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

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I. INTRODUCTION

When the skin of an Australian platypus was first taken to England in the 1700s, scientists thought it was a fake. It looked like someone had sewn a duck’s bill onto a beaver’s body; one scientist even took a pair of scissors to the skin looking for stitches.1 The animal had fur and was warm-blooded like a mammal, yet laid eggs and had webbed feet like a bird or a reptile. Scientists struggled to categorize this unusual creature. Was it a bird, a mammal or a reptile? Or was it some strange hybrid of all three?

Comprehending the investment treaty system has proven just as problematic. Investment treaties are clearly creatures of public international law: they are entered into by two or more states and are substantively governed by public international law. However, they are distinct from most public international law treaties because the vast majority of them permit investors to bring arbitral claims directly against host states based on procedural rules and enforcement procedures developed largely in the context of international commercial arbitration and investor-state contracts. Accordingly, the system grafts private international law dispute resolution mechanisms onto public international law treaties.2

However, there are other ways to understand the beast based on the regulatory relationship it establishes between host states (as governors) and foreign investors (as governed). Investors are increasingly challenging specific regulatory actions (such as the denial of building or operating permits) or general regulatory measures (such as legislation concerning the economy, environment, human rights, and health and safety) that adversely affect them. Instead of being contractual disputes between private parties, these disputes concern public actions and involve public interests. Accordingly, investment arbitrations permit challenges to governmental conduct in a manner reminiscent of judicial review under domestic public law.3

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Comparisons are also drawn between the investment treaty system and other sub-fields of public international law that concern a state’s right to act and regulate domestically, like trade and human rights, which I group together as examples of “international public law.” Like international trade law, investment treaties are international economic law agreements that require a delicate balancing of economic and non-economic interests. And like certain international human rights regimes, investment treaties are inter-state agreements that regulate a state’s treatment of non-state actors within its territory and permit those actors to challenge governmental conduct before an international body.

Why are these comparisons important? Investment treaties have traditionally been short and vaguely worded, while the system as a whole is new and under-theorized. As a result, participants routinely draw on comparisons with other legal fields when seeking to fill gaps, resolve ambiguities or understand the system’s nature. This occurs at a micro level with analogies being drawn with cases and principles from related legal areas, and at a macro level with other legal fields being used as paradigms or frameworks for understanding the investment treaty system. These comparisons are important because different comparisons suggest radically different ways of analyzing concrete problems, often with outcome determinative consequences.

On a micro level, this “choice of analogies” can be seen in the use of case law and principles from other legal fields when analyzing unresolved issues in the investment field. For a substantive example, consider the interpretation of the provision in the US-Argentina BIT permitting states to take measures that are “necessary” to protect their essential security interests or maintain public order. The Enron Tribunal interpreted this provision by reference to the very strict test for “necessity” as a circumstance precluding wrongfulness under public international law.

(Stephan W. Schill ed., 2010); SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009).


law – a test that Argentina failed. The Continental Casualty Tribunal, by contrast, interpreted it by reference to the less stringent test for “necessary” governmental measures developed in trade law – a test that Argentina passed.

For a procedural example, consider whether a winning respondent state should be required to pay its own costs or whether these should be borne by the unsuccessful claimant investor. In the Thunderbird case, one arbitrator concluded that the state should bear its own costs on the basis that “[t]he judicial practice most comparable to treaty-based investor-state arbitration is the judicial recourse available to individuals against states under the European Convention on Human Rights” where “states have to defray their own legal representation expenditures, even if they prevail.” In other cases, tribunals have endorsed the principle that “the successful party should have its costs paid by the unsuccessful party, as adopted in commercial arbitration.”

On a macro-level, this “clash of paradigms” occurs in attempts to conceptualize the investment treaty system as a sub-field of public international law, a type of international arbitration, or a form of international judicial review. These lenses shape understandings of the system’s nature and its development by emphasizing certain features and empowering particular actors at the expense of others. Consider, for example, debates about whether investment arbitrations should be presumptively confidential and closed and, if so, whose consent should be required to overcome these presumptions. The paradigm adopted not only influences the answers given to these questions but helps to shape the system as a whole as more private or public law in nature, and more in the control of the disputing or treaty parties.

According to a commercial arbitration paradigm, one might reason that investment arbitrations should remain confidential and closed unless the disputing parties agree otherwise as two of the hallmarks of arbitration are confidentiality and party autonomy. A public international law framework, by contrast, brings the inter-state treaty basis of investment arbitrations into sharp focus, suggesting that these questions should be determined by the

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6 Enron Corp. & Ponderosa Assets, L.P. v. Argentina (ICSID), Case No. ARB/01/3, Award, paras. 322-45, esp. 334 (May 22, 2007).
7 Continental Casualty Co. v. Argentina (ICSID), Case No ARB/03.9, Award, paras. 189-230, esp. 192 (Sept. 5, 2008).
8 See Vadi, supra note 14, at 85-86.
9 Int’l Thunderbird Gaming Corp. v. Mexico (UNCITRAL-NAFTA Ch. 11), Award, Separate Opinion of Thomas Wälde, para. 141 (Jan. 26, 2006).
10 ADC Affiliate Ltd. & ADC & ADMC Mgmt. Ltd. v. Hungary (ICSID), Case No. ARB/03/16, Award, para. 532 (Sept. 27, 2006) (internal citations omitted).
intentions or wishes of the treaty parties, regardless of the disputing parties’ views. Meanwhile, a public law approach would result in emphasizing the public nature of investment disputes, suggesting that these arbitrations be presumptively public and open to participation by interested parties, such as NGOs, regardless of the wishes of the disputing or treaty parties.

What should we make of these comparisons? It is normal for people to understand the new by reference to the old, working with existing conceptual tools and maps when charting new territory. What makes this process particularly noteworthy in the investment context is the diversity of tools and maps being used. States, investors and NGOs often favor different paradigms in light of their divergent interests. The field’s arbitrators, advocates and academics come from diverse backgrounds, frequently bringing different default templates with them that result in conceptual collision. And no authoritative voice exists to resolve these differences because the system is based on thousands of bilateral treaties, which in turn are interpreted by hundreds of ad hoc tribunals, with no centralized appellate body. As a result, the investment treaty field is a conceptual mess.

A natural response to this problem is to offer a normative theory of what the investment treaty system is or should become. Such endeavors are important but, in my view, premature given the system’s rapidly changing nature, outstanding empirical questions about the effectiveness of investment treaties, and stark divisions of approach between the field’s diverse participants. Instead, this Article lays the groundwork for such efforts by creating an architectural framework for understanding competing conceptions of the investment treaty system based on comparisons with public international law, international commercial arbitration, public law, trade law and human rights. Of these, only the public law approach has been explicitly identified as an interpretive paradigm. Public international law and commercial arbitration approaches often operate implicitly, while the trade and human rights frameworks have not previously been conceptualized.

This Article draws attention to the phenomenon of choice of analogies, which occurs routinely – though often unreflectively – within the field. It demonstrates that analogies from other legal fields frequently point to diverse solutions as a result of differences in the structures, assumptions and normative commitments of their underlying paradigms. It dissects these paradigms to demonstrate that each one reveals – and, importantly, obscures – significant aspects of the investment treaty system. And it examines the way in which different participants unconsciously default to, or consciously advocate, particular paradigms in light of their diverse backgrounds and interests.

As the investment treaty field evolves from its infancy and awkward adolescence, we can expect solutions to develop that sit “between the poles” of the paradigms identified in this Article. The investment system exists at the intersection of multiple fields and it will not achieve adulthood until participants embrace and theorize its *sui generis*, platypus-like nature … or transfigure it into some other animal altogether. To do this, however, it is first necessary to understand the clash of paradigms underlying the system, along with the rise and fall of different actors and analogies over time.

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

Choice of analogies represents an acute, though by no means the only, manifestation of the field’s underlying clash of paradigms. When analyzing investment treaties, participants draw analogies with a wide range of legal disciplines. Different analogies often point to diverse solutions, but no meta-theory exists for resolving when to rely on any particular analogy. This is problematic because, as Dworkin argues, “analogy without theory is blind.”\(^\text{15}\) Without a theory about whether particular analogies are relevant and why one should be chosen over another, analogies becomes “a way of stating a conclusion, not a way of reaching one.”\(^\text{16}\) Although not unique to this field, a number of factors make this phenomenon particularly noteworthy here.\(^\text{17}\)

A. Analyzing the System

First, analogical reasoning is rife because the investment treaty system is new and hybridized.\(^\text{18}\) When a field is young, it is common for many issues to remain unresolved, leading participants to draw analogies with more established legal disciplines in seeking to provide content and form to the new field.\(^\text{19}\) Such borrowing is particularly likely when the field derives from, or represents a hybrid of, more mature legal disciplines, as is evident with other fused areas like international criminal law. Investment treaties also lie at the fault line of many


\(^{16}\) *Id.* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) (“For analogical reasoning to operate properly, we have to know that A and B are ‘relevantly’ similar, and that there are no ‘relevant’ differences between them.”). *See also* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 933 (1996).


\(^{18}\) As Thomas Wälde has observed, investment treaty arbitration is a “novel hybrid/mixed form” of dispute settlement that, during its infancy, has had frequent “recourse to other, external sources of law.” Thomas Wälde, *The Specific Nature of Investment Arbitration*, in *NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW* 43, 118 (Philippe Kahn & Thomas Wälde eds., 2007).

\(^{19}\) For example, the law of non-international armed conflict was given content largely based on the assumption that the laws applicable in international armed conflict applied by way of analogy. *See* Sandesh Sivakumaran, *Re-envisioning the International Law of Internal Armed Conflict*, 22 EUR. J. INT’L L. 219 (2011). Attempts to give content to economic and social rights often involve drawing analogies to more established rights, such as property rights and civil and political rights. *See* KATHARINE G. YOUNG, *THE TRANSFORMATION OF ECONOMIC AND SOCIAL RIGHTS* (forthcoming 2012).
problematic dichotomies, such as public and private law and international and domestic law, thus providing considerable scope for drawing diverse analogies.

Second, investment treaties have traditionally been brief and broadly worded, leaving many gaps and ambiguities that are likely to be resolved through recourse to analogies. Substantively, investment treaties are creatures of public international law because they are inter-state agreements that must be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT). Procedurally, most investment treaties permit investors to bring arbitral claims directly against states based on rules developed largely in the context of international commercial arbitration and investor-state contracts. Accordingly, many substantive rules developed in public international law, and many procedural rules developed in private international law, apply directly rather than by way of analogy.

However, the VCLT interpretive rules leave considerable scope for analogical reasoning. Under Article 31(1), dictionary definitions are unlikely to provide much assistance in determining the ordinary meaning of many investment provisions, such as the obligation to ensure that foreign investments “shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security.” And resort to object and purpose provides little help as debates continue about whether investment treaties exist to protect investors and investments (which might suggest that ambiguities should be resolved in favor of investors) or to promote public welfare by increasing foreign investment (which might require investment protections to be weighed against other policy goals).

Article 31(3) of the VCLT requires interpreters to take into account subsequent agreements and practice of the treaty parties on interpretation along with “any relevant rules of international law applicable in the relations between the parties.” This last provision encourages “systemic integration” as the treaty parties are taken to incorporate customary international law and general principles of law for all questions that the treaty does not itself resolve (such as rules on state responsibility). But this is complicated when investment treaties and general international law overlap and it is unclear to what extent the former codifies, ousts or exists alongside the latter. It

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22 Interpreters may also, in certain circumstances, look to the treaty’s travaux preparatoires, but these are rarely available or helpful in the investment context given that most negotiations work off model BITs. VCLT, supra note 20, art. 32.
is also problematic when general international law rules govern inter-state relationships but it is not clear whether and, if so, how they might apply to investor-state relations.

As the VCLT rules often provide little help in resolving interpretive difficulties, investment tribunals routinely draw analogies with and from other legal disciplines. For instance:

- In defining the obligation to treat foreigner investors no less favorably than nationals “in like circumstances,” the *SD Myers* Tribunal drew comparisons with trade law jurisprudence on “like products.”

- In determining the scope of the minimum standard of treatment under NAFTA, the *Mondev* Tribunal examined the case law of the European Court of Human Rights concerning the “right to a court” as providing possible “guidance by analogy.”

- In interpreting the concept of “legitimate expectations,” the *Total* Tribunal conducted a comparative analysis of domestic public law, European Human Rights law, European Union law and public international law.

