U.S.-Argentina BIT in which it is embedded.⁹⁵ The tribunal in *Continental* does not consider that Art. XI, by its terms and consistent with the object and purpose of a treaty that seeks to protect the rights of foreign investors and seeks to give them the better of any rights conferred under national, international or contractual law, merely precludes a state from "taking" certain measures. It ignores the fact that Art. XI was never intended to be a total excuse from financial liability under the BIT. It makes no sense to treat Art. XI as a "primary rule" excusing all liability when the same treaty explicitly anticipates continuing obligations by a state to an investor not to discriminate even in the wake of crisis,

namely in cases involving “armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events.”⁹⁶ For all these reasons, *Continental*’s interpretation of Article XI conflicts with the text, context, and object and purpose of the U.S.-Argentina BIT.

Continental also suggests another one of the possible hazards of cross-regime borrowing: the risks of getting the borrowed law wrong. *Continental*’s misguided effort to apply WTO jurisprudence ignores the text and context of GATT Article XX itself. The WTO has developed its unique interpretation of what a “necessary” measure entails pursuant to a two-tier process that *Continental* does not even address. A party invoking GATT Article XX must prove that its measure falls within one of the enumerated exceptions of XX (a-j) but it must also prove that its measure is applied consistently with the chapeaux of Article XX which requires a showing that measures are not arbitrary or discriminatory. This two-tiered standard is actually the one applied in the trade cases that *Continental* would have investor-state arbitrators apply. WTO panels can afford to apply their deferential “least restrictive alternative” balancing test, in other words, because in the context of GATT Article XX governments’ actions are assessed against the chapeaux clause’s requirements that even “necessary” measures need to be shown to be non-arbitrary, non-discriminatory, and are not otherwise a disguised restriction on trade. The single balancing test that *Continental* misleadingly draws from the trade regime does not stand alone; it is actually part of two balancing tests that in combination achieve the object and purpose of the GATT, namely to discourage trade protectionism. It is understandable that in the trade regime “necessary” deviates from the usual dictionary meaning of “indispensable.” *Continental* fails to consider how the chapeaux clause of GATT Article XX affects the meaning of “necessary” in that provision. But this failure also means that what *Continental* applies as “WTO law” does not even accurately reflect trade law much less investment law. The fact is that no one, not even WTO adjudicators, applies the sole balancing test that *Continental* imports to use in applying Article XI.

Article XI of the U.S.-Argentina BIT does not incorporate a “least restrictive alternative” test. It is not provision authorizing states to generally regulate in the public interest so long as its actions are not

discriminatory – as is the GATT’s Article XX. Article XI exists, on the contrary, within a broader treaty that anticipates that its provisions will continue to apply even when a state regulates in the public interest, even when its actions are non-discriminatory, and even when it takes measures in the course of emergencies.⁹⁷ While the balancing approach foreseen under the GATT’s Article XX furthers the object and purpose of that treaty insofar as trade law is concerned principally with avoiding discriminatory measures, a least restrictive alternative balancing approach simply makes no sense with respect to applying Art. XI of the U.S.-Argentina BIT, a treaty that seeks to protect property rights from national appropriation even when a state regulates in the public interest. *Continental*’s misapplication of what it calls trade law to interpret the BIT’s Article XI leaves no room for consideration of the substantive protections of that treaty, including its provisions barring arbitrary or discriminatory measures or those anticipating compensation even for expropriations that are justified by a public purpose.⁹⁸ By misconceiving Article XI as a “primary” rule that obviates consideration of the rest of the BIT, *Continental* turns a clause originally intended only to preclude a finding of wrongfulness into an excuse from any and all liability. When combined with its flawed turn to GATT jurisprudence, *Continental*’s interpretation of Article XI turns a treaty originally intended to, among other things, affirm customary protections and provide these with an effective forum for enforcement, into a pact that provides investors with *fewer* protections than they would have enjoyed under customary international law and that accords them *less effective protection* than they would have had in the days when diplomatic espousal was the only vehicle for protecting their rights.

To summarize: *Continental*’s borrowing of WTO law fails to consider the fundamental differences in object and purpose between the trade and investment regimes. The purpose of the trade regime is to encourage trade liberalization and prevent trade protectionism. To achieve these ends, the WTO dispute settlement system enables the authorization of trade retaliation by an injured state. The purpose of the trade regime is not to provide a monetary remedy to persons or entities whose property rights have been harmed, to calculate the monetary recompense for past harms, or to regulate states during

period of economic crisis – to identify but three of the purposes of the U.S.-Argentina BIT. *Continental* fails to consider that the word “necessary” in Article XI needs to be read in light of a particular treaty whose object and purpose is precisely to provide assurances to investors that their investments will be safe, *particularly* in the case of a volatile or unstable economy when investor rights are most vulnerable; that is, in situations comparable to those that faced Mexico when the United States asserted the Hull Rule.⁹⁹ *Continental* never asks whether Article XI was intended to be an all-encompassing excuse from compensation, no matter what the nature of the governmental action is, so long as that action is undertaken during a period of an economic crisis. It never considers whether such a blanket excuse was intended in the context of a treaty between a major capital exporter and a country that had repeatedly resorted to such crises to escape its obligations to foreign investors and that had indicated that it was entering into the BIT with the United States (and others) precisely to provide a credible commitment that it would no longer do so in the future.¹⁰⁰ Apparently intent on an interpretation that would promote (and reflect) “systemic integration,” *Continental* failed to interpret the treaty that it was compelled to apply.

Continental’s reliance on WTO law also failed to consider the differing remedies of the trade and investment regimes.¹⁰¹ The U.S.-Argentina BIT, like most U.S. BITs of the same period, focus on the rights of third parties who invest in host states in reliance on these treaties. The chief remedies they authorize are damages to third parties for past harms they incurred because of government action. BITs also authorize those third parties to bring such claims for damages themselves, thereby displacing the usual espousal practice dependent on intervention by the investor’s home country. BITs turn their third party beneficiaries, namely foreign investors, into a species of “private attorneys general” charged with treaty enforcement.¹⁰² The trade regime, by contrast, is more state-centric. It is structured to secure only to enable prospective relief of a particular kind as between states. Its remedies are limited to authorized tariff retaliation – namely a method of countermeasures that attempts to get states to remove their offending measures. It is also an *interstate* dispute settlement system comparable to old-fashioned diplomatic espousal in one critical sense: it anticipates that states will weigh the costs and benefits of

bringing WTO claims against each other and anticipates that some states may decide not to bring some claims because of fears of reciprocal claims or of establishing troubling legal precedents. (Indeed, this may help to explain the absence of WTO claims based on assertions of “essential security.”)

