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ABSTRACT

Should the United States continue to enter into free trade agreements containing sovereign commitments to resolve regulatory disputes with qualifying multinational corporations before international arbitral tribunals? This question has gained public prominence due to the vocal opposition of Senator Elizabeth Warren and President Donald Trump to the Trans-Pacific Partnership (TPP), denouncing it as disastrous and corrupt.[1] *Public outcry has focused in particular on the investor–state dispute settlement (ISDS) mechanism included in the treaty. Public criticism submits that ISDS suffers from a fatal systemic asymmetry—it favors the profit interests of multinationals over the public policy concerns of the host states in which these multinationals invest.*

As this Article demonstrates, existing academic literature on ISDS tends to confirm this asymmetry. The prevalent ISDS literature is descriptively incorrect in this regard. This oversight is caused by a significant blind spot in the ISDS research perspective: the literature focuses exclusively on the expectation interests of multinationals arising out of investment

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1. *See* Matthew Boyle, *Donald Trump: Obama's Trans-Pacific Free-Trade Deal Is 'Insanity,'* BREITBART.COM (Nov. 9, 2015), http://www.breitbart.com/big-government/2015/11/09/exclusive-donald-trump-obamas-trans-pacific-free-trade-deal-insanity/ [https://perma.cc/KQM5-3BYJ] (archived Oct. 1, 2016); Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html [https://perma.cc/5JRG-WTYN] (archived Oct. 1, 2016).

transactions. This Article demonstrates that this focus is descriptively untenable.

This Article proposes an alternative to the expectation interest model prevalent in the current literature: ISDS does not focus upon investor expectancy, as currently theorized, but protects the reciprocal reliance interests of states as well as multinational investors. An ISDS process focused on the reliance interests of states and non-state actors imposes meaningful obligations on all parties to investment transactions. These obligations are part of a legal process mediating between state-to-state international law and commercial transnational law norms. By protecting the reciprocal reliance interests of states and multinationals, ISDS emerges as a constitutive component of the success of global public–private cooperation. This change in perspective demonstrates how ISDS can assist both states and multinationals in harnessing market mechanisms to achieve development policy goals.

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I. INTRODUCTION

Oh and while the king was looking down
The jester stole his thorny crown
The courtroom was adjourned
No verdict was returned.

-Don McLean, *American Pie*.[2]

Is it prudent and sustainable to privatize the global governance of international investment flows? Today's legal infrastructure relies significantly on investor–state dispute settlement (ISDS)—a network of international arbitral tribunals sitting *ad hoc*—to fulfill just this task.[3] Currently, the amount in controversy involved in pending ISDS claims between states and multinationals exceeds half a trillion dollars ($595.5 billion).[4] These ISDS tribunals are empowered either under privately negotiated investment contracts between multinationals and the host states to their investment or by consent of the host state to the investment in vaguely worded international investment treaties or domestic investment laws.[5] In either case, ISDS tribunals are not subject to broad governmental or international oversight.[6] Given the ubiquity of contract, treaty, and legislative consents to ISDS,

2. DON MCLEAN, *American Pie*, *on* AMERICAN PIE (United Artists 1971).

3. *See* Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1610 (2011) (discussing the role of investment arbitral tribunals in global governance).

4. Michael Goldhaber et al., *2015 Arbitration Scorecard*, AM. LAW. INT'L (July 1, 2015), http://www.international.law.com/id=1202731137443/2015-Arbitration-Scorecard-Contract-and-Treaty-Disputes?slreturn=20151108120650 [https://perma.cc/NXE7-E5XQ] (archived Oct. 26, 2016) (reporting an amount in controversy of $410.85 billion for treaty disputes pending on July 1, 2015 and an amount in controversy of $184.65 billion for contract claims between investors and state-owned companies brought pursuant to contract in the same period).

5. *See* JESWALD SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 3–4 (2013).

6. Eloise Obadia & Frauke Nitschke, *Institutional Arbitration and the Role of the Secretariat*, *in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES 80, 123 (Chiara Giorgetti ed., 2014) (discussing institutional oversight).

transactions subject to ultimate ISDS review are worth trillions of dollars.[7]

The question of whether such a large role for ISDS makes for good policy has acute political significance. The United States entered into an international treaty with eleven Pacific Rim nations, known as the Trans-Pacific Partnership (TPP), on October 5, 2015.[8] The treaty has been decried as "insanity" and "rigged" by President Donald Trump and Democratic Senator Elizabeth Warren, respectively.[9] The issue drawing the most pitched opposition—the one clause "everyone should oppose"—is the ISDS provision of the treaty.[10]