- In determining whether inter-state countermeasures were a permissible defense in investor-state disputes, the *Corn Products* Tribunal drew comparisons with the prohibition on countermeasures affecting the rights of third states under customary international law.

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

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

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

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

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

28 *Methanex Corp. v. United States* (UNCITRAL-NAFTA Ch. 11), Decision on Amici Curiae, paras. 29-34 (Jan. 15, 2001).
Third, the field’s decentralization opens the system to a myriad of competing analogies and slows down the process of convergence on a single set of accepted analogies. The system is based on thousands of (mostly bilateral) treaties rather than a single or handful of overarching multilateral treaties. These treaties are interpreted and applied by hundreds of ad hoc tribunals constituted by disputing parties, rather than a standing court constituted by the treaty parties. The decisions of one tribunal are not binding on any other, nor are they subject to any centralized form of appeal or review.

However, the system is also subject to important centripetal forces that make it possible to discuss the field as a whole. Most investment treaties were negotiated from a relatively small set of similar model BITs, making them bilateral in form but somewhat multilateral in substance. They typically contain a most-favored-nations clause that operates to extend the greatest protection offered by a state in any single treaty to the beneficiaries of all of its treaties, which has a multilateralizing effect. Many awards are made public and tribunals often engage in extensive reviews of them as persuasive (though non-binding) precedents. Disputing parties and appointing institutions closely scrutinize previous awards when deciding appointments. Arbitrators often feel somewhat constrained by their previous awards when deciding new cases and are conscious that what they say in one case could impact upon future cases and appointments.

Accordingly, the investment treaty system exists somewhere between bilateralism and multilateralism, and between ad hoc and systemic dispute resolution. My point here is not to engage in a debate about the merits of fragmentation. This in-between approach entails both risks (such as inconsistency and confusion) and rewards (such as diversity and dynamism). Instead, my aim is to highlight factors that encourage the introduction of diverse analogies and slow down the process of any single set of analogies becoming accepted as authoritative. As the field’s case law becomes more developed and settled, we are likely to witness greater recourse to internal quasi-precedents and lesser resort to external analogies with other fields. Nevertheless, the use of analogies in the field’s early cases, as well as in contemporary cases involving novel issues, plays an important role in shaping the nature of the field and its emerging case law.

B. Analyzing the Actors

Analogies do not draw themselves; rather, they are drawn by particular participants and tend to support some actors, interests and solutions over others. Once a particular analogy or paradigm has been invoked, the answer to a problem often appears obvious, but that is because the real work is done in choosing the relevant comparison and the reasons for that choice – along

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with the assumptions and value judgments it contains— are rarely analyzed. I suggest that interests and backgrounds often influence one’s choice of analogy. Cause and effect can work in both directions: sometimes participants will pick an answer that suits their interests and use it to find a supportive analogy, other times participants will pick an analogy that strikes them as a self-evident and use it to find a supposedly neutral answer.

On one level, where one “sits” in the investment treaty field can affect where one “stands” in terms of one’s choice of analogies or paradigm. Participants in investor-state arbitrations often deploy analogies in an ad hoc way to advance their interests in a particular case. Repeat players may also have an interest in supporting certain paradigms for understanding the system as a whole even if these count against their interests in a particular case because these approaches privilege their role or perspective in general. The public international law paradigm, for instance, focuses attention on the system’s treaty basis, thereby putting the treaty parties in a position of relative superiority to both investors (who are not treaty parties) and investment tribunals (who are presented as agents of the treaty parties). The commercial arbitration paradigm, by contrast, focuses attention on the disputing parties and emphasizes that the investor and host state are equal disputants, which tends to downgrade the relative significance of states and upgrade that of investors. Meanwhile, NGOs often favor the public law paradigm because it shifts attention away from the treaty parties and disputing parties towards the interests of the public at large.

On another level, comparisons to other legal fields results from the convergence of different epistemic communities of lawyers who come to the investment treaty system with distinct conceptual frameworks. Investment treaty specialists often have a background in, or dual specialization with, a related area of law, such as commercial arbitration or public international law. Certainly, not everyone coming to the investment treaty field from a particular background will share the same approach. Nor will all actors come from a single background only; many participants can plausibly claim to be experts in two or more related fields. However, acknowledging the problems of simplification and stereotyping involved in such generalizations, it seems likely that the analogies and paradigms invoked by arbitrators, academics and (to some extent) advocates are influenced by their backgrounds, training and interests.

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33 Although the background, training and interests of advocates likely play some role in their choice of analogies, these choices are also significantly influenced by the interests of their clients. As it is difficult to disaggregate these phenomena, I do not address this issue here. There is also considerable overlap between those acting as arbitrators, advocates and academics within the field, making these roles difficult to separate in practice.

34 As an empirical matter, it is difficult to prove what impact, if any, arbitrators’ backgrounds will have on their approach to investor-state disputes. Whether and to what extent arbitrators’ backgrounds or personal views play a role in their decision-making may vary between hard and easy cases, and different aspects of arbitrators’ backgrounds may pull them in different directions. For some early empirical work on the influence of arbitrators’ backgrounds on their decisions, see Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435 (2009); Michael Waibel & Yanhui Wu, *Are Arbitrators Political?* (draft, on file with author). But for criticism that we lack sufficient data from which to draw reliable statistical conclusions, see Gus
The unique marriage of public international law as the applicable law with dispute resolution rules resembling those in international commercial arbitration means that the field was historically populated by two, very different, professional communities: one from the side of public international law and inter-state dispute resolution, and the other from the side of private law and commercial arbitration. The result was a “veritable culture clash.”

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

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

Why do these divisions appear? First, familiarity breeds content. Expertise in a related legal field provides a ready source of analogies on which to draw. Arbitrators who specialize in international commercial and investment arbitration often treat commercial arbitration as a “default template” for investment treaty arbitration, readily transporting principles from one area to the other. Similar points could be made about arbitrators with backgrounds in other areas. For instance, the President in *Corn Products* was a prominent professor of public international law (and is now a Judge on the International Court of Justice) and the award drew extensively on


36 Schill, *supra* note 35.


38 Id. at 38.

international law jurisprudence,\textsuperscript{40} while the President in \textit{Continental Casualty} was a member of the WTO Appellate Body and the award drew extensively on trade law jurisprudence.\textsuperscript{41}

As the regulatory impact of the system has become more evident, other professional communities have joined the field, including those with backgrounds in public law, international human rights law, environmental law and trade law. This is particularly evident in the academic sphere where numerous scholars are articulating approaches to the investment field built upon related areas with which they are familiar, such as Schneiderman (constitutional law), Kingsbury (global administrative law), Kurtz (international economic law) and Simma (public international law and human rights). As the investment regime intersects with new domains, like European Union law, we can expect other professional communities to join the field, bringing their analogies with them.\textsuperscript{42}

Second, conceptual paradigms subconsciously influence processes of reasoning. Psychologist have observed that different metaphors suggest different ways of understanding phenomena, which lead to different inferences being drawn that are consistent with the original framing. Whether crime is described as a “virus infecting the city” or a “beast preying on the city” influences whether people suggest responding by investigating root causes and treating the problem through social reforms, or catching and jailing criminals and enacting harsher enforcement laws.\textsuperscript{43} Similar experiments have been conducted with different ways of conceptualizing electricity as being analogous to “flowing water” or a “teeming crowd.”\textsuperscript{44} Framing plays a crucial role in how people conceptualize issues and analyze problems, but its effects are typically covert as people rarely recognize the role that framing plays in shaping their reasoning.\textsuperscript{45}

The backgrounds of lawyers likewise helps to shape what framework for understanding the investment treaty system they unconsciously default to as “natural” and what frame-consistent inferences they draw as a result. Links between arbitrators’ professional experiences and their awards have been identified in other areas, such as employment and labor arbitration,\textsuperscript{46} so we

\textsuperscript{40} Corn Products, \textit{supra} note 27 (Christopher Greenwood, President).

\textsuperscript{41} \textit{Continental Casualty, supra} note 7 (Giorgio Sacerdoti, President).


\textsuperscript{44} Dedre Gentner & Donald R. Gentner, \textit{Flowing Waters or Teeming Crowds: Mental Models of Electricity}, in D. Gentner & A Stevens (eds) \textit{MENTAL MODELS} 99 (1983).

\textsuperscript{45} Gentner & Gentner, \textit{supra} note 43.

should not be surprised to observe similar effects here. Different types of training encourage participants to focus on certain issues, be sensitive to particular concerns and ask certain questions, which all work to highlight some problems and obscure others.\textsuperscript{47} This has been observed in other hybrid areas, such as international criminal law, where public international lawyers and domestic criminal lawyers clashed over different understandings of the role of law and the state.\textsuperscript{48} It can also be seen in other areas where different communities adopt different frameworks, such as human rights and humanitarian law, to analyze common issues.

Third, the clash between different analogies and paradigms reflects a struggle between competing claims to expertise. Pierre Bourdieu uses the notion of “symbolic capital” – which includes factors such as education, career, knowledge, reputation and expertise – to explain the relative power of different participants within a given field.\textsuperscript{49} How participants understand and characterize the system, including through their choice of analogies, can influence the distribution of symbolic capital. If the investment treaty system is understood as being part of public international law, those with expertise in that area will enjoy greater “symbolic capital” than if the system were understood as being part of international arbitration, international economic law or public law. Whether done consciously or not, the more one is able to shape the investment treaty system in the likeness of a related legal discipline with which one is an expert, the greater one’s comparative advantage.

In debates about fragmentation in public international law, Martti Koskenniemi notes that political intervention often takes the form of defining a situation or problem in a particular way (as, for example, a problem of human rights or humanitarian law) as particular areas of specialization have their own vocabulary, structural bias and privileged expertise. As with choices of paradigm, these choices are not neutral as:

Each such vocabulary is likely to highlight some solutions, some actors, some interests ….

Each renders some aspect of the carriage visible, while pushing other aspects into the background, preferring certain ways to deal with it, at the cost of other ways. What is being

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\textsuperscript{48} This merger of legal disciplines and professional groups resulted in conceptual collisions given that public international law is consensual, created by states and deferential to the idea of state sovereignty, whereas domestic criminal law is coercive, focused on the individual, and often suspicious of state action due to its focus on abuses of power. \textit{See Louise Arbour, Emerging Systems of International Justice}, Unpublished Lecture (June 26, 2000).

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put forward as significant and what gets pushed into darkness is determined by the choice of the language through which the matter is looked at . . . . That this choice is not usually seen as such — that is as a choice — by the vocabularies, but instead something natural, renders them ideological.\(^50\)

While much has been written about fragmentation, the investment treaty field is arguably undergoing a reverse process of convergence. The perception in the past that investment treaty law was a field of “exotic and highly specialized knowledge”\(^51\) but is now “rapidly moving mainstream”\(^52\) begs the question of which mainstream, if any, the system is joining. Characterizations of the system as a sub-field of public international law, a form of international arbitration or a type of public law represent different attempts at seizing institutional power by empowering particular types of expertise, systems of knowledge, and values.\(^53\) These mainstreaming efforts are important because participants tend to treat intra-systemic analogies and expertise as more persuasive and valuable than extra-systemic ones.

III. CLASH OF PARADIGMS: WHAT IS REVEALED AND OBSCURED

Different analogies point to diverse solutions as a result of distinctions in the structures, assumptions and normative commitments of their underlying paradigms. This Part compares five paradigms to what we know about investment treaties: they are agreements entered into by states acting in their public capacity; they contain substantive obligations about the treatment of foreign investors, without generally specifying whether these obligations create substantive rights or mere benefits for investors; and they create a procedural mechanism for foreign investors to bring arbitral claims against host states. This structure is represented graphically below, with the broken diagonal lines reflecting uncertainty over whether these treaties grant investors rights.

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\text{Investment Treaty System} \\
\text{State A (public)} \longleftrightarrow \text{State B (public)} \\
\text{Investor from State A} \quad \text{Investor from State B}
\]

Identifying which elements each paradigm brings into the foreground and relegates to the background permits useful meta-comparisons to be made, though it inevitably involves simplifications and generalizations that a more in-depth study of any single paradigm would avoid. In undertaking these comparisons, this section primarily focuses on the nature of the


parties (state/non-state), the nature of the cases (public/private) and the nature of the adjudicatory function (agency/trusteeship and dispute resolution/law making). Due to space constraints, I leave for another day comparisons on remedies and enforcement. While the selection of criteria inevitably involves some normative choices, my primary aim is to expose the structures and assumptions underlying these paradigms rather than to endorse a particular paradigm.