Continental’s unwarranted leap to trade jurisprudence ignores these realities. It wrongly presumes that the level of deference owed to states in an interstate dispute settlement system principally designed as a bulwark against trade protectionism should be transposed to a bilateral treaty that explicitly anticipates that nationals of both of its state parties are the intended beneficiaries, that these third party beneficiaries’ reliance will result in sunk costs, and that these non-state parties will be owed compensation for past injuries.¹⁰³

None of this suggests that it is wrong to “balance” investor and government rights in the course of interpreting a BIT. Such balancing could have been applied in *Continental* itself more properly – to determine whether the substantive rights to fair and equitable treatment of the investor under were indeed violated, for instance.¹⁰⁴ We will never know what the outcome of that balancing would have been because that tribunal short-changed that substantive inquiry by turning a measures not precluded clause into a deferential right to regulate clause. But the differences between the trade and investment regimes that were ignored in *Continental* serve as a cautionary note against seeing alleged “public law” general principles like proportionality balancing (or the “margin of appreciation”) as an all-purpose legitimating principle that can be readily applied to all parts of a BIT without adverse consequences the legitimate expectations of a regime’s stakeholders.

The problematic aspects of the annulment ruling in *Enron v. Argentina* can be more briefly discussed. That ruling, another one in the series of Argentina “crisis” cases, annulled a multi-million dollar annulment decision originally rendered in favor of Enron. The basis for this annulment turned also on the proper application or interpretation of Art. XI of the U.S.-Argentina BIT. The ICSID Enron annulment committee overturned the original award on the basis that the original panel had by failing to address certain questions under the customary defense of necessity had “failed to state the reasons on

which it is based” under ICSID Convention, Art. 52(1)(e). It also justified annulment on the basis of ICSID Art. 52(1)(b)(failure to apply the applicable law) because the panel had relied on economic experts to base a legal conclusion. In the Enron case, the original panel, as had a number of prior arbitral decisions, interpreted Art. XI in light of the customary defense of necessity as codified under the ILC’s Articles of State Responsibility, Art. 25.¹⁰⁵ That panel had decided, on the basis of the expert opinions of the economists presented by both Argentina and the claimant, that Argentina had failed to demonstrate that the measures that it had taken that had been shown to violate the BIT did not satisfy the “only way” requirement of the customary defense, and that therefore Argentina had failed to substantiate its Art. XI defense from liability.

The annulment committee, perhaps inspired by GAL advice that legitimate investor-state rulings need to be comprehensively and clearly reasoned, annulled this decision because the original panel had failed to address “a number of issues that are essential to the question of whether the ‘only way’ requirement was met.”¹⁰⁶ The Enron annulment noted that the panel had failed to consider alternatives to the literal interpretation of the “only way” requirement: namely whether a state could satisfy the defense if it adopted a measure that involved the “least grave violation of international law.”¹⁰⁷ It noted that the panel had also failed to address whether the “relative effectiveness of alternative measures” should be taken into account;¹⁰⁸ and whether this determination needs to be made at the date of the award with the benefit of hindsight or needs to take into account the information that was available to the state at the time the measures were taken.¹⁰⁹ The absence of considerations of these matters led the annulment committee to its conclusion that the panel had failed to give sufficient reasons. The annulment committee also opined that since determining the application of the customary defense of necessity involved the determinations of legal questions, it was an error to rely on the testimony of economic experts to resolve such matters.¹¹⁰ This failure led to its finding that the panel had failed to apply the applicable law while also failing to provide adequate reasoning for its conclusions.¹¹¹ The annulment found nearly identical flaws with respect to the original panel’s findings with respect to the other requisites of the customary

necessity defense. It found that the panel had not adequately addressed whether Argentina's measures seriously impaired the essential interests of other states or the international community,¹¹² and had not answered a number of interpretative questions concerning whether Argentina had "contributed" to the underlying essential security threat.¹¹³

Along the way, the annulment committee had interesting things to say about what it means to issue a reasoned award:

The Committee notes that from the material before it, the parties in their arguments before the Tribunal do not appear to have expressly identified and argued the questions set out above, which would provide an explanation for why the Tribunal did not expressly address them. A Tribunal is not required to address expressly every argument put by a party, and a Tribunal is therefore certainly not required to address arguments that have not been put by parties.

Having said that, the Tribunal is required to apply the applicable law, and is required to state sufficient reasons for its decision. In this case, a reading of the cursory reading of paragraphs 300 and 308-309 of the Award clearly suggests that the Tribunal accepted the expert evidence of Professor Edwards over the conflicting expert evidence of Professor Nouriel Roubini, to the effect that Argentina had other options available to it for dealing with the economic crisis. From this, without any further analysis, the Tribunal immediately concluded, that the measures adopted by Argentina were not the "only way."¹¹⁴

The Enron arbitrators, both in the original panel and in the annulment committee, engaged in a substantive boundary crossing – reaching from a specific treaty to general customary norm (the defense of necessity) – that is plausible and licensed by the ILC's substantive canons of interpretation. Unlike Continental's (over)reach to WTO law, this is not an instance where the interpretive leaps are necessarily wrong and themselves violate the ordinary rules of treaty interpretation. But the Enron annulment committee's ruling drew shock and scorn from the arbitration community precisely because it stretched to the breaking point the purposely narrow rationales for annulment provided in the ICSID Convention, and did so on the basis that an arbitral decision needs to contain a particular kind of reasoning, whether or not that reasoning had been articulated by the litigants.¹¹⁵ In doing so, the Enron annulment committee appears to engage in the "systemic" approach to investor-state arbitration recommended by public law

scholars, including their prescriptions as to the kind of detailed reasoning that arbitral opinions such contain. It assumed, as would public law scholars, that investor-state arbitrators need to engage in arguments and consider precedents even when these are not presented by the litigants.¹¹⁶ It assumed that even the underlying panel decision, whose conclusions on the applicability of the necessity defense was not more terse than are many of the conclusions reached in the typical ECJ ruling, was not “reasoned” enough for its taste.

Contrary to the assumptions of public law scholars, these conclusions are controversial and potentially de-legitimizing. BIT parties and investors originally turned to investor-state arbitration, in all likelihood, at least in part because it is supposed to be a party-driven adversarial process focused on solving the particular dispute and not on the making systemic precedents. The appeal of arbitration, after all, is that these characteristics make it presumptively less expensive and more expeditious than domestic courts. The Enron annulment committee, presumably in thrall to the “public law” analogy, ignored what distinguishes arbitration from other forms of adjudication. It also engaged in the kind of arbitral activism that was in all likelihood not intended by the ICSID annulment process, which was not supposed to authorize de novo appeals from findings of fact or law. But transforming by arbitral fiat the ICSID process into a full scale review mechanism that requires exceedingly detailed rulings to avoid annulment is consistent with the prescriptions of GAL and IAP scholars who insist that such plenary review is required by the “rule of law” – even if it was not deemed essential by those who established ICSID arbitration.

Whether or not the Enron annulment committee was consciously adopting the recommendations of the public law scholars discussed above, its decision certainly reflected their sentiments in other ways as well. That tribunal took the long-established customary defense of necessity and rendered it unrecognizable in an apparent effort to turn that purposely dichotomous, exceedingly narrow, and hard to prove defense from *pacta sunt servanda* into a malleable exception that “balances” investor rights and “public values.” It transformed an exceptional defense for self-preservation into far more readily

available excuse from liability that requires deference to the policy choices made by sovereigns while suggesting that a private party should have the burden of showing what those policy choices were.¹¹⁷

Although coming to different conclusions from *Continental* with respect to the applicable substantive law since it read Art. XI in light of customary and not trade law, the result in *Enron annulment* was in the end similar: it too empowers the state at the expense of investor rights irrespective of the object and purpose of the treaty at issue.

The Enron annulment ruling may be among the most expansive precedents ever rendered in deference to sovereignty – or as GAL scholars would put it, to “public values.” Unlike *Continental* whose erroneous ruling is at least limited to future applications of a single clause within a single treaty, the Enron annulment implies that the customary defense of necessity is not the exceedingly and purposely narrow excuse from international wrongfulness anticipated by long-standing custom – or by the ILC when it attempted to codify that defense in its Articles of State Responsibility. The Enron annulment’s suggested reformulation has implications for an excuse that, absent *lex specialis*, applies to all treaties, from those involving arms control to the protection of the environment. If other arbitrators or judges insist that Enron’s unanswered questions about this defense be addressed when states seek to get out of a treaty obligation, such inquiries could license much more expansive exceptions to *pacta sunt servanda*. The suggestion in Enron annulment that states might be able to assert “necessity” when this is only the least undesirable (and not the only) alternative, that they can excuse themselves from their international obligations even when they have caused the underlying crisis that provokes the state’s violation of law so long as they did not do so “recklessly” or “negligently,” or that those resisting such defensive claims have the burden of proof are risky steps to take for those seeking to uphold the international rule of law.¹¹⁸ The irony that such risks emerge from a decision ostensibly justified on the basis of the need to *promote* the rule of law through reasoned decisions in the public interest should escape no one’s attention.

“Public Law” Crossings via International Personhood

A particularly seductive method for engaging in boundary crossings, at least for international lawyers, is to resort to international legal personhood. The appeal of branding someone or some entity a “subject” of international law is irresistible for those invested in “public law.” As is clear from the IAP project discussed above, such a conclusion immediately suggests that the actions of such subjects involve “public” governance of interest to the international community. A determination of international subject-hood is tantamount to a finding of “publicness” triggering the GAL or “rule of law” values and prescriptions enumerated above. For some, a determination that X is a “subject” or an “international legal person” is shorthand for concluding that X is therefore subject to the same set of primary and secondary rules, that is, the same rights and obligations, as states. As the ICJ Advisory Opinion that originated the notion that international organizations have legal personhood indicates, that would be wrong as a matter of positive law.¹¹⁹ The ICJ concluded only that the UN had, in the context of the UN Charter, the ability to pursue a claim for a mediator who had been killed in the course of his UN duties.¹²⁰ In so ruling, the ICJ took care to examine the specific treaty-making clauses contained in the UN Charter and other evidence that the UN’s “objective” personhood, good against third parties, was intended. It noted that sending a mediator to risky places where they might be killed was indeed an anticipated task of UN agents, even though peacekeeping as such was not mentioned in the Charter. Even so the ICJ specifically warned against concluding from its conclusion that the UN was intended to be the kind of legal person that was entitled to bring a claim on behalf of damages suffered by its deceased agent that the UN was entitled to the same kind of rights and responsibilities as apply to states. It concluded that the UN was a special kind of legal person, one whose rights and responsibilities needed to be drawn based on functional necessity and grounded in its constituent instrument.¹²¹ The legal personality recognized by the ICJ in that case was not intended to establish a single category of legal personhood.¹²² The ICJ did not suggest all international legal persons necessarily enjoy rights and duties comparable to states.

These lessons have not always been heeded by courts, human rights advocates, or even the learned luminaries charged with the codification and progressive development of international law on the ILC. Consider claims brought under the Alien Tort Act in U.S. courts against corporations charged with human rights violations.¹²³ Among the most controversial questions posed by some of the courts considering these cases is whether corporations can be seen as “subjects” of international law, or “international legal persons.” The argument that they are has normally been made by human rights advocates anxious to establish liability under that U.S. law, which permits aliens to sue for “torts” in violations of the law of nations. The issue has been addressed in a number of U.S. courts, countless amicus briefs and law review articles and may even be soon addressed by the U.S. Supreme Court.¹²⁴

It is easy to see why this argument appeals from the “public law” perspectives enumerated above. ATC claims seem the embodiment of cases brought on behalf of the international community; they are meant after all to elucidate public values (such as what human rights are and who is responsible for their violation), and while private parties and not states are the focus, frequently the hand of the state is close by but not reachable due to sovereign immunity. The proponents of humanity’s law, GAL, IAP, and constitutionalism would probably argue that given the globally applicable rights in question, the international rule of law requires harmonious consistent law to resolve such questions, and that ATC cases are an ideal vehicle to promote the cross-pollination between international and domestic courts required to achieve this laudable end.¹²⁵ What better way to resolve that corporations are liable for human rights violations than to reach for a doctrine of general international law, namely personhood, that has been extended to other non-state actors, namely international organizations originally by judicial fiat?¹²⁶

As I have argued elsewhere, the attempt to use international legal personhood as a shortcut for determining the primary rules applicable to corporations is an intellectual cul de sac that distracts U.S. courts from what should be the real question, namely whether given the special nature of the corporate form (which is unlike that of individuals or states), which human rights ought to be applicable to such entities and if so, how best to do so.¹²⁷ Those of a more positivist inclination might also ask whether any

of the sources of international law (treaties, custom, or general principles) make human rights applicable to such actors. These more relevant inquiries lead to more serious questions about which reasonable people may disagree, such as whether those treaties or rules of custom that enable international criminal law to apply to private actors (such as war crimes or the Genocide Convention) also apply to corporate entities (and not merely individuals who are acting in their corporate capacity) or whether general principles of private law around the world envision civil or criminal liability for corporate actors.¹²⁸ Another relevant question, more interesting to U.S. lawyers invested in the proper interpretation of the ATC, is whether that statute requires proving that international law specifically anticipates bringing corporate claims or is it enough if U.S. tort law anticipates corporate claims.¹²⁹ None of these questions are resolved or greatly assisted by the misleading personhood inquiry.

But advocates in U.S. court are not the only ones who favor international personhood as a tool for systemic integration. The ILC recently completed a set of articles on the Responsibility of International Organizations (IOs).¹³⁰ The central conceit of that effort is that all inter-state organizations established by treaty, from an adjudicative institution such as the International Criminal Court to the International Monetary Fund, are “international legal persons” and, subject to *lex specialis*, are governed by a single set of secondary rules.¹³¹ These rules, which turn out to be remarkably similar in content and structure to those that the ILC elaborated for states in its Articles of State Responsibility,¹³² govern matters such as whether actions can be attributed to such organizations as well as the scope of remedies and excuses (like the defense of necessity) from internationally wrongful acts.¹³³ They also purport to indicate when such organizations might be liable for the acts of other organizations¹³⁴ as well as when state members of these organizations might also be liable for organizational acts.¹³⁵ These IO articles are exceedingly attractive to advocates of harmonious “public law.” They are certainly invaluable to those, like IAP scholars, who want to focus on such inter-state organizations and aspire to draw common conclusions regarding their legitimate behavior. At one blow the ILC has provided doctrinal solutions to a vast number of accountability problems that have troubled even proponents of global governance and that have only

started to be confronted by courts.¹³⁶ This ILC effort enables numerous opportunities for boundary crossings across international regimes. Thanks to the ILC, we now know, for example, that when states act jointly and “abuse” the organizational form, they might be liable, together with the organizations in question, for the wrongful acts of any of these organizations whether the wrongful act takes the form of an IMF decision to cut off funds or a WTO Appellate Body ruling.¹³⁷

This author has been a critic of this ILC effort.¹³⁸ Like some advocates for human rights claims in U.S. courts, the ILC appears to have misread the ICJ’s warning (in its Reparation opinion) not to assume that there is a one-size fits all concept of an international legal person. The ILC’s articles of IO responsibility presume that all these international legal persons are sufficiently alike that we ought to presume, unless their charters or rules provide otherwise, that they are subject to the same secondary rules with respect to wrongful behavior. This assumes that organizations as distinct as those establishing a mechanism for engaging in treaty making and resolving trade disputes (the WTO) share the same rules for liability as does one providing loans or technical assistance (the IMF), deciding boundary disputes (the ICJ), or enforcing international peace and security (the UN Security Council). It assumes, contrary to the insights of political scientists and others, that all these organizations, charged with a remarkable diversity of tasks and with differing relationships to their respective members, nonetheless operate on a single principal/agent model – and not as trustees or independent contractors, for example.¹³⁹

As the ILC itself acknowledges, its Articles of IO Responsibility partake of more than the usual share of “progressive” development as opposed to codification of actual state or IO practice.¹⁴⁰ Further, since there is no clear agreement on whether entities like the UN Security Council or the IMF are subject to human rights duties or, if so, which ones, there is no agreement on the primary obligations that apply to such organizations or even whether a single set of such rules applies to all. (Indeed, it was not until the Secretary-General settled the question by issuing a declaration on the subject followed by organizational practice in conformity with it that it became clear that the foundational rules of

international humanitarian law apply to UN peacekeepers.)¹⁴¹ Despite what the ILC has concluded, there is no clear agreement by either states or IOs that a single set of secondary rules apply to all IOs.

Whether the ILC's effort is truly progressive in the sense of advancing human rights is also a dubious proposition. As with respect to the effort to find corporations "subjects" of international law for purposes of the ATC, the ILC's effort could produce a backlash – where the ostensible new "subjects" generate *lex specialis* to the contrary, duly assisted by cooperating states that may resist being put on the same plane as either international organizations or corporations. Consider the risks posed by the example of article 13 of the ILC's articles of IO responsibility. Art. 13 indicates that an IO that "aids or assists" a state or another IO in the commission of an internationally wrongful act is responsible if it does so "with knowledge" but only if the act would be internationally wrongful if committed by the aiding/assisting organization.¹⁴² That rule accurately reflects the corresponding rule that applies with respect to states that aid or assist another state in the commission of an internationally wrongful act.¹⁴³ But is this rule really what human rights advocates would want to apply if the IMF, for example, were to extend a loan to a state with the knowledge that those funds would be used to violate a human rights treaty or to commit an international crime? I suspect that many would want to hold the IMF responsible for such an act, even if article 13's insistence on *dual* wrongfulness by both state and organization was not satisfied because the IMF, as an organization, was not bound to any underlying treaty making it subject to human rights or culpable of an international crime. Article 13 is flawed in imposing aiding and assisting secondary liability on an entity for which there is as yet no clear consensus on the applicable primary rules to which it is subject. An insistence on dual wrongfulness except insofar as there is no *lex specialis* to the contrary makes no sense when the "international legal persons" in question may not share the same primary obligations. Of course, article 13, like the other IO articles, also ignores the huge differences *among* international organizations. When dealing with an organization as endowed and powerful as the IMF, we might want to say that it should be held responsible with no separate requirement of dual wrongfulness, that is, merely if it engaged in certain heinous actions with knowledge. But we probably do not want to

say that the International Criminal Court is guilty of “aiding or assisting” states that enforce an arrest warrant issued by that Court that is later shown to have been legally flawed or illegal. In addition, we might have questions about whether the test of “knowledge” as applied to an organizational entity like the IMF should be the same as that applied with respect to a state or a court or other entity charged with a far more limited range of tasks. (We might, on the other hand, apply the same knowledge test where the organizational body is in reality the alter ego of a particular state.) For all these reasons, we should not assume that the ILC’s attempt at encouraging boundary crossings across IOs will produce “progressive” results.

Consider as well the possible human rights implications if, as some advocates of boundary crossings would recommend, investor-state arbitrators were to apply the concept of international legal personality to the corporate claimants before them. The international investment regime might be seen as a mere application of traditional diplomatic espousal, where the state parties to BITs ultimately retain the discretion to waive the rights given to investors in a particular case, to withdraw from these treaties, or to issue from time to time interpretative decisions that preclude certain claims by their own nationals. Alternatively, we might regard investment protection treaties (or some of them) as breaking entirely from such state centrality by making investors third party beneficiaries whose claims, like those of human rights claimants, are their own and should not be subordinated to the needs of states.¹⁴⁴ On this view, states would have no power to waive or terminate investor claims at their discretion. If U.S. courts were to find in ATC cases that corporations are “international legal persons” or “subjects” of international law and such rulings were heeded by investor-state arbitrators, would that not encourage findings by those arbitrators that indeed states no longer retain control over these subjects’ rights? Would that not also encourage, as some GAL scholars suggest, more two-way traffic between investment tribunals and human rights courts, where the investor property owner would be analogized, as for purposes of determining the scope of fair and equitable treatment, to a human rights claimant in the ECHR? But are either of these outcomes really what human rights advocates want?

As I have suggested elsewhere, it is not as clear that either human rights advocates or investors would be pleased by genuine two way traffic between the investment and human rights regimes. Contrary to the suggestions of some public law scholars, the fairness or other standards applied in the ECHR to individuals might not appropriately be extended to corporate investors under BITs. It is not clear after all that this was what was intended by either treaty regime. (The rights to non-discrimination enjoyed by vulnerable minority groups in Europe, for example, are hardly comparable to the non-discrimination guarantees assured to businesses under BITs, for example.¹⁴⁵) We should also worry about the subtle changes that may occur with respect to either human or investor rights if these are readily imported (and translated) by regional human rights judges, WTO adjudicators, or investor-state arbitrators.¹⁴⁶ Given the different epistemic communities from where these adjudicators come, are we sure that we want, for example, the Inter-American Court of Human Rights' case law on the duty on states to "ensure" as well as "respect" human rights to be applied (and likely transformed) by the commercial lawyers who often arbitrate investor-state claims or the trade specialists in the WTO's dispute settlement scheme? And if WTO panelists or investment arbitrators were to suggest that some of those human rights standards were not as extensive as applied to the rights of traders and investors, would human rights advocates welcome such interpretations back in regional human rights courts? This is what two-way traffic means, after all.¹⁴⁷

The boundary crossings in *Continental* or the *Enron annulment* may not produce the progressive results intended: not if these are treated as precedents establishing that states have a general license to engage in uncompensated takings of any and all property or denials of justice (even when it occurs by complete refusal to permit access to court) when they assert that they took the "least restrictive alternative." More generally, why is it necessarily "progressive" to give greater deference to state courts or administrative procedures, or a government's self-interested judgments about how best to balance private versus public rights? Was not the premise of international investment law, like that international human rights law, that governments could not be trusted to safeguard private rights and needed

supranational scrutiny to keep them in line? Surely advocates of “humanity’s law” could not have forgotten that the history of human rights has largely been about the struggle to protect the private realm from the abuses of state power?

The Questionable Premises of “Public Law”

Flaw One: Presuming Uniformity Amidst Regime Complexity

As those who examine the “rational design” of international legal institutions would be the first to remind us, the design of such institutions, including the underlying treaties and the adjudicative mechanisms used to enforce them, reflects the preferences of those who design them.¹⁴⁸ States are responsible for the proliferation of international regimes, including courts and tribunals. They choose to make only some international obligations (e.g., trade, investment, regional human rights norms) enforceable through “hard” dispute settlement while leaving other obligations (e.g., many international environmental obligations, global human rights, and labor rights) subject to “softer” enforcement tools. They license private parties to invoke only some of these dispute settlement mechanisms and the scope of delegation accorded to either “interstate” or “transnational” adjudicators varies with the regime and the degree of precision of the standards involved.¹⁴⁹ Whether an adjudicatory mechanism empowers only states or private parties to invoke them, includes relatively more binding tools of enforcement, or is subject to wide or narrow state defenses from liability reflect conscious choices that are essential to whether that regime operates as intended. The rational design of such treaty regimes is owed respect. That is what *pacta sunt servanda* means and what the ordinary rules of treaty interpretation affirm and defend.