Part of the current academic response to public criticism of ISDS mechanisms is quantitative.[11] This quantitative response submits that the outcomes of ISDS proceedings do not support the claim that ISDS is "rigged" because states incur liability in only a reasonable number of disputes and, in those instances, recovery is typically significantly less than originally requested by the investor.[12] This analysis proves, in a sophisticated manner, that there is no overt bias against states when international tribunals determine governmental liability.[13] It concludes definitively that, while there is room for ISDS reform, there is no need categorically to question its fairness.[14]

But the quantitative responses given so far allow for a potential rejoinder: the scholarship focuses upon ISDS state *loss* rates. It does not address the possibility for states' recovery of damages from multinational investors in ISDS for investor misconduct.[15] This focus is consistent with the conventional wisdom in qualitative ISDS

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7. *See* Charles Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 778 (2014) (noting the existence of "over 3,000 bilateral investment treaties and additional regional trade agreement with investment chapters").

8. *See* Jackie Calmes, *Trans-Pacific Partnership Is Reached, But Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?_r=0 [https://perma.cc/6EL9-6ESF] (archived Oct. 15, 2016) (reporting signature of the agreement and next steps to ratification in the United States).

9. *See* Dan Merica & Eric Bradner, *Hillary Clinton Comes out Against TPP Trade Deal*, CNN (Oct. 7, 2015), http://www.cnn.com/2015/10/07/politics/hillary-clinton-opposes-tpp/index.html [https://perma.cc/2EN5-LBK5] (archived Oct. 1, 2016) (reporting Hillary Clinton's opposition); Boyle, *supra* note 1; Warren, *supra* note 1.

10. *See* Warren, *supra* note 1.

11. *See* Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 520–21 (2015) (defending liability decisions against states from a quantitative point of view).

12. *See id.*

13. *See id.*

14. *See id.* at 489–90 (referring to the 60 percent of cases in which "respondent won" as "no state liability").

15. *See* George Kahale III, *Remarks*, *in* 8 INVESTMENT ARBITRATION AND INTERNATIONAL LAW 191, 198 (Ian Laird et al. eds., 2014) (noting the qualitative problem of such responses).

scholarship: states bargain away legal protection to investors in exchange for the expectation of increased future foreign investment flows.[16] States do not bargain with investors to gain legal protection through ISDS themselves.[17] This conventional wisdom sets up the problem identified by ISDS critics—that ISDS, in fact, appears to be completely one-sided, favoring investor rights to the exclusion of state rights.[18]

Part II will explain that this rejoinder fails because the ISDS literature is descriptively incomplete. The ISDS literature so far does not account for the habitual and significant counterclaims raised by states and state entities in both treaty and contract arbitrations.[19] The recent landmark decision in *Perenco v. Ecuador*, permitting counterclaims in a treaty arbitration to proceed for a failure by the investment vehicle to act "as a responsible environmental steward" in the host state, is only the most recent—and most visible—example of this facet of ISDS.[20] The literature so far thus fails to fully explain the scope and nature of ISDS.

Part II submits that much of the qualitative ISDS literature is self-defeating because it looks to answer the wrong question.[21] The literature accepts that states bargain away ISDS protections in exchange for the prospect of investment,[22] and then seeks to define the scope of protection by reference to investor expectancy—what benefit of the bargain must states provide to investors to attract investment? Such expectancy measures whether the "breach of the [state's] promise causes [the investor] to feel that [the investor] has been 'deprived' of something which was [the investor's own]."[23] The dominant approaches simply diverge on the narrower question of whether expectancy should be defined by reference to the commercial law perspective of the investor,[24] the administrative law perspective of the

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16. *See* Jeswald Salacuse & Nicholas Sullivan, *Do BITs Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77 (2005) (arguing that the grand bargain of the current regime is "a *promise* of protection of capital in return for the *prospect* of more capital in the future") (emphasis in original).

17. *See id.*

18. *See* Warren, *supra* note 1.

19. *See, e.g.*, Goldhaber et al., *supra* note 4.

20. Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Environmental Counterclaim, ¶ 447 (Aug. 11, 2015), IIC 699 (2015).

21. *See* CHRISTOPHER DUGAN ET AL., INVESTOR-STATE ARBITRATION 153–54 (2008); Franck & Wylie, *supra* note 11, at 520–21 (focusing upon liability decisions against states).

22. *See, e.g.*, Richard C. Chen, *A Contractual Approach to Investor-State Regulatory Disputes*, 40 YALE J. INT'L L. 295, 302 (2015); Barnali Choudhury, *International Investment Law as Public Good*, 17 LEWIS & CLARK L. REV. 481, 495 (2013); Salacuse & Sullivan, *supra* note 16, at 77 (quoted above).

23. Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 57 (1936).

24. *See* Julian Cardenas Garcia, *The Era of Petroleum Arbitration Mega Cases*, 35 HOUS. J. INT'L L. 537, 579 (2013) (submitