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Law's Laboratory: Developing International Law on Investment Protection as Common Law

By Frédéric G. Sourgens*

Abstract: This Article posits that international law on investment protection develops as a common law through adjudication of investor-state disputes. It reviews the three prevalent theories on the development of international law on investment protection. These three theories are (a) that investor-state decisions reflect a new customary international law, (b) that investor-state decisions are a potentially corrupt tool of corporate usurpation of international law, and (c) that investor-state disputes form part of a self-contained legal regime. The Article explains that each theory fails because it superimposes policy preferences not present in investor-state decisions. In rejecting these theories, this Article argues that investor-state disputes trace a case-by-case common law process rather than conform to any rigid theory. Accordingly, this Article provides a cogent theory of persuasive precedent in investor-state arbitration premised upon a common law understanding of persuasive authority in the U.S. courts. The case-by-case common law approach clarifies the current problem of substantively inconsistent decisions arising out of investor-state disputes. Normatively, the decision-making divergence between investor-state tribunals is preferable to artificial uniformity that the three currently prevalent theories impose upon investor-state decision-making tribunals and outcomes.

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I. INTRODUCTION

Internationalists frequently decry the "Americanization" of international law.[1] Most similarly disfavor a common law conception of international law.[2] While champions of a common law approach do exist, they leave the reasons for adoption of a common law approach significantly under-theorized.[3] This Article sets out to correct the near instinctive resistance to a common law approach to international law. In doing so, it furnishes a cogent theoretical appraisal of an increasingly important field of application of international law—the arbitration of claims by foreign investors against their host states under international treaties.

The unique relevance of the common law approach to contemporary international law should be readily apparent. A web of international courts and tribunals currently applies international law to the conduct of states towards their own nationals, prosecutes offenders of international crimes, regulates international trade, polices the seas, and protects international investments.[4] The resulting explosion of international law in the form of judgments, arbitral awards, and tribunal decisions under crisscrossing treaties has given an unprecedented concreteness to international legal rights and obligations. This development evokes parallels to the institutional design of the common law. In both systems, what is concretely law (rather than legal principle) is resolved in adjudication of (hard) cases rather than through legislative action.[5]

The explosion of adjudication predictably threw international law into an unprecedented state of disarray. With the growing number of courts and tribunals, "court-splits" on related legal questions before them increased.

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[1] *See* Christos Ravanides, *The Internationalization of the American Journal of International Law: Reality or Chimera? (A Survey)*, 31 HASTINGS INT'L & COMP. L. REV. 193 (2008); *see also* MARTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 522–32 (2d ed. 2005) (criticizing "law-as-fact" approaches associated with the U.S. common law approach).

[2] *See, e.g.*, Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970 (1924); GEORG SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 33 (1965); *see also* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523, 545–46 (2004).

[3] *See, e.g.*, Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 524–25 (2009) (positing without analysis that "[u]nlike common law, however, these rules [adopted by international tribunals] lack the binding force of law"); Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007) (providing a purely descriptive study of jurisprudence).

[4] *See, e.g.*, Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012).

[5] For a discussion of the virtues and short-comings of a disputes-based and a legislation-based legal system, see, for example, Frederik Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006) (warning of the potential shortcomings of a case-by-case approach to rule establishment inherent in U.S. common law).

Competition between tribunals appears to be on the rise, with some scholars considering that certain tribunals use their approach to the law as an outright "marketing tool" to become, for certain questions of international law, what Delaware has become for corporate law in the United States.[6] As academia grapples with this phenomenon, responses have varied from apology, dystopia, utopia, and back again. But the common theme emerging from almost any study is that the multiplication of narrow, concrete rules in disparate specialized dispute resolution bodies has created challenging obstacles to any grand theory of international law to which each concrete rule could be reduced. Competition has led to a perception of dangerous "fragmentation" of international law into a number of international laws, plural, each administered wholly independently by one of the various courts and tribunals.

This fragmentation and the attendant inconsistencies and competition between different tribunals do not threaten the coherence and cohesion of international law particularly when viewed from a common law perspective. This international law development is much like a domestic phenomenon. Despite the existence of circuit splits and major differences in approaches to law there nevertheless exists *one* common law of contracts, torts, property, etc. In fact, it is these divergences that enliven the debate about finding better problem solutions in legal academia and the courts. And it is the cross-fertilization between different branches of the law that results in the evolution of the common law to respond to new social and economic realities.[7]

The problem that emerges thus is one of current theories *about* international investment jurisprudence rather than necessarily a problem of the jurisprudence itself. These theories are that international investment jurisprudence evidences customary international law, that international investment jurisprudence should not be consulted as a source of law or inspiration at all, and that international investment jurisprudence is part of a self-contained international legal regime. All of these theories seek to impose a principled uniformity on investor-state arbitration to explain and (de)legitimize the near instantaneous growth of a body of decisional law under a network of approximately 3,000 international investment agreements (IIAs), most of which are bilateral international investment agreements (BITs). This decisional approach leads current theories to fail descriptively—each proposed principle cannot be defended in the face of

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[6] *See, e.g.*, Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1606–12 (2011); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 440–44 (2008). On the role of the Delaware Chancery as a competitive jurisdiction, see John C. Coffee, Jr., *The Delaware Court of Chancery: Change, Continuity—And Competition*, 2012 COLUM. BUS. L. REV. 387, 394–404 (2012) (describing the competitive pressure on courts in U.S. corporate litigation).

[7] *See* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 74 (1988).

treaty, state, or arbitral practice.[8] But it also fails normatively because it cannot support why uniformity along the lines of its chosen principle would be desirable despite contrary state and arbitral practice.

The resulting problem for these theories reflects a well-known aporia about general international law posited in critical international legal theory.[9] Existing theories to international investment arbitration over-determine and under-determine the law by arguing for a specific result from mutually exclusive premises: either the theory posits that its proposal is law because it is accepted as such by state parties, or it submits that it is legal on account of some higher order normative principle which overrules the potential objection of the states against which it is being marshaled. Existing theories are caught between "is" and "ought," giving an inadequate account of either.

This Article argues that this impasse can be overcome by treating investor-state arbitration not from the vantage point of an "investment law" it supposedly creates but from the point of view of the decisional process of resolving investor-state disputes. This process reveals a remarkably different picture from any of the theories espoused so far. Counsels engage the entirety of international and comparative law to frame the international legal problem the tribunal must resolve. This engagement problematizes record events as legally relevant facts through the invocation of prior decisions dealing with factually analogous questions. This problem conditions the interpretation of legal instruments. Further, the choice of case law by counsel is not limited to any one subset of international law but encompasses all of the specialized tribunals. Rather than seeking to segregate investment protection from general international law, the process of investor-state arbitration seeks to integrate it within a larger international legal framework.

The appreciation of the process of decision in investor-state arbitration evidences that it does not operate deductively as existing theories assert. Rather, judicial and arbitral decisions reason *inductively* from legally relevant facts to the applicable legal rules. To answer the problem of earlier theories, the common law approach posits that there is simply no organizing principle to defend. Common law rule establishment occurs in the absence of such a principle, premised instead upon the problematization of facts through the lens of any prior international legal decisions. The previously challenging concreteness of cases consequently creates coherence within the common law by providing pragmatic prototypes for problem solution.

Not only does investor-state adopt the inductive logic of the common

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[8] *See, e.g.*, Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1059 (2012).

[9] An aporia denotes a perplexing difficulty falling just short of a paradox. For development of the aporia, see, for example, David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251, 275 (1985); KOSKENNIEMI, *supra* note 1.

law, its use of prior decisions by an international adjudicatory body follows the same logic as the use of persuasive precedent in U.S. common law. It treats prior decisions as convincing because of their precision, weight, and canonicity. The dimension of precision, in particular, explains why decisions can in fact disagree with lines of cases having apparent superior weight.

The common law approach further corrects the perception that jurisprudence is "soft law," simply on account of being non-binding.[10] Such a claim may be substantively accurate, but it seriously misunderstands the importance of jurisprudence to the decision-making process. Although each decision is not binding, it would be impossible for tribunals to exercise their function without recourse to jurisprudence. Jurisprudence sets the parameters of relevant record facts (as opposed to irrelevant ones) on the basis of which the legal determination of the case must proceed. By permitting the tribunal to set the factual parameters of its inquiry, jurisprudence is instrumental to the inductive process of decision-making. Jurisprudence is not "soft law" so much as it is a hardwired component of legal analysis.

This Article is structured as follows. Part II explores existing theories of international investment law and their respective shortcomings. It concludes that each of these theories is trapped in a critical knot of argument from mutually exclusive premises. Part III approaches investor-state arbitration from the point of process. It concludes that investor-state arbitration is both more integrative of general international law solutions by borrowing from a wide range of public international law disputes, and more record determined by comparing principally the facts of these disputes to record facts proved in the arbitration than the prevalent academic views had theorized. Part IV reconstructs a theory of investor-state arbitration on the basis of the process insights in Part III. Part V concludes that a common law approach to investor-state arbitration overcomes both the descriptive and normative infirmities of existing approaches to investor-state arbitration.

II. LIMITATIONS OF EXISTING THEORIES OF PRECEDENT

Investor-state arbitration is fertile ground for the competing theories addressing the new and expanded role of international law. The extreme positions are, on the one hand, the exploding web of IIAs and decisions interpreting them to develop new customary international law,[11] and, on the other hand, the denial that this growth of treaties and decisions could

[10] Guzman & Meyer, *supra* note 3, at 524–26.
[11] *See discussion infra* Part II.A.

legitimately expand the scope of international law.[12] Between these extreme positions, some authors advocate that arbitral decisions generate a specialized regime of international investment law in its own right but do not have free-standing force of law.[13] As discussed in this part, each of these theoretical approaches is structurally and normatively problematic: they rest on generalizations champions of each theory themselves call into question and result in a vision of international law that is either undesirably extreme or near irreconcilably fragmented. Both problems can be explained by means of the aporia of the structure of general international law proposed by critical international legal theories.[14]

As discussed in the next section, the structural and normative problems encountered by the currently predominant theories of international investment law are not the necessary byproducts of the structure of investor-state arbitration itself.[15] Rather, these theories are descriptively inconsistent with the practice of investor-state arbitration. It is therefore possible to provide a better account of the foundation, structure, and development of the role of international law in the resolution of investor-state disputes than any of the currently predominant theories provide.[16]

A. Investor-State Awards as Evincing Customary International Law

Until recently, the most widely accepted theory of international investment law was that the explosion of IIAs in their own right created customary international law.[17] This theory posits that the specific content of these customary norms is developed in investor-state arbitrations resolving political risk disputes.[18] Reliance upon a consistent line of investor-state arbitral decisions, therefore, is a means to determine the customary international law standard to be applied in any given dispute.[19]

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[12] *See discussion infra* Part II.B.

[13] *See* discussion *infra* Part II.C.

[14] *See supra* note 9.

[15] *See* discussion *infra* Part III.

[16] *See* discussion *infra* Part IV.

[17] *See, e.g.*, Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27 (2004). This theory is distinct from the position, subscribed to by other commentators, that some BIT "rights are a confirmation of obligations Sovereigns owe under customary international law, others are new." Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1532 (2005) [hereinafter Franck, *The Legitimacy Crisis*].

[18] *See, e.g.*, Andreas Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 129 (2003).

[19] This appears to be the rationale for investor-state decisions self-consciously adopting a jurisprudence constante approach such as Saipem SpA v. Bangladesh, *infra* note 169. *See* Gabriele Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23 ARB. INT'L 357, 377 (2007). For a full list of relevant decisions, see *infra* note 169.

Conversely, divergence from a line of consistent decisions on a relevant point of law is legally fallacious because it is inconsistent with customary international law.[20] Champions of this theory include Judge Stephen Schwebel, a former President of the International Court of Justice;[21] Professor Andreas Lowenfeld, a pioneer of the study of international law in the world economy;[22] Professor José Alvarez, a former President of the American Society of International Law;[23] and Professor Gabriele Kaufmann-Kohler, a leading arbitrator of investor-state disputes.[24] As discussed in this section, this theory is neither descriptively nor normatively defensible because it imposes an inapposite principle of property protection over IIAs and the decisions interpreting them.

1. Rival Conceptions of Customary International Law

The invocation of customary international law must be placed in context. The rapid expansion of international law has led to controversy over what customary international law is and how it is proved. Classically, customary international law is defined as "evidence of a general practice accepted as law."[25] Its proof required a showing of "widespread and representative state practice" and a showing that this state practice arose out of sense of legal obligation, or *opinio juris*.[26] But scholars (and courts) now disagree about what constitutes "state practice," and how (or whether) to prove the subjective recognition by states of the legal force compelling the practice.[27]

Classical positivists regard this debate as a dangerous "Trojan horse," undercutting the link between state consent and positive international law

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[20] *See* Kaufmann-Kohler, *supra* note 19, at 377.

[21] *See* Schwebel, *supra* note 17; *see also Judge Stephan A. Schwebel*, 24 LINCOLN'S INN FIELDS, http://www.londonarbitrators.net/cvs/sschw.pdf (last visited Jan. 18, 2013).

[22] *Compare* Lowenfeld, *supra* note 18, *with* ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW (2002). The earlier edition of the similarly entitled book published by Matthew Bender in the 1980s was hailed as a leader in the field. *See* Richard Gardner, *Book Reviews and Notes*, 76 AM. J. INT'L L. 868, 902 (1982) (reviewing PAOLO PICONE & GIORGIO SACERDOTI, *DIRITTO INTERNAZIONALE DELL' ECONOMIA* (1982)).

[23] José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 32, 57–59 (2009) [hereinafter Alvarez, *A Bit on Custom*]; *see also Biography of José E. Alvarez*, NYU LAW, https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=30514 (last visited Jan. 18, 2013).

[24] *See* Kaufmann-Kohler, *supra* note 19; *see also* Michael D. Goldhaber, *Arbitration Scorecard 2011: The Biggest Cases You Never Heard Of*, AM. LAW., July 6, 2011, http://amlawdaily.typepad.com/amlawdaily/2011/07/arbscorecard2011.html (last visited Jan. 18, 2013).

[25] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute], *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&.

[26] *See, e.g.*, North Sea Continental Shelf (W. Ger. v. Den.), 1969 I.C.J. 3, 42–44 (Feb. 20).

[27] *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 458–59 (2000) ("CIL is an example of nominalization. It survives only because nations and theorists mean radically different things when they use the term.").

in the pursuit of a utopian agenda.[28] Depending upon the evidence available in a given dispute, a custom is established in the absence of clear state practice premised exclusively upon the moral force of the rule invoked.[29] In other cases, customary international law was established solely on the basis of state acts. These state acts have been further diluted to permit creation of custom through recent conventional acts of states, i.e., the fact of participation in a treaty.[30] At times, the same piece of evidence, such as conclusion of a multilateral treaty, would be cited as evidence of the state practice element or evidence of the *opinio juris* element.[31] In short, classical positivists are correct that the proliferation of customary international law rules in international awards and judgments facially does not meet the traditional elements of customary international law proof.

The most radical departure from classically positive customary international law sought to justify this shift in the context of human rights adjudications.[32] It argued that these adjudications reflected a form of "new custom."[33] This new custom relied heavily upon *opinio juris* even in the absence of consistent state practice.[34] It derived this *opinio juris* from

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[28] *See, e.g.*, Hilary Charlesworth, *The Unbearable Lightness of Customary International Law*, 92 AM. SOC'Y INT'L L. PROC. 44, 44 (1998) ("In his stern critique of 'relative normativity,' Prosper Weil presented customary law as a type of Trojan horse by which the homogenous normativity of traditional international law was threatened."); *see also* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 433–34 (1983); *see also* Kelly, *supra* note 27, at 458.

[29] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14, 97–99 (June 27); Charlesworth, *supra* note 28, at 45 ("the Nicaragua case, which identified customary norms limiting the use of force and intervention despite the lack of supporting state practice, has been much criticized"); Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–59 (2001) [hereinafter Roberts, *Traditional and Modern Approaches*]. *But see* Herbert W. Briggs, *The International Court of Justice Lives Up to Its Name*, 81 AM. J. INT'L L. 78 (1987) (noting that the recognition of the customary rule by both parties in pleadings justified the conclusion of opposability of the customary rule to the United States).

[30] Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14, 95 (June 27) (citing approvingly *North Sea Continental Shelf*); *see* North Sea Continental Shelf (W. Ger. v. Den.), 1969 I.C.J. 3 (Feb. 20).

[31] *Compare* Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14, 98–99 (June 27) (relying upon UN Charter to supply *opinio juris*), *with* North Sea Continental Shelf (W. Ger. v. Den.), 1969 I.C.J. 3, 38–39 (Feb. 20) (discussing the possibility of reliance upon a multilateral convention in an area in which "State practice [previously] lacked uniformity"); *see also* Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 150 (1987) (including the evidence of conclusion of the UN Charter for the proposition of non-intervention at issue in the Nicaragua case in *opinio juris* and potentially including conclusion of multilateral treaties addressing maritime border issues in state practice).

[32] *See, e.g.*, Roberts, *Traditional and Modern Approaches*, *supra* note 29.

[33] *Id.*

[34] *See, e.g.*, Louis Henkin, *Human Rights and State "Sovereignty*," 25 GA. J. INT'L & COMP. L. 31, 38–39 (1996) ("[L]aw is 'constitutional,' in a new sense. The international system, having identified contemporary human values, has adopted and declared them to be fundamental law, international law. But, in a radical derogation from the axiom of 'sovereignty,' that law is not based on consent: at least, it

nearly universal consent of states to treaties, U.N. General Assembly resolutions, or common positions in the drafting of a multilateral treaty.[35] This view of custom thus openly rejects the positivists' conservative conception that only longstanding state practice can prove formal acceptance of a customary legal rule by the state against which it is invoked.[36]

The proposition that IIAs and decisions interpreting them constitute customary international law depends critically upon the persuasiveness of its view of customary international law. Resolving this problem is beyond the scope of this Article.

2. The Descriptive Flaw of IIAs as Custom

The customary international law view of IIAs takes the side of new custom. Its champions admit that a subjective sense of legal obligation on the part of signatory states to extend the protections contained in these instruments cannot be proved.[37] As new custom, it operates deductively from a strong (moral) principle of protection of property.[38] It claims that this principle garnered near universal consent through IIAs.[39] Problematically for the champions of IIAs as customary international law, there is no such near universal consent.[40]

As an initial matter, there is no *multilateral* consensus on the substance of investment protection.[41] The failure of several successive multilateral treaties weakens the claim that bilateral IIAs evidence near

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does not honor or accept dissent, and it binds particular states regardless of their objection."). This custom resides on the extreme of Kirgis' sliding scale. *See* Kirgis, *supra* note 31, at 150.

[35] *See, e.g.*, Louis B. Sohn, *Generally Accepted International Rules*, 61 WASH. L. REV. 1073, 1074 (1986); Legality of the Threat of Nuclear Weapons, 1996 I.C.J 226, 254 (July 8); *see also* Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of Internationanl Law or its Fragmentation*, 23 MICH. J. INT'L L. 929, 942–43 (2004) (discussing the *Threat of Use of Nuclear Weapons* decision).

[36] *See, e.g.*, Charlesworth, *supra* note 28.

[37] *See, e.g.*, Lowenfeld, *supra* note 18, at 129–30; Kelly, *supra* note 27, at 460, 469; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 82–85 (2010); *see also* Patrick Dumberry, *Are BITs Representing the "New" Customary International Law in International Investment Law?*, 28 PENN. ST. INT'L L. REV. 675, 690–93 (2010); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: The Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 666–67 (1998) ("LDCs face a prisoner's dilemma in which it is optimal for them, as a group, to reject the Hull Rule, but in which each individual LDC is better off 'defecting' from the group by signing a BIT that gives it an advantage over other LDCs in the competition to attract foreign investors.").

[38] *See infra* note 43. For the deductive nature of new custom, see Bruno Simma, Book Note, *Georges Abi-Saab, Cours Général de Droit International Public*, 92 AM. J. INT'L L. 577, 578 (1998).

[39] *See supra* notes 34–35.

[40] *See infra* note 43.

[41] SORNARAJAH, *supra* note 37, at 81–82, 233.

universal support for a strong principle of investment protection.[42] Bilateral IIAs differ significantly both between treaty programs and within the same program.[43] These differences concern the scope of critical investment protections, such as the fair and equitable treatment standard, arbitrary treatment, the expropriation standard, and the scope of regulatory action that, by agreement of the treaty parties, falls entirely outside the scope of these treaties.[44] These differences undercut claims that there is agreement on a meaningful principle of property protection in IIAs.

Champions of the customary international law theory cannot overcome this problem by arguing that certain provisions in IIAs are sufficiently uniform to create custom.[45] This position leads to a snippet hunt for isolated treaty language without providing a rationale why these treaty provisions can be read in isolation.[46] Furthermore, even if treaty provisions could be isolated, it is far from clear whether the drafting of later generation investment treaties did not in fact narrow the range of treaty protections by other means such as the inclusion of non-precluded measures clauses—a development which an isolated reading would not take into account.[47]

The claim that IIAs would create new custom is not without irony. Champions of IIAs as custom typically deny that UN General Assembly resolutions purporting to limit the scope of international law with regard to the rights of aliens, especially with regard to natural resource investments,

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[42] A strong case could be made (and has been made) to the contrary. *See, e.g.*, Meyer*, supra* note 8, at 1058 ("[T]he fragmented codification of international investment law is a key, and underappreciated, reason that states have been unable to agree on a truly multilateral set of investment rules.").

[43] *See id.* at 1059–67; SORNARAJAH, *supra* note 37, at 81–82, 233; *see also* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327 (1994) (insufficient congruence between BITs to create a customary norm); Matthew C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT'L ECON. L. 79 (2006) (the asserted customary international law minimum standard of treatment is too amorphous to constitute a legal rule); Dumberry, *supra* note 37, at 685–90.

[44] *See supra* note 43.

[45] *See* Alvarez, *A Bit on Custom*, *supra* note 23, at 32–33.

[46] Impregilo S.p.A. v. Arg., ICSID Case No. ARB/07/17, Concurring and Dissenting Opinions of Professor Brigitte Stern (June 21, 2011).

[47] *See, e.g.*, Kenneth Vandevelde, *A Comparison of the 2004 and 1994 U.S. Model BITs, Rebalancing Investor and Host Country Interests*, Y.B. INT'L L. & POL'Y 283, 288 (2008) ("The second objective was to preserve greater regulatory discretion for the BIT parties. This was to be achieved by increasing the number of general exceptions to BIT obligations, by allowing the parties greater latitude to maintain or adopt measures that do not conform to certain BIT obligations."). By ignoring the exceptions provisions, the customary international law advocates would thus ignore the balance intended to be struck for example with regard to the facially broader expropriation provisions. *See also* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 223 (2010) ("Scrutiny of the internal practices of the treaty parties or states as a whole would demonstrate that these standards are unrealistic and inappropriate for use as the threshold for review.").

created custom that relies on the traditional definition of custom.[48] Their own invocation of the new customary theory in the current, changed climate thus seems at best opportunistic and at worst, hypocritical.

Even admitting that the champions of IIAs as new custom had it right, custom would swing between extremes at an alarming rate. In twenty years, new custom would swing from strong investment protection at the end of World War II to a significant limitation of investment protection in the 1960s and 1970s.[49] In another twenty years, it would swing back again to strong investment protection through the adoption of IIAs.[50] The perceived backlash against IIAs could be used by IIA opponents as evidence of yet another sea change, swinging the pendulum of new custom back to the 1970s.[51] The customary international law of investment protection would thus change more quickly than the ordinary shelf life of a production sharing agreement to which it would apply.[52] This consequence of adoption of a new custom framework shows that the attempt is ultimately impractical.

3. The Normative Flaw of IIAs as Custom

In the absence of evidence of consistent state practice or *opinio juris*, the customary international law position is reduced to simple policy preference. It prefers universalizing the IIA interpretations of the first generation of investor-state arbitrations.[53] Because there is no external descriptive reason why this line of decisions should be preferred, i.e., state practice or *opinio juris*, the preference must be defended normatively.[54] The normative defense would have to explain why the law would be better or bring about better results if it were organized following this first generation of decisions. Such a normative defense is almost entirely absent in the literature defending this point of view. As it stands, the customary international law position appears to rest on an arbitrary policy preference.[55]

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[48] *See* Alvarez, *A Bit on Custom*, *supra* note 23, at 39.

[49] *See supra* note 43.

[50] *See supra* note 43.

[51] SORNARAJAH, *supra* note 37, at 81–82, 233.

[52] *See, e.g.*, Robert Peachey, Comment, *Petroleum Investment Contracts After the Baku-Tblisi-Ceyhan (BTC) Pipeline*, 31 NW. J. INT'L L. & BUS. 739, 740 (2011) (discussing production sharing agreement with 30 year term); Ernest E. Smith, *From Concessions to Service Contracts*, 27 TULSA L.J. 493, 516 (1992) (discussing 20 year time frame for production sharing agreements). Placing the custom argument on a "sliding scale" does not assist in the argument as the problems identified concern both state practice and *opinio juris*. *See* Kirgis, *supra* note 31, at 150.

[53] *See* Kaufmann-Kohler, *supra* note 19, at 377.

[54] *See* discussion *supra* Part II.A.2.

[55] *See* Lowenfeld, *supra* note 18; Alvarez, *A Bit on Custom*, *supra* note 23; Schwebel, *supra* note 17; Kaufmann-Kohler, *supra* note 19.

The customary international law thesis also threatens the legitimacy of the entire IIA enterprise. The continued use of IIAs depends upon the faith of treaty parties that the bargains reflected in their mutually agreed upon treaty language will in fact be enforced. Champions of the customary international law undercut this faith when hunting for snippets of preferred treaty provisions across IIAs in order to generate evidence of conforming state practice.[56] The result of the snippet hunt is a supposed affirmation of principles contained in early model U.S. BITs as custom.[57] This customary international law then feeds back into the interpretation of IIAs that precisely negotiated away from the early U.S. BIT positions.[58] Customary international law, ironically, is used as a bulwark against treaty practice in a way that reveals a principled preference for stronger investment protection provisions on the part of its champions.[59] It appears to be precisely the Trojan horse that classical positivists warned the invocation of customary international law had become.[60]

This does not mean that the customary international law thesis has been entirely unsuccessful. The notion that there is no *international* legal obligation, at all, owed to foreign investors is certainly no longer defensible given the current treaty practice.[61] Further, the proponents of the customary international law thesis recognized a feature of critical significance: "[I]n practice, publicly available arbitral decisions, including those by investor-state arbitrators, are more than just 'subsidiary means for the determination of rules of law.'"[62] They are important "simply because such bodies necessarily are required to apply law to concrete facts and generally operate within a tradition that discourages findings of '*non-liquet*.'"[63] This insight is critical for understanding to what kind of system of international law arbitral decisions contribute. But its significance, as is also discussed below, does not depend upon the inclusion of the rules of decisions developed in earlier decisions in customary international law.

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[56] Alvarez, *A Bit on Custom*, *supra* note 23, at 32, 42–43.

[57] *See, e.g.*, Schwebel, *supra* note 17, at 30.

[58] *See, e.g.*, Vandevelde, *supra* note 47, at 288.

[59] *See, e.g.*, Schwebel, *supra* note 17, at 30 ("All this said, in the last few years elements of opinion in the U.S., evidencing an antipathy to foreign investment comparable to that shown at the time of the American Revolution, seem intent on crippling a U.S. policy that has endured for more than one hundred fifty years. The new model BIT embodies regressive changes that are deplorable. They have the further deficiency of prejudicing my thesis.").

[60] *See supra* note 28.

[61] *See, e.g.*, SORNARAJAH, *supra* note 37, at 82–85, 184 (describing the confused state of the law at the beginning of the IIA era).

[62] Alvarez, *A Bit on Custom*, *supra* note 23, at 45; Lowenfeld, *supra* note 18, at 129.

[63] Alvarez, *A Bit on Custom*, *supra* note 23, at 46.

B. Putting the Genie Back in the Bottle

At the other extreme, some authors submit that IIAs and arbitral decisions interpreting them are odious or unfair.[64] These authors therefore reject that arbitral decisions should have much of any legal or persuasive force.[65] They argue that the IIA process has introduced multinational corporations as a new, powerful, and unregulated international legal actor.[66] They further assert that arbitral decisions inherently and illegitimately favor the corporate interests over the sovereign regulatory prerogative of the host state and thereby do serious damage to developing states.[67] The leading champion of this position is Muthucumaraswamy Sornarajah.[68] Others include Professors Gus Van Harten, David Schneiderman, Peter Muchlinski, and, as muse if not participant, Andrew Guzman.[69]

1. The Critique of IIAs and Investor-State Arbitration

At its core, the critical movement argues that "the writings of publicists and the decisions of tribunals, including arbitral tribunals, are eminently manipulable towards the creation of an international law that applies to foreign investments."[70] Multinational companies,[71] and their

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[64] *See* Gus Van Harten et al., Public Statement on the International Investment Regime (Sept. 2, 2010) [hereinafter Van Harten Statement], *available at* http://alainet.org/active/40578&lang=es.

[65] SORNARAJAH, *supra* note 37.

[66] *Id.* at 6, 55, 57, 61. For a detailed discussion of a corporate regulatory agenda, see PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISE & THE LAW 81–122 (2007) (concluding that "there has been a transformation in political discourse which challenges not the legitimacy and value of free private enterprise as such, but its legitimacy as a polluter, an abuser of market power, a corruptor of state officials, an exploiter of workers, and a potential accomplice to violations of fundamental human rights"); *see also* Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265 (2004) (outlining key areas of action for NGOs to increase corporate regulation).

[67] *See* Van Harten Statement, *supra* note 64; SORNARAJAH, *supra* note 37, at 82, 229–30, 313; DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION, INVESTMENT RULES AND DEMOCRACY'S PROMISE 208, 223–37 (2008).

[68] SORNARAJAH, *supra* note 37; *see also Biography of Professor M. Sornarajah*, NAT'L UNIV. OF SING., *available at* http://law.nus.edu.sg/about_us/faculty/staff/staffcv/sornarajahcv2012.pdf (last visited Jan. 21, 2013) (rejecting the use of arbitral decisions as legal authorities by investor-state tribunals because these decisions impermissibly favor corporate over sovereign interests).

[69] *See* Van Harten Statement, *supra* note 64 (Professors Sornarajah, Van Harten, Schneiderman, and Muchlinski are the principal drafters of the document); *see also* Guzman, *supra* note 37.

[70] SORNARAJAH, *supra* note 37, at 52. On recent charges of manipulation in the appointment process, see Jan Paulsson, First Inaugural Lecture as Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law: Moral Hazard in International Dispute Resolution (Apr. 29, 2010), *available at* http://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf (arguing that when counsel act as arbitrators in investor-state arbitrations they are more likely to adopt positions beneficial to their future clients).

[71] *See* SORNARAJAH, *supra* note 37, at 239, 297.

"inventive" and "lost lawyers," use litigation strategies to allegedly manipulate the law and demonstrate "the adverse use to which treaty principles could be put."[72] Consequently, tribunals "often show a near-fundamentalist zeal for investment protection to the exclusion of other considerations such as economic development, human rights and the environment."[73] This leads to the rejection of the notion that "a small group of persons can foist a system on the whole world by an esoteric process to which others are not privy."[74] According to the critics, this system is as corrupt as it is opaque.

Apart from charges of greed and manipulation, critics also reject the narrower notion that BIT awards could be used to cross-fertilize resolution of future disputes premised upon other BITs. The concordant will of states is the principal basis of international law.[75] In this context, they note that "[i]t is highly unlikely that . . . a regime has come about simply because . . . there is simply a lack of concordance in treaty principles."[76] Treaties within one program differ from each other significantly because "[m]odel investment treaties are redrafted with the benefit of earlier experiences."[77] The differences only increase across treaty programs so that each treaty bargain will have to be interpreted ad hoc in light of its specific context.[78] Given these important differences between treaties, "arbitral tribunals or the writings of highly qualified publicists are not significant sources of law, and any theory of international law based entirely on such sources will be tainted with the weakness of the sources on which it is built."[79]

These critics do recognize that "[t]here is a systematic pattern in [the] use [of general principles of law] by arbitral tribunals and precedents have been built upon on the basis of past awards recognizing general

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[72] *Id.* at 24–25. A similar critique of investor-state arbitration was advanced in GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 5–6, 121–85 (2007); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L. J. 419 (2000); *see also* Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 751–56 (2007) (noting that an institutional bias exists when there is an issue link between investment law and, for example, environmental law).

[73] SORNARAJAH, *supra* note 37, at 82.

[74] *Id.* at 303; *see also* Prabhakar Singh, *Macbeth's Three Witches: Capitalism, Common Good and International Law*, 14 OR. REV. INT'L L. 47, 64–68 (2012) (advocating "efficient breach of international law" on the premise of M. Sornarajah's analysis).

[75] SORNARAJAH, *supra* note 37, at 88–143.

[76] *Id.* at 179.

[77] *Id.* at 182.

[78] *Id.* at 186–87; *see also* Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties*, 32 FORDHAM INT'L L.J. 1550, 1610 (2009) (noting that the primary problem is the "increasing tendency of analysts to view BIT promises as not simply *lex specialis*, binding only between treaty partners, but as both indicative of and constituting a universal, one-size-fits-all, customary international law of foreign investment.").

[79] SORNARAJAH, *supra* note 37, at 290.

principles."[80] They accept the "existence of some general principles" that "cannot be denied."[81] But even these general principles do not save the use of prior decisions by arbitral tribunals because the "principles which have been extracted have been challenged as being based on the subjective choices of individual arbitrators and scholars predisposed to building up a system of investment protection."[82] Thus, "[t]he idea that a contract made by a state is defeasible in the public interest is demonstrably common to all legal systems" but not reflected in the general principles applied by international tribunals.[83]

The end goal of this line of criticism is to strengthen the state's regulatory power and limit the potential of international legal liability for what the authors consider to be the inherent regulatory right of the state. It limits the scope of international review of state conduct towards foreign nationals.[84] Its appeal to sovereignty is premised nearly exclusively upon the primacy of state conduct.[85] This conduct is argued to support the idea that absolute sovereignty is required to protect environmental norms and human rights, which are goals that would be unprofitable for multinational corporations to protect.[86]

2. The Descriptive Flaw of the Critique

The critique of investor-state arbitration cannot substantiate the central claim of bias or manipulation empirically. The statistics provided by the main investor-state arbitration institution, the International Centre for Settlement of Investment Disputes (ICSID), report that 23% of ICSID investor-state disputes are dismissed at the jurisdictional or screening stage.[87] In fact, investors receive *any kind of* recovery in only 48% of cases.[88] In the majority of these 48% of cases in which investors do

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[80] *Id.* at 86.

[81] *Id.*

[82] *Id.* at 292. For further discussion of the historical challenges to general principles of law in disputes between host states and investors, see Georges Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575 (1989); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135 (2007).

[83] SORNARAJAH, *supra* note 37, at 293, 296.

[84] *Id.* at 290, 299–300.

[85] *Id.* at 299, 313.

[86] *Id.* at 55–60 ("Once it is conceded that multinational corporations can both benefit and harm economic development, it is easy to adopt the position that foreign investment should be harnessed to the objective of economic development and must be carefully regulated to achieve this end.").

[87] ICSID, ICSID CASELOAD—STATISTICS (ISSUE 2012-2) 13, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32 (last visited Apr. 23, 2014).

[88] *Id.*

recover, they recover at a rate significantly below their asserted damages claim.[89]

Recent surveys of investor-state arbitrations have found that the win-loss ratio of host states in investor-state arbitrations does not significantly differ from the win-loss ratio in other types of legal proceedings.[90] Development of the parties was a statistically insignificant factor, i.e., the surveys are not skewed by the presence of developed countries as investor-state arbitration respondents.[91] The charge that appointment of a small cabal of elite arbitrators "foisted" a regime that is "zealously" in favor of international investors has similarly been debunked as flatly inconsistent with the set of awards rendered by "elite arbitrators."[92]

The asserted weakness of arbitral awards as a source of international law is also inconsistent with the voluntarist paradigm the critics appear to espouse. *Both* investors and host states routinely rely upon such awards.[93] States invoking investor-state awards as authoritatively supporting their case have included least-developed states,[94] developing states,[95] developed states,[96] Asian states,[97] European states,[98] North American states,[99] South

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[89] *See, e.g.*, Linda A. Ahee, Leonardo Giacchino & Richard E. Walck, *Historical Analysis of ICSID Concluded Cases*, 5 WORLD ARB. & MEDIATION REV. (2011).

[90] *See, e.g.*, Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 48–52 (2007); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 81 (2010).

[91] Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 465 (2009).

[92] Kapeliuk*, supra* note 90, at 81 (2010) ("The results thus show that arbitration tribunals involving elite arbitrators do not have a tendency to render compromise awards. Moreover, since most awards dismissed all investors' claims and more than 80% of all decisions rendered an award of less than 40% of the amount claimed, the results clearly do not support the claim that investment-arbitration tribunals display a tendency to rule in favor of investors.").

[93] For further discussion, see *infra* Part III.

[94] *See, e.g.*, Biwater Gauff (Tanz.) Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶¶ 430–432, 438 (July 24, 2008) (Tanzania relying on *Waste Management v. Mexico* as an analogous case with regard to the fair and equitable treatment and expropriation claims, *Azinian v. Mexico* as a relevant analogue for the expropriation claim, and *Tecmed v. Mexico* as a relevant authority with regard to the requirement of permanence of a measure to constitute an expropriation). Tanzania is a developing country. *See List of Developing Countries*, USAID (Feb. 6, 2012), http://transition.usaid.gov/policy/ads/300/310maa.pdf (listing Tanzania as a low income country).

[95] *See, e.g.*, Paushok et al. v. Mong., Award on Jurisdiction and Liability, ¶¶ 2.3, 285 (Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf (Mongolia relying on the discrimination standard set out in *Champion Trading v. Egypt*, *Sempra v. Argentina*, and the expropriation standard set out in *LG&E v. Argentina*). Mongolia is a middle low-income country. *See List of Developing Countries*, USAID (Feb. 6, 2012), http://transition.usaid.gov/policy/ads/300/310maa.pdf.

[96] *See infra* Part III.B.2, discussing the submissions of the United States on the content of the international minimum standard of treatment in *Glamis*.

[97] Fraport AG Frankfurt Airport Servs. Worldwide v. Phil., ICSID Case No. ARB/03/25, Award, ¶ 288 (Aug. 16, 2007) (Philippines relying on the definition of "investment" in *Salini Costruttori S.p.A.* and *Italstrade S.p.A. v. Kingdom of Morocco*).

[98] Frontier Petroleum Services Ltd. v. Czech Republic, Award, ¶ 258 (Nov. 12, 2010) (Czech

American states,[100] and African states.[101] State behavior thus gives greater importance to arbitral decisions than critics deem appropriate. This change in behavior, in and of itself, means that a purely descriptive theory of international law premised upon the actions of states would not support the narrow conclusion that arbitral decisions are a "weak" source of law without support in state practice.

3. The Normative Flaw of the Critique

The critical project's normative flaws mirror those of the customary international law thesis. Like the customary international law thesis, it ultimately must admit that it "cannot be denied" that IIAs and arbitral awards interpreting them have created a reality that is at least partially at odds with the critical paradigm.[102] Like the customary international law thesis, the critical project hunts for snippets of state practice to affirm the primacy of strong sovereignty.[103] Like the customary international law thesis, it assumes that its criteria for snippet hunting are ultimately correct without explaining why it chose those criteria.

The problem for critics is that they assume, rather than substantiate, the claim that strong sovereignty is preferable to strong property protection. Critics assume that development in least developed states would improve if regulatory power were left exclusively to host state governments.[104] This presumption then feeds back into the negative view of IIAs that precisely negotiated away from this policy presumption.[105] But this assumption is neither defended nor ultimately empirically defendable.[106]

Again ironically, a voluntarist paradigm is used as a bulwark against treaty practice in a way that reveals a principled preference for weaker investment protection provisions on the part of its champions.[107] The critique thus repeats the same mistake as the theory it attacks, crippling the

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Republic explaining "that the vast majority of investment treaty awards have limited the obligation of full protection and security to ensuring the physical safety of the investment property and personnel in the host state consistent with the resources available to the host state, which Respondent notes is in line with the historical development of the standard in customary international law").

[99] *See infra* Part III.B.2, discussing the submissions of the United States on the content of the international minimum standard of treatment in *Glamis*.

[100] Brandes Inv. Partners, L.P. v. Venez., ICSID Case No. ARB/08/3, Award, ¶ 72 (Aug. 2, 2011) (Venezuela relying on *Plama v. Bulgaria*).

[101] Jan de Nul NV & Dredging Int'l NV v. Egypt, ICSID Case No. ARB/04/13, Award, ¶ 182 (Oct. 24, 2008) (Egypt relying on *Lowen v. United States* and *Saipem v. Bangladesh* regarding exhaustion of remedies).