Respecting the rational design (including boundary demarcations) of international legal regimes may encourage forum-shopping, as states or private parties search for the best forum to negotiate or arbitrate. Forum-shopping (or “regime shifting”) is not inherently an evil, particularly where the designers of the regime anticipate it – as does the Law of the Sea Convention’s “cafeteria” approach to

dispute settlement or the numerous BITs that enable private investors to choose whether to resolve their disputes in local court or in a number of arbitral mechanisms (including some that, by design, are neither transparent nor open to third party participation).¹⁵⁰ States can hardly complain if, after they authorize private parties to sue them in arbitral forums that are not transparent, not subject to amicus participation, and less costly and more expeditious precisely because they issue relatively terse judgments not subject to full-fledged review procedures, private parties actually take advantage of such procedures – as they may do under many BITs. And while forum shopping may indeed benefit the powerful and resourceful, the results are complex and not entirely in one direction.¹⁵¹

Investor-state dispute settlement was designed to avoid politicized espousal and the gunboat diplomacy by powerful states that often accompanied it, much as the WTO was intended to displace bilateral trade leverage with less partial application of law. Investor-state arbitration was also intended to empower less powerful smaller investors, even those whose claims would not have been espoused by home states intent on pursuing greater foreign policy concerns. Private and governmental power continues to play a role in all of these forums, including investor-state dispute settlement, but the normative consequences depend on how power is deployed and by whom. Lesser developed countries have themselves resorted to regime and dispute settlement forum shopping – as by raising issues in the General Assembly or other forums deemed favorable to their interests, such as the Advisory Opinion jurisdiction of the ICJ.¹⁵² Some governments may have entered into both investor-state and human rights regimes precisely in order to *strengthen* their hands vis-à-vis internal groups that might seek to undermine these, while also tying the hands of future governments that might seek to renege on such rights.¹⁵³ This is what “constitutionalization,” after all, entails.

Both horizontal and vertical boundary crossings need to be pursued with caution less they violate the very design (and intention) of the treaty regimes in question. As is suggested by *Continental*, the horizontal importation of substantive WTO law into the investor-state regime may be inconsistent with the latter. As *Enron annulment* suggests, the procedures and reason-giving evident in one

international court should not always be transposed to another international forum. Similarly, some vertical boundary crossings proposed by public law scholars are in tension with the goals of those who designed the underlying regimes. Some forums, such as investor-state arbitration under BITs, are intended to provide an alternative to the application of national law by national courts. As is well known, many of these treaties sought to provide investors with assurances to compensate for the “obsolescing bargains” that characterize foreign investment, where sunk costs are, once invested, subject to the whims of the host state’s laws, courts, and agencies.¹⁵⁴ The proliferation of investment protection treaties with binding arbitration has long been regarded as a departure from the doctrine propounded by Carlos Calvo, who insisted that foreign investors should get only the treatment available to local investors under local law.¹⁵⁵ The suggestion by some public law scholars that national administrative or constitutional law should be re-imported into the interpretation of investment treaties (by, for example, looking to ostensibly “general” principles of administrative law) comes perilously close to violating the object and purpose of such treaties by returning to the age of Calvo.

At the same time, as is indicated at the beginning of this chapter, there is considerable scope for legitimate *and legitimating* boundary crossings. If the ILC’s interpretative canons in its Study on Fragmentation are taken seriously, general international law will necessarily be needed in many cases to fill the inevitable gaps of specific treaties, for example. But even such boundary crossings, as the *Enron annulment* ruling and the ILC’s efforts on the responsibility of IOs suggest, need to be undertaken with caution to prevent damage to the general law in the course of importation.

Possibly few public law scholars would endorse the specific findings in *Continental* or *Enron annulment* or the efforts to stretch the concept of “international legal personhood” discussed above. They may be horrified by the careless lawyering involved in these instances and rush to proclaim that these are not the kind of boundary crossings that they would endorse. Public law scholars generally are likely to agree with Schill that the “relevant differences between the different regimes should not be forgotten.”¹⁵⁶ But public law scholars cannot escape responsibility for bad boundary crossings so easily. They have

elevated the supposed threats posed by fragmentation and forum-shopping and the ostensible value of boundary crossing as solution to such an extent that they can hardly claim surprise if judges or arbitrators take both threat and solution seriously. They have, more importantly, encouraged the sense that international treaty regimes are not as disparate as they seem but are actually part of a “system” of “global governance,” “global administrative regulation,” “international public authority,” or “global constitutionalism.” They encourage expectations that these regimes reflect “common public values” and they are producing ostensibly exportable substantive and procedural recipe books in pursuit of them. Whether “global administrative law,” IAP, or common constitutional norms exist as often in the real world as they do on the pages of law articles and books remains, however, a contestable proposition.

Flaw Two: Euro-centric Comparativism

If Schill’s multi-authored study is taken as symptomatic, it is striking how narrow a slice of the world is represented by the effort to engage in “comparative public law.” Virtually all the examples of “public law” in that study are taken from OECD countries and often, from an even narrower slice of those, such as a comparison of the laws of the U.S., Germany, and France. While Schill contends that it is essential that the common principles of public law sought to be applied in investor-state disputes be “broadly recognized,” he suggests that examining only a narrow slice of OECD countries is justified because BITs assume a “rights-based approach to the relation between the state and society, which is based on the rule of law and respect or individual economic rights.”¹⁵⁷ But treaties seeking to uphold certain economic rights for foreigners, and providing an international forum to enforce them, do not assume that their treaty parties share the Western rule of law tradition, nor do they seek to re-make states to conform to that tradition. The global reach of the international investment regime, in which some 180 countries have concluded at least one BIT exceeds that of the WTO’s. Any attempt to interpret this regime through a “public law” lens or to apply “general principles” to it requires a truly global comparative exercise. In a world where as many as a third of existing investment protection treaties are

between developing states and one of the largest signers of BITs is China, efforts to define “comparative public law” by looking only to a handful of Western allies is risible.