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

The public international law paradigm focuses on the inter-state treaty relationship and private international law paradigm focuses on the investor-state disputing relationship. (I deal here with traditional public international law concerning state-to-state rights and obligations only. I treat specialized international law regimes that concern a state’s right to act or regulate domestically and which may involve non-state actors being granted rights or benefits, such as trade and human rights, below as examples of International Public Law.) As diagrammed below, the two approaches focus on different horizontal relationships of equality and sit on opposite sides of the public/private divide, leading to numerous tensions.

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

Some tribunals have analyzed this issue under a private international law paradigm, focusing on the disputing parties as the relevant actors and their relationship of procedural equality. Under this approach, the respondent state could not effectively rewrite the rights and obligations of the underlying treaty without the investor’s consent. In Pope & Talbot, for instance, the Tribunal viewed the FTC’s interpretation as an illegitimate attempt to amend the treaty retroactively in order to interfere with an ongoing case. Other tribunals have adopted a public international law

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54 Notes of Interpretation, supra note 12.

paradigm, focusing on the states as masters of their own treaties with expansive powers to define and redefine their treaty obligations. The ADF Tribunal, for example, accepted the FTC’s interpretation stating that “we have the Parties themselves – all the Parties – speaking to the Tribunal” and “[n]o more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.”

The private international law approach is problematic because it treats states as though their only role is being actual or potential respondents in investor-state disputes, imputing to them the sole motivation of seeking to avoid liability in ongoing or future cases. The public international law approach provides a counter-balance because it focuses attention on the role of states as treaty parties with a legitimate and ongoing interest in interpreting their own treaty obligations. However, international courts and tribunals have often taken a broad approach to subsequent agreements and practice, allowing both interpretations and de facto amendments under the guise of interpretations. This is relatively unproblematic when dealing with treaties that create rights and benefits for the treaty parties only, for all of the treaty parties will have consented to the interpretation and thus are able to protect their own interests. But transplanting the same approach to the investment sphere is arguably problematic because the treaties create rights, benefits or legitimate expectations for investors.

Second, the two paradigms draw attention to different aspects of the origins of investment tribunals’ powers, which derive from the general authorization granted by the treaty parties and the specific invocation of that authority by the disputing parties who constitute the tribunal.

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

56 In addition to Article 31(3) of the VCLT, NAFTA provides that the FTC has responsibility for resolving “disputes that may arise regarding [the treaty’s] interpretation or application” and that its interpretations are binding on NAFTA tribunals. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 8, 11, 14, & 17, 1992, 32 ILM 289 & 605 (1993), arts. 1131(2), 2001(1), 2001(2)(c).

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

While it is common to analyze the relationship between treaty parties and most international courts and tribunals through principal-agency theory, the suggestion that investment tribunals are the agents of the treaty parties is more tenuous. The disputing parties constitute investment tribunals in specific cases, with the arbitrators typically being appointed by the disputing parties and/or an appointing institution. Accordingly, the treaty parties play a lesser role in determining the appointment and re-appointment of investment arbitrators. They also lack a number of control mechanisms that treaty parties enjoy with respect to many other international courts and tribunals, such as the ability to starve investment tribunals of future cases. Accordingly, investment tribunals are unlikely to view themselves primarily as agents of the treaty parties.

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

Investment tribunals differ from this commercial model because they are authorized by the treaty parties but constituted by the disputing parties. Investment tribunals cannot be viewed as agents of the disputing parties only because the disputing parties’ rights and the investment tribunal’s powers are defined and delimited by the treaty’s grant of power. This explains why some concepts that are of central importance in commercial arbitration, such as the autonomy of the disputing parties, are problematic when imported unmodified into the investment treaty context. However, investment tribunals also cannot be viewed solely as agents of the treaty parties because they are tasked with impartially resolving disputes between investors and states and enhancing the credibility of the treaty parties’ commitments, which requires a meaningful degree of independence.

Third, the two paradigms provide different models for understanding the function of investment tribunals. Following an international commercial arbitration approach, the sole or at least primary function of arbitral tribunals is the resolution of a particular dispute between the disputing parties, not the development of a substantive body of law. In international commercial arbitration, the substantive terms of the contracts vary considerably, as does the governing law. The decisions also tend not to be published. As a result, there is very little opportunity for commercial arbitral tribunals to engage in lawmaking through the creation of a body of quasi-precedent. The private international law paradigm thus focuses attention on the settlement of disputes rather than law creation.

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The situation looks different through a public international law paradigm as international courts and tribunals resolve disputes and engage in law creation. As a matter of theory, states create international law while international courts merely interpret and apply that law. As a matter of practice, however, international courts play a critical role in developing the law through interpretation and application.60 Judicial decisions are routinely looked to – by states, other courts and academics – as evidence of the content of international law. Although international law does not recognize a doctrine of precedent,61 an informal doctrine operates because most decisions become publicly available and many concern the interpretation of common obligations.

The public international law paradigm helps to explain the development of a non-binding body of precedent in the investment field. The disputing parties and arbitral tribunals are attempting to give content to common terms, which themselves are extremely vague. In order to support their arguments and findings, it is unsurprising that they resort extensively to previously published awards. This accumulation of precedents has the virtue of increasing certainty and stability for investors and states overtime. This paradigm helps to demonstrate why some issues that are relatively uncontroversial in commercial arbitration, such as the same individuals appearing as counsel in one case and arbitrator in another, are problematic in the investment context when common legal issues are at stake and awards become public.62

The public international law paradigm also explains why the development of investment treaty law depends on ongoing interactions between treaty parties (as law givers) and tribunals (as law appliers).63 A body of law is developing based on treaties drafted by states, awards rendered by arbitrators, and reactions by states in the form, inter alia, of new interpretations and new treaties. However, this interaction is more complicated than in the typical public international law scenario because of the system’s bilateral treaty basis and decentralized dispute resolution. Questions are also raised about the fairness of disputing parties having to pay for tribunals’ forays into broader jurisprudential questions where these benefit participants in the system as a whole but are not necessary for resolving the dispute at hand.

Finally, as their names suggest, the public and private international law paradigms sit on opposite sides of the public/private law divide. States entering into treaties are assumed to be acting in their public capacity as this is a uniquely sovereign act. Commercial contracts giving rise to international arbitration, by contrast, typically deal with the private rights and obligations of private parties (like individuals and companies) only. In some cases, international commercial arbitration also occurs between a private party and a state when the latter is understood to be acting in a private capacity, for instance by purchasing computers or hiring gardeners. When an

61 See Statute of the International Court of Justice, arts. 38(1)(d), 59 [hereinafter ICJ Statute].
63 See Roberts, supra note 5, at 185-95; Jan Paulsson, Avoiding Unintended Consequences, in Appeals Mechanism in International Investment Disputes 241, 244 (K. Sauvant ed., 2008).
investment contract between a private investor and a public authority is at stake, such as a concession contract for developing natural resources or the privatization of government services like water and electricity, it is difficult to characterize such contracts as purely private or public. But many such contracts have been made subject to international commercial arbitration.

Debate exists over whether investment treaty arbitration is more appropriately characterized as a form of public or private international law given its treaty basis and arbitral dispute resolution. Those who characterize it as private note the choice of dispute resolution and emphasize the conceptual similarities and practical overlap between investment contracts (subject to commercial arbitration) and investment treaties (subject to treaty arbitration). Those who characterize it as public emphasize the system’s treaty basis and the lack of similarity between investment treaty disputes and purely private/commercial disputes. As for the overlap between investment treaties and contracts, some agree that different regimes should apply (because treaties create governance regimes by covering all investors from a particular state whereas investor-state contracts exist with particular investors only) while others suggest that neither investment treaties nor investment contracts should come under the rubric of commercial arbitration. On these points, the rise of the public law critique has added new fuel to the fire.

B. The Rise of the Public Law Paradigm

Since the mid-2000s, a number of authors have argued that investment treaty arbitration should be understood as a form of international judicial review, analogous to domestic administrative or constitutional law review. To the extent that participants adopt a public or private international law approach, these paradigms tend to be implicit rather than explicit. The public law approach, by contrast, has been clearly acknowledged as a paradigm, adopted with the express purpose of influencing conceptions of and approaches to the system. However, this important critique has not yet itself been subject to much critique.

Many align the public law and public international law approaches because both fall on the same side of the public/private divide. However, the public law paradigm differs from both of the above paradigms because it focuses on vertical relationships between unequal parties (a state acting in its public capacity and a private actor subject to that state’s regulatory power) instead of horizontal relationships between equal parties. While “public” in one sense, the public international law framework deals with horizontal relations between sovereign states and thus

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65 See, e.g., VAN HARTEN, supra note 3; SCHNEIDERMAN, supra note 3; MONTT, supra note 3; INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, supra note 3.

many of the analogies that it draws upon are private in nature. By focusing on the vertical, regulatory dimension of investment treaties, the public law paradigm provides many important insights, but obscures the system’s underlying treaty basis and marginalizes the choice of arbitration as its dispute resolution mechanism.

Public Law

State A (public)  
↑  
Non-State Actor in State A  
↓  
State B (public)  
↑  
Non-State Actor in State B

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

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

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

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

67 HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).
68 See, e.g., VAN HARTEN, supra note 3, at 45-71; Van Harten & Loughlin, supra note 3, at 145-50; Kingsbury & Schill, supra note 3, at 1.
umbrella clauses in treaties (which upgrade certain contractual obligations into treaty obligations) and stabilization clauses in contracts (which require contractual compensation for certain regulatory acts), as both muddy the public/private distinction.69

Another theory, which I term the public interest theory, distinguishes public and private arbitrations based on whether they involve significant matters of public concern that transcend the private rights and obligations of the disputing parties. Debate exists over which factors are relevant for identifying a case as a matter of public concern and whether these are cumulative. Potential candidates include where: (1) liability turns on an underlying regulatory act, such as a governmental action taken to protect broader public interests like the environment, human rights or the economy; (2) the dispute concerns the provision of important public services that have often been privatized or contracted out by the government, such as the provision of water and electricity; and/or (3) the damages claim is large enough to have serious implications for the public purse.70 This approach would encompass some investor-state contractual disputes as well as many investment treaty disputes.

The public-versus-private nature of investment treaty and commercial arbitration explains why these paradigms pull in opposite directions when it comes to issues such as transparency and the participation of third parties. International commercial arbitrations are generally confidential and closed to third party participation because they are typically understood as involving private law matters that are only of relevance to the disputing parties. Investment treaty arbitration, by contrast, arguably involves public law obligations and may raise significant issues of public concern. These differences help to explain the push towards transparency and the participation of civil society as amici curiae in the investment field.71

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

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


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

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

This legitimate power to harm – which may surprise those not trained in public law – constitutes a fundamental aspect of state liability . . . . [B]ecause administrative decisions can legally encroach on citizens’ rights, harm alone cannot therefore be sufficient to establish liability. Something more than a demonstration of economic damages is needed in order to successfully demand that the government pay compensation.72

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

The public law paradigm suggests the relevance of public law principles (such as proportionality and legitimate expectations) for determining an appropriate balance between investors’ rights and other public policy goals. These should not be confused with private law doctrines, such as estoppel. A private party may be estopped from departing from a previous representation if another has relied upon the representation to its detriment, whereas a state is presumed to have the power to change its law and policies subject to the much less constraining doctrine of legitimate expectations.73 The difference between these approaches can be illustrated by two cases. In Tecmed, the Tribunal took an estoppel-like approach when holding that treaty parties have to afford investments “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment,” whereas in Saluka, the Tribunal took a more public law approach when stating that “[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”74

72 Montt, supra note 3, at 7-8 (internal quotes omitted).

73 Disputes exist over whether the doctrine of legitimate expectations protects procedural expectations only (given the general sovereign right of states to change their laws and policies) or whether it can also protect substantive expectations in narrow circumstances (such as when a specific representation is made to a narrow class). See, e.g., Paul Craig, EU Administrative Law 635–37 (2006); Søren Schønberg, Legitimate Expectations in Administrative Law (2001).

74 Técnicas Medioambientales Tecmed, S.A. v. Mexico (ICSID), Case No. ARB (AF)/00/2, Award, para. 154 (May 29, 2003); Saluka, supra note 21, para. 305.
Structurally, the public law paradigm creates a model for thinking about issues such as standards of review and deference. Investment treaty cases can turn on the appropriate balance between investor protection and the pursuit of competing public interests, such as the protection of the environment, the promotion of human rights and securing a stable economy. In adjudicating such issues, should arbitral tribunals (1) defer to the decisions of defendant states about which public policy goals are legitimate and how these should best be achieved, (2) review these decisions de novo, or (3) adopt some standard of review in between? Here, the private international law and public law paradigms pull in opposite directions.

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

By contrast, if investment tribunals are understood to be performing a judicial review function, appropriate guidance on standards of review might be drawn from a comparative analysis of public law. Constitutional democracies are premised on a separation of powers between the legislature, executive and judiciary. Even when the judiciary is empowered to review the acts of the legislature and executive, there are typically calls for it to adopt some level of deference, given the greater democratic legitimacy of the legislature and expertise of the executive. Accordingly, investment tribunals should arguably exercise some deference to the regulatory actions of defendant states as “courts in virtually all domestic legal orders exercise some deference vis-à-vis the acts of the legislator and acts of domestic regulatory agencies.”

Domestic systems frequently recognize different levels of scrutiny – such as strict, intermediate and rational basis scrutiny – with the appropriate level depending on factors such as the nature of the individual right, the purpose of the governmental measure, and the relative expertise of the decision-makers. Exercising deference does not necessitate a finding of no liability. Instead, the degree of deference adopted determines how readily tribunals will

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78 Schill, *supra* note 76.

79 Schill, *supra* note 76.
substitute their views for those of respondent states. The greater the level of deference, the more latitude states will have to exercise their governance functions; the lower the level of deference, the more power tribunals will assume and the greater will be their governance functions. Thus standards of review “directly reflect – or more precisely, define – the distribution of powers that must inevitably exist between those tribunals and the national bodies under [their] control.”

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

Although helpful in many respects, the public law paradigm elides and obscures other aspects of the investment treaty system. It ignores the underlying state-state treaty relationships because it focuses on the state-investor regulatory relationship, so it does not address public international law issues, such as the interpretive role of treaty parties. Proponents also play fast and loose with the VCLT’s rules on interpretation. For instance, some argue that because investment tribunals perform the same function as domestic courts exercising judicial review they should accordingly apply similar principles and be subject to similar constraints. But this has little textual grounding in the earlier treaties and there is sparse evidence that states understood this to be the object and purpose of investment treaties when they entered into them. Attempts to classify these public law ideas as “general principles of law” are also problematic given their decidedly Western origins.

It is also not clear whether and how certain public law principles should be applied to the international context. For instance, the justification for domestic courts adopting deferential standards of review towards the legislature and executive is based on the comparatively greater democratic legitimacy of the legislature and expertise of the executive. Yet these rationales do not always cross-apply comfortably to the investment treaty realm where respondent states may not be democratic, either at all or robustly, and may have weak executives that lack relevant policy expertise. Even when respondent states are democratic, investment treaties might have been signed to give protections to foreign investors precisely because domestic democratic processes do not adequately protect them. And given the rise of South-South BITs, does it make sense to interpret these treaties by reference to standards developed in North American and Western European?

80 Montt, supra note 3, at 15.
81 See Roberts, supra note 75, at 178; Schill, supra note 76.
Those drawing the public law paradigm also tend to overlook the importance of the treaty parties’ choice of arbitration as the dispute resolution mechanism. Unlike domestic judicial review, investment treaty arbitration permits non-state actors to help constitute the adjudicatory body, which undoubtedly affects the profile of who is appointed to such tribunals and whom these arbitrators view as their delegating principals. Instead of assuming that these results were foreseen or foreseeable by the treaty parties, public law proponents assume that the choice of arbitration was not intended to import private law concepts or approaches into the field or that, if it was, this was a mistake that should be rectified by the introduction of an international investment court.\(^8^3\)

**C. The Emergence of International Public Law Paradigms**

The traditional public international law paradigm concerns rights and obligations running between states only. However, international law is increasingly concerned with restrictions on the ability of states to act and regulate domestically, particularly with respect to non-state actors. Unsurprising, then, comparisons are frequently drawn between the investment treaty system and other modern sub-fields of public international law that concern domestic actions and regulation, such as human rights and trade law. To some extent, all three areas enjoy common origins in Friendship, Commerce and Navigation treaties. Despite this, the trade and human rights approaches have not yet been conceptualized as explicit paradigms.

I characterize these approaches as examples of international public law rather than sub-fields of public international law for two reasons. First, while treaty parties are assumed to incorporate rules of general international law on issues not resolved by the treaty, the relevance of the rules developed in one specialized international law regime to another is more tenuous and contentious. Secondly, a key advantage of the human rights and trade law frameworks is that they are hybridized because they encompass insights from both public international law (because of their inter-state treaty basis) and public law (because they concern a state’s right to act or regulate domestically). It would be possible to add other approaches under this heading, such as ones based on international environmental law or European Union law.\(^8^4\) However, grouping these paradigms together should not obscure important differences between them.

\begin{center}
\begin{tikzpicture}[node distance=2.5cm,auto]
  \node [circle,draw] (A) {State A (public)};
  \node [circle,draw] (B) [right of=A] {State B (public)};
  \node [circle,draw] (C) [below of=A] {Non-State Actor A};
  \node [circle,draw] (D) [below of=B] {Non-State Actor B};

  \draw [->] (A) to (B);
  \draw [->] (B) to (A);
  \draw [->] (A) to (C);
  \draw [->] (B) to (D);
  \draw [->] (C) to (D);
  \draw [->] (D) to (C);

\end{tikzpicture}
\end{center}

\(^8^3\) VAN HARTEN, supra note 3, at 129, 180-84.

\(^8^4\) This approach is consistent with that taken by Schill, who argues that investment tribunals should adopt a comparative law approach encompassing both domestic and international public law, with the latter being defined to include human rights, trade law and European Union law. See INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, supra note 3.
The key similarity between the trade and human rights paradigms is that both fields encompass a horizontal treaty relationship between states as sovereign equals and a vertical substantive relationship between states (as governors) and non-state actors (as governed). Accordingly, both fields contemplate competing regulatory goals being weighed and require adjudicators to pass judgment on states’ domestic actions and regulations by reference to internationally agreed standards.

Substantively, the trade system balances economic interests (such as free trade) against non-economic interests (such as environmental or health and safe measures), while the human rights regimes require accommodation between certain rights (such as freedom of expression and property protections) and public goals (such as the needs of a democratic society and the public interest). Similar balancing tests have been imported into the investment sphere, suggesting that investment protections are important but not absolute and should be weighed against other public policy goals. For instance, the “least restrictive means” test was invoked in assessing the validity of Argentina’s response to its economic crisis,85 and the proportionality test has been applied in determining whether an expropriation has taken place.86

Procedurally, these international public law fields take concerns that underlie public law, such as the appropriate balance of power between the domestic courts, legislatures and executives, and apply them to the balance of power between international adjudicators and sovereign states. Domestic notions of deference and judicial restraint are adapted to the international sphere through concepts such as standards of review and margin of appreciation. In the trade context, there is no express provision on general standards of review in the GATT or the WTO Agreements, but the Appellate Body has adopted a general standard based on Article 11 of the Dispute Settlement Understanding, which requires panels to make an “objective assessment” of the matters before them. In determining the applicability of exceptions to GATT obligations for sanitary and phytosanitary measures taken by a member state, the Appellate Body has held that the standard of review it adopts “must reflect the balance established . . . between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”87 Accordingly, it has endorsed a middle

85 Continental Casualty, supra note 7, paras 193-95 (relying on WTO case).
86 Tecmed, supra note 74, para. 122 (relying on ECHR case law); Alec Stone Sweet, Investor-State Arbitration: Proportionality’s New Frontier, 4 LAW & ETHICS OF HUMAN RIGHTS 47 (2010).
approach that did not amount to either de novo review or total deference.\textsuperscript{88} In the human rights context, courts such as the ECtHR have adopted a margin of appreciation when assessing governmental conduct even though it is not expressly provided for in the ECHR. This doctrine embodies: 

\textit{judicial deference}, meaning that international tribunals should exercise a certain degree of judicial restraint when evaluating the actions of national authorities; and \textit{normative flexibility}, meaning that some international norms are sufficiently open ended or uncertain that they can be met in a variety of ways, creating a “zone of legality.”\textsuperscript{89}

Again, these ideas are being transported into the investment sphere. For instance, William Burke-White and Andreas von Staden argue that investor-state tribunals should borrow the margin of appreciation doctrine given the public nature of investment disputes and the limited institutional capacity of arbitral tribunals.\textsuperscript{90} They reason that arbitrators rarely have public law expertise (so they are poorly equipped to adjudicate upon public law issues) and are not embedded within the national environment in which these decisions are made (so they lack a full appreciation of the context and their decisions may be viewed as illegitimate). However, as with all paradigms, adopting a singular framework tends to privilege one side of the debate. For instance, in assessing institutional capacity, these scholars neglect the importance of international or investment law expertise which domestic actors often lack, and ignore one of the purposes behind selecting international arbitration, which is to secure arbitrators who are removed from the national context and thus more impartial in adjudicating investor-state disputes.

The key difference between the trade and human rights paradigms lies in the way in which they treat non-state actors. Trade treaties create substantive rights for the treaty parties only, even if these commitments create benefits for or adverse effects on non-state actors. They also create procedural rights for state parties only, even if non-state actors often play a crucial role in driving dispute resolution behind the scenes. (The informal effects on and behind-the-scenes role of non-state actors is represented through the use of grey broken lines.) In this way, the trade law approach is similar to the classic public international law paradigm. Human rights treaties, on the other hand, create substantive rights for individuals and sometimes also give them procedural rights to enforce those substantive rights. These differences can affect the analysis of controversial issues, such as whether investment treaties create procedural and particularly substantive rights for investors.\textsuperscript{91} Comparisons with trade law have the potential to assume the


\textsuperscript{89} Yuval Shany, Toward a General Margin of Appreciation Doctrine in International Law, 16 EUR. J. INT’L L. 907, 909-10 (2005).

\textsuperscript{90} Burke-White & von Staden, supra note 70, 337-38.

\textsuperscript{91} See Roberts, supra note 5, at 184; Douglas, supra note 2, at 162-64.
non-existence of investor rights, while the human rights paradigm runs the risk of assuming the opposite. Neither paradigm provides a model for granting investors procedural but not substantive rights; if anything, many human rights treaties provide the opposite.

Even if investment treaties grant investors substantive rights, the human rights paradigm may have the effect of overselling the nature of these rights. Even if investment treaties grant investors substantive rights, the human rights paradigm may have the effect of overselling the nature of these rights. Human rights are typically understood as a good in their own right, whereas investor rights might be viewed as a means to the end of increasing foreign investment rather than an end in and of themselves. Even if investor rights are equivalent to human rights, they might better correspond to lower ranked human rights norms, like property rights and protections against discrimination, than fundamental *jus cogens* norms, like freedom from torture. There are also structural differences between the two regimes. Human rights treaties are based on inter-state commitments but they are more like independent pledges to behave in certain ways than contract-like devices between states establishing reciprocal rights and obligations. These differences help to explain the *erga omnes* nature of human rights treaties, which differs from investment treaties.

Human rights treaties most commonly concern vertical relations between a state and its own nationals within its territory, although they can create obligations with respect to foreigners within a state’s territory as well as citizens and foreigners outside a state’s territory but subject to its control. (This is depicted above through the use of black lines for the common vertical relationship and grey lines for the less common diagonal one.) By contrast, investment treaties by definition concern a state’s diagonal relationship with foreign nationals. Even when State A owes human rights obligations to a national of State B who is on its territory or subject to its control, this is not based on a reciprocal relationship, i.e., these obligations are assumed by State A alone and are not a *quid pro quo* for State B agreeing to owe the same obligations to citizens of State A. This differs from the investment regime where State A and State B agree to give rights or benefits to each other’s nationals on a reciprocal basis.