[102] SORNARAJAH, *supra* note 37, at 86.

[103] *Id.* at 297.

[104] *See, e.g.*, SCHNEIDERMAN, *supra* note 67, at 223–37.

[105] *See, e.g.*, Van Harten Statement, *supra* note 64.

[106] *See infra* note 133.

[107] *See, e.g.*, Van Harten Statement, *supra* note 64.

ability of states and others to use international law as a problem solving tool.

This does not mean that the purely critical insights of proponents of this view can be dismissed out of hand. They rightfully point out over-generalizations and deep lacunae in the theories presented by others. It is in these "critical" elements that the doubters of current conceptions of "investment law" largely do and should succeed.

C. Grand Bargains and Self-Contained Regimes

Current scholarship seeks the middle ground between these extremes. Its insight is that there exists an "epistemic community" of international lawyers and scholars focusing their practice and research on international investment law issues. This "epistemic community" is a "network[] of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain."[108] To this epistemic community, the network of approximately 3,000 IIAs created a self-contained international legal regime.[109] This regime forms the background conditions for all future interpretation of IIAs.[110]

This regime is less than full-fledged customary international law, i.e., regime theory addresses "the strong similarity among treaties and the common concepts, language, structure, and processes they employ" but "[w]ithout resolving the debate as to whether or investment treaties constitute customary international law."[111] But it nevertheless rejects the claims of critical movement that IIAs should be treated as purely bilateral bargains.[112]

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[108] JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 13 (2010) (quoting Peter M. Haas, *Introduction: Epistemic Communities and International Policy*, *in* INTERNATIONAL ORGANIZATIONS 3 (1993)) [hereinafter SALACUSE, LAW OF INVESTMENT TREATIES]; Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 465–66 (2010).

[109] *See* SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108.

[110] *Id.*

[111] *Id.* at 5.

[112] STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 280–81 (2009); SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 8–11. The champions of this theoretical approach include Professor Jeswald Salacuse of the Tufts Fletcher School of Law and Diplomacy and Dr. Stephan Schill of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. *See Biography of Professor Jeswald Salacuse*, THE FLETCHER SCH., http://fletcher.tufts.edu/~/media/Fletcher/Directory/CVs/cv_Salacuse_Jeswald.pdf (last visited Jan. 21, 2013); *Biography of Dr. Stephan W. Schill*, MAX PLANCK INST., http://www.rzuser.uni-heidelberg.de/~p00/down/cv_schill.pdf (last visited Jan. 21, 2013); *see also* Commission, *supra* note 3, at 136–41; Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 49 (2013) (arguing that "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"). For further discussion of

1. Self-Contained Regimes in General International Law

The invocation of a "regime" of investment protection in international law, like the invocation of customary international law, has to be placed in context. The growth of international law caused several scholars to warn of the risk of a loss of the coherence and normative force international law, leading to its ultimate fragmentation.[113] Self-contained regimes are a unit into which international law could break off or "fragment"—the fact and implications of their existence have stirred significant controversy in its own right to the point of making fragmentation of international law an object of study for the United Nations' International Law Commission (ILC).[114]

The ILC observed a state of significant terminological confusion.[115] A self-contained regime narrowly refers to a special set of rules concerning the consequences of a violation of an international legal obligation.[116] Alternatively, it "refer[s] to interrelated wholes of primary and secondary rules, sometimes referred to as 'systems' or 'subsystems' of rules that cover some particular problem differently from the way it would be covered under general law."[117] In the event of such a subsystem, the complex subject matter of the field in fact requires expertise beyond what general international lawyers (such a judges on the International Court of Justice) possess.[118] In this broader sense, a self-contained regime has "effect predominantly through providing interpretive guidance and direction that in some way deviates from the rules of general law."[119]

The "interpretive guidance" provided by a self-contained regime partially displaces the traditional "systematic integration" in treaty

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Clash of Paradigms, see Frederic G. Sourgens & Baiju S. Vasani, *Doubling Down on Deference? Treatment Standards and the Public Law Fallacy*, 7 WORLD ARB. & MEDIATION REV. (2013).

[113] *See, e.g.*, Weil, *supra* note 28, at 430 (With regard to "fragmentation of normativity," the author notes that "[a] normativity subject to unlimited gradation is one doomed to flabbiness, one that in the end will be reduced to a convenient term of art, covering a great variety of realities difficult to grasp. Like the 'variable legal authority' of subnormative acts, the graduated normativity of normative acts is a notion so elusive as to escape comprehension."). For an historical survey of fragmentation in international law, see Rao*, supra* note 35, at 931–39; Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 483–85 (2006).

[114] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. DOC. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *ILC Fragmentation*].

[115] *Id.* at 68.

[116] *Id*. On the derogation from such "secondary rules," see Simma & Pulkowski, *supra* note 113, at 483.

[117] *ILC Fragmentation*, *supra* note 114, at 68.

[118] *See* Rao, *supra* note 35, at 944–45 (quoting Rosalyn Higgins, *Respecting the Sovereign States and the Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 122 (2001)).

[119] *ILC Fragmentation*, *supra* note 114, at 70.

interpretation.[120] Such systemic integration requires that other international legal obligations of the parties be taken into account in interpreting the treaty language at issue in a given case.[121] In a self-contained regime, systemic integration operates when there is a *renvoi* to general international law (such as, for example, the meaning of statehood).[122] Barring such an immediate intersect with general international law, interpretation first and foremost makes the treaty provision coherent with the remainder of the subsystem—even if that sub system does not contain any relevant legal obligations between the parties in question.[123] It is when this integration does not resolve how interpretation should proceed that other sources of international law will be consulted.[124]

2. International Investment Law as a Self-Contained Regime

The "regime" theorists of international investment law assert that the web of approximately 3,000 IIAs and the jurisprudence under them has led to the creation of a regime in this stronger sense.[125] IIA awards take precedence over and displace systemic integration under the Vienna

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[120] *Id.* at 70, 80; *see also* Simma & Pulkowski, *supra* note 113, at 488 ("[B]oth the International Court of Justice and the Claims Tribunal, in a first step, examined the content of the rule of general international law and considered, in a second step, whether states in the particular case had derogated from this standard by creating a more special set of rules. Tribunals established under a special legal subsystem—such as WTO panels or the European Court of Justice—generally follow the reverse order of examination. They are primarily concerned with the content of 'their' special law.").

[121] *See* Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT]; *see also ILC Fragmentation*, *supra* note 114, at 206–43; RICHARD K. GARDINER, TREATY INTERPRETATION 260–76, 278–81, 284–87 (2008).

[122] *See ILC Fragmentation*, *supra* note 114, at 96 ("To press upon a perhaps self-evident point, there is no special 'WTO rule' on statehood, or a 'human rights notion' of transit passage, as little as there is a special rule about State immunities within the European Court of Human Rights or a WTO-specific notion of 'exhaustible resources.'").

[123] *See* VCLT, *supra* note 121, art. 31(4); *see also ILC Fragmentation*, *supra* note 114, at 82; GARDINER, *supra* note 121, at 291–98; *see also* Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1014 (2004) ("In contrast to the courts of developed Nation-States that guarantee legal unity, globally dispersed courts, tribunals, arbitration panels and alternative dispute resolution bodies are so closely coupled, both in terms of organization and self-perception, with their own specialized regimes in the legal periphery that they necessarily contribute to a global legal fragmentation. These conflicts are a result of the 'poly-contexturalization' of law. They are created by the different internal environments of the legal system, which, for their part, are dependent upon multiple paradigms of social ordering."); *cf.* Simma & Pulkowski, *supra* note 113, at 505 (The authors summarize the regime approach as having "a certain scepticism towards any attempt to 'smuggle' alien elements into the regime. Making use of norms outside the regime is more of an 'emergency operation' than a desirable practice. Tribunals established under particular regimes thus tend to apply a presumption in favour of complete and exhaustive regulation in the respective regime.").

[124] *ILC Fragmentation*, *supra* note 114, at 82, 97–99.

[125] SCHILL, *supra* note 112, at 280–81; SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 8–11.

Convention on the Law of Treaties.[126] Thus, the regime approach legitimizes current arbitral practice against the critical movement.[127]

Regime theorists argue that state actors purposefully set up an independent, internally consistent international investment law regime. *Historically*, IIAs show a conscious effort on the part of states to create uniform textual bases for their IIAs by using the same draft multilateral conventions as the basis of their own bilateral model treaties.[128] *Functionally*, the parallel legal structures reflect an agreement on common principles, norms, rules, and dispute resolution mechanisms.[129] *Doctrinally*, the historical and functional "multilateralization" of formally bilateral IIAs is justified by reference to the Most Favored Nation (MFN) clause, included in the IIAs.[130]

The result of the regime approach is a purposive recasting of investor-state decisions to meet the ultimate principle of increased prosperity for the treaty states through clear rules, i.e., "a *promise* of protection of capital in return for the *prospect* of more capital in the future."[131] This principle is

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[126] *See supra* notes 123–125.

[127] *See supra* notes 123–125.

[128] SCHILL, *supra* note 112, at 40–41, 65, 70–71, 90.

[129] SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 8 (The basic "principle" of the regime is the grand bargain "that clear and enforceable rules that protection foreign investors reduce investment risk, and a reduction in risk, all other things being equal, promotes investment."). Salacuse warns that "[b]y principles, regime theorists mean something different from what lawyers and legal scholars usually understand by that term. Within the context of international regimes, principles may be defined as 'beliefs of fact, causation, and rectitude.' Regimes are based on a belief by their participants that cooperation in a particular area will lead to some desired outcome." *Id.* at 6–7. Next, this approach identifies bilateral investment treaty treatment standards as the "norms" of the regime. *Id.* at 9–10. Salacuse explains that "[n]orms in regime theory are defined as 'standards of behavior defined in terms of rights and obligations.'" *Id.* The rules of the regime are the application of the vague norms in specific situations. *Id.* at 10. Investor-state dispute resolution is the decision-making procedure of the regime. *Id.* at 10–11. On the relationship between political-science regime theory in political science and self-contained regimes in international law, see Simma & Pulkowski, *supra* note 113, at 502.

[130] SCHILL, *supra* note 112, at 122. As such, "MFN clauses affect the structure of the international economic order and impact the system of international investment protection by supporting the emergence of a uniform international investment regime." *Id.* at 124. They do so by attracting selectively the most favorable investor protection from any IIA signed by the host state and piecing together the best possible treaty from the investor's vantage point, thus extending protection to investors potentially beyond the strongest *combination* of protections contained in any one treaty. *Id.* at 140, 159. Schill further submits that the liberal corporate structuring requirements to fall within BITs further support the multilateralization of the regime because it does not create significant barrier to entry. *See id.* at 197–240.

[131] *See, e.g.*, SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 111 ("Thus, an investment agreement between a developed and a developing country is founded on a grand bargain."). Salacuse concludes after econometric analysis of U.S. outflows of investment to BIT countries that the grand bargain does in fact work, noting an increase in investment flows of approximately $1 billion per annum following conclusion of a U.S. bilateral investment agreement. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 109 (2005); *see also* SCHILL, *supra* note 112, at 43–44, 106–

critical to defend the existence of the regime.[132] It also provides the focal point for its application.[133]

3. The Flaws of the Regime Approach

The most challenging problem for the regime approach is the need for substantive coherence and convergence within the regime, i.e., like cases must be decided alike.[134] Absent such coherence, it is questionable whether an "epistemic community" exists at all.[135] Further, absent coherence, the regime could provide severely limited interpretive guidance because a later decision maker cannot identify a "seamless web" into which it could integrate its new decision.[136]

Scholars widely comment upon the increasing *divergence* between IIA awards.[137] They view divergence as the most important legitimacy problem

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20, 278, 288, 300. Other studies conclude the opposite, i.e., that bilateral investment treaties have no effect on investment flows. *See, e.g.*, Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011) (arguing that BITs have little to no effect on FDI premised upon underwriting decisions of political risk insurance providers and decisions by in-house counsel in large U.S. corporations); Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT'L L. REV. 451, 454–55 nn.7–8 (2007).

[132] SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 8.

[133] SCHILL, *supra* note 112, at 293–356.

[134] *See id.* at 293.

[135] To the extent that the academic community has identified a core "principle," that the protection of investment leads to promotion of investments and beneficial development, it is unclear what they mean by this credo. More worryingly, its empirical accuracy is essentially untested and perhaps untestable, leading to a cottage industry of dueling economic and econometric studies none of which appear to have changed the mind of any member of the epistemic community about the role and value of international law in this field of application. For a representative sample of articles, see *supra* note 131. The easy reference to markets as the driver behind global legal processes has been criticized in other contexts as too facile. *See* Fischer-Lescano & Teubner, *supra* note 123, at 1005. Overall, it is more likely that the true policy goal behind IIAs is growth (and investment protection), rather than simple economic development. These policy goals include foreign policy realignments, as well as deeper realignments with regard to the importance of property rights for the construction of a sustainable civil society whether globally or locally.

[136] *See* VCLT, *supra* note 121, art. 31(4); *see also ILC Fragmentation*, *supra* note 114, at 82; GARDINER, *supra* note 121, at 291–98; *see also* Fischer-Lescano & Teubner, *supra* note 123, at 1014; *cf.* Simma & Pulkowski, *supra* note 113, at 505 (The authors summarize the regime approach as having "a certain scepticism towards any attempt to 'smuggle' alien elements into the regime. Making use of norms outside the regime is more of an 'emergency operation' than a desirable practice. Tribunals established under particular regimes thus tend to apply a presumption in favour of complete and exhaustive regulation in the respective regime.").

[137] *See, e.g.*, Franck, *The Legitimacy Crisis, supra* note 17; David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 44 (2006); Suzannah Linton & Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT'L L. 407, 458–61 (2009); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Sphere: The Standard*

of the entire IIA enterprise.[138] The central factual premise of regime theorists is thus heavily contested ground.[139]

And the composition and practice of investor-state tribunals directly contradicts the existence of a self-contained regime. Investor-state tribunals are composed of international law and commercial law generalists.[140] They unquestioningly apply the general law of state responsibility.[141] Their decisions adopt legal rationales that borrow problem solutions from other areas of international law through systemic integration, including general international law, human rights law, and trade law.[142] In fact, hard cases in investor-state disputes are resolved along similar lines as international legal disputes in completely different areas of international law, such as border disputes and continental shelf disputes.[143]

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of Review in Investor-State Arbitrations, 35 YALE J. INT'L L. 283, 300 (2010); Leah D. Harhay, *Investment Arbitration in 2021: A Look to Diversity and Consistency*, 18 SW. J. INT'L L. 89 (2011); José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223, 244 (2011) [hereinafter Alvarez, *The Return of the State*].

[138] *See infra* note 139.

[139] The proposed response has two prongs. First, it posits that empirically, there are comparatively limited instances of divergence given that there is no unifying mechanism of results. This rejoinder is not convincing given its own perceived need for qualification. *See* SCHILL, *supra* note 112, at 293. Further, the frequency of dissent within arbitral circles is notoriously increasing, not decreasing, so much so that dissenting has itself become a subject of academic study. *See, e.g.*, Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN (Arsanjani et al. eds., 2010). Second, it submits that dissent is not premised upon a bilateral rationale but upon a different view of the role of international investment law as whole. SCHILL, *supra* note 112, at 356. This rejoinder reveals deep fissures within the epistemic community upon which the entire regime hypothesis rests. If members of the epistemic community do not agree as to the principles, norms, and rules applicable to these disputes but insist on globally different principles, norms, and rules, international investment law is the battleground of regime conflict rather than the result of regime creation. See *supra* note 108.

[140] *See* Rao, *supra* note 35, at 946 (quoting Rosalyn Higgins, *Respecting the Sovereign States and the Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 122 (2001)). Former members of the International Court of Justice frequently sit in ICSID arbitrations, as do human rights lawyers, international trade lawyers and commercial arbitrators. *See generally* Goldhaber, *supra* note 24.

[141] The Argentine decisions discussed *supra* Part III.B.1 are one example of this fact. The interpretation of the non-precluded measures clause in the U.S.-Argentina BIT, as reflecting the customary international law standard codified in ILC Draft Article 25 on State Responsibility, evidences that tribunals (and parties) instinctively view political risk disputes governed by international law as subject to the same secondary rules as any other area of international law. In the instance of the Argentine cases, several annulment decisions have noted that the specific wording of the non-precluded measures clause in question requires a different interpretation. This conclusion, however, precisely confirms rather than weakens the general point: these committees did not hold that the law of state responsibility as a general rule does not apply. It would apply if not displaced by express treaty language. For further discussion, see, for example, Michael D. Nolan & Frédéric G. Sourgens, *The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements*, *in* Y.B. INT'L INV. L. & POL'Y 362 (Karl Sauvant ed., 2011).

[142] *See* discussion *infra* Part III.A.

[143] *See* KOSKENNIEMI, *supra* note 1, at 258–72 (noting that "nationalization of foreign property

Investor-state arbitration descriptively bears none of the hallmarks of a strong self-contained regime. Divergence of IIA decisions appears to be a far greater problem than it admits. IIA tribunal members are drawn not from a specialist field, but instead are generalists. And the practice of IIA decisions relies heavily on systemic integration, which regime theory precisely seeks to displace.[144] The regime theory is thus left to argue that an epistemic community of IIA lawyers should exist. Its explanation why remains outstanding.

That is not to say that IIA disputes do not bear a resemblance to some of the characteristics of self-contained regimes. The relevance of IIA awards to the interpretation of an IIA of third parties is in fact critical to the legal strategy of counsel of both parties and is reflected in the resulting awards of tribunals in most occasions. An "epistemic community" does exist. But its ties are not as strong as posited by either the regime or multilateralization theories. Membership in this epistemic community is one of many roles held by its members—and in many instances is comparatively the weaker membership in the context of a potential role conflict.[145] Though tempting, reliance upon a self-contained regime theory to explain the current role of international law in the resolution of political risk disputes is inaccurate.[146]

D. The Critical Knot

The structural problems faced by all three theories addressing the development of international investment law are reflected in an aporia regarding general international law.[147] Martti Koskenniemi posits that international law is both over and under-determined because it argues from mutually incompatible assumptions. Koskenniemi begins his examination with a dilemma: international law assumes that it can be simultaneously "concrete" and "normative," meaning that law is verified "not against some political principles but by reference to the concrete behaviour, will and

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provides a further example" of the constructivist approach taken by the International Court of Justice in resolving continental shelf delimitation disputes).

[144] For examples, see *infra* notes 185–205.

[145] *ILC Fragmentation*, *supra* note 114, at 71 n.168 (noting that a clash between special regimes would "appear as a clash of rationalities" and that "fragmentation of international law would articulate a rather fundamental aspect of globalized social reality itself—the replacement of territoriality as the principle of social differentiation by (non-territorial) functionality"); *see also* Fischer-Lescano & Teubner, *supra* note 123, at 1004 ("At core, the fragmentation of global law is not simply about legal norm collisions or policy-conflicts, but rather has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve, but which demand a new legal approach to colliding norms.").

[146] *See, e.g.*, Rao, *supra* note 35, at 958–60 (confirming studies that reveal that specialized tribunals do not deviate in their legal approach from the outlook of other international law courts and tribunals).

[147] KOSKENNIEMI, *supra* note 1.

interest of States" and remains "opposable to State policy."[148] Following this dichotomy, Koskenniemi submits that arguments can be "descending" from "a given normative code which precedes the State and effectively dictates how a State is allowed to behave," or "ascending" by attempting to "construct a normative order on the basis of the 'factual' State behaviour, will and interest."[149] He submits that both patterns are "exhaustive and mutually exclusive."[150] Koskenniemi argues that international legal argument (and international legal decisions) includes *both* assumptions because it seeks to be both concrete and normative.[151] As such, it is incoherent because "it incorporates *contradictory assumptions* about what it is to argue objectively about norms."[152] Using this dichotomy, Koskenniemi concludes:

> In situations of uncertainty (hard cases) we are thrown back into having to argue both what the law's content is and why we consider it binding on the State. To avoid utopianism, we must establish the law's content so that it corresponds to concrete State practice, will and interest. But to avoid apologism, we must argue that that it binds the State regardless of its behaviour, will or interest.[153]

Koskenniemi's discussion of his aporia in the context of customary international law captures the disagreement between IIA scholars whether customary international law exists because it explains their methodological disconnect of looking principally to state practice or principally to *opinio juris*. Customary international law conceptually oscillates between a psychological element (*opinio juris*) and a material element (State practice) in order to suspend customary international law "between the fully descending (natural law) and the fully ascending (treaty)."[154] The IIA customary international law position focused upon the treaty practice of states to generalize specific commitments given in a large number of bilateral agreements, without inquiry as to whether states are legally

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[148] *Id.* at 58.