Of course, even comparisons of the public law of certain OECD countries require considerable care and judgment. It is potentially hazardous to extrapolate “general public values” from disparate practices embedded in distinct national institutions even among Western nations. While it is true, for example, that the U.S., German, and ECJ courts engage in “proportionality” analysis, there are considerable differences among the rational basis/intermediate/strict scrutiny categories used in U.S. constitutional law and the doctrines of “margin of appreciation” or subsidiarity deployed in European courts. Nor is it clear that these distinct methods of “balancing” stem from comparable concerns. International courts and tribunals have been appropriately more cautious about exporting the European “margin of appreciation” principle than have many public law scholars, some of whom appear to be suggesting that this principle, which arose as a democracy-representing principle based on counting the numbers of European democracies that engage in a particular practice, is a readily transferable form of “balancing” individual versus sovereign rights that can be applied to any portion of any BIT even when these involve Cuba or China as treaty parties.¹⁵⁸ The suggestion that this kind of “proportionality balancing” should apply to all investor rights, from fair and equitable treatment to the right to compensation upon expropriation, as well as to a measures not precluded clause or to the customary defense of necessity presumes a sameness among all of these clauses – and among BITs – that does not exist. While forms of proportionality balancing are indeed common to all forms of adjudication, that fact says nothing about whether balancing should occur with respect to more dichotomous rights or defenses, such as absolute rights to compensation under certain circumstances or the defense of necessity as codified in Art. 25 of the Articles of State Responsibility. National courts do not apply proportionality to any and all questions in willy nilly fashion. They “balance” only some rights and some defenses, compare distinct values when balancing, and accord different weights to what they balance. Why should investor rights and state defenses in BITs be treated any differently? Similarly, BITs differ, as do national

laws, with respect to the whether and when “transparency” applies.¹⁵⁹ Given these realities, public law prescriptions that “general principles of public law” or common “rule of law” values generate specific transparency outcomes for investor-state arbitrations are hard to take seriously.¹⁶⁰

Flaw Three: Presuming that Judges Should Act Like Legislators

Some of the public law scholars have elided another important distinction: they mingle prescriptions directed at adjudicators with recommendations better suited to the state treaty makers or regime designers. Public law scholars may be right that many international regimes would benefit from institutional overhaul to better accommodate the rights of sovereigns to regulate or to better protect other public values. They may be right to seek changes in the ICSID Convention, for example, to permit a full scale appellate process or amendments to specific arbitration rules to permit greater transparency and third party participation. But all too often their proposals for treaty or regime change are directed at the regimes’ adjudicators, on the assumption that these have failed to engage in the desired boundary crossings because they have failed to see the underlying “public law” concerns or have refused to abide by clearly established “general principles of public law” for extraneous reasons (such as bias).

These contentions are in tension with the innovative nature of many of the underlying public law arguments (as well as the rational design of the regimes under which these adjudicators are working). The public law frameworks enumerated in this chapter have one common characteristic: they are all recent attempts to re-frame international law in light of equally recent developments, namely the proliferation of international dispute settlement mechanisms and forums. It seems unfair to establish a “new” conception such as “global administrative law” while at the same time criticizing international adjudicators for failing to apply it.

The tensions between “legislative” and “judicial” change and the merits/demerits of “judicial activism” by national judges that have divided prominent legal philosophers like Ronald Dworkin and Jeremy Waldron are strangely absent from most of the public law literature discussed.¹⁶¹ Even within

national legal systems strengthened by hierarchical courts and established checks and balances, proponents of the rule of law differ on whether and when the legislator versus the judge should be expected to take the lead for change. Those who argue that international adjudicators – whether human rights judges or investor-state arbitrators – need to turn to GAL or IAP and engage in greater boundary crossings need to wrestle with the hard question of whether it is appropriate or legitimate to promote “progressive” change *ex post*, through judicial or arbitral processes in the course of dispute settlement, rather than *ex ante*, as through changes in the practices of host states or in changes to investment treaty standards or defenses going forward.¹⁶² Some BIT parties, as is well known, are already changing the investment protection treaties that they are negotiating, often by shrinking the domain of the investor rights accorded while expanding the “policy space” of sovereigns.¹⁶³ At the same time, some states are leaving in place their older BITs containing different rules. Other states, perhaps more anxious to signal that they remain “open” to foreign investors given their own prior histories of internal protectionist pressures, continue to negotiate more investor-protective treaties. These distinct choices by the “legislators” of the investment regime add to the “spaghetti soup” that is today’s investment “regime.”¹⁶⁴ These choices may be criticized on many grounds but they do not raise familiar complaints against “activist” adjudicators.

The assumption by public law scholars that there exists “a common core of legal principles common to all domestic legal orders”¹⁶⁵ often presumes that there is also (silent) common global agreement that these should be divined by international judges or arbitrators in the course of settling a particular dispute before them. This is inconsistent with a substantial literature as well as some evidence that international adjudicators actually differ with respect to their perceived roles.¹⁶⁶ Some arbitrators see themselves as deciding only the narrow dispute before them and not as systemic law-makers for the international community.¹⁶⁷ Contrary to some of the public law literature, the international rule of law does not indicate that they are right. The international rule of law is surely no more specific than is the national rule of law as to the proper demarcation of legislative versus judicial roles. Neither it nor the

traditional rules of treaty interpretation requires that international adjudicators should take the lead with respect to boundary crossings not currently authorized by the treaty makers. To the contrary, it may be that the international rule of law is threatened or undermined by this kind of judicial activism, especially if one believes that “if politics becomes overly judicialized, the politicization of the judiciary likely follows.”¹⁶⁸

Flaw Four: Presuming a Dichotomous Public/Private Divide

IAP scholars define their domain as any international regime involving the state as participant. They study how such “public authority” is exercised, whether through instruments directly affecting individuals or states themselves, more general instruments, or public standards.¹⁶⁹ As IAP scholars acknowledge, their efforts presume that “global governance flattens the difference between public and private phenomena.”¹⁷⁰ GAL and constitutionalist scholars flatten these distinctions for descriptive and prescriptive purposes as well. Because international regimes affect the public, they argue, they need to be regulated by “public values,” as are national administrative agencies or other mechanisms that impose constitutional values. As applied to the international investment regime, the assumed dichotomy between “public” and “private” leads to the critique that investor-state arbitration is in reality “public” adjudication that has been wrongly “privatized” and needs, at a minimum, to be reformed to incorporate the public values of transparency, participation, judicial review, and greater reason-giving.¹⁷¹ The premise is that recourse to the institutions, tools, and persons used to solve purely commercial disputes between private parties is not suited to a juris-generative process involving matters of “public” import. This borrows a page from critics of wrongful privatization, whether involving a government’s turn to “private” prisons or its use of modern day mercenaries to wage war. Public law scholars assume that certain governmental functions should not be delegated to private parties or to private processes, at least not without making those private persons/processes subject to *public forms of accountability*.