The human rights paradigm creates a model for approaching the overlapping and sometimes conflicting relationships that exist within the investment treaty system. In addition to the horizontal treaty relationship and the vertical regulatory relationship, some human rights treaties also establish a horizontal procedural relationship between non-state actors (as claimants) and states (as respondents) in the context of dispute resolution. For instance, the European Convention on Human Rights (ECHR) permits individuals to bring claims directly against states before an international tribunal like the European Court of Human Rights (ECHR). The tensions created by these overlapping relationships provide an important parallel to the investment treaty context when looking at issues such as the relevance of subsequent agreements and practice.

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The ECtHR, for example, routinely looks to subsequent practice by the treaty parties in interpreting how broad rights should be applied in particular circumstances, but it treats such evidence as highly persuasive rather than binding. It plays a gate-keeping function as it is significantly guided, but not constrained, by the treaty parties’ views on interpretation. Accordingly, the Court strikes a balance between being a simple agent (which is completely deferential to the treaty parties) and a pure trustee (which makes decisions completely independently of the treaty parties). This allows it to be responsive to the ongoing interest of the treaty parties in the interpretation of their obligations, but gives it room to provide a check on these practices where they appear to infringe upon the rights or legitimate expectations of protected non-state actors.

The different approaches of the trade and human rights regimes to the existence and nature of rights granted to non-state actors can also have important implications for understanding whether treaty parties can prejudice rights or benefits granted to non-state actors under those treaties through actions like countermeasures. If, for example, the United States violates its NAFTA obligations owed to Mexico, may Mexico lawfully enact countermeasures against the US where doing so would violate its NAFTA obligations with respect to US investors?

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

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

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95 Roberts, supra note 5, at 202-06.


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


99 Id. at 130, para. 5.
If the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt.  

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

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

Adopting a human rights law paradigm might suggest a different approach yet again. Article 50 of the Draft Articles on State Responsibility provides that countermeasures shall not affect “obligations for the protection of fundamental human rights.” As the ILC Commentaries explain, “for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable” because such obligations have a “non-reciprocal character and are not only due to other States but to the individuals themselves.” Debates could then be waged on at least three levels. Do investment treaties, like human rights treaties, grant investors substantive rights? If so, does that necessarily mean that these obligations are non-reciprocal like human rights obligations or can they still be offered and performed on a quid pro quo basis? And is the limitation on countermeasures intended to protect any rights granted to non-state actors (which would include investor rights) or only obligations of a “humanitarian” or “fundamental human rights” character (which presumably would not)?
D. Parsing the Politics of the Paradigms

Adopting a particular paradigm is not inevitably outcome determinative. These approaches are broad enough that investors, states and NGOs can often find analogies within them to suit their purposes in individual cases. However, by emphasizing some aspects and de-emphasizing others, these paradigms promote different visions of the investment treaty system, which in turn tend to privilege different actors and goals. Having dissected these approaches in detail, it is worth summarizing the political uses of these paradigms in a more general way.

The public international law paradigm tends to privilege the role of states because it focuses on the system’s treaty basis and locates the field within a broader corpus of international rules, paving the way for principles from trade, human rights and environmental law. The private international law paradigm, by contrast, focuses attention on the disputing parties and tends to narrow and privatize conceptions of the dispute. The public law paradigm is often invoked by respondent states and NGOs because it presents investment treaty arbitration as: requiring respect for host states as sovereigns (encouraging the protection of regulatory space and deference by arbitral tribunals); and being of interest to the public at large (encouraging a more transparent and open arbitral process). However, it has also been invoked to: protect investors against abuses of sovereign powers (drawing on concepts like due process, good faith and legitimate expectations); and strengthen the role of investment tribunals (by comparing them to quasi-constitutional courts empowered to review the state actions).106

The trade law paradigm often works to the interests of host states by downplaying the existence or significance of investors being granted substantive and/or procedural rights and creating a model for balancing economic and non-economic goals. The political uses of the human rights paradigm are starkly divided. Investors and those supportive of investor rights tend to endorse what I term a narrow human rights paradigm. Just as individuals are granted substantive and procedural rights under human rights treaties in order to protect them from abuses of sovereign powers, so too are investors granted such rights under investment treaties. This comparison paves the way for arguments such as that: the object and purpose of investment treaties is to protect investors, so gaps and ambiguities should be resolved in their favor; inter-state countermeasures cannot be used as a defense in investor-state disputes; and it is appropriate to define investors’ property and due process rights by reference to human rights jurisprudence.107

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


such as the right of local populations to clean water. Different types of rights are also delineated, such that even if investors have been granted rights, these are viewed as individual rights rather than human rights, or as less normatively weighted human rights like property rights. Instead of viewing investor rights as a trump card, this approach encourages tribunals to draw on principles frequently used in human rights, such as proportionality, to balance competing rights. This approach overlaps with the public international law and public law approaches.

IV. THE TRAJECTORY OF THE INVESTMENT TREATY SYSTEM

So long as the investment treaty system remains based on thousands of bilateral investment treaties interpreted by hundreds of ad hoc tribunals, we will continue to see conflicting analogies and diverse paradigms for understanding the system’s nature. Although we should not expect any single paradigm to win out, the relative importance of different approaches is likely to shift over time as the system matures from its infancy and adolescence into adulthood.

A. The System’s Infancy

The investment treaty system’s early days were dominated by the international commercial arbitration and narrow human rights paradigms as a result of two main factors. First, investment treaties were typically signed between developed (capital-exporting) states and developing (capital-importing) states, with most cases being brought by investors from developed states against developing states. As such, these treaties were symmetrical in structure but asymmetrical in application. The treaties typically operated to require the capital-importing state to provide certain protections to investors from the capital-exporting state, with the penalty of arbitration followed by damages if they fell short. The quid pro quo was not the protection of nationals from capital-importing states investing in capital-exporting states as such instances were negligible. Instead, capital-importing states signed these agreements based on widely held beliefs that they would fuel economic growth and development by increasing foreign investment.

These early investment treaties were based on a limited set of model BITs drafted by capital-exporting states with the purpose of protecting their investors abroad. The preambles of these investment treaties state their aims as being to create and maintain favorable conditions for investments. The substantive terms of these treaties include broad protections for foreign investors with little or no reference to the need to balance investor protections against other public policy goals, such as protection of the environment, the economy, health and safety. These

108 ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 107 (2009) (noting that although human rights law has been invoked by claimant investors, “[m]ore often, however, human rights law may be invoked by respondent states to justify the measures complained of, and thus as defenses against liability”); Glamis Gold, Ltd. v. United States (UNCITRAL - NAFTA Ch. 11), Non-Party Supplemental Submission: Submission of the Quechan Indian Nation (Oct. 16, 2006) (drawing on a wide range of human rights materials in support of the interests of the indigenous peoples affected by the case).

109 This section treats states as unitary actors, which is clearly a fiction. However, interests and power bases within states are disaggregated differently in different states, making generalizations across states problematic. For this reason, I have chosen not to lift that veil in this Article.
treaties were quite unlike most trade treaties, which typically include a list of exceptions for regulations that a state could adopt even if they infringe upon free trade. This divergence can be traced to the assumption by capital-exporting states that investment protections, unlike trade treaties, would not be applied against them in a reciprocal manner.

This narrow framing meant that the treaties contained few, if any, textual indications of the potential relevance of public law approaches. Instead, many participants viewed investment treaties as protecting foreign investment as an unqualified end in itself rather than as a good to be balanced against other public policy goals. It was common to find parallels being drawn between investment treaties protecting investor rights and human rights treaties protecting human rights. Some tribunals also relied upon this narrow understanding of the object and purpose of investment treaties to justifying resolving gaps and ambiguities in favor of the investor. For example, in *SGS v. Philippines*, the Tribunal found that the treaty was intended to “create and maintain favorable conditions for investments,” and thus it was “legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments.”

Second, investment treaties traditionally coupled short and broadly worded obligations with strong enforcement mechanisms. In the language of legalization theories, these investment treaties involved a high level of obligation and delegation, because they established legally binding commitments and delegated enforcement power to tribunals, but a low level of precision, because the commitments themselves are broad and vague (for example, the promise to treat investors fairly and equitably). Imprecision is normally associated with state discretion, but when coupled with a high degree of obligation and delegation, the opposite is true: the tribunal charged with interpreting and applying the standard is given wide discretion. The net result was a considerable shift of interpretive power away from the treaty parties and towards investment tribunals, leading to much investment treaty law being developed through a body of *de facto* precedents.

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

The community of lawyers who took part in the first generation of investment treaty disputes was relatively small, with a majority having a background in international commercial arbitration and a minority being specialists in public international law. One reason for this was that investors themselves could select arbitrators and they frequently chose commercial arbitrators with whom they were familiar. Another was that the arbitral institutions tasked with appointing arbitrators were embedded within commercial arbitration and investor-state contractual arbitration. The strong influence of participants with a commercial background resulted in an over-reliance on the commercial arbitration paradigm, without adequate consideration of the differences between the systems. 

According to Barton Legum, former Chief of the US NAFTA Arbitration Division:

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

The commercial background of many investment treaty lawyers often manifested itself in investment treaty protections being treated as akin to contractual obligations between equal disputing parties. It also contributed to the lack of awareness of and sensitivity to the public international law and, in particular, public law dimensions of investment treaty arbitration in many early awards. For example, Burke-White and von Staden have complained that few ICSID arbitrators have a background in public or constitutional law, which may have contributed to a lack of appropriate deference being given to states. And Bruno Simma has lamented the failure of investment tribunals to consider human rights arguments adequately, observing that this might be because a “large majority of [arbitrators] has a private or commercial law rather than a public law or public international law background.”

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114 Waibel & Wu, supra note 34 (noting that more than 60% of the arbitrators in ICSID cases are in full-time private practice and less than 30% are specialists in public international law); Schill, supra note 35, at 880; Brigitte Stern, The Future of International Investment Law: A Balance Between the Protection of Investors and the States’ Capacity to Regulate, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME 174, 186 (Jose E. Alvarez & Karl P. Sauvant eds., 2011) (noting that the current roster of investment treaty arbitrators is “rooted in international commercial arbitration”); Schill, supra note 35, at 880.


116 Legum, supra note 39, at 73.

117 See Hirsch, supra note 5, at 108-09.

118 Burke-White & von Staden, supra note 70, at 330.

119 Simma, supra note 5, at 576. See also James Harrison, Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, supra note 5, at 396, 416 (“Investment arbitrators inevitably have limited expertise in human rights law.”).
B. The System’s Adolescence

We are in the early stages of a major recalibration of the investment treaty system that is leading to a significant revaluation of the importance of different paradigms. Two catalysts have been particularly important in driving these changes.

First, some developed states have been sued as host states. When capital-exporting states originally drafted investment treaties, they viewed them as exclusively or primarily aimed at protecting the rights of their investors abroad, and thus demonstrated little concern about the breadth of interpretive authority being delegated to investment tribunals or the absence of clear language protecting regulatory powers. However, a number of early and notorious cases have been brought against developed states, including the United States, Canada and Australia, increasing appreciation of the need to protect the regulatory freedom of host states and limit arbitral discretion. In particular, cases brought against Canada and the United States under NAFTA – the only real example of investment treaty protections running between developed states with an investor-state arbitration clause – led to considerable recalibration by both states.

Second, a number of early cases dramatically demonstrated the public law implications of investment treaty arbitration. The cases arising out of Argentina’s economic crisis and various NAFTA cases concerning environmental and public health measures showed that investment arbitrations often turn on important regulatory decisions. The number of claims brought against some states (such as Argentina) along with the magnitude of the damages claimed and/or awarded in other cases (such as the recent $1.8 billion award against Ecuador) demonstrated the potential for investment treaty arbitration to significantly affect a state’s economy and future regulatory choices. The 2008 global financial crisis, along with the current economic crises being faced by a number of European Union states, have raised the possibility of Argentina-style claims and class actions being brought against a variety of other states.

These developments are resulting in a shift in the prevalence and power of different paradigms. Approaches that focus attention on the state as a treaty party and regulatory sovereign are ascending in value, while those that draw comparisons with private law or which narrowly focus on the importance of investor protections are declining in value. This shift is occurring through three mechanisms but remains subject to important counter-veiling forces.