[149] *Id.* at 59.

[150] *Id.*

[151] *Id.* at 58, 65 ("The dynamics of international legal argument is provided by the contradiction between the ascending and descending patterns of argument and the inability to prefer either. Reconciliatory doctrines will reveal themselves as either incoherent or making a silent preference. In both cases, they remain vulnerable to criticisms from an alternative perspective. . . . Consequently, doctrine is forced to maintain itself *in constant movement from emphasizing concreteness to emphasizing normativity and vice-versa* without being able to establish itself permanently in either position.").

[152] *Id.* at 63.

[153] *Id.* at 66.

[154] *Id*. at 410.

obligated to make these commitments.[155] It adopts a strategy that, in Koskenniemi's words, "tends towards reconciliation by a tacit consent argument—materializing the psychological element."[156] Inferred tacit agreement is used to overrule actual objection (in the form of changed treaty commitments).[157] The position falls headlong into utopianism that property ought to be protected. But this position is true whether or not there is material state practice supporting it. The customary international law argument thus is caught in the aporia.

Koskenniemi's challenge of sovereignty accounts for the difficulties of the critique of IIAs and arbitral decisions interpreting them. Sovereignty "oscillates between an ascending and descending perspective on statehood," i.e., "[o]ne State argues in terms of effective power" while the "other argues in a way which assumes the precedence of constraining norms to actual power."[158] At first, the critique appears to argue from the sovereignty of the state as effective power to justify the subjection of the investor to the state's legislative, regulatory, and executive conduct.[159] But part of the premise of the critique is to curtail the power of multinational corporations acting independently from their home states.[160] It attempts to *resist* a perceived change in effective power.[161] The constraining factors relied upon are a right to development and economic self-determination.[162] The critical project thus falls into the same utopianism of which it accused the champions of investment protection. It, too, is caught in the aporia.

Finally, the construction of a specialized regime of international investment law also does not escape the aporia. Rather, it falls into the problem Koskenniemi describes in the context of treaty interpretation. It also oscillates between "a subjective approach [that] treaties bind because they express consent" (ascending) and an "objective approach" that "they bind because considerations of teleology, utility, reciprocity, good faith or

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[155] *See supra* Part II.A.1.

[156] KOSKENNIEMI, *supra* note 1, at 427.

[157] *Id.* at 430 ("But to say that material practice creates a presumption about consent does not, by itself, go far enough to make that practice normative. . . . [I]f we wish to achieve the original aim of having a custom which binds non-accepting States, too, we must regard the presumption as *non-rebuttable*.").

[158] *Id.* at 225, 228.

[159] *See, e.g.*, SORNARAJAH, *supra* note 37, at 388 ("Regulatory functions are a sovereign right of the host state, and there could be no right in international law to compensation or diplomatic protection in respect of such interference.").

[160] *See supra* Part II.B.

[161] *See, e.g.*, SORNARAJAH, *supra* note 37, at 20, 37.

[162] *Id.* at 297 ("Likewise, norms of international law on development will have to be addressed. Thus, the principle of economic self-determination which in itself is a principle enshrined in the United Nations Charter and elevated, at least by a group of writers, to a principle of *ius cogens* in modern international law.") The invocation of ius cogens signals a radical departure from the voluntarist paradigm, as Prosper Weil demonstrates in *Towards Relative Normativity in International Law. See generally* Weil, *supra* note 28.

justice so require."[163] Thus, the key advance of the regime position over other rival conceptions of IIAs is its acknowledgment of an "objective" starting point that conditions an essentially teleological interpretation towards the coherence and convergence of an inherently "neoliberal" international investment law.[164] This move alone, however, "provides no solution" because we cannot "know which interpretation (which behavior, which teleology) manifests consents."[165] The objective approach must *itself* be justified by consent, i.e., the existence of a relevant epistemic community.[166] This in turn means that the moment the epistemic community descriptively ceases to exist, so does the objective starting point of interpretation. Regime theory attempts to avoid this fate by appealing to the rationality of the regime principles—but this appeal falls into the same utopianism as the customary international law and critical projects. It, too, falls prey to the logic of the aporia.

To resolve the theoretical problem of the role international law in settling investor-state disputes, it is necessary to either resolve or reject Koskenniemi's aporia. The theoretical approaches championed so far have done neither. The remainder of the Article will propose an approach to resolve the problem by switching points of view from result to process, from deductive reasoning to inductive reasoning.

III. LAW AS PROCESS—THE PRACTICE OF INVESTOR-STATE TRIBUNALS

The failure of the three predominant theories for investor-state arbitration requires a return to the drawing broad. These three competing conceptions all focused on results—the award in IIA disputes. This focus reveals a methodological flaw: decisions do not appear ready-made but are the result of a dispute resolution process. It is this process, rather than the result to which it leads, that defines the system that these decisions help form.[167] This part explores the process both in instances of affirmative reliance by tribunals upon earlier decisions and in instances in which tribunals diverge from earlier relevant decisions.

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[163] KOSKENNIEMI, *supra* note 1, at 333.

[164] *See supra* Part II.C.1.

[165] KOSKENNIEMI, *supra* note 1, at 336.

[166] *See id.* at 333; SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 8.

[167] *See, e.g.*, Myers McDougal & W. Michael Reisman, *The Prescribing Function in World Constiutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1979) (using process to critique natural law and positivist positions to international law).

A. Reliance Upon Earlier Decisions in Investor-State Arbitral Awards

Express reliance by investor-state tribunals upon decisions rendered by other international courts and tribunals is ubiquitous. The fact of this reliance is acknowledged by all three theories,[168] and it is increasingly acknowledged in arbitral decisions themselves.[169]

Studies of arbitral precedent focus first and foremost on the *tribunals'* use of prior decisions.[170] This starting point leads to imprecise results because a tribunal views prior decisions through the lens of the record created by counsel.[171] The first step to understanding the use of prior decisions by arbitral tribunals is to understand how these decisions are before those tribunals in the first place: it is taking note of the instrumental role of counsel in assembling the legal record upon which a tribunal decides the dispute.

The task of establishing the use of prior decisions by counsel is made

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[168] *See infra* note 171.

[169] *See* Saipem SpA v. Bangl., ICSID Case No. ARB/05/07, Decision on Jurisdiction, ¶ 67 (Mar. 21, 2007); Noble Energy Inc. & MachalaPower Cia Ltd. v. Ecuador & Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, ¶ 50 (Mar. 5, 2008); Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador, ICSID Case No. ARB/04/19, Award, ¶¶ 116–117, (Aug. 12, 2008); Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Pak., ICSID Case No. ARB/03/29, Award, ¶ 145 (Aug. 24, 2009); Austrian Airlines v. Slovk., Final Award, ¶¶ 83–84 (Oct. 9, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0048.pdf; Chemtura Corp. v. Can., Award, ¶¶ 108–109 (Aug. 2, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf; Abaclat v. Arg., ICSID Case No. ARB/07/5, Decision on Jurisdiction, ¶ 293 (Aug. 4, 2011); Daimler Fin. Servs. AG v. Arg., ICSID Case No. ARB/05/1, Award, n.588 (Aug. 22, 2012); Chevron Corp. & Texaco Petroleum Co. v. Ecuador, Interim Award, ¶ 121 (Dec. 1, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0150.pdf; *see also* Int'l Thunderbird Gaming Corp. v. Mex., Separate Opinion of Prof. Thomas Wälde, ¶ 129 (Jan. 26, 2006), http://italaw.com/sites/default/files/case-documents/ita0432.pdf; Canadian Cattlemen for Fair Trade v. U.S., Award on Jurisdiction, ¶ 50 (Jan. 28, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0114.pdf; Suez v. Arg., ICSID Case No. ARB/03/17, Decision on Liability, ¶ 182 (July 30, 2010).

[170] *See, e.g.*, SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 155 ("[I]n applying international law, international courts and tribunals may refer to previous judicial decisions and arbitral decisions to determine the applicable rules of international law."); *see also* Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175, 185–86 (2007); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1294–97 (2009) [hereinafter Bjorklund, *Emerging Civilization*] (quoting Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 TRANSNAT'L DISP. MGMT. 10 (Apr. 2006)).

[171] David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 689 (2004) ("Given the common practice of both private investors and governments in citing prior investment tribunal decisions that appear to favor them, it is inevitable that ICSID and other tribunals interpreting similar provisions of these BITs will consider and sometimes follow the NAFTA cases."); Franck, *The Legitimacy Crisis*, *supra* note 17, at 1612 (endorsing David Gantz's analysis); *see also* SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 155.

difficult by the privacy of arbitral proceedings. Most briefing is not publicly available. Counsels' pleading of cases must therefore be inferred from the awards' recitation of arguments.[172] The recitations frequently obscure the use of authorities by counsel. In many instances, it is impossible to recreate it.[173]

Available evidence shows that counsel have two principal goals when relying upon jurisprudence. *First*, counsel's "central contribution lies in finding the place where the facts and the law intersect to yield the outcome sought by the client in the arbitration."[174] This contribution requires that counsel find analogous cases that make record facts relevant to the legal claim or defense advanced. This use of decisions by counsel focuses principally on the *conduct* of the parties and supports how the parties' behavior produces a normative result.[175]

It is unsurprising that counsel would and do rely upon prior BIT determinations that address the same underlying conduct of the respondent state, if such determinations are available.[176] These decisions are most directly relevant to the dispute at bar. Counsel next draw upon decisions

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[172] The problem created by the relative dearth of such material was noted for example by Professor Strong in the context of international commercial arbitration. *See* S. I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 128 (2009) ("Thus, historically speaking, outsiders operated under a double handicap, not only lacking the reference materials from which to craft their legal arguments but also lacking the specialized know-how on how to conduct their research."); *see also* James E. Castello, *Report on the UNCITRAL Arbitration Working Group*, 63 JUL- DISP. RESOL. J. 7 (2008) (noting that "NGOs proposed adding the following rules for investor-State arbitrations that arise under a multilateral treaty or BIT: (1) require UNCITRAL to publish all pleadings (subject to limited redactions) and all awards; (2) open all hearings to the public; and (3) authorize tribunals to accept submissions from amici curiae"). The most notable exception to this general rule is that pleadings in NAFTA cases are generally available. In addition, some other materials are known to counsel in investor-state arbitrations, their legal experts, and—obviously—arbitrators. The conclusions gleaned below from specific summaries in arbitral awards are consistent with the author's experience as a participant in investor-state arbitrations.

[173] For 2012 decisions that do not recite the use of authorities by counsel in the merits context, see Bosh Int'l, Inc. & B&P Ltd. Foreign Inv. Enter. v. Ukr., ICSID Case No. ARB/08/11, Award (Oct. 22, 2012); Iberdrola Energía S.A. v. Guat., ICSID Case No. ARB/09/5, Award (Aug. 17, 2012); Swisslion Doo Skorpe v. Maced., ICSID Case No. ARB/09/16, Award (July 6, 2012).

[174] GUILLERMO AGUILAR ALVAREZ, *Effective Written Advocacy*, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 195, 203 (R. Doak Bishop & Edward G. Kehoe eds., 2d ed. 2010).

[175] *See, e.g.*, Paushok et al. v. Mong., Award on Jurisdiction and Liability, ¶¶ 226–229, 302, 305 (Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf.

[176] *See, e.g.*, Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award, ¶¶ 273–274, 346, 376 (Sept. 18, 2007) (recounting significant discussion by the parties of the earlier *CMS v. Argentina* and *Enron v. Argentina* decisions addressing liability of Argentina arising out of its response to the 2001 financial crisis similarly at issue in the *Sempra* arbitration); Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 192 n.259 (Sept. 5, 2008) (recounting significant reliance by the claimant upon the earlier *Enron v. Argentina* decision); *see also* Quasar de Valores SICA SA v. Russian Fed'n, SCC Case No. 24/2007, Award, ¶¶ 18, 59 (July 20, 2012) (recounting significant reliance by the claimant on the earlier *RosInvest v. Russia* award on the merits addressing the Russian Federation's treatment of Yukos Oil Company similarly at issue in *Quasar de Valores*).

addressing a specific industry in the host country.[177] Finally, counsel submit decisions addressing measures by other host governments that are materially similar to the measures at bar.[178]

Counsel also seek to distinguish the decisions relied upon by their adversaries. Distinctions of prior decisions seek to distance the problem at bar from the problem in the case relied upon by opposing counsel.[179] Such distinctions frequently are factual, i.e., they point to a record fact that materially changes the problem of the case at bar from the one decided previously.[180] In other instances, they seek to point to a difference in the

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[177] *See, e.g.*, Ulysseas, Inc. v. Ecuador, Final Award, ¶ 224 (June 12, 2012), http://www.italaw.com/sites/default/files/case-documents/ita1019.pdf ("In short, Respondent concludes that Claimant had no legitimate expectation that it would be guaranteed market, profitability, price or collection of payments. In Respondent's view, the reasoning in Duke v. Ecuador should thus apply here as well."); *see also id.* ¶ 160 ("Claimant refers to *Noble Energy Inc. v. Ecuador*, in which it was recorded that the generator was not operating at a profit, and to Mr. Veldwijk's report, in which he states that he was receiving similar information in relation to Termoguayas. Claimant also cites *Duke v. Ecuador* and *Noble v. Ecuador*, where the claimants, who had entered into contracts with Ecuador, struggled to obtain any collections.").

[178] *See, e.g.*, Paushok et al. v. Mong., Award on Jurisdiction and Liability, ¶ 268 (Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf (defending against claims that the manner of passage of a law through the Mongolian parliament violated the Mongolia Russian Federation BIT, "Respondent submits that legislative processes are not within the scope of any transparency conception as discussed by the international investment tribunals"); Romak S.A. v. Uzb., PCA Case No. AA280, Award, ¶ 136 (Nov. 26, 2009) ("Romak draws support from the recent award in *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, arguing that 'a taking by the judicial arm of the State may also amount to an expropriation.' Further, relying on *Saipem v. Bangladesh*, Romak argues that the courts' refusal to enforce the GAFTA Award has destroyed Romak's rights and the commercial value of its investment, and therefore constitutes expropriation."); Cargill Inc. v. Mex., ICSID Case No. ARB(AF)/05/2, Award, ¶ 256 (Aug. 13, 2009) ("Claimant asserts that these actions were inconsistent as they constituted a dramatic shift from Respondent's initial equivalent tax treatment of sugar and HFCS. Claimant quotes the tribunal's holding in GAMI for support of its position: 'The imposition of a new license requirement may for example be viewed quite differently if it appears on a blank slate or if it is an arbitrary repudiation of a preexisting licensing regime upon which a foreign investor has demonstrably relied.'").

[179] *See, e.g.*, Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like a Lawyer*, 29 U. MEM. L. REV. 1, 16 (1998) ("Successful legal research and analysis depends upon the ability to locate cases that a court would find factually analogous and to distinguish cases that a court would find factually dissimilar. The ability to accurately assess those cases that a court would or would not find analogous promotes the accuracy of your prediction concerning: (a) the legal issue(s) raised by Able's fact scenario; (b) the selection, interpretation, and statement of the applicable rules of law; and (c) the legal conclusions that result from the application of the rules to the facts.").

[180] Although party argument is not recounted, the difference of opinion between the majority and dissent in the recent *Abaclat* award reveals how such distinctions are drawn by counsel in investor-state arbitrations. *See* Abaclat v. Arg., ICSID Case No. ARB/07/5, Dissent of Prof. Abi-Saab, ¶¶ 101, 105 (Oct. 28, 2011) ("*Fedax* is an isolated case. It is an outlier. But I need not expand further on whether it was correctly decided or not, as it is clearly distinguishable in this respect (of territorial link) from the present case on facts"); *see also* Daimler Fin. Servs. AG v. Arg., ICSID Case No. ARB/05/1, Award, ¶ 63 (Aug. 22, 2012) ("absence of a contract between the disputing parties distinguishes the present case from other investor-State cases in which tribunals have had to grapple with whether the presence

legal instrument governing the dispute at bar that would materially alter the outcome of a prior, factually analogous dispute.[181]

Importantly, counsel do not limit themselves to BIT disputes to set the frame of facts for which an interpretation of the applicable instrument ultimately must account. Rather, cases have relied upon human rights adjudications,[182] WTO determinations,[183] and judgments from the International Court of Justice, to name but a few.[184]

The decision in *Paushok et al. v. Mongolia* illustrates this style of argument and how tribunals rely upon in drafting the ultimate awards of investor-state tribunals. In *Paushok*, Mongolia argued that the foreign gold miner could not claim that a 68% windfall profits tax imposed on revenue above a price of $500 an ounce on sale of gold violated a bilateral investment treaty because of the gold miner's conduct.[185] The gold miner upon appropriate due diligence would have had an opportunity to avoid the risk of taxation by entering into a stability agreement with the Mongolian government, but failed to do so.[186] Mongolia relied upon several prior decisions that similarly declined liability when the investor failed to conclude a stability agreement.[187] The *Paushok* tribunal ultimately followed this line of argument in its award, focusing on this fact as critical to its interpretation of the treaty's mandate that Mongolia accord Russian investments fair and equitable treatment.[188]

Paushok further evidences the use of non-BIT sources to frame the legally relevant facts for which an interpretation of an IIA has to account. For instance, Mongolia submitted that the relevant facts to establish

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of a forum selection clause within a specific investment or concession agreement could 'oust' the jurisdiction of a BIT-based arbitral tribunal with respect to claims concerning violations of the contractual agreement"); Occidental Petrol. Corp. & Occidental Exploration & Prod. Co. v. Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 418 (Sept. 24, 2012).

[181] *See* discussion of NAFTA cases regarding the scope of fair and equitable treatment *infra*.

[182] *See, e.g.*, Quasar de Valores SICA SA v. Russian Fed'n, SCC Case No. 24/2007, Award, ¶ 13 (July 20, 2012) (Respondents relied upon ECHR decision in its favor in *Yukos v. Russia* with regard to part of the factual allegations raised by the claimants in the arbitration).

[183] *See, e.g.*, Continental Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 192 (Sept. 5, 2008) (relying upon WTO-GATT case law "which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT").

[184] Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶¶ 175–176 (Oct. 5, 2005) (relying upon the ICJ ELSI case in order to determine legal standard applicable to state conduct towards insolvent companies, an issue in common in both cases).

[185] *See, e.g.*, Paushok et al. v. Mong., Award on Jurisdiction and Liability, ¶¶ 226–229 (Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf.

[186] *Id.*; Paushok v. Mong., Mongolia's Rejoinder Pleading, ¶¶ 49–51 (Feb. 20, 2009) (on file with the author).

[187] Paushok v. Mong., Mongolia's Rejoinder Pleading, ¶¶ 49–51 (Feb. 20, 2009) (on file with the author); *see also* Paushok et al. v. Mong., Award on Jurisdiction and Liability, ¶¶ 226–229 (Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf.

[188] Paushok et al. v. Mong., Award on Jurisdiction and Liability, ¶¶ 302, 305 (Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf.

whether Mongolia discriminated against the Russian gold miner were limited to examination of treatment extended to competitive and substitutable goods (i.e., other gold miners) rather than permitting a cross-sectoral analysis of the treatment of oil and gas companies.[189] Mongolia relied upon WTO jurisprudence for this delimitation of legally relevant facts.[190] The tribunal followed the WTO approach.[191]

Second, counsel relies upon jurisprudence as support for their reading of a bilateral or multilateral investment treaty. This use is the most prevalent when prior decisions are sharply divided over their interpretations of facially similar treaty language or the content of customary international law. The most heavily litigated issues falling within this second category are the meaning of so-called umbrella clauses requiring host states to observe any obligation they have assumed with regard to specific investments in its territory by investors of the other contracting party.[192] Further, the content of the so-called customary international law minimum standard of treatment particularly in the context of NAFTA has led to sharp disagreements.[193] Another frequently litigated issue concerns the scope of non-precluded measures clauses and the defense of necessity under customary international law.[194] Counsel addressing claims involving these issues as a general rule submit and discuss the canon of decisions favoring their interpretations and refine that jurisprudence to improve their odds of persuading their respective tribunals.[195]

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[189] *Id.* ¶ 266.

[190] *Id.*

[191] *Id.* ¶ 315 ("The Tribunal is of the view that, before concluding to discrimination in the present case, the sectors covered should relate to competitive and substitutable products, an expression regularly used in WTO/GATT cases. In doing so, the Tribunal is aware of the differences between the Treaty and the one governing the WTO. It merely states that such a requirement is a reasonable one to apply when considering allegations of discrimination."). The question thus was one of delimitation of legally relevant facts for interpretation rather than of interpretation of the treaty in and of itself.

[192] For a discussion of umbrella clause disputes, and divergent interpretations of different umbrella clauses, see, for example, Stephan W. Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MIN. J. INT'L L. 1, 93–94 (2009) (submitting that the function of umbrella clauses "consists in opening recourse to an international dispute settlement forum in order to enable investors to enforce contractual and quasi-contractual promises made by the host State and to counter opportunistic behavior of the host State that can undermine the initially-struck bargain, independent of whether the host State's breach was based on commercial or sovereign conduct"); *see also* Wong, *supra* note 82, at 135.

[193] For a recent discussion, see generally Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard*, 56 MCGILL L.J. 919 (2011) (critiquing the doctrinal approach of the *Glamis Gold* tribunal).

[194] For a discussion, see, for example, Nolan & Sourgens, *supra* note 141, at 362. *See also* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307 (2008).

[195] *See, e.g.*, SGS Société Générale de Surveillance S.A. v. Republic of Para., ICSID Case No. ARB/07/29, Award, ¶ 83 (Feb. 10, 2012) ("Respondent cites a string of cases including *Siemens v.*

Counsel again draw heavily on jurisprudence from the International Court of Justice and the Permanent Court of International Justice.[196] They have pointed tribunals to decisions by human rights bodies.[197] They have argued from WTO decisions.[198] They have submitted awards from tribunals hearing purely contractual claims from investors against host states or their instrumentalities.[199] They have even relied upon awards arising out of disputes between political risk insurers and insureds.[200] These invocations of non-BIT sources are frequently successful.

Prior theories dealing with case law through the lens of tribunal practice (rather than the use of jurisprudence by counsel) captures the second element only. The use of cases to set the framework for interpretation of relevant legal instruments goes largely unnoticed.[201] As discussed below, it is this first aspect of problem-setting that ultimately helps to explain the role of international law in the resolution of investor-state disputes without running into the traps encountered by the currently

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Argentina, *Bayindir v. Pakistan*, *RFCC v. Morocco*, *Waste Management v. Mexico*, *Impregilo v. Pakistan* and *Duke v. Ecuador* for the proposition that a government's breach of contract can only rise to the level of a breach of the BIT if it involved an abuse of sovereign authority."); Mobil Investments Canada Inc. & Murphy Oil Corp. v. Can., ICSID Case No. ARB/07/4, Decision on Liability and on Principles of Quantum, ¶¶ 113, 126 (May 22, 2012) ("Claimant's principally rely on *Medioambientales Tecmed, S.A. v. United Mexican States*, and *Metalclad Corporation v. Mexico*. (On the standard applicable under Article 1105, the Respondent relies in particular on the decisions in *Glamis Gold, Ltd. v. U.S.* and *Cargill, Incorporated v. United Mexican States* to the effect that the customary international law standard 'has not evolved from the 'shocking and egregious' standard described in *Neer*' but that 'what is 'egregious and shocking' has developed since 1926.'")).

[196] *See, e.g.*, Kardassopoulos v. Republic of Geor., ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, ¶¶ 487–488 (Feb. 28, 2010) (Claimant relying upon the PCIJ *Case concerning the Factory at Chorzów* for principle of full compensation for losses); Azurix Corp v. Arg., ICSID Case No. ARB/01/12, Award, ¶ 387 (June 23, 2006) (Respondent relying upon the ICJ *ELSI* case for definition of arbitrary treatment standard).

[197] *See, e.g.*, Roussalis v. Rom., ICSID Case No. ARB/06/1, Award, ¶¶ 131–137 (Dec. 7, 2011) (Claimant relying upon the ECHR decisions in *Maşinexportimport Industrial Group S.A. v. Romania* and *Riabykh v. Russia* in support of a BIT expropriation claim that "proceedings initiated by Respondent have deprived the investor of the use of his ownership by creating juridical insecurity through a breach of the principle of legal certainty"); *see also* Commission, *supra* note 3, at 152 (collecting citations to non-ICSID decisions by investor-state tribunals).

[198] *See, e.g.*, Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 85 (Sept. 5, 2008) ("Argentina submits that the term 'necessary' contained in Art. XI of the BIT must be interpreted in line with the GATT-WTO case-law, under which 'necessary' is not synonymous of 'indispensable.'"); *see also* Commission, *supra* note 3, at 152.

[199] ICS Inspection and Control Services Ltd. v. Arg., PCA Case No. 2010-9, Award on Jurisdiction, ¶ 145 (Feb. 10, 2012) (Respondent relying upon *Saudi Arabia v. ARAMCO* and *Texaco v. Libya*).

[200] El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award, ¶ 165 (Oct. 27, 2011) (Respondent relying upon arbitration between Revere Copper and the U.S. political risk insurer OPIC); Telenor Mobile Commc'ns A.S. v. Hung., ICSID Case No. ARB/04/15, Award, ¶ 69 (June 22, 2006) (Claimant relying upon the *Revere Copper* decision).

[201] *See* SCHILL, *supra* note 112, at 347–50 (noting the practice of tribunals (rather than counsel) distinguishing prior awards on the facts).

predominant theories.[202]

B. Divergence of Investor-State Arbitral Awards

As discussed above, investor-state arbitral decisions have diverged—and continue to diverge—both on their interpretation of legal standards and their appreciation of facts.[203] Divergence can be better explained from the point of view of process than from the point of view of results. What appears as divergence of results is, in fact, the reasonable outcome of a different understanding by the tribunals in question of what constitutes the legal problems put before them by the parties.

This part will use the process lens to examine apparent divergence with regard to the two most recent, and potentially serious, instances of divergence. They are (1) decisions interpreting Argentina's invocation of a state of emergency in proceedings relating to measures adopted after the 2001 financial crisis, and (2) the interpretation of Article 1105 of NAFTA.

1. The Argentine Cases

The 2001 Argentine financial crisis led a multiplicity of legal proceedings arising out of the same government measures under the same underlying bilateral investment treaties.[204] In all of these proceedings, Argentina pled that the economic emergency brought upon it by the 2001 financial crisis precluded or excused its treaty liability.[205] The most notable divergences between tribunals arose with regard to the interpretation and application of the non-precluded measures clause in the US-Argentina BIT. The clause states the following with deceiving simplicity:

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[202] *See infra* Part IV.

[203] *See supra* Part III.A.

[204] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (Apr. 25, 2005); LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award (Sept. 18, 2007); Enron Corp. & Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Award (May 22, 2007); Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award (Sept. 5, 2008); El Paso Energy Int'l Col. v. Arg., ICSID Case No. ARB/03/15, Award (Oct. 27, 2011); CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (Aug. 21, 2007); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award (June 10, 2010); Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010).

[205] For an overview of the events leading up to the financial crisis and the immediate response thereto, see J. F. Hornbeck, *The Argentine Financial Crisis: A Chronology of Events*, U.S. DEPT. OF STATE: FOREIGN PRESS CENTER, http://fpc.state.gov/documents/organization/8040.pdf (last visited Jan. 24, 2013).

> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.[206]

The majority of decisions concluded that Argentina could not invoke the non-precluded measures clause because Argentina did not meet the customary international law definition of necessity.[207] The decisions in *LG&E* and *Continental Casualty* differed, as did the annulment committees in *CMS* and *Sempra*.[208]

The decisions had different results for two reasons, both of which arise in the specific records before the respective tribunals: (1) significant changes in strategy by Argentina, and (2) diverging views on how systemically to integrate customary international law in the interpretation of the non-precluded measures clause. These differences do not reveal the emergence of, or threat to, a consistent legal standard in investor-state decisions. Instead, they reveal the importance of the "input" for the decision-making process of investor-state arbitrations. Rather than speak to systemic legitimacy, they stand for the unremarkable proposition that counsel's litigation strategy can and does affect the outcome of litigation.

a. Introduction of New Theories

The *Continental Casualty Company v. Argentina* decision is the only award (as opposed to annulment decision) to reject the legal paradigm adopted by all prior awards. All prior awards concluded that Article XI of the U.S.-Argentina BIT adopted the customary international law defense of necessity.[209] The *Continental Casualty* tribunal did not follow earlier BIT

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[206] Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, art. XI, Nov. 14, 1991, 31 I.L.M. 124, amended by S. Treaty Doc. No. 103-2 (1993), *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp (last visited Jan. 24, 2013).

[207] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (Apr. 25, 2005); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award (Sept. 18, 2007); Enron Corp. & Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Award (May 22, 2007); El Paso Energy Int'l Col. v. Arg., ICSID Case No. ARB/03/15, Award (Oct. 27, 2011).

[208] LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 213–242 (Oct. 3, 2006); Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶¶ 196–236 (Sept. 5, 2008); CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (Aug. 21, 2007); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, ¶ 199 (June 10, 2010).

[209] This paradigm was later rejected in several annulment decisions discussed *infra*. It is noteworthy that these annulment decisions are fundamentally inconsistent with the arbitral records before the tribunals reaching contrary decisions.

decisions. Instead, it concluded the following:

> [T]he text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.[210]

Premised upon the WTO understanding of necessity, the tribunal concluded that Argentina could invoke Article XI of the U.S.-Argentina BIT with respect to the Corralito (bank freeze), the devaluation of the peso, and the pesification of U.S. dollar denominated contracts and deposits. [211]

The difference in approaches between *Continental Casualty* and the other Argentine cases arises directly out of the specific records of these cases. The C*ontinental Casualty* tribunal endorsed and adopted Argentina's litigation position in that proceeding; as the Award records, "Argentina submits that the term 'necessary' contained in Art. XI of the BIT must be interpreted in line with the GATT-WTO case-law."[212] The distinction between the conception of necessity in customary international law and in GATT-WTO case law is not commented upon in *CMS v. Argentina*,[213] *Sempra v. Argentina*,[214] *Enron v. Argentina*,[215] or the 2011 decision in *El Paso v. Argentina*.[216] Argentina's arguments raised during the later annulment stage strongly suggest that the distinction simply was

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[210] Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶ 192 (Sept. 5, 2008). For a discussion of the WTO standard of necessity under Article XX of GATT 1947, see generally Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO*, 43 VIRG. J. INT'L L. 365 (2002); Wesley A. Cann, *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 YALE J. INT'L L. 413 (2001); Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 PENN. J. INT'L ECON. L. 263 (1998).

[211] Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶¶ 196–236 (Sept. 5, 2008),

[212] *Id.* ¶ 85 (citing Argentina's Rejoinder, ¶¶ 409–419).

[213] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶¶ 368–371 (Apr. 25, 2005) (discussing GATT Article XXI only to contrast the wording of that clause for purposes of analyzing whether Article XI of the US-Argentina BIT was self-judging).

[214] Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award, ¶¶ 369, 383–385 (Sept. 18, 2007) (same as *CMS Gas* award).

[215] Enron Corp. & Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Award, ¶ 336 (May 22, 2007) (same as *CMS Gas* award).

[216] El Paso Energy Int'l Col. v. Arg., ICSID Case No. ARB/03/15, Award (Oct. 27, 2011) (same as *CMS Gas*). The hearing on the merits in El Paso predates issuance of the *Continental Casualty* award.

not pled in the earlier proceedings.[217]

Approaching the substantive difference in outcome and legal reasoning in *Continental Casualty* from those in the earlier Argentine decisions from the point of process overcomes the apparent divergence problem. From the point of view of legal process, comparing the *Continental Casualty* award and other Argentine decisions is to compare apples to oranges because of the fundamentally different approaches taken in these cases. It is simply meaningless to speak of "divergence" between these decisions because they lack a common procedural denominator.

b. Difference in Factual Findings

This leaves the inconsistent result reached by the *LG&E* tribunal, but this inconsistency was not caused by the adoption of a different legal framework.[218] Rather, it follows from different factual findings made by the *LG&E* tribunal compared to other Argentine tribunals. As the decision prominently notes:

> The entire healthcare system teetered on the brink of collapse. Prices of pharmaceuticals soared as the country plunged deeper into the deflationary period, becoming unavailable for low-income people. Hospitals suffered a severe shortage of basic supplies. Investments in infrastructure and equipment for public hospitals declined as never before. These conditions prompted the Government to declare the nationwide health emergency to ensure the population's access to basic health care goods and services. At the time, one quarter of the population could not afford the minimum amount of food required to ensure their subsistence. Given the level of poverty and lack of access to healthcare and proper nutrition, disease followed.[219]

This evidence is not commented upon in any of the other Argentine decisions.[220]

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[217] *See* CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶¶ 123–127 (Aug. 21, 2007) (discussing the framework in which the parties pled the Article XI defense); Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 353 (July 30, 2010) (not raising as one of the annulment arguments that the tribunal failed to state reasons that the tribunal did not address an argument that Article XI of the U.S.-Argentina BIT followed the approach of GATT 1947 Article XX); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, ¶ 132 (June 10, 2010) (same as *Enron* annulment).

[218] LG&E Energy Corp. v. Arg., ICSID Case No. ARB/02/1, Decision on Liability, ¶ 261 (Oct. 3, 2006).

[219] *Id.* ¶ 234.

[220] *See supra* note 204.

Again the process point of view avoids the divergence problem. The *LG&E* tribunal either differed in its appreciation of the factual evidence, or it was faced with different pieces of factual evidence altogether. It is to be expected that different tribunals would come to different evidentiary conclusions. To ascribe such differences to "divergence" is precisely not to understand that arbitral tribunals have a legal duty of independence in finding the facts upon which their resolution of the dispute hinges.[221]

c. Divergence in Integration

The coherence and legitimacy of investor-state arbitrations has also been called into question by reference to three annulment decisions reached in arbitration arising out of the Argentine financial crisis.[222] The annulment committees in *CMS* and *Sempra* concluded that the U.S.-Argentina BIT did not integrate the customary international law defense of necessity but created a wholly independent defense.[223] The annulment committee in *Enron* further faulted the tribunal for its failure to press the parties for further evidence in order to establish whether there was an underlying state of necessity.[224] These decisions evidence a fundamental breakdown in the ICSID control mechanism.[225] They do not, however, demonstrate a need for either greater convergence in arbitral determinations or a symptom of a larger legitimacy crisis.

To speak of divergence again is senseless from a process perspective. As a matter of the arbitral record, the annulment committees in question did not disagree with the tribunals' treatment of arguments or evidence actually presented to them.[226] Rather, the annulment determinations turned on positions that Argentina *contradicted* in the arbitral proceedings prior to the annulment stage, namely that Article XI of the U.S.-Argentina BIT should not be interpreted from the starting point of customary international law.[227]

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[221] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 385 (5th ed. 2009) ("[F]act-finding is one of the most significant functions of an arbitral tribunal, and it is a function that all tribunals take seriously.").

[222] Alvarez, *The Return of the State*, *supra* note 137, at 244; Burke-White & von Staden, *supra* note 137, at 300; Harhay, *supra* note 137, at 89.

[223] CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶ 130 (Aug. 21, 2007); Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, ¶ 198 (June 10, 2010).

[224] Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Arg., ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 392 (July 30, 2010).

[225] For further discussion, see Frédéric G. Sourgens, *Whose Power Is It Anyway? An Assessment of Article 52(1)(b) of The ICSID Convention* (forthcoming).

[226] *Id.*

[227] *See* CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶ 123 (Aug. 21, 2007) ("Argentina took the same approach, conflating 'state of emergency' and 'state of necessity' and adding

Given this procedural posture, it would not have been possible for the arbitral tribunals hearing the original claims to rule in the manner suggested by the annulment committees without depriving the claimants of due process of law.[228] The disagreement between the awards and annulment decisions arises again only by the comparison of apples to oranges.

The question whether Article XI of the U.S.-Argentina BIT incorporates customary international law, as the majority of awards concluded, WTO law, as the *Continental Casualty* tribunal concluded, or an entirely independent defense, as several annulment decisions suggest, cannot be answered by a tribunal as an abstract legal proposition.[229] As the recent *El Paso* tribunal explains, the preference for systemic integration reflected in Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT) justifies reliance upon customary international law in interpreting the term "necessary" in Article XI of the U.S.-Argentina BIT.[230] But as the *Continental Casualty* award shows, this preference for systemic integration does not explain *what* legal rules to integrate, e.g., customary international law of necessity or GATT 1947 Article XX.[231] This issue requires a tribunal to make determinations of law *and* record facts. The factual component in particular means that a tribunal cannot do so outside of the specific record with which it is being presented by the parties.

2. The NAFTA Cases

NAFTA Article 1105 requires each party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[232] The scope of the obligation in this treaty provision has led to significant divergence between NAFTA arbitral tribunals. The most recent iteration of this divergence arises out of the different yardstick set by the *Glamis Gold v. U.S.* and *Merrill & Ring Forestry v. Canada* decisions.[233]

Current NAFTA jurisprudence unfolds against the background of an interpretive note, issued by the NAFTA treaty parties in reaction to earlier NAFTA jurisprudence. In response to early NAFTA jurisprudence, the NAFTA treaty parties agreed that "[t]he concepts of 'fair and equitable

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that state of necessity is included in Article XI.").

[228] *See* Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Annulment, ¶¶ 197–247 (Dec. 17, 2010).

[229] *See supra* notes 211–219.

[230] El Paso Energy Int'l Col. v. Arg., ICSID Case No. ARB/03/15, Award (Oct. 27, 2011).

[231] Cont'l Cas. Co. v. Arg., ICSID Case No. ARB/03/9, Award, ¶¶ 196–236 (Sept. 5, 2008).

[232] North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993).

[233] Glamis Gold Ltd. v. U.S., Award (May 14, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf; Merrill & Ring Forestry, L.P. v. Can., Award (Mar. 31, 2010), http://italaw.com/sites/default/files/case-documents/ita0504.pdf.

treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[234]

The *Glamis* tribunal determined "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[235] It thereby adopted the standard adopted in the *Neer* case.[236] *Glamis* established this standard on the basis of the pleadings of the U.S. (in *Glamis* itself),[237] as well as legal pleadings of Mexico and Canada in prior NAFTA proceedings.[238] The tribunal looked to state practice of the three NAFTA member states,[239] and held that what constitutes egregious behavior on the part of states evolves over time.[240] The tribunal determined that at the current point in time, "legitimate expectations relate to an examination under Article 1105(1) in such situations 'where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct. . . .' [i.e.,] a State may be tied to the objective expectations that it creates *in order to induce* investment."[241]

The *Merrill & Ring Forestry* tribunal disagreed with the *Glamis* approach and rejected anchoring the minimum standard of treatment in the *Neer* decision:[242]

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[234] NAFTA FREE TRADE COMMISSION, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS, § B (July 31, 2001), *available at* http://www.worldtradelaw.net/nafta/chap11interp.pdf; *see also* Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT'L L. 347 (2006).

[235] Glamis Gold Ltd. v. U.S., Award, ¶ 612 (May 14, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf (internal quotation marks omitted).

[236] *Id.*

[237] *Id.* ¶ 21 ("In the case of the customary international law standard of 'fair and equitable treatment,' the Parties in this case and the other two NAFTA State Parties agree that the customary international law standard is at least that set forth in the 1926 *Neer* arbitration.").

[238] *Id.* ¶ 612 n.1257.

[239] This approach to custom satisfies the classicist view of customary international law in as much as it relies upon government statements reflecting express *opinio juris*. The problem remains that the statements were made in a capacity as defendant in a legal proceeding and as such is not fairly to be viewed as the unbiased expression of the state's view of its legal obligations. *See* Roberts, *Traditional and Modern Approaches*, *supra* note 29. For a discussion of the role of customary international law in international investment protection, see *supra* Part II.A.

[240] Glamis Gold Ltd. v. U.S., Award, ¶ 613 (May 14, 2009), http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf.

[241] *Id.* ¶ 621.

[242] Merrill & Ring Forestry, L.P. v. Can., Award, ¶ 204 (Mar. 31, 2010), http://italaw.com/sites/default/files/case-documents/ita0504.pdf.

> State practice was even less supportive of the standard referred to in the *Neer* case. And in the absence of a widespread and consistent state practice in support of a rule of customary international law there is no *opinio juris* either. No general rule of customary international law can thus be found which applies the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process.[243]

The tribunal expressly expanded the scope of Article 1105 of NAFTA beyond customary international law to include "general principles of law" as well.[244] It noted that "[g]ood faith and the prohibition of arbitrariness are no doubt an expression of such general principles[.]"[245] The *Merrill & Ring Forestry* tribunal thus anchored the fair and equitable treatment provision in a general duty of reasonableness.[246]

Again, the records in *Glamis* and *Merrill & Ring Forestry* are instructive. Glamis argued that a "lack of 'transparency and candour in an administrative process'" violated the fair and equitable treatment standard by failing to accord Glamis due process.[247] It is in this context that Glamis submitted (unsuccessfully) that the fair and equitable treatment standard required a showing of unreasonableness, unfairness, or injustice rather than egregiousness, outrage, or shock.[248] The principal evidence of state practice relied upon by Glamis was the submission of the U.S. in the ICJ dispute in the *ELSI* case between the U.S. and Italy.[249] In addition, Glamis submitted that "BITs are reflective of the customary international law standard of treatment owed to foreign investors," meaning that the interpretation of other fair and equitable treatment provisions in other BITs would be directly relevant to the content of customary international law.[250] The U.S. rejected Glamis's reliance upon *ELSI* because "the arguments concerning 'arbitrary' conduct in that case were based on *lex specialis*: Article I of the Supplementary Agreement to the Treaty of Friendship, Commerce and Navigation between Italy and the United States, on which the relevant claims in that case were based[.]"[251] The United States rejected the reliance upon BITs as such as evidence of customary

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[243] *Id.*

[244] *Id.* ¶¶ 184, 187.

[245] *Id.* ¶ 187.

[246] *Id.* ¶¶ 210, 213.

[247] Glamis Gold Ltd. v. U.S., Memorial of Claimant Glamis Gold Ltd., ¶ 521 (May 5, 2006).

[248] *Id.* ¶¶ 526–531.

[249] *Id.* ¶ 530. Glamis further relied upon other pleadings submitted by the United States in other NAFTA proceedings. Glamis Gold Ltd. v. U.S., Reply of Claimant Glamis Gold Ltd., ¶ 216 (Dec. 15, 2006).

[250] *Id.* ¶¶ 212–213.

[251] Glamis Gold Ltd. v. U.S., Counter-Memorial of the U.S., ¶ 228 (Sept. 19, 2006).

international law for essentially the same reasons.[252]

Merrill & Ring Forestry took a different approach to prove the content of Article 1105 of NAFTA, relying principally on the submission that the treatment prescribed by Article 1105 "is grounded in their [i.e., the NAFTA treaty parties'] obligation to act in good faith."[253] Merrill & Ring Forestry further submitted that Article 1105 could not be confined to customary international law, but required reference to all sources of international law.[254] From there, Merrill & Ring Forestry submitted that the tribunal should look to the general principle of law of good faith in order to define the content of the fair and equitable treatment standard in Article 1105.[255]

Like in the Argentine cases, the NAFTA cases are "inconsistent" or "convergent" only if they are divorced from their records. Glamis and Merrill & Ring Forestry in critical respects differed in their submissions of how arbitrators should integrate general international law in the interpretation of Article 1105 of NAFTA. The outcomes reached by the respective tribunals reflect this difference. Comparing NAFTA decisions to each other in the abstract thus again risks comparing apples to oranges.

IV. THE COMMON LAW SOLUTION

The process of investor-state dispute resolution leaves little doubt that investor-state arbitration forms part of a common law.[256] In fact, it is not seriously disputed that all participants in investor-state arbitration are "employing styles of common law reasoning."[257] Despite this observation, the major theories addressing investor-state arbitration shy away from treating investor-state arbitration as forming part of a common law because

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[252] Glamis Gold Ltd. v. U.S., Rejoinder of the U.S., ¶ 142 (Mar. 15, 2007).

[253] Merrill & Ring Forestry, L.P. v. Can., Reply Memorial of Claimant, ¶ 193 (Feb. 13, 2008).

[254] Merrill & Ring Forestry, L.P. v. Can., Reply of Claimant, ¶ 305 (Dec. 15, 2008).

[255] *Id.* ¶ 313.

[256] It could be argued that international law is a mixed jurisdiction that combines aspects of the civilian and common law traditions. In terms of the *substance* of international law in general, and the application of international law to political risk disputes in particular, this is certainly accurate. It is the proposition of this Article that this mixed jurisdiction systemically develops as a common law jurisdiction would, rather than along the lines of a civilian jurisdiction. The key factors leading to this conclusion are the lack of a common code of international law, the proliferation of international courts and tribunals (and consequently international judicial decisions), and the International Law Commission's use of prior decisions from international courts and tribunals as a principal source of its own codification (or restatement) efforts. *See, e.g.*, James Crawford, *The ILC's Articles on Responsibility of States for International Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 885 (2002). For a discussion of the mixed-jurisdiction development of "systemic respect for jurisprudence," see Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775 (2005).

[257] *See, e.g.*, SCHILL, *supra* note 112, at 361; SALACUSE, LAW OF INVESTMENT TREATIES, *supra* note 108, at 155–56; Alvarez, *A Bit on Custom*, *supra* note 23, at 45; Kaufmann-Kohler, *supra* note 19, at 377; SORNARAJAH, *supra* note 37, at 333–62.

of their focus on the outcome of arbitration over the arbitral process.[258] It was this focus that caused the major theories to fail.[259]

The remainder of this Article sets out how arbitral decisions in investor-state arbitrations reveal the development of an international common law that precisely overcomes the structural aporia which caused prior theories to fail. It then addresses how the common law theory overcomes the problems raised by existing theories. Finally, it provides a structurally sound and descriptively accurate account of the persuasiveness of jurisprudence in investor-state arbitrations.

A. International Common Law

The practice of investor-state arbitration goes beyond demonstrating that its participants treat it as part of a common law. Due to the wealth of decisional law and the variety of sources on which it is premised, it also demonstrates the inherent theoretical value of a common law paradigm to overcome the significant theoretical problems encountered by other conceptions of investor-state arbitration, and international law adjudication in general. As discussed below, the common law paradigm is particularly apt for the further development of international law because of its principally horizontal rather than vertical structure.[260] This shift to a common law paradigm helps to resolves a central aporia about the nature of general international law posited by Martti Koskenniemi in *From Apology to Utopia* by adding a new dimension.[261]

1. The Common Law Paradigm

The key systemic difference between common law and civil law traditions is the manner in which legal axioms and rules are generated. The civilian tradition operates principally along a vertical axis: it effectively argues from first principles to the rules these first principles entail.[262] The

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[258] The notable exception is CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION, SUBSTANTIVE PRINCIPLES 70–75 (2007) (citing Crawford*, supra* note 256, at 886). Crawford in context discusses whether civil law or common law concepts of responsibility prevailed in the drafting of the articles. Crawford*, supra* note 256, at 885.

[259] *See supra* Part II.

[260] *See infra* Part IV.A.1.

[261] *See infra* Part IV.A.2.

[262] *See, e.g.*, ANTONIO GAMBARO & RODOLFO SACCO, SISTEMI GIURIDICI COMPARATI 323 (2d ed. 2002) (noting that prevalent French legal theories of the twentieth century reconciled apparently inconsistent legal rules through common first principles and used these first principles to generate additional rules of law when needed to close *lacunae*); HANS BROX, ALLGEMEINER TEIL DES BGB 27 (29th ed. 2005) ("In an effort to prevent that the German Civil Code would become unmanageable, the legislator derived concrete rules from ever more general principles by means of broadening abstraction.") (author translation); OLE LANDO, KORT INDFØRING I KOMPARATIV RET 204 (3rd ed.

coherence of the system is "vertical" because it depends upon the link of a rule (or decision) to the first principle.[263] Consequently, interpretation in the civil law moves along vertical lines, establishing the coherence of a proposed interpretation with the axiomatic first principle and its coherence with the conception of this first principle evident throughout the code in other areas of law.[264] It is a predominantly deductive paradigm.[265]

Critique within civilian tradition is similarly predominantly vertical. It focuses on the tenability of the prevalent conception of the axiomatic first principle in light of the results it achieves in actual practice.[266] When the results the conception achieves in actual practice achieves unjust results, the conception of the first principle changes, leading to a significant overhaul in the code of the jurisdiction in question, a systemic reinterpretation of the existing code or fragmentation.[267] Given the radical nature of this step, civilian legal systems appear remarkably stable, with few but radical realignments interspersed between periods of relative

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2009) ("It must further be considered that German law in contradistinction to other legal systems is held together by the principle of good faith or reasonableness, *Treu und Glauben*, which is used as corrective when legal rules would lead to an injustice.") (author translation).

[263] *See, e.g.*, H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 143 (2000) ("If there is no Perfect Author, there are at least authors, whose ongoing arguments require ongoing response. The notion that legislation and its interpretation are simply means of continuing the discussion, and not in any way means of bringing it an end or limiting its breadth, is brilliantly represented in recent continental writings. Inter, in the sense of the search for the truest meaning, would thus remain at the heart of the civilian tradition, as it was in the time of Rome."); KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 88 (Tony Weir trans., 2d ed. 1987) ("the Code civil is founded on the creed of the Enlightenment and law of reason that social life can be put into a rational order if only the rules of law are restructured according to a comprehensive plan"); MARCEL PLANIOL, TREATISE ON THE CIVIL LAW 161 (Louisiana State Law Institute trans., 1959); BROX, *supra* note 262, at 27; LANDO, *supra* note 262, at 204. In this respect, civilian interpretation and legal development follows along the lines of the ideal of perfect vertical coherence found in Dworkin. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 333–54 (1986).

[264] Reasoning by analogy in civil law jurisdictions is a mode of *interpretation* of the Code precisely because the analogy works "through" the first principle. It highlights how the first principle is at work in another area of law that could be applied by analogy to the question at bar. The analogy is similarly "vertical" because it analytically develops the application of the first principle to the question at bar rather than developing a truly horizontal coherence across areas that have facially inconsistent first principles. *See, e.g.*, GAMBARO & SACCO, *supra* note 262, at 323; BROX, *supra* note 262, at 41–44.

[265] *See, e.g.*, GLENN, *supra* note 263, at 133 (2000) ("deductive thought follows from this form logic; given a point of departure, you can reach further conclusions which are derivable from it (or entailed by it, some might say), in a consistent manner").

[266] *See, e.g.*, PLANIOL, *supra* note 263, at 162 ("The logical method treats all these questions as if they were theorems of geometry. It uses a corps of axioms containing in themselves the salutation to practically all difficulties. The disadvantage of this method is that it causes law to function as it were a blind piece of machinery, indifferent to the good or evil it might do. Laws, however, are made in order to obtain for man the greatest possible amount of good. A juridical science which would lead to unjust or dangerous solutions would be false. It would defeat its own purpose.").

[267] *See, e.g.*, FRANÇOIS TERRÉ ET AL., DROIT CIVIL, LES OBLIGATIONS 17–18 (9th ed. 2005) (noting the role of jurisprudence to make such adjustments "when necessary" and noting the emergence of new, ever more specialized codes).

jurisprudential tranquility.[268]

The common law, on the other hand, developed and develops through the resolution of specific problems brought forward through actual disputes.[269] The common law tradition operates principally along a horizontal axis: it argues from (and towards) the coherent solution of related legal problems towards a common bond between them.[270] The coherence of the system is "horizontal" because it depends upon the bonds between the solutions of related problems as such.[271] Consequently, the common law moves along horizontal lines by establishing rules rather than "interpreting" legal rules.[272] Rule establishment depends upon the coherence of a proposed common law rule against the facts of each cases relied upon by the parties.[273] It is a predominantly inductive paradigm.[274]

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[268] *See id.* (noting the historical resistance to change in French civil law of obligations outside of periods of significant change).

[269] GAMBARO & SACCO, *supra* note 262, at 132–33, 256 (noting that the common law was by its nature incomplete and grew through resolution of disputes); *see also* E. ALLAN FARNSWORTH, CONTRACTS 11–19 (3d ed. 1999) (discussing the early development of the enforcement of promises at common law). This form of development of the common law is critical to understanding the casebook method, or contract law by anthology, currently underlying first-year U.S. law school curriculum. *See, e.g.*, E. Allan Farnsworth, *Contract Scholarship in the Age of Anthology*, 85 MICH. L. REV. 1406 (1987) (discussing the evolution of common law of contracts scholarship through the case method since the publication of Langdell's contracts casebook in 1871). For a specific example of the historical vagaries of this form of legal development, see Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985) (explaining the record-based necessity for the court in *Lawrence v. Fox* to develop the third party beneficiary rule and its infectious effect on the development of U.S. common law thereafter).

[270] For an extreme position, see Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 257 (1987) (arguing that "'the common law' is best regarded as the institutionalized process of adjudication itself, rather than as the body of relatively stable (but nonetheless constantly changing) dispute-settling standards which emerge from that process"). A similar position is espoused by Melvin Eisenberg in the context of finding morally necessary exceptions to announced and otherwise coherent common law rules. *See* EISENBERG, *supra* note 7, at 66–68.

[271] *See, e.g.*, EISENBERG, *supra* note 7, at 54–55 (positing that the "announcement approach" is the one ordinarily followed by courts, which uses the "rule of a precedent [which] consists of the rule that it states, provided that the rule is relevant to issue raised by the dispute before the court").

[272] *See, e.g.*, Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW 183–216 (Laurence Goldstein ed., 1988) ("common law reasoning, like that in science and ethics, is non-hermeneutic in nature"); EISENBERG, *supra* note 7, at 52.

[273] *See, e.g.*, EISENBERG, *supra* note 7, at 54–55, 61; *see also* S.L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 OXFORD J. LEGAL STUD. 221, 223–24 (1990) ("The fourth stage is the heart of the deliberative process. At this stage we engage in all-out theorizing, looking for hypotheses which account for the resolutions of issues we found in stage three [gathering settled cases that have proposed apparently conflicting solutions to relevant legal problems]. That is we are trying to formulate hypotheses about the relationships between the conflicting reasons under various different circumstances present in the stage three cases, which account for those resolutions.").

[274] *See* Moore, *supra* note 272, at 183–89 (arguing for an inductive, non-hermeneutic view of common law precedent); DWORKIN, *supra* note 263, at 228–38 (analogizing the role of the judge to writing part of a chain novel premised solely on the earlier parts of the novel); *see generally* Frederick Schauer, *Prescriptions in Three Dimensions*, 82 IOWA L. REV. 911 (1997) [hereinafter Schauer,

The inductive paradigm entails a different mode of rule establishment and, consequently, a different modality of change.[275] True to the inductive nature of the common law, rule establishment occurs in the context of a new case or problem.[276] Due to its inductive nature, common law rule establishment will problematize the facts of the new dispute in light of their resemblance to facts of prior decisions.[277] In relating the facts at bar to their resemblance of facts in prior decisions, it is possible both to derive the principle applicable to the resolution of the dispute at bar and to confirm and adapt its validity in light of additional factual problems not previously encountered in other cases.[278] In this way, the common law develops on a constant basis with the resolution of each new case.

This is not to say that the common law lacks axiomatic principles or that the civil law is entirely static. Both characterizations, in this extreme form, would caricature the legal systems in question. Thus, the common law elevates the case which in its holding cleanly states an axiomatic norm to paradigmatic status.[279] Further, the art of interpretation of civil law, or hermeneutics, cannot but gradually shift the meaning of civil code provisions so as to make the provisions meaningful to the shared social and linguistic experience of the jurists applying the code.[280]

But the fundamental difference between the principal directedness of the legal system (vertical vs. horizontal) remains a necessary corollary of

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Prescriptions] (discussing the inductive nature of the common law in Dworkin).

[275] For the reasons discussed by Professor Eisenberg, the issue is one of "rule establishment" rather than "interpretation" because "the role of the deciding court in determining what rule a precedent stands for is not so much to determine what the precedent was intended to stand for as to determine what it has or will come to stand for." EISENBERG, *supra* note 7, at 52.

[276] *See, e.g.*, EISENBERG, *supra* note 7, at 54–55, 61; DWORKIN, *supra* note 263, at 228–38; Moore, *supra* note 272, at 183; Perry, *supra* note 270, at 215.

[277] See *supra* note 273.

[278] *See, e.g.*, EISENBERG, *supra* note 7, at 74 (discussing how this process operated in the context of *McPherson v. Buick Motor Co*. and noting that the break with prior case law was appropriate because its "rule came to be socially incongruent, it also came to lack consistency with the body of law" in other areas). It is in this sense that the common law makes "available to us no formal decision procedure which will make clear, in a reliable and certain way, which principles are applicable to which sorts of cases, what weight they carry, and concrete results they support." Perry, *supra* note 270, at 251. The inductive nature of the process deprives legal argument of this kind of deductive certainty and replaces it with a literally pragmatic point of view premised upon the totality of possible problem solutions premised upon similarly cast factual problems.

[279] *See, e.g.*, Lawrence v. Fox, 20 N.Y. 268 (1859); Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 YALE L.J. 1008, 1013 (1918) ("Although not the first case of the sort, the famous case of *Lawrence v. Fox* is now regarded as the leading authority to the effect that a creditor-beneficiary has an enforceable right."); Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1363 (1992) ("Although *Lawrence v. Fox* is often celebrated today as a landmark case that established the power of a third-party beneficiary to bring suit, in reality the case was not very remarkable for its time.").

[280] TERRÉ ET AL., *supra* note 262, at 17–18.

the historical and analytical differences between both systems.[281] Historically, the civil law developed "from the complete opposite" starting point to the common law: "not from political power and its structures of government, but from the absence of such structures and independently from any existing political power."[282] The resulting system in the civil law is thus by origin as philosophical as the common law is pragmatic.[283] Their structure of decision making still reflects this historical difference by placing primacy on different aspects of a legal dispute (factual similarity vs. legal fit).[284]

2. Investor-State Arbitration as Common Law

The experience of investor-state arbitration follows the paradigm of the common law rather than the civil law not principally because of the weight given to prior cases, as others suppose, but because of the manner in which prior cases are employed.[285] Counsels focus intensively on the similarity of facts at bar to the facts of prior decisions.[286] It is the similarity of the factual situation to the earlier cases that conditions the interpretive question about the applicable treaty, customary international law, general principle of law, or unilateral act to be answered in the dispute.[287] Counsels in investor-state arbitration *problematize* the facts in the way of litigation in the common law: adjudication turns first upon whether a proposed rule (treaty interpretation proffered in a prior decision relied upon by counsel, for example) "is relevant to the [factual] issues raised by the dispute."[288]

Through the prism of the factual dispute between the parties, the interpretation of legal texts such as treaties or contracts becomes a different enterprise. These texts are not interpreted in a factual vacuum for abstract legal content, for example, "What is the content of the fair and equitable treatment standard in the Russia-Mongolia BIT?"[289] Instead, the texts are

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[281] The same difference is noted, in a critical fashion, by Frederick Schauer. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006). The criticism he raised of the common law method of law making (or, in Eisenberg's terminology adopted for purposes of this Article, rule establishment) is addressed further in Part IV.B *infra*.

[282] GAMBARO & SACCO, *supra* note 262, at 245 (author translation).

[283] *See id*.

[284] *See id*.

[285] *See, e.g.*, CHRISTOPHER F. DUGAN, DON WALLACE, NOAH RUBINS & BORZU SABAHI, INVESTOR-STATE ARBITRATION 217 (2008); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 35–37 (2012); Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT'L L. 43, 48 (2008) (noting as "paradoxical" that international law developed on the basis of precedent while formally rejecting stare decisis).

[286] *See supra* Part III.A.

[287] *See supra* Part III.A.

[288] EISENBERG, *supra* note 7, at 55.

[289] *See, e.g.*, Paushok et al. v. Mong., Award on Jurisdiction and Liability, ¶255 (Apr. 28, 2011), http://italaw.com/documents/PaushokAward.pdf ("the Tribunal will consider the interpretation of the Treaty in

interpreted to determine whether specific conduct established on the basis of record evidence and deemed legally relevant because of earlier cases presented by the parties (failure to conclude a legal stability agreement in the context of claim premised upon allegedly unfair and inequitable tax increases) is actionable under the specific treaty language of, for instance, the Russia-Mongolia BIT.[290] Earlier decisions reached under different legal instruments thus are not principally invoked to assist in the *textual* interpretation of apparently unrelated documents; they are invoked to define the problem to which the legally applicable document responds.[291] The interpretive question then becomes whether specific language requires deviation from the solution or logic applied to the problem at bar in case(s) that addressed this same or similar problems.[292]

The common law approach can reconcile this currently prevalent pragmatic approach to IIAs with the interpretive method of the VCLT. The VCLT requires that the text of a treaty be interpreted according to its "ordinary meaning."[293] On its face, this suggests a method more akin to the hermeneutics of code interpretation than common law rule establishment. But the meaning of "ordinary meaning" itself requires interpretation.[294] It is typically understood to require that interpretation give meaning to a term similar to "a person reasonably informed in that subject."[295] This causes the problem to regress one step because it is not going to be abstractly apparent what the relevant "subject" is.