As both the IAP and GAL projects indicate, at both the national and international levels, we see an increasing resort to diverse forms of public/private partnerships, other hybrid forms of regulation and adjudication, and even increasing delegation to entirely private juris-generative mechanisms.

International governance is neither wholly private nor wholly public. Why should this hybridity of form be forced into a public/private dichotomy? Why should we presume, merely from the fact that governments remain involved in such efforts (under IAP) or from the fact that such regimes have “public” effects (under GAL) that such novel and diverse forms of regulation or adjudication must demonstrate a certain shared set of “public” characteristics? Why should hybrid public/private forms of impacting the general public or, for that matter, entirely private efforts that result in the same, all need to fit into pre-conceived molds for “public” regulation or adjudication? Governments, and the demos that they serve, obviously differ on the propriety of the delegation of “public” functions, as well as on the forms of accountability that may be required once delegation occurs. As Helen Hershkoff’s chapter in this volume reminds us, these differences may stem from different national histories and distinct abilities among nations to engage the government in tackling certain tasks.¹⁷² The public law theorists described here tend to ignore such distinctions. Their resort to an either/or choice between “public” and “private” leads many to ignore very real differences among international regimes (flaw one above), but reliance on this unrealistic divide also artificially constricts the range of possibilities for forms of accountability that may be unique to hybrid forms of governance. Why delimit the forms of accountability for such hybrids to those found in some states’ administrative law, as urged by GAL scholars, or to those that can only be found supported by engaging “comparative public law”?¹⁷³

The problematic aspects of presuming a black/white public/private divide have been suggested by, among others, Jeremy Waldron. Waldron cautions against presuming that the “rule of law” applies at the international level, to benefit states (as opposed to people).¹⁷⁴ He reminds us that people, not states, are the bearers of ultimate value, and that it would be an error to accord states (or governments or legislators or international institutions) the benefit of rule of law values, such as transparency, that

presume that they, like individuals, need be accorded the benefits of liberty or dignity.¹⁷⁵ Unlike those who would see only one kind of “international legal person” or public law scholars who suggest, for example, that the “rule of law” requires investor-state arbitrators to recognize a sovereign “right to regulate,” Waldron points out the large (if obvious) differences between states, individuals, corporations, and international institutions – and the flaw of suggesting, for example, that the “publicness” of certain agencies requires them to be treated equally or indistinguishably.¹⁷⁶ “Governmental freedom,” he writes, “is not the *raison d’être* of the ROL [rule of law]”:

The ROL does not favor freedom or unregulated discretion for the government. Quite the opposite is true; the government is required to go out of its way ensure that legality and the ROL are honored in its administration of society If official discretion is left unregulated; if power exists without a process to channel and discipline its exercise; if officials are in a position to impose penalties or losses upon individuals without clear legal guidelines, then this is not an opportunity, but rather a defect, a danger, and a matter of regret so far as the ROL is concerned.¹⁷⁷

Of course, the investment regime is intended to compel governments to respect the rule of law in the treatment of foreign investors – precisely in the sense that Waldron describes. Investor-state arbitrations impose financial liability for states that fail to respect the rule of law. Those who criticize those arbitrations on the premise that these violate the rule of law are motivated by the adverse consequences on the public welfare that may result from, for example, a determination that a certain environmental regulation violates a BIT. But the leap from those normative consequences to general prescriptions for change *ostensibly based on the rule of law* is a jurisprudential leap of judgment that requires distinct justification – and not a blithe assumption that everything that affects the public is subject to a set of public values in accordance with the rule of law.

Conclusion

The cautionary tales of boundary crossings discussed here provide a counterpoint to the public law frameworks that are emerging to explain contemporary international law in the age of legalization cum fragmentation. Unlike many who write in the “public law” vein, from GAL to IAP, this author does

not believe that boundary crossings horizontally, among international courts and tribunals, or vertically, between international and national adjudicators, are necessarily to be encouraged or applauded as part of international law's progress narrative.¹⁷⁸ Some boundary crossings are desirable, others are not. The legitimacy of the "international rule of law" does not always require them. Context matters. Nor do I believe, as scholars in the GAL, IAP or constitutional mindset apparently do, that the failure by some international adjudicators – such as investor-state arbitrators in ICSID – to engage in boundary crossings is a product of careless or erroneous legal analysis or worse still, a conscious effort to promote a (nefarious) political agenda. Further, while Downs and Benvenisti are surely correct that fragmentation and the forum shopping that accompanies and produces it are reflections of the political choices made by states, there is room for doubt about whether efforts to respect the boundary demarcations of international legal regimes invariably benefit the powerful. Fragmentation and its cousin forum-shopping can and have been used to benefit the less empowered. Forum-shopping can produce races to the top in the form of "competitive multilateralism," as well as to the bottom.¹⁷⁹ We should also question whether, even when fragmented international regimes benefit the strong, the remedy for that lies with *adjudicative* rulings that seek to escape such political outcomes. What will yet emerge from the rulings in *Continental* and *Enron annulment* remain to be seen. Such rulings may undermine, not enhance, the legitimacy of dispute settlement. They may produce backlash by states and may be a poor substitute for reforming the underlying regimes themselves.¹⁸⁰

For all these reasons, prescriptions for boundary crossings, and jurisprudential approaches that presume that these are "progressive," should be accompanied by a warning: "Beware: unintended consequences ahead."

¹ Herbert and Rose Rubin Professor of International Law, New York University School of Law. The author gratefully acknowledges the research support provided by the Fiomen D'Agostino and Max E. Greenberg Research Fund.