1. Shift in the Interpretive Balance of Power

While the first generation of investment treaties were characterized by a considerable shift of interpretive power from the treaty parties to investment tribunals, the newly emerging second generation will be characterized by states seeking to recalibrate this balance of power by increasing the specificity of their treaty commitments and reasserting their interpretive rights as

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121 See, e.g., Metalclad Corp. v. Mexico (ICSID-NAFTA Ch. 11), Case No. ARB(AF)/97/1, Award (Aug. 30, 2000); Methanex, Final Award, supra note 24; CMS Gas Transmission Co. v. Argentina (ICSID), Case No. ARB/01/8, Award (May 12, 2005).
treaty parties. In doing so, states are likely to clarify or change the content of these treaties to increase the prevalence of public, public international and trade law ideas.

The more “rule-like” a treaty prescription, the more treaty parties decide *ex ante* what categories of behavior are acceptable and unacceptable; the more “standard-like” a prescription, the more this determination is left to be made *ex post* by investment tribunals. The rise in the number of investor-state arbitral disputes, coupled with the investor-friendly interpretations adopted in many investment awards, has led states to question the wisdom of delegating so much power to investment tribunals. Some have responded by withdrawing from the ICSID system or investment treaties altogether, while others have entered into new investment treaties that omit the possibility of investor-state arbitration. A common reaction, however, is likely to be (1) states drafting a new breed of investment treaties in which they spell out the extent and limits of their treaty obligations with greater specificity and (2) states asserting their rights as treaty parties to adopt agreements about the meaning of provisions and the applicability of defenses.

The actions of the United States provide a good illustration. Following early arbitral decisions that interpreted the requirements of “fair and equitable treatment” and “full protection and security” as going beyond the customary international law minimum standard of treatment, the United States responded in two ways. In 2001, the NAFTA FTC adopted Notes of Interpretation that specified, among other points, the relationship between NAFTA’s treatment standards and customary international law’s minimum standard of treatment. In 2004, the US

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

124 For example, Bolivia, Ecuador and Venezuela have withdrawn from the ICSID Convention, and other states (such as Nicaragua) have considered doing likewise. See List of Contracting States and Other Signatories of the Convention (Jan. 7, 2010) and Denunciation of ICSID by Venezuela (Jan. 24, 2012). Some countries, including Ecuador and Venezuela, have reportedly withdrawn from or sought to renegotiate a number of their investment treaties. See UN Conference on Trade & Development [UNCTAD], *Recent Developments in International Investment Agreements (2007–June 2008)*, 2 IIA MONITOR 6 (2008). Others have suspended further negotiations of investment treaties pending reviews of their policy frameworks and withdrawn from some early-style treaties. See, e.g., Republic of South Africa, *Bilateral Investment Treaty Policy Framework Review: Government Position Paper* 12 (June 2009); Luke Eric Peterson, “South Africa pushes phase-out of early bilateral investment treaties after at least two separate brushes with investor-state arbitration,” *IA REPORTER* (Sept. 23, 2012).

125 For example, the 2005 Australia-United States FTA does not include investor-state arbitration and in 2011, Australia announced that it would no longer include investor-state dispute settlement provisions in its future trade agreements due to concerns about sovereign risk. See Australia-United States Free Trade Agreement (2005); Gillard *Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* 14 (Apr. 2011). India has resisted the inclusion of an investor-state arbitration provision in its negotiations over a Free Trade Agreement with the European Union and recent reports suggest that it plans to resist the inclusion of such provisions in its future investment treaties. See Asit Ranjan Mishra, *India rejects clause on litigation*, MINT, July 4, 2011; Asit Ranjan Mishra, *India may exclude clause on lawsuits from trade pacts*, MINT, Jan. 29, 2012.

126 *Notes of Interpretation, supra* note 12.
released a revised Model BIT, which is more than twice as long as earlier versions and provides much greater specificity on a number of obligations.\textsuperscript{127} The 2004 and 2012 versions include similar language about the relationship between treaty protections and customary international law and give greater content to this standard.\textsuperscript{128}

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

First, an increasing number of investment treaties are including provisions in their preambles that make clear that investment promotion and protection is not to be achieved at the expense of other key values, such as protection of health, safety, labor standards and the environment.\textsuperscript{129} In terms of substantive provisions, an increasing number of investment treaties now provide that, except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, will not constitute indirect expropriations.\textsuperscript{130} These clauses will enhance the relevance of public law and trade law paradigms given similar efforts in those fields to protect regulatory space and balance economic and non-economic goals.


\textsuperscript{128} For example, the newer versions provide, among other things, that “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” 2004 U.S. Model BIT, \textit{supra} note 127, art 5(2)(a); U.S. Dep’t of State, 2012 Model BIT, art 5(2)(a).

\textsuperscript{129} For example, the preamble of the 2002 BIT between the Republic of Korea and Trinidad & Tobago sets out the assumption that the objectives of investment protection and promotion “can be achieved without relaxing health, safety and environmental measures of general application,” while the preamble of the 2005 BIT between the United States and Uruguay sets out the desire of the treaty parties to “achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights.” \textit{See UN} Conference on Trade & Development [UNCTAD], \textit{Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking} 3-5 (2007) (citing and discussing the quoted texts).

Second, some states are beginning to introduce general exceptions clauses modeled on Article XX of GATT or Article XIV of GATS. For example, the newly drafted investment treaty between Canada and China includes a “General Exceptions” provision that states:

2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

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

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

(c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Some states are also including exceptions relating to their regulation of financial services, which again have a basis in GATS. Incorporating language and ideas developed in the trade context into investment treaties will increase resort to trade law analogies in future interpretations. This form of cross-fertilization is particularly likely given that investment protections are now often addressed within the context of free trade agreements (FTAs) and thus are negotiated by teams that include lawyers with trade law backgrounds.

Third, states are starting to draw on constitutional and administrative law concepts in their treaties. For instance, the 2012 US Model BIT sets out three factors that should be considered

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132 2012 Canada-China BIT, art. 33.

133 See, e.g., 2012 U.S. Model BIT, supra note 128, art. 20; 2012 Canada-China BIT, arts. 33(3).


135 Several academics have also argued that tribunals should undertake a comparative assessment of domestic law principles in providing content to vague investment treaty norms. See, e.g, Thomas Wälde & Abba Kolo, Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law, 50 INT’L & COMP.
in determining whether there has been an indirect expropriation: (i) the economic impact of the
government action; (ii) the extent to which the government action interferes with distinct,
reasonable investment-backed expectations; and (iii) the character of the government action.136
This test is derived from a domestic US case on the takings clause.137 By incorporating language
from its domestic public law into its treaties, the United States has provided a hook for the
introduction of further domestic law principles in the interpretive process.138 As many other
states treat developments in the US Model BIT practice as the gold standard for treaty
developments, some have imported this test into their own treaties, thereby providing a hook for
analogies with US public law rather than their own public law.139

Fourth, many states are shifting decision-making powers away from arbitral tribunals to
either host states individually or the treaty parties collectively. Some states are clarifying that
carve outs for protecting their essential security interests are self-judging.140 Other states are
including provisions on financial services where a respondent state can request a joint
determination from the competent financial authorities of the treaty parties, which will then be
binding on the arbitral tribunal in the case.141 In other treaties, the investor-state tribunal cannot
decide a defense relating to financial services but must instead defer to an agreement by the

L.Q. 811, 821 (2001); MONTT, supra note 3, at 22 and 76; Stephan W. Schill, Fair and Equitable Treatment, the
Rule of Law, and Comparative Public Law, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW,
supra note 3, at 151, 175-76.

136 2012 U.S. Model BIT, supra note 128, Annex B.
Kantor, “Comparing U.S. law and recent U.S. investment agreements: Much more similar than you might expect,”
in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010/2011 (Karl P. Sauvant ed.). One explanation
for this approach comes from the 2002 Trade Promotion Act in which the US Congress set out as a negotiating
principle that future US investment treaties should include no “greater substantive rights” for foreign investors than

138 For instance, the United States relied extensively on US and Canadian cases in giving content to the meaning of
international investment treaty law protections in Glamis Gold. See, e.g., Glamis Gold, Ltd. v. United States
(UNCITRAL-NAFTA Ch. 11), Counter-Memorial of Respondent (Sept. 19, 2006), at 195-96, 201-04, 210-11, 213-
14, 234, 246; Glamis Gold, Ltd. v. United States (UNCITRAL-NAFTA Ch. 11), Rejoinder of Respondent (Mar. 15,
2007), at 189-92, 200, 203-04, 208-12, 225.

139 See, e.g., 2004 Canada Model BIT, supra note 130, art. 10; ACIA, supra note 134, Annex 2. See generally,
David Schneiderman, NAFTA’s Taking Rule: American Constitutionalism Comes to Canada, 46 U. TORONTO L.J.
499 (1996); Jürgen Kurtz, State Recalibration of Investment Treaties: Causes, Embodiments and Implications,
Presentation at the 2nd Singapore Conference on International Investment Arbitration – International Investment
Agreements (IIAs) and Financial Crises (May 31, 2011). This development may be problematic where a state’s
public law differs from US public law, as the High Court of Australia recently found with respect to Australia’s

140 See, e.g., 2012 U.S. Model BIT, supra note 128, art. 18; 2004 Canada Model BIT, supra note 130, art. 10(4);
ACIA, supra note 134, art. 18; 2006 US-Peru FTA, art. 22.2 (n. 2).

141 See 2012 U.S. Model BIT, supra note 128, art. 20.
treaty parties or, failing that, a ruling by a state-to-state tribunal.\textsuperscript{142} And a number of states are now including interpretive mechanisms akin to NAFTA’s FTC, along with provisions permitting non-disputing treaty parties to make submission on interpretation in investor-state disputes.\textsuperscript{143}

This shift of interpretive authority emphasizes the important role that treaty parties can play in interpreting their own agreements and squarely situates investment treaty arbitration within a public international law paradigm. Indeed, the United Nations Conference on Trade and Development issued a paper arguing that “[a]s masters of their [treaties], States can be more proactive in asserting their interpretive authority to guide tribunals towards a proper and predictable reading of IIA provisions” by playing a more active role in drafting investment treaties, participating in investor-state disputes to which they are not a disputing party, and issuing interpretive declarations.\textsuperscript{144} We may also see states carving out a greater role for their national courts in the future by, for instance, reintroducing an exhaustion of local remedies requirement, insisting on strict time periods before investment disputes can be filed (which may or may not be coupled with a requirement to pursue a local claim), or giving their national courts a greater role in reviewing investment treaty awards.

2. Broadening and Diversification of Participants

In the early days, investment treaty arbitration was seen as a discrete area that was primarily of interest to states and investors as actual or potential disputing parties, on the one hand, and to a relatively small group of lawyers who appeared in those disputes as advocates and arbitrators, on the other. The arbitrators who hear these cases have traditionally come from a relatively narrow background with a majority coming from full time private practice (about 60%), a vast majority coming from North America and Western Europe (about 70%) and a super majority being men (about 97%).\textsuperscript{145} Many early articles within the field were published in practitioner rather than academic journals or were part of edited collections that arose from conferences dominated by practitioners. Although some important critiques were written from a North-South perspective,\textsuperscript{146} there was relatively little critical engagement with the field by academics from other disciplines or by those not taking part in the practice of arbitration.

\textsuperscript{142}See 2012 Canada-China BIT, arts. 20(2), 33(3).

\textsuperscript{143}See, e.g., 2012 U.S. Model BIT, supra note 128, arts. 28(2), 30(3); 2004 Canada Model BIT, supra note 130, arts. 35(1), 40(2), 41, 51(2)(a); ACIA, supra note 134, art. 40(3); 2012 Canada-China BIT, arts. 18(2), 27(2), 30.

\textsuperscript{144}UNCTAD, Interpretation of IIAs: What States Can Do, 3 IIAS ISSUES NOTE (Dec. 2011).

\textsuperscript{145}Waibel and Wu, supra note 34 (more than 60% of the arbitrators in ICSID cases are in full-time private practice); ICSID, The ICSID Caseload – Statistics 16 (Issue 2011–2) (as of June 30, 2011, 70% of Arbitrators, Conciliators and ad hoc Committee Members Appointed in ICSID Cases are from North America or Western Europe); Gus Van Harten, The (lack of) women arbitrators in investment treaty arbitration, 59 COLUMBIA FDI PERSPECTIVES (Feb. 6, 2012) (of the 249 known investment treaty cases as of May 2010, only 4% of those who served as arbitrators were women).