The common law approach allows for resolution of the problem of what "ordinary meaning" to give treaty provisions.[296] By making treaty provisions speak to a problem, and contrasting it with existing legally cognizable problem solutions, the common law approach specifically defines the "reasonably informed person" as the one educated about the

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the context of the specific claims made by Claimants").

[290] *See* discussion of *Paushok*, *supra* Part III.A.

[291] *See supra* Part III.

[292] As discussed in Part III, this is precisely the manner in which tribunals interpret IIAs. It is this reliance upon prior decisions that is responsible, in significant part, for the debate between the three approaches discussed in Part II.

[293] VCLT, *supra* note 121, art. 31(1).

[294] Aguas del Tunari, S.A. v. Republic of Bol., ICSID Case No. ARB/02/3, Objections to Jurisdiction, ¶ 91 (Oct. 21, 2005) ("As Schwarzenberger observed, the word 'meaning' itself has at least sixteen dictionary meanings.").

[295] ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 67 (2007). Linderfalk gives, as one example of interpretation in accordance with a technical meaning, the interpretation of a BIT provision by an ICSID tribunal. *Id.* at 69–70; *see also* GARDINER, *supra* note 121, at 174 ("Thus the test is not necessarily what the ordinary person would understand a term to mean but could take account of the subject matter of the treaty so as to seek what a person reasonably informed in that subject, or having access to evidence of what a reasonably informed person would make of the terms.").

[296] *See* Aguas del Tunari, S.A. v. Republic of Bol., ICSID Case No. ARB/02/3, Objections to Jurisdiction, ¶ 91 (Oct. 21, 2005).

legal problem to be answered in the dispute at bar.[297] The common law approach avoids circularity because the establishment of the legally relevant problem and the legally relevant facts that an interpretation must address *precede* interpretation and overlay (through case law) an independent legal matrix over record assembled by the parties.[298] Ordinary meaning interpretation is thus perfectly consistent with a common law approach.

The common law approach is further supported by the requirement of systemic integration.[299] In international law, systemic integration requires that an interpretation take into account other rules of international law in force between the parties.[300] Systemic integration is a core principle of rule establishment in the common law setting.[301] A problem-based approach will select the relevant "other rules of international law" from the legally relevant facts.[302] What makes facts legally relevant is determined through the parties' use of jurisprudence ascribing such legal relevance to alleged conduct.[303]

The result of the common law paradigm is that the interpretations of treaties and investment contracts subject to international law, general principles of law, or domestic investment laws, are inherently open-textured.[304] Past interpretations of bilateral investment treaties expand the universe of legally relevant facts.[305] Facts other than those made relevant by past decisions in investor-state arbitrations can become legally relevant through decisions in other international fora and thus expand the range of problems to be resolved in future bilateral investment treaty arbitrations.[306]

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[297] *See* GARDINER, *supra* note 121, at 174; *cf.* Moore, *supra* note 272, at 183–216.

[298] *Cf. supra* Part III (describing the current interpretive approach of investment treaty tribunals in these terms).

[299] VCLT, *supra* note 121, art. 31(3)(c).

[300] *Id.* art. 31(3)(c); *see also* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005); Campbell McLachlan, *Investment Treaties and General International Law,* 57 INT'L & COMP. L.Q. 361 (2008).

[301] *See supra* note 125.

[302] *See* discussion of Argentine cases, *supra* Part III.B.1.

[303] *See* discussion of Argentine cases, *supra* Part III.B.1.

[304] "Open texture" is another way of expressing an indeterminacy. *See* H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994). The open texture here describes not an indeterminacy as concerns the resolution of a specific dispute, but rather an indeterminacy of the broader system of law. The common law traditionally is precisely conceived of as incomplete (and thus expanding by including additional facts within the realm of the legally actionable). Hart would banish indeterminacy to the penumbra only of rules of precedent, submitting that there is a core meaning as to which no indeterminacy is applicable. *Id.* at 135. For a critique, see generally Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). As discussed below, this solution to indeterminacy overstates the relative strength of rule establishment.

[305] *See* EISENBERG, *supra* note 7, at 74 (discussing the innovation in *McPherson v. Buick Motor Co.* in similar terms).

[306] On the expanding role of international law in general, see, for example, Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International*

The common law that investor-state arbitration helps form is an adaptive, if chaotic, organism.[307] Because of the manner that the horizon of rule establishment can shift with every case, the common law displays significant horizontal coherence. In return, it gives up vertical coherence: the shifting horizon of interpretation deprives the interpretive process, and its result, of a strong substantive focal point.[308] Nowhere is the relational, rather than absolute, character of this law more on display than its central protection of fair and equitable treatment and its identification with the protection of legitimate investment-backed expectations. What is a "fair" or "legitimate" expectation? The open texture of this question, its dependence on appraisal of a reciprocal relationship between investor and state, poses no problem for the horizontal conception of investor-state arbitration. By contrast, in a vertically organized system, it is a question that simply allows no legal resolution.[309]

3. Law in Multiple Dimensions

The common law approach, unlike the prevalent theories about international investment arbitration, can overcome Koskenniemi's aporia.[310] As discussed above, Koskenniemi's aporia is premised upon the identification in international legal argument of two logically inconsistent premises, namely that (1) an international legal obligation is binding solely because of state consent to the rule (apology), and (2) states are legally bound by an international legal rule whether or not they object to it (utopia).[311] Using this dichotomy, Koskenniemi concludes the following as

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Court of Justice, 31 N.Y.U. J. INT'L L. 791, 794 (1999).

[307] *See, e.g.*, Elizabeth D. De Armond, *A Dearth of Remedies*, 113 PENN ST. L. REV. 1, 37–38 (2008) (summarizing scholarship on the nature of the common law of torts as "common law, by changing shape with each new decision, can 'embody the fundamental values of a society' as those values shift over time and respond to developments in technology, industry, and moral reasoning. It has a record of adapting over centuries to societies' needs as they evolve: 'It is the peculiar merit of the common law that its principles are so flexible and expansive as to comprehend any new wrong that may be developed by the inexhaustible resources of human depravity.' An early torts scholar described the common law as 'an organism which is almost purely of natural growth.'").

[308] Rather than as a single principle, substantial unity is currently provided through open-ended, and internally contradictory, lists or canons of what international law seeks to achieve. This method precisely evidences the lack of a single axiomatic principle (such as, for example, "sovereign equality") that could serve as a vertical organizing principle for the entirety of international law. Dupuy, *supra* note 306, at 795 ("For instance, the rules prohibiting the use of force, outlawing genocide, and establishing non-intervention, the rights of people, and the basic rights of the human person are parts of this substantial set of unifying rules."). Non-intervention and prohibition of the use of force facially contradict the prohibition of genocide. If genocide occurs, there must be a right of intervention for the international legal obligation to have more than hortatory force.

[309] KOSKENNIEMI, *supra* note 1, at 330–31.

[310] *See id.*

[311] *See* discussion *supra* Part II.D.

a matter of theory:

> In situations of uncertainty (hard cases) we are thrown back into having to argue both what the law's content is and why we consider it binding on the State. To avoid utopianism, we must establish the law's content so that it corresponds to concrete State practice, will and interest. But to avoid apologism, we must argue that that it binds the State regardless of its behaviour, will or interest.[312]

Koskenniemi's critique is cogent only if law is conceived of as a *deductive* enterprise. Deductive reasoning proceeds by syllogism, i.e., an argument in which the conclusion follows necessarily from a major and minor premise.[313] If the major and the minor premise in an argument contradict each other, the syllogism cannot be closed. Koskenniemi's point is to identify a logical inconsistency in the premises of international legal argument.[314] The aporia therefore is problematic only to the extent that it is assumed that law is inherently deductive.

Koskenniemi's critique is defeated when international law is viewed not from the vantage point of a deductive legal order but instead as an inductive form of reason. From at least Aristotle onwards, philosophers and lawyers have commented on the inductive nature of legal argument in general.[315] The common law, being principally derived from legal argument, places a systemic premium on the inductive nature of law itself.[316] Both classic common law theorists and legal realists have defended the virtue of the inductive process over deductive legal reasoning.[317]

Viewed from the perspective of inductive reasoning, there is nothing strange about the aporia highlighted by Koskenniemi: inductive argument relies upon, and formulates rules from, the observation of relevant facts.[318] To borrow from the philosophy of science, it is similarly a truism that any observation of facts to form a theory depends on the existence of a higher-order paradigm to which the facts are relevant.[319] Scientific discourse, and

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[312] KOSKENNIEMI, *supra* note 1, at 66.

[313] *See, e.g.*, CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 68–69 (5th ed. 2006).

[314] *See* discussion *supra* Part II.D.

[315] *See, e.g.*, Miles F. Burnyeat, *Enthymene: Aristotle on the Rationality of Rhetoric*, *in* ESSAYS ON ARISTOTLE'S RHETORIC (Amelie Rorty ed., 1996).

[316] *See* discussion *supra* Part III.A.1.

[317] *See, e.g.,* Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 825–29 (2002) (providing an overview of the history of theoretical rejection of deductive logic as ordering principle in U.S. common law in the late nineteenth and twentieth centuries).

[318] *See* discussion *supra* Part IV.A.1.

[319] *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 81, 96–105 (2012).

other inductive discourse, similarly functions by an oscillating movement between facts and norms, each of which depending on the other for its ultimate support.[320]

The fundamental distinction between the world in which Koskenniemi's aporia turns into a paradox and one in which it is a simple description of the modality of rule formation is a question of how norms are recognized. In a deductive system, it is assumed that the ultimate paradigm is closed. Recognition depends on the placement of a rule within a full interpretation or rationalization of the larger paradigm.[321] Both the philosophy of language and the philosophy of science challenge this view of paradigm coherence on the basis of the insights garnered by Ludwig Wittgenstein.[322] Kuhn, in his seminal work on scientific revolutions, summarizes this debate:

> That question is very old and has generally been answered by saying that we must know, consciously or intuitively, what a chair, or leaf, or game *is*. We must, that is, grasp some set of attributes that all games and that only games have in common. Wittgenstein, however, concluded that, given the way we use language and the sort of world to which we apply it, there need be no such characteristics. Though a discussion of *some* of the attributes shared by a *number* of games and chairs or leaves often held us learn how to employ the corresponding term, there is no set of characteristics that is simultaneously applicable to all members of the class and to them alone. Instead, confronted with a previously unobserved activity, we apply the term "game" because what we are seeing bears a close "family resemblance" to a number of the activities that we have previously learned to call by that name. For Wittgenstein, in short, games, and chairs, and leaves are natural families, each constituted by a network of overlapping and crisscross of resemblances. The existence of such a network sufficiently accounts for our success in identifying the corresponding object or activity.[323]

International law, conceived of as an inductive process, precisely follows this insight. Family resemblance is both ascending, i.e., premised upon prior observation, and descending, i.e., applying a norm to make a new observation fit within the language of the discipline.[324] Obviously,

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[320] *Id.*

[321] *Id.* at 108.

[322] *See generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (P.M.S. Hacker & Joachim Schulte eds., 4th ed. 2009).

[323] *See* KUHN, *supra* note 319, at 108–09.

[324] *See* WITTGENSTEIN, *supra* note 322.

this process too must oscillate between observation and norm-application for either the observation or the norm to make sense.[325] Rather than being mutually exclusive of each other, the ascending and descending patterns of argument are mutually supportive, and as such support the open texture, or in Koskenniemi's terms, "openness" of legal language.[326]

This inductive openness or open texture of international law departs from the single dimension imagined by Koskenniemi by introducing a new, integrative dimension. This integrative dimension transforms phenomena that, by themselves, are of no significance to facts to be accounted for in legal argument. This integrative move stabilizes oscillation from falling into nonsense and makes it possible to speak of different legal arguments and choose between them by finding, on the basis of conduct, which family resemblance invoked by the parties in fact fits most closely the problem at hand.

Koskenniemi unsuccessfully seeks to defend his aporia against what he calls the "law as fact" approach.[327] His main objection to such an approach is that "it ignores the determining power of the law as a conceptual scheme which controls our perception of the facts of international society."[328] This rejoinder misses the point because it assumes that the conceptual scheme provided is deductive rather than inductive, that it provides a paradigm that permits a seamless placement of a rule by means of a full interpretation or rationalization of the larger paradigm itself.[329] The common law approach rejects such a view and relies precisely on the interaction of fact and the conceptual framework to which it is relevant to form an inductively coherent, pragmatic, and organic system.[330]

4. Resolving the Problems of the Prevalent Approaches

The common law approach can resolve the problems of the prevalent approaches discussed above. The inductive nature of the common law approach does not need to overstate the internal uniformity or the convergence of the IIA regime in order to make prior decisions of arbitral tribunals under different treaty instruments relevant to interpretation. It also does not need to elevate arbitral decisions to formal sources of international law. Rather, it allows an understanding of the modality and value of both convergence and divergence.

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[325] *See id.*
[326] *See* KOSKENNIEMI, *supra* note 1, at 61.
[327] *See id.* at 522–32.
[328] *See id.* at 524.
[329] *See* KUHN, *supra* note 319, at 108.
[330] *See supra* notes 275–280.

a. Problems of the Custom and Regime Approaches

Both the customary international law and regime approaches recognized that the decisions of IIA arbitral tribunals are highly influential for the resolution of future IIA disputes.[331] This insight posited the formation of a new body of law out of the growth of IIAs themselves and the decisions that interpreted them.[332] The problems faced by both approaches, although to different degrees, were twofold. First, they overstated the coherence of IIAs and IIA awards in order to create a sufficiently cohesive system that would justify future reliance on past IIA awards.[333] Second, they overstated the independence of IIA decisions from other areas of law and thereby created a closed system that did not resemble the open texture of the body of IIA decisions.[334]

The common law approach fully credits the insight that IIA decisions are highly influential in future IIA disputes.[335] It acknowledges the central importance of IIA decisions to the international legal enterprise.[336] It places these decisions at the forefront of the interpretive exercise engaged in by international tribunals both by selecting the specific factual question an interpretation has to answer and by identifying the relevant rules of law to take into account in the process of interpretation.[337]

But the common law approach does so without overstating the coherence of IIAs or IIA awards critical to the customary international theory and, to a somewhat lesser degree, the regime theory. The common law approach concerns itself with the horizontal coherence between decisions (i.e., the understanding of the scope of legally relevant facts to take into account in an interpretation).[338] It does not principally draw on the vertical cohesion between decisions or the IIAs on which they rely (i.e., the common legal rule that all of the decisions interpret, whether in a moderately different form).[339] This change in focus permits the common law approach to abandon the requirement of a single legal rule or principle that all the decisions interpret in common. It can treat each IIA as a distinctly different international legal bargain (and consequently each IIA decision as interpreting a different bargain) without giving up the key relevance of these decisions for setting the interpretive horizon for future IIA disputes.

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[331] *See* discussion *supra* Parts II.A–B.
[332] *See* discussion *supra* Parts II.A–B.
[333] *See* discussion *supra* Parts II.A–B.
[334] *See* discussion *supra* Parts II.A–C.
[335] *See* discussion *supra* Part IV.A.2.
[336] *See* discussion *supra* Part IV.A.2.
[337] *See* discussion *supra* Part IV.A.2.
[338] *See* discussion *supra* Part IV.A.1.
[339] *See* discussion *supra* Part IV.A.1.

But the common law approach also does not submit that every IIA is a fundamentally different bargain in all respects. Rather, it is a method that permits discovery of relevant differences in drafting between IIAs in light of specific factual problems at bar during IIA disputes.[340] The common law approach is consistent with the hypothesis of a core overlap between many IIAs regarding their historical development to be tested in every case.[341] The point is that the common law approach can make relevant to the analysis of an IIA at bar decisions of a tribunal interpreting a completely different treaty instrument, such as another IIA or even the GATT or European Convention on Human Rights, by making relevant the facts of that dispute as a point of comparison.[342] This was a problem that either the regime theory or the customary international law theory could overcome.

The common law approach also does not need to divorce the body of IIA awards from general international law to the degree that regime theory must do. In order to be a self-contained regime, an area of law must exhibit significant separation from general international law with respect to both primary and secondary rules of liability.[343] IIA decisions rely upon the secondary rules of general international law.[344] IIA decisions interpret the primary rules contained in IIAs by reference to decisions such as general international law decisions, WTO decisions, and human rights decisions.[345] This significantly hampered the plausibility of the regime theory as a descriptive matter.[346]

The common law approach encourages parties to draw on a broad set of international legal decisions to set the scope of legally relevant facts that must be taken into account in interpreting an IIA. It rejects any interposition of a strong paradigm of "international investment law" because it takes seriously the open texture of investor-state decisions to date.[347] In doing so, it can explain how IIA decisions are relevant—and in many instances more relevant—than general international law decisions. The factual problems will have a higher likelihood of overlap given the similarity of problems (investor rights) and actors (e.g., investors, host states, and host state agencies).[348] That does not mean, however, that only those actors are relevant. To the contrary, analogy to problems

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[340] *See* discussion *supra* Parts IV.A.1–2.
[341] *See* discussion *supra* Parts IV.A.1–2.
[342] *See* discussion *supra* Parts IV.A.1–2.
[343] *See* discussion *supra* Part II.C.1.
[344] *See* discussion *supra* Part III.A.
[345] *See* discussion *supra* Part III.A.
[346] *See* discussion *supra* Part II.C.
[347] *See* discussion *supra* Part IV.A.1.
[348] *See* Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT'L L. 335 (2013).

encountered in other areas is highly persuasive and at times dispositive in IIA disputes to the point of informing a common understanding of the key problem of fair and equitable treatment across IIAs (if not always informing its common solution).[349]

In sum, the common law approach can better account for the original impetus of both the regime theory and the customary international law theory: IIA awards are highly persuasive in future disputes even though these disputes have no common party. It provides a better description than either theory because it allows for a greater divergence between IIAs and IIA awards, and a greater amount of reliance on non-IIA sources. The open texture it achieves is also normatively preferable precisely because it does not risk breaking apart international law into fully autonomous fiefdoms of an ever more rarified group of experts.

b. The Lex Specialis Problem

Authors calling into question the systemic legitimacy of investor-state arbitration identified two central problems of prevalent approaches to international investment law. First, they identified normative overstatements on the part of proponents of the customary international law and regime theorists of investor-state arbitration.[350] Second, they submitted that current international legal approaches dealt poorly with the emergence of international investors as independent right holders (or, at the very least, claimants) on the international legal stage.[351] Although it is likely that critics would reiterate their complaints with respect to the common law approach, this approach in fact takes into account both key insights.

Thus, critics of the legitimacy of international investment law will submit that treating arbitral awards as part of a common law exacerbates (rather than resolves) the problem they have identified. They will submit that a common law system precisely relies upon the status of case law as a *formal* source of law (i.e., a source "imparting to a given rule the force of law").[352] Judicial and arbitral decision precisely lack such force under Article 38 of the Statute of the International Court of Justice which lists the commonly agreed upon sources of international law.[353] Article 38 of the Statute of the International Court of Justice at most admits to the use of judicial and arbitral decisions as material sources of law, and then only insofar as they point out the normative content of formal sources of

[349] *See* discussion *supra* Part III.A.

[350] *See* discussion *supra* Part II.B.

[351] *See* discussion *supra* Part II.B.

[352] *See, e.g.*, GODEFRIDUS J. H. HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 58 (1983) (summarizing the debate on the difference between formal and material sources of international law).

[353] ICJ Statute, *supra* note 25, art. 38.

international law.

This criticism is misplaced. As discussed more fully below, in a common law system, decisions have binding force only within a hierarchy of courts.[354] There is no hierarchy of international courts or tribunals in international law.[355] The decisions of international courts and tribunals are not binding authority; they are persuasive.[356] The common law approach thus does not submit, as this criticism supposes, that the decisions of international courts and tribunals are formal sources of international law.

The original criticism is in fact resolved by the common law approach. Functionally, the common law approach uses prior decisions of international courts and tribunals in the manner critics would submit they should be used: the decisions aid in the interpretation of the relevant formal source of international law.[357] Cases frame the issue in the case at bar by identifying the legally relevant facts for which the interpretation of the legal instrument has to account.[358] They identify the relevant audience to determine the ordinary meaning of a treaty provision.[359] They point out the relevant areas of international law in resolving the dispute.[360] They provide concrete points of comparison of possible interpretations of similar language in similar factual contexts.[361] In all these regards, the decisions do not independently have force of law but have value only to the extent they illuminate the content of the applicable rules of international law.[362] It was this independent force of law to which critics appeared to be most vehemently—and correctly—opposed.