During the 2000s, academic engagement with the system changed significantly. A number of books explored the public law dimensions of investment treaty arbitration, most notably Gus Van Harten (2007), David Schneiderman (2008), Montt (2009) and Stephen Schill (2010). There has also been growing interest within public international law, international trade law and human rights law circles about their fields’ connections with investment treaty law, leading to engagement by scholars such as José Álvarez, Jürgen Kurtz and Bruno Simma. The diversification of the field’s participants has led to a wider pool of analogies being invoked, with the relevance of any particular analogy being less likely to be assumed and more likely to be contested. In broad terms, this scholarship has challenged the appropriateness of defaulting to a private international law paradigm, but internal splits have arisen over which of the more publicly-oriented approaches are appropriate in analyzing particular issues.

At the same time, the rise of public law and public international law paradigms within the academy has both reflected and reinforced concerns within the broader community (as articulated by journalists and NGOs) about the lack of transparency and third party participation in investment treaty arbitration. These criticisms came as a surprise to many investment treaty practitioners who were used to operating in a commercial arbitration paradigm and who frequently assumed that confidentiality and privacy were simply hallmarks of arbitration. New participants who drew comparisons with public law, international trade law and international human rights law squarely challenged such assumptions. The broadening and diversification of participants in the field has resulted in two significant changes.

147 ÁLVAREZ, supra note 64; Kurtz, Use and Abuse, supra note 4; Simma, supra note 5.

148 For instance, Álvarez and Brink have taken a critical look at the use of trade law analogies in interpreting the necessity test in investment treaty law, while Kurtz and Waibel have examined the difficulties in relying on a public international law analogy in the same context. Compare José E. Álvarez & Tegan Brink, Revisiting the Necessity Defense: Continental Casualty, 2010-11 Y.B. INT’L INVESTMENT L. & POL’Y 315 with Kurtz, Adjudging the Exceptional, supra note 4, at 337-38, 341-47 and Michael Waibel, Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E, 20 LEIDEN J. INT’L L. 637, 640-41 (2007).


150 See, e.g., Noah Rubins, Opening the Investment Arbitration Process: At What Cost, for What Benefit? 2009 AUSTRIAN ARB. Y.B. 483, 483 (describing how the author first became aware of the issue of “transparency” in investment arbitration in 2002 following a television documentary entitled “Trading Democracy”); Legum, supra note 39, at 73 (describing his 2001 remark that “for traditionally open and democratic governments like the United States, litigating issues of public concern in secret before an arbitral tribunal was simply unacceptable” as being “received as a radical manifesto” within the arbitration community).
First, states and arbitral tribunals have responded to legitimacy critiques by adopting various reforms aimed at increasing the transparency of, and the potential for amicus participation in, investment treaty arbitration. For instance, the first tribunal to allow amicus briefs, *Methanex v. United States*, did so after stressing the public nature of the dispute and drawing comparisons with the practice of the Iran-US Claims Tribunal, WTO panels and domestic courts. The NAFTA states announced that they would publish all documents submitted to or issued by NAFTA tribunals and that they supported public participation in NAFTA arbitrations, recommending procedures for tribunals to adopt in dealing with submissions from non-participating parties. The ICSID Arbitration Rules were amended to permit tribunals to accept submissions from non-disputing parties, to permit hearings to be open (subject to the disputing parties’ objections) and to require publication of excerpts of the legal reasoning of the awards. By adopting mechanisms to increase public awareness of and participation in investment arbitration, states have shifted perceptions of the system’s nature along the private/public law spectrum and provided a solid platform for future public law arguments to be made within the context of arbitral disputes.

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

This statement received a hostile reaction from many investment treaty arbitration lawyers, with a commonly voiced criticism being that the signatories lacked relevant expertise in investment treaty law and arbitral practice. For instance, Todd Weiler (an investment treaty

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151 Methanex, Decision on Amicus Curiae, supra note 28, at paras. 29-34.


arbitration specialist) stated that: “I’ve seen the list [of academics who signed the statement]. I see four professionals I recognize as having expertise in investment arbitration policy and only one who has substantive dispute settlement experience. I think that fact speaks for itself.”

But, as Van Harten (one of the signatories and a notable critic of the system) countered: “decisions of investment arbitrators warrant attention by ‘outsiders’ precisely because outsiders do not have a direct career interest in the system’s perpetuation and entrenchment.” Moreover, he argued that there is a pressing need for experts in public health, public contracting, utilities regulation and development economics to turn their attention to the system because investment treaty disputes often implicate these issues, yet, “[i]n these and other areas of public policy, investment law practitioners too often have a limited background and perspective.”

This dispute starkly illustrates current debates within the field about what counts as relevant expertise and appropriate credentials for critiquing the investment treaty system: in depth knowledge of investment treaty law and involvement in investment arbitration or broader knowledge of public policy issues implicated by investment treaties and financial independence from the arbitral system? This battle can be readily understood through Koskenniemi’s conception of competing claims to expertise and Bourdieu’s conception of symbolic capital. But it also raises questions about what happens when particular paradigms are disproportionately represented in the academy or practice.

For instance, although the public law perspective has proved highly fertile within academia, it has made less significant inroads into practice. Public law expertise has not, at least so far, been generally considered essential for either advocates or arbitrators. If anything, the perceived importance of public law credentials has decreased as investment arbitration has professionalized over the last two decades. Dezalay and Garth captured the movement in international arbitration generally from the grand old men of arbitration (who frequently made their names outside arbitration, often as senior judges or officials with significant legislative/executive/international organization experience) to younger arbitration technocrats (who usually made their names within the arbitration field, typically from a commercial law firm platform). One would expect this professionalization to equate to an increase in commercial law and arbitration expertise and a decrease in public law expertise.

Imagine, however, if public law academics were able to successfully re-characterize the investment treaty system as a form of international judicial review. Not only would public law principles assume greater importance within the field, but so would those individuals who could credibly claim public law expertise based on academic credentials or legislative, executive or judicial experience. This would create a virtuous or vicious cycle, depending on one’s viewpoint.


157 Id.

158 See DEZALAY & GARTH, supra note 49 at 10, 18-62.
Consider how different the investment treaty arbitration market would look if every team of advocates and every arbitral panel were perceived as requiring public law expertise. And then consider the potential impact of such expertise on the field’s jurisprudence and, in turn, how this would affect the perceived importance of public law expertise in future cases and so on.

One of the problems with many public law scholars claiming authority based on their independence from the system is that it may limit their ability to change the system from within by accepting positions as advocates, experts and arbitrators. Wearing multiple hats increases the possibility of academic ideas being transported into arbitral practice and arbitral realities informing academic thinking. Of course, it can also lead to (1) unhelpful self-censorship with academics refraining from writing on controversial issues for fear of limiting their appointment prospects and (2) a suspicion over the neutrality of writings on topics where the academic has worked on the same issue as an advocate or expert. Ultimately, however, the public law approach might have greater bite in practice if some participants use it externally to critique the game and others use it internally to play the game.

The flipside is that private international law approaches to investment treaty arbitration are much better represented in practice than in academia. We have numerous academics endorsing sophisticated versions of different – broadly public – paradigms but few who are providing nuanced accounts of the private international law paradigm. International arbitration has a long history of dealing with investor-state contracts involving important public issues. Arbitration has faced extensive debates about what subject-matter is or should be non-arbitrable. And arbitration is becoming increasingly judicialized, including through the growth of reporting on awards and the extensive use of treatises within the field. Accordingly, the existing one-dimensional understanding of the private international law approach deserves more sophisticated treatment within the academy, even if it is overrepresented in practice.

3. Changing Backgrounds and Interests of Arbitrators

There have been many calls for the field of arbitrators to be diversified. For instance, Brigitte Stern has argued that the arbitral “roster should comprise more academics, more lawyers with a public law background and, undoubtedly, more women” as well as a greater number of lawyers from non-OECD countries, and she has asked “why should arbitrators not come from the ranks of NGOs?” Several projects are underway to track the profiles of arbitrators, to examine who appoints which arbitrators and which way these arbitrators rule, but no database is yet complete or publicly available. However, no strong trends of diversification appear evident to date. If anything, the field’s growing professionalization appears to have increased the percentage of arbitrators with a background in private practice.


160 Stern, supra note 114, at 186.

161 For instance, academics currently creating such databases include Julie Maupin, Empirical Trends in Contemporary Investor-State Jurisprudence (database profile on file with author); Sergio Puig (see description at http://codex.stanford.edu/puig.html); and Waibel and Wu (supra note 34).
Why has this occurred? States have less control over who gets appointed to investment tribunals compared to international courts because the arbitrators are not selected by the treaty parties. This helps to explain the high percentage of private practitioners appearing as arbitrators because they are likely to be attractive to investor claimants and appointing institutions.¹⁶² Their presence then affects the way in which states select arbitrators as respondent states must be cognizant of the need to appoint arbitrators who will carry weight with the chair and other party appointed arbitrator. Picking someone with extreme pro-state views or obvious connections to the host state (such as previous government service for that state) is unlikely to achieve this objective. A growing recognition of this fact might explain why some respondent states are selecting arbitrators with commercial expertise.

However, given the public interests involved in investment treaty arbitration, we may see increased demand by states for arbitrators with backgrounds in or sensitivities to public international law, trade law and public law. (Although other factors such as availability, conflicts, standing within the field and ability to understand quantum will remain important.) States can exert direct influence over whom they appoint as their party-appointed arbitrators, and they may also be able to exert indirect influence over whom appointing institutions view as an appropriate “neutral.” Even if the arbitral community remains predominantly constituted by those with private practice experience, the injection of individuals with more varied, public-oriented backgrounds has the potential to introduce new ideas and approaches. This is particularly so if they are appointed as chairs.

If states wish to shift the backgrounds of arbitrators more significantly, they can do so by changing the mechanisms for appointment.¹⁶³ For example, if states were to determine that lawyers could not serve as counsel and as arbitrators, this would change the composition of the arbitral field because most serving law firm partners would choose the role of counsel given its greater billing and leveraging potential. If states wanted to make sure arbitrators were aware of their dual masters, being the treaty parties and the disputing parties, they could play an ex ante screening role by selecting a group of individuals as potential arbitrators and then allowing the disputing parties to select from that list. The treaty parties could agree to a standing investment court or a WTO-style appellate body with judges selected by the treaty parties, providing an ex


¹⁶³ On the impact of different models for the selection of arbitrators, see Bruce L. Benson, Arbitration, Encyclopedia of Law & Economics 159, 184-86.
States could also impose requirements on the appointment of arbitrators, such as specialized knowledge of certain fields. These changes in procedure would likely lead to changes in substance because they would affect who appoints arbitrators, what backgrounds are valued for arbitral appointments, and who these arbitrators would view as their delegating principals. All of these factors would impact upon choices of paradigm and analogies within the field.

Even without these changes of background, we should expect some recalibration to occur because arbitrators have a strategic interest in accommodating changing dynamics within the field. Some commentators argue that arbitrators have an actual or perceived bias in favor of investors given the asymmetrical nature of investment treaty arbitration. For example, Van Harten notes that because arbitrators are not tenured, they are dependent on future claims being brought by investors if there is to be continuing work for them in the field as advocates or arbitrators. This creates an appearance of bias because arbitrators have an interest in ruling broadly on jurisdiction and favorably to investors on merits and damages to increase the likelihood of future claims. If certain paradigms are more likely to protect the interests of states than investors, some might predict that arbitral tribunals will be hostile to these approaches.

But intra-panel and personal dynamics complicate this story. Arbitrators are typically interested in reappointment, leading them to be extremely concerned with how their award will be received by the arbitral community, which in turn depends on that community’s composition. Arbitrators’ incentives might differ depending on whether they have been appointed in a particular case, or wish to be appointed in future cases, by a claimant investor, respondent state or an appointing institution. Whether an arbitrator is relatively new or well established may impact upon his or her behavior, as could whether a case deals with issues on which the

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164 For instance, the US Model BIT contemplates the possibility of a future appellate body and European Commission recently suggested using quasi-permanent arbitrators or establishing an appellate mechanism. See 2012 U.S. Model BIT, supra note 128, art. 28(10); European Commission, Towards a comprehensive European international investment policy, at 10, COM(2010)343 final (July 7, 2010).

165 For instance, recent ASEAN investment agreements require that any person appointed as an arbitrator “shall have expertise or experience in public international law, international trade or international investment rules.” ACIA, supra note 134, art. 35(2); ASEAN-Australia-New Zealand Free Trade Agreement art. 23(2), Feb. 27, 2009. Analogous provisions exist for the ICJ and the WTO Appellate Body.

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

167 VAN HARTEN, supra note 3, at 172.

arbitrator has previously opined. Arbitrators also have certain incentives to seek consensus awards (e.g., such awards may look less political, may add to the perceived effectiveness of the chair, and may be less likely to be annulled) even if this means making some compromises.

However, even if arbitrators collectively have an actual or perceived interest in the investment treaty field growing over time, they would likely have a prior interest in the field continuing to exist so that they can carry on working in it. Arguably, some developments within the field (e.g., increased transparency, participation by non-disputing parties and a growing sensitivity to the need for states to have some regulatory freedom) reflect mounting awareness by tribunals of the need to mollify negative reactions by states and the public at large. If arbitrators perceive the threat of exit and recontracting by states to be significant, they will have increased incentives to accommodate states’ preferences, including as to paradigms and analogies. Thus, even arbitrators with strong commercial backgrounds should become more open to certain public-oriented approaches if these are consistently advocated by states.

4. Counter-Veiling Forces

The rise and fall of different paradigms is a dynamic function as new approaches typically arise in response to the perceived inadequacies and excesses of established approaches. When a particular lens favoring certain players becomes accepted as orthodoxy, it is likely to be challenged by other players favoring different lenses. As such, we can expect a somewhat cyclical ascent and descent of different paradigms as various participants and perspectives vie for advantage or dominance. We should also expect some inter-generational movement within paradigms as, for instance, public international lawyers who came of age during the era of the New International Economic Order would be responding to very different concerns to those who came of age after the proliferation of investment treaties and arbitrations in the 1990s and 2000s. Paradigms will not be frozen, either internally or in their status relative to one another.

As states begin drawing more heavily on public international law and public law paradigms in the field’s adolescence, for instance, investors will likely respond by championing paradigms that privilege their role (such as the commercial arbitration and narrow human rights approaches) and promoting analogies to suit their purposes within the more public-oriented paradigms (such as by developing concepts like due process, good faith and legitimate expectations). If they perceive systems, such as ICSID, as becoming too public, they may opt for less public dispute resolution under the UNCITRAL and ICC Rules. If they view treaties as being too accommodating of state-sovereignty, they are likely to press for investor-state contracts with stabilization clauses. Whether states would respond by, for example, only permitting ICSID arbitration or not agreeing to stabilization clauses, remains to be seen and may vary based on the interests and relative power of the state and investor in question.

Lawyers with a cross-specialty in commercial and investment arbitration are also likely to protect their turf. Some may encourage their clients to repackage potential investment treaty disputes as commercial disputes. Others may argue that broad distinctions between commercial 

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169 See Roberts, supra note 5, at 197-98.
and investment treaty arbitration are unhelpful as commercial arbitration has dealt with similar, public law issues for many years and can thus adequately handle the challenges posed by investment arbitration. (It is unclear whether this analysis should lead to the conclusion that investment arbitration does not require specialized scrutiny and procedures or that critical attention should also be paid to certain “commercial” arbitrations.) Some may seek to develop a more nuanced private international law paradigm, while others are likely to educate themselves in public law, trade law and public international law to demonstrate that such expertise can be developed from within and does not require the entry of new participants.

C. Approaching the System’s Adulthood

The investment treaty system is likely to face a protracted period of adolescence with diverse participants pulling in different directions but with a general trend toward more public-oriented approaches. But what will its adulthood hold?

A range of forces threatens the continued existence of the investment treaty system, at least in its current form. Capital-importing states entered into investment treaties in droves in the 1990s based on the widely shared belief that this would increase foreign investment. This foundation stone appears to be cracking: although some studies have found a link between signing investment treaties and increased investment flows, others have found no link or only a marginal effect (though, it should be noted, it is very difficult to find reliable information on bilateral investment flows and to compare this data meaningfully over time and across countries). The number of investor-state claims, as well as the number of states counting themselves as respondents, has also increased dramatically. Being sued changes states’ perceptions of the risks and rewards inherent in their treaty programs and an increased number of states facing suit may serve as a major catalyst for change. High profile regulatory disputes, like Germany being sued over its decision to phase out nuclear power, will increase the field’s notoriety and galvanize NGO opposition. Battles over the scope of annulment and enforcement of awards are also leading investors to question whether the system is living up to its promise from their perspective.

However, despite these threats, the field has demonstrated staying power so far and remains subject to certain forces of entrenchment. The vast majority of states have not withdrawn from the system and states are continuing to enter into investment treaties at a greater rate than terminations are occurring. Many states are now incorporating investment protections into their

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170 Stern, supra note 114 at 175 (describing international investment law’s “teenager’s crisis”).
FTAs and important multi-state negotiations have been concluded or remain afoot. Moreover, even if states decide not to enter into new investment treaties, a web of 3,000 treaties remains in effect. Any terminations of these treaties are likely to occur in a slow, piecemeal fashion and, in any event, they typically provide for covered investments to remain protected for ten or twenty years after termination. Accordingly, we still need to understand how interpretations of investment treaties are likely to develop as the field matures into adulthood as the system’s continued existence seems likely, even if its exact form and future robustness remain open to question.

In projecting forward, the key to the system’s future viability lies in finding treaty provisions, interpretations and structures that adequately balance the interests of investors, home and host states, and the public at large. But how can this be achieved? One way in which this balancing is likely to occur is through states realizing that they hold interests as both capital-importers and capital-exporters and internalizing these pros and cons. Significant levels of foreign direct investment now flow from (not just to) developing states and to (not just from) developed states. States that traditionally viewed themselves as capital exporters or importers, such as the United States and China respectively, are recognizing their dual status and formulating treaties that attempt to strike a balance between these interests. The European Union is also working hard to develop a common investment policy, which will require similar internalization.

Unlike early BITs, current investment treaties and FTAs including investment protections are now being signed or negotiated by states where there is a good chance of reciprocal investment, such as the recent Canada-China BIT and China-New Zealand FTA and the ongoing US-China negotiations. There are a growing number of agreements between developing states, though in some cases there remains a clear capital-importer and capital-exporter between the two. We are also seeing mini-multilateral negotiations where particular states may be more capital-importing in relation to some treaty parties and more capital-exporting in relation to others. Consider, for instance, the recently signed ASEAN-Australia-New Zealand FTA and the ongoing Trans-Pacific Partnership negotiations involving Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States.

These factors should push states to draft treaty provisions that they are happy to live with on either side of the equation. If investment treaties were purely bilateral, a state which was more of a capital-exporter in one treaty and more of a capital-importer in another might want to pursue treaty terms that favored investors in the former and host states in the latter. But the investment treaty system sits between bilateralism and multilateralism for a number of reasons, including the operation of the most favored nation clause. This means that treaty parties must recognize that whatever favorable treatment they accord to investors in treaties where they are capital-exporters may then be used against them under treaties where they are capital-importers. This approach

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174 In 2010, foreign direct investment inflows and outflows for developed states stood at $601 billion and $935 billion, while inflows and outflows for the developing states were $574 billion and $328 billion. UN Conference on Trade & Development [UNCTAD], *World Investment Report 2011*, at 187 (2011), Annex table I.1 FDI flows, by region and economy 2005-2010.
pushes towards more balanced formulations, which is reinforced by the tendency of some states to adopt singular model BITs for treaty negotiations instead of varied models depending on the nature of their negotiating partner.

What impact will these developments have on the paradigms used to frame the system? It should push participants to craft “between the poles” solutions that draw on a range of interdisciplinary analogies instead of narrowly endorsing any single paradigm. As each approach reveals certain aspects of the investment treaty system while obscuring others, and each serves the interests of different participants or different interests of the same participant, singular paradigmatic approaches are unlikely to be stable. Views will differ on the best balance to be struck between various paradigms, which in turn will depend on different theories about the system’s purpose and how that purpose is best achieved. In general, however, those seeking to create long-term solutions within the current system should use different paradigms to identify and remedy blind spots in any given approach in order to craft *sui generis*, hybridized solutions.

On an ad hoc level, we can already see “between the poles” solutions developing in the participation of amici in investment treaty arbitrations. In a relatively short period of time, the system moved from having no amicus interventions (based on a commercial arbitration paradigm) to permitting some amicus interventions (based on public international law and public law paradigms). But the shift is unlikely to be complete because, in contrast to most international and domestic courts, the cost of paying for the arbitrators’ time is borne by the disputing parties alone rather than the treaty parties as a whole or the community at large. This structural feature, which derives from the private law origins of the system’s dispute settlement mechanism, is likely to qualify the application of public and public international law principles in the investment context, resulting in a hybridized approach.

A qualified “between the poles” approach is also developing with respect to the permissibility of interpretive statements. The pure commercial arbitration paradigm is unstable because it views states only as actual or potential respondents, permitting no role for interpretive statements especially in ongoing disputes. The pure public international law approach is also unstable because it focuses on states only as treaty parties, permitting interpretive statements even if they seek to amend the treaty during the course of an ongoing dispute. The human rights paradigm could provide some insights about how tribunals could mediate between the dual role of states as treaty parties and respondents by treating such statements are highly persuasive but not binding. And the public law paradigm could suggest the relevance of particular doctrines, such as good faith, legitimate expectations and due process, to qualify the application of interpretive statements to pre-existing disputes.

On a more systematic level, participants need to move past the singular paradigms identified above to begin theorizing the more complicated, platypus-like nature of the investment treaty system. We need to work towards a theory that considers the role of states as treaty parties and investors and states as disputing parties. We need to understand how investment treaties between states interact with investment contracts between investors and states. We need to explore the tensions created by the system’s public and private law adjudicatory functions and what consequences this should have for public access, the development of precedent and appellate mechanisms. We need to theorize whether investment treaties create substantive and procedural
rights for investors, states or both and what this means for a variety of issues, including waiver, the availability of countermeasures and possibilities for state-to-state arbitration. In short, we need to embrace the tensions identified in this paper rather than using singular lenses to obscure them.

In doing so, we may find that some paradigms identified above have the potential to offer more nuanced insights than their current use would suggest. For instance, the public and private international law paradigms have, to date, been used to focus on relationships between the treaty parties and disputing parties respectively. But both have potential to provide insights into triangular relationships where an agreement is reached between A and B that creates rights or benefits for C. In public international law, the VCLT contains rules concerning treaties that create rights or benefits for third states, while the Vienna Convention on Consular Relations creates individual (rather than human) rights for nationals that are “interdependent” with the rights of their home states.175 Likewise, in private international law, extensive literature exists on contracts that create enforceable rights for third party beneficiaries and what limits they place on the rights of the contracting parties and beneficiary.

Arguably, both states and arbitrators – the two main actors forging investment treaty law – have an interest in supporting “between the poles” solutions. Many states are seeking to balance their interests as capital exporters and capital importers, while arbitrators should have an interest in balancing the interests of investors and states as that is the best way of ensuring the continuation of the system and, with it, their future employment. This means making the system attractive enough to investors so that claims continue to be brought and attractive enough to states so that they remain within the system. A desire to split the baby – a common critique of arbitration – could take the form of combining multiple paradigms instead of endorsing a single one.

V. CONCLUSION

Investment treaty arbitration “is not a sub-genre of an existing discipline. It is dramatically different to anything previously known in the international sphere.”176 As with the platypus, the investment treaty system may come to be seen as *sui generis*; something that defines its own category.177 But its identity will have been forged in large part by comparisons being drawn between it and other legal disciplines. By identifying multiple paradigms and exposing the assumptions underlying them, I hope to make those engaged in the field more self-conscious about their own approaches and open to seeing that the system can be viewed in different ways. This ground clearing exercise then lays the groundwork for two types of normative arguments.

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176 Paulsson, *supra* note 110 at 256.
177 The platypus came to be identified as a monotreme, a rare type of mammal that lays eggs. *See* http://en.wikipedia.org/wiki/Monotreme.
The first is the development of meta-theories about how the existing investment treaty system should be understood. This piece takes as its premise that the system is platypus-like in nature, with different lenses focusing on different aspects of the beast. This approach paves the way for theories about the system’s *sui generis* nature, which will likely draw on insights from multiple paradigms instead of endorsing any single one. The second is the development of arguments about how the future system should be reformed to become more like one paradigm and less like another. The existing system may be a platypus, but one can still argue that it should be transfigured into some other animal altogether by excising certain features (such as ad hoc arbitration) or adding others (such as an appellate body).