The related criticism that the use of international decisions is illegitimate because states have not consented to its use can similarly be resolved.[363] Even accepting the premise that international law is binding on a state only to the extent it has specifically consented, state parties to international arbitral proceedings use cases in the same manner as claimants.[364] They use cases to identify relevant conduct that an interpretation of the key legal instruments has to take into account.[365] They submit cases reaching favorable interpretations in cases they submit to be factually similar.[366] They distinguish cases on the facts submitted by

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[354] *See* discussion *infra* Part IV.B.1.
[355] *See* discussion *infra* Part IV.B.1.
[356] *See* discussion *infra* Part IV.B.2.
[357] *See* discussion *supra* Part II.B.
[358] *See* discussion *supra* Parts IV.A.1–2.
[359] *See* discussion *supra* Parts IV.A.1–2.
[360] *See* discussion *supra* Parts IV.A.1–2.
[361] *See* discussion *supra* Parts IV.A.1–2.
[362] *See* discussion *supra* Parts IV.A.1–2.
[363] *See* discussion *supra* Part II.B.
[364] *See* discussion *supra* Part II.B.2.
[365] *See* discussion *supra* Part II.B.2.
[366] *See* discussion *supra* Part II.B.2.

opposing counsel. It is this technique, not the substance of each particular decision, which makes up the common law approach. State conduct in every arbitral proceeding in which the state has legal counsel amply supports this technique.

The common law approach similarly takes seriously that investor-state arbitration is the bellwether of introducing public international law into a world beyond state-to-state behavior. Investor-state arbitration gives non-state actors immediate rights of action for significant damages against states premised upon international law.[367] As critics point out, this situation leads to different problems for international law to answer than in the context of state-to-state disputes because in the state-to-state context, international obligations are typically reciprocal, whereas in the investor-state context, international obligations are principally unilateral, binding the host state rather than the foreign investor.

The common law approach precisely answers this concern by placing the similarity of facts in the current disputes to facts in prior adjudications at the heart of its method. It seeks to develop how the factual predicates of a specific dispute affect immediate investor rights (as opposed to the rights of the home state acting in diplomatic protection). In doing so, it uses facts relied upon by host states in defense of disputed measures to determine the appropriate interpretation of the legal instruments invoked by the investor. It further allows host states to develop factual predicates of investor liability in regularly litigated counterclaims by host states against foreign investors. The open texture of the common law approach thus permits the critics to bring their concerns forward within the context of the law as it currently exists rather than having to counsel abandoning the enterprise entirely.

B. Prior Decisions as Persuasive Precedent

So far, the focus has been upon the systemic functions of the common law approach: how does the common law approach change our appreciation of the role of international law in the resolution of investor-state disputes as a whole? What remains to be developed is the particular manner in which prior decisions are used in each case. This section develops such a theory of persuasive precedent.

A misconception about the common law approach, as applied to international law, is that the common law approach must import rules of stare decisis.[368] Because authors reject that these rules can be imported in every case, they opt for a civil law-inspired system of "*jurisprudence*

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[367] *See* Sourgens, *supra* note 348.

[368] *See, e.g.*, DUGAN, *supra* note 285, at 217; DOLZER & SCHREUER, *supra* note 285, at 35–37; Gal-Or, *supra* note 285, at 48 (noting as paradoxical that international law developed on the basis of precedent while formally rejecting stare decisis).

constante"—binding precedent once a critical mass of decisions have resolved an issue of law in the same manner.[369] Viewed through the lens of the common law approach, this misconception can be corrected,[370] thereby materially altering the legitimacy debate—whether inconsistent outcomes are a danger to international law.[371]

1. The Stare Decisis Fallacy

Rejecting the common law approach because it would import the rules of stare decisis is a structural and a substantive fallacy. In resolving these fallacies, it is possible to arrive at an understanding of persuasive precedent that better reflects the current state of international law.

The structural fallacy, mentioned above, translates the stare decisis rules, which operate only within a hierarchy of courts, to a dispute resolution system that is non-hierarchical. In the most scrutinized sense, stare decisis requires the highest court in a jurisdiction to follow its own precedent.[372] And in terms of binding precedent, stare decisis requires lower courts to follow apposite case law from higher courts within the same jurisdiction.[373] Lower courts may also have to follow apposite case law issued by other panels within the same court.[374]

The structure of international law dispute resolution does not meet any of the prerequisites of stare decisis or binding precedent. There is no hierarchy of international courts and tribunals[375]—they operate alongside,

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[369] Kaufmann-Kohler, *supra* note 19, at 377; *cf.* Bjorklund, *Emerging Civilization*, *supra* note 170, at 1295 ("The better analogy, and the approach towards which investment arbitration is headed, is to the *jurisprudence constante* of the French civil law tradition. Such an analogy is appealing for several reasons. First, it recognizes that the starting point for analysis should be the language of the treaty—just as the starting point should be the code in a municipal civil law system. Secondarily, but not insignificantly, tribunals would then turn to the decisions of other tribunals interpreting the same or similar treaty language. These decisions could be viewed as persuasive to the extent they were well reasoned. Moreover, doctrine would develop through the accretion of awards decided in a consistent manner—the 'method of small paces.'").

[370] *See* discussion *infra* Part IV.B.1.

[371] *See* discussion *infra* IV.B.2.

[372] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

[373] *See, e.g.*, Algero, *supra* note 256, at 783–86 (summarizing the historical development of stare decisis in English and American common law). For a discussion of stare decisis at the federal circuit court and district court level, see generally Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787 (2012) (examining the law of the circuit practice of U.S. federal circuit courts through which future three-judge panels are bound by published decisions of three-judge panels from the circuit in question and noting the problems resulting from a lack of a similar doctrine at the district court level).

[374] *See* Mead, *supra* note 373.

[375] *See, e.g.*, Fischer-Lescano & Teubner, *supra* note 123, at 1002; Rao, *supra* note 35, at 936; Stephan, *supra* note 6, at 1591–92.

and in competition with, each other.[376] Furthermore, in the context of adjudicating investor-state disputes, tribunals are fully independent of each other and do not function as different panels of the same court.[377] Even under a more regimented system of investor-state arbitration, decisions interpreting the same IIA could create different kinds of stare decisis.[378] Even if such a system existed, its severe limitations are apparent when considering the diversity of respondent states in investor-state arbitrations.[379]

Similarly, it is a substantive fallacy to suggest that a critical mass of decisions reaching the same result requires reproducing their results because "*stare decisis* . . . applie[s] not to a single decision, but to a line of cases, or a *jurisprudence constante*."[380] This line of reasoning overreaches and under-explains current practices in investor-state arbitrations.[381] Specifically, *jurisprudence constante* exaggerates the weight of precedence because tribunals frequently rule against settled case law.[382] For instance, the *Glamis* decision concerning the scope of NAFTA's fair and equitable treatment standard significantly departs from what proponents of *jurisprudence constante* consider settled case law.[383] Tribunals also frequently rely upon a single case decision without considering whether that decision is broadly accepted.[384]

The common law treatment of precedent better reflects current practices in investor-state arbitration because even a single decision by an out-of-state court can be highly persuasive, and perhaps even binding, if it

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[376] *See, e.g.*, Cogan, *supra* note 6, at 438–46; Stephan, *supra* note 6, at 1606–17.

[377] *See, e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160.

[378] *See, e.g.*, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 5, 2005, T.I.A.S. No. 06-1101, Annex E (limiting appellate mechanism to disputes arising under the bilateral treaty).

[379] *See* ICSID, *supra* note 87.

[380] Kaufmann-Kohler, *supra* note 19, at 376.

[381] *Id.* at 377.

[382] *See id.* at 372–73.

[383] For a discussion of *Glamis*, see *supra* Part III.B.2.

[384] *See, e.g.*, Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, ¶¶ 123–128 (May 11, 2005) (relying upon two recent arbitral decisions that had not been consistently endorsed); *see also* Perenco Ecuador Ltd. v. Republic of Ecuador & Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Provisional Measures, ¶¶ 50, 55 (May 8, 2009) (relying on a decision issued only months earlier). Given the pattern of investor-state arbitrations, a rigid application of the *jurisprudence constante* would result in procedural unfairness. For instance, several decisions on windfall taxation have been issued in a three-year span. In this timeframe, claims regarding similar measures were already pending. Using a *jurisprudence constante* approach, these claims would have been mooted by third-party proceedings that the remaining claimants did not participate in and on the basis of fundamentally different records. Thus, a *jurisprudence constante* approach runs the risk of seriously conflicting with due process rights.

is convincing.[385] A decision's persuasiveness is determined by the precision with which it analyzes a problem that is relevant to a subsequent case.[386] A decision is particularly persuasive when it addresses the same problem or rejects a principal argument in the current case.[387] A decision can also be highly persuasive if it makes a question in the current case less vague or ambiguous.[388] And adopting such a decision would further the development of a newly expanded paradigm.[389]

Alternatively, a decision's persuasiveness may depend on its weight, otherwise known as "[its] ability . . . to prevail against a prescription indicating the opposite result."[390] The measure of the "ability of a prescription to prevail" is the frequency with which it bests other rival prescriptions.[391] Weight replicates the concern of the *jurisprudence constante* that a string of decisions in which a prescription prevailed ought to be given deference.[392] In the common law approach, weight is one factor of persuasion rather than the exclusive one.[393] Further, as evidenced by the continued existence of minority rules in U.S. common law, weight *alone* does not guarantee convergence without the presence of additional elements.[394]

Persuasiveness more generally also can be aphoristic or canonical.[395] Although canonical statements are typically considered to be binding in the formal sense, the anthologizing of decisional law that is not formally

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[385] *See* Richard Bronaugh, *Persuasive Precedent*, *in* PRECEDENT IN LAW 223 (Laurence Goldstein ed., 1987) ("Any serious consideration of a persuasive precedent in an opinion (i.e. not ignoring it or merely mentioning it as of minor relevance) can have only one of two purposes, the writer either has been convinced by it or is distinguishing it (which renders its convincingness of no account).").

[386] *See* Schauer, *Prescriptions*, *supra* note 274, at 913 ("For present purposes, therefore, the important dimension is not a dimension in which the opposite of particularity is generality, but rather one in which particularity is best seen as specificity or precision, and its opposite as vagueness.").

[387] *See* Chad W. Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 67 (2009).

[388] *See* Schauer, *Prescriptions*, *supra* note 274, at 913.

[389] *See* KUHN, *supra* note 319, at 96–105; *see also* RICHARD A. POSNER, CARDOZO, A STUDY IN REPUTATION (1990) (stating that Benjamin Cardozo was a master of persuasion through his precise casting of problems).

[390] Schauer, *Prescriptions*, *supra* note 274, at 919.

[391] *See id*.

[392] Kaufmann-Kohler, *supra* note 19.

[393] *See* Schauer, *Prescriptions*, *supra* note 274, at 919.

[394] *See id.*

[395] *Id.* at 916 ("A canonical prescription . . . is one that appears in specific written form as a prescription and for which there is a common source and a common point of reference. . . . And so too is a prescription set forth at one time and in one place by a court, at least where it is expected that this is the form of the prescription that is the starting point for lower courts and others who are bound by it. The three-part test for obscenity in *Miller v. California* is canonical in much the same way that statutory provisions are canonical and so is the actual malice rule of *New York Times Co. v. Sullivan* and the form of the warning in *Miranda v. Arizona*.").

binding, for example in textbooks, can also be described as canonical.[396] The decisions included in the canon share an *aphoristic quality*, as the expression of the third-party beneficiary rule in *Lawrence v. Fox* illustrates.[397] In other instances, the poignancy of their specific facts turns the affirmation of a rule of law into a symbolic or emblematic totem for the rule, as could be argued is the case in *Hamer v. Sidway*.[398] Adopting these decisions strengthens the expression of the paradigm.

This common law process of persuasion better describes how arbitral tribunals treat prior decisions. As an international law scholar noted about the relationship between the various decisions of international courts and tribunals:

> By contrast to the binding nature of the judgments of superior courts, it belongs to the logic of networks that autonomous regimes enter into relations of mutual observation. Legal certainty within this polycentric legal system cannot be furnished by a hierarchically superior decisional instance placed at the center of the law. Rather, what can be realistically expected is uncertainty absorption in a process of iterative connection of legal decision to legal decision that recalls the strict precedent tradition, but that also departs from it in various significant ways.[399]

The common law approach takes this nature of international law into account without giving up a manner in which the persuasive force of cross-fertilization can be explained and harnessed. By treating the persuasive precedent along the axes of precision, weight, and canonicity, it is possible to account for why decisions frequently are uniform on similar questions of law without becoming static or guaranteeing complete convergence. By giving these factors persuasive force rather than using them to explain binding force, they further fit within the broader inductive framework of the common law described in the previous section. Weight and canonicity are the conservative forces anchoring legal analysis in past conceptualizations of the law. Precision on the other hand permits a reshaping of both weight and canonicity by forcing decision to include facts, which make relevant a different resolution to the problem than the weight of prior decisions would facially suggest.

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[396] *Id.*; *see also* Farnsworth, *supra* note 269.
[397] Lawrence v. Fox, 20 N.Y. 268 (1859); *see also supra* note 279.
[398] Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891); *see also* Farnsworth, *supra* note 269, at 1442–43.
[399] Fischer-Lescano & Teubner, *supra* note 123, at 1039–40.

2. Legitimacy Restored: The Virtue of Divergence

The common law approach makes strides in resolving the legitimacy challenge of international law resolution of disputes between investors and their host states.[400] Rather than considering divergence an evil to be avoided, it is one of the happy incidents of the lack of hierarchy between tribunals underlying the common law approach that a single courageous tribunal may, if the parties choose, serve as a laboratory and try novel legal approaches to social and economic problems in international law without risking the rest of the body of international law.[401] Further, the decisions reached by any tribunal follow the input of the parties in framing and presenting their case to the tribunal rather than the proclivities of the arbitrators.[402] The common law approach thus develops a view of international law that is open textured, grounded in party consent, and ultimately responsive to the justice of the proposed problem's solutions in jurisprudence.[403]

By virtue of the multiplicity of international courts and tribunals, the lack of a hierarchy of tribunals will, perforce, lead to divergence.[404] Similar divergence is amply on display in the disagreement on common law rules between U.S. states.[405] It is evident in circuit splits on questions of federal law not dispositively resolved by the U.S. Supreme Court.[406] This divergence does not, by and large, undermine the legitimacy of state common law or U.S. federal law. It similarly should not lead to any conclusions about the legitimacy of international law or adjudication.

Apart from this straightforward observation, the common law supports

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[400] *See* discussion *supra* Part II.

[401] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[402] *See* discussion *supra* Part III.

[403] *Cf.* discussion *supra* Part IV.A.

[404] *See* discussion *supra* Part IV.B.

[405] The development of promissory estoppel in the United States may be one such example. *See, e.g.*, Kevin M. Teeven, *A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance*, 72 TENN. L. REV. 1111 (2005). A controversy whether promissory estoppel is a reliance or a promissory theory of liability continues to rage on. *Compare* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (arguing that promissory estoppel rests upon promissory liability, not reliance liability), *with* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998) (arguing that promissory estoppel rests upon reliance); *see also* Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669 (2010) (judges typically combine both approaches in a hybrid understanding of promissory estoppel).

[406] *See generally* Emily Grant, Scott A. Hendrickson & Michael S. Lynch, *The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision*, 60 CLEV. ST. L. REV. 559 (2012) (discussing the limited circumstances when circuit splits are resolved by the U.S. Supreme Court).

not only that divergence is to be expected, but also that it is to be desired. A key to the persuasiveness of international legal decisions is their increased precision with which to understand the problem presented for resolution.[407] The recent turn to adjudication in international law has revealed the relative, and frequently purposeful, vagueness of international law.[408] To formulate precise norms of international law, different problematizations of common fact patterns reflect, not the illegitimacy of the dispute resolution process, but the original vagueness of the law being applied.

It is through the mediation of different problematizations of common fact patterns that international law itself can contrast problem solutions. It is this divergence that permits the weight of a problem solution to be tested at all. It is this divergence that permits an appraisal of the relative precision with which actual problems can be answered by international legal analysis.[409] It is this laboratory that permits, eventually, the authoring of canonical problem solutions.[410] Disagreement between tribunals, therefore, is a sign of healthy development and serves the ultimate development of the law towards better, more precise norms in the future.[411]

The experimental nature of adjudication is evidence of legitimacy of international dispute resolution in yet another manner. Authors have submitted that international adjudication is running away from state consent and creating an illegitimate law because the judicial and arbitral outcomes do not reflect the will of its subjects. Divergence in international dispute resolution tends to disprove this submission.[412] Divergence reveals the responsiveness of international dispute resolution to the process of pleading and presenting the case by the parties.[413] This responsiveness means that the law develops only because of the will, and with the "consent," of disputing parties to the outcome of international dispute resolution, if only because the losing party was unable to persuade the tribunal of a "better" outcome, i.e., a more precise, weightier, or more paradigmatic solution to the litigation.

Not enough, a party considering the result reached in prior decisions unjust is not precluded by the common law approach to relitigate its case in future disputes. The status quo ante is only law so long as it is persuasive. A truly unjust result will in short order not only come to be socially incongruent, but also come to lack consistency with the growing body of

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[407] *See* discussion *supra* Part IV.B.1.

[408] *See, e.g.*, Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37, 66 n.163 (2003).

[409] *See* discussion *supra* Part IV.B.1.

[410] *See* discussion *supra* Part IV.B.1.

[411] *See* discussion *supra* Part IV.B.1.

[412] *See* discussion *supra* Part IV.B.1.

[413] *See* discussion *supra* Part III.B.

the law around it.[414] And change.[415]

V. CONCLUDING THOUGHTS

This Article began by taking stock of the academic responses to the proliferation of international dispute resolution of investor-state disputes that failed. It uncovered that common to all these theories was the superimposition of a substantive organizing principle over the wealth of jurisprudence (strong property protection, strong regulatory sovereignty, a grand bargain of protection for development promotion). These substantive principles failed to reflect both treaty and arbitral practice.

The Article proceeded to explain that the problem of academic theorizing about investor-state arbitration was their search for a substantive organizing principle in the first place. It explained that no such substantive principle is likely to emerge. The proliferation of international law and adjudication introduced a heterogeneity that could no longer be overcome by further abstraction or deduction.

The Article proposed that the appropriate solution for international law scholarship was not to search for the elusive first principle—an exercise as fruitful as *Waiting for Godot*—but rather to treat international law as process. Viewed in this manner, it became apparent that international adjudication behaves like the common law, inductively and pragmatically. Precedent became the conceptual language through which to understand new disputes and the limits of international legal problem solution. But the inductive nature of the legal process explained why this language of international law resembled more the new *lingua franca* of international law, English, rather than its Latin predecessor. It continues to expand by creating new family resemblances between new problems and old solutions. These new resemblances enrich its conceptual grammar and vocabulary. Just like English, and unlike Latin, this conceptual language continues to adapt to new technology, political sea change, and shifts in culture.

The value of this conception of international law likely extends beyond the scope of investor-state arbitration, or even international adjudication. It possibly identifies something about the nature of international law in its own right. As noted by a practicing lawyer in the U.S. State Department prior to the proliferation of international adjudication:

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[414] EISENBERG, *supra* note 7, at 74.

[415] Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 5 TRANSNAT'L DISP. MGMT. (2006) (noting the beneficial competition for future acceptance between investor-state awards).

> The task of finding ways to work out international disputes tends also to develop in the Office attorney what might be called a pragmatic or functional approach to international law—a tendency to view that law less as a body of fixed and unchangeable rules than as a flexible tool for use in forging real solutions to practical problems of international order. Perhaps as an outgrowth of common-law training, there is a working habit of viewing new and unique areas of problems on a case-by-case basis at first, and letting the law work itself out, rather than jumping immediately into the enunciation of broad principles. In general, precedent and authority, while important, do not preclude analysis in terms of sensible result and workable rule.[416]

Perhaps the common law view can encourage internationalists to see international law not as a body of rules organized under principles and axioms, but to focus their attention again on tackling and resolving problems. On its best of days, international law has lived up to these aspirations and been a tool for change rather than an impediment to it. To do so again, it is necessary to shed the constraints of internationalist formalism evident in the deductive views of international law and embrace a different, functionalist idea of law. As economic, social, environmental, and resource problems tend to become increasingly global and increasingly defy easy categorization in the musty terms of 19th century neo-classical aphorisms, this change would not come a moment too soon.

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[416] Richard B. Bilder, *The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 680 (1962). For further discussion of Bilder's remarks, see David Kennedy, *Speaking Law to Power: International Law and Foreign Policy Closing Remarks*, 23 WIS. INT'L L.J. 173 (2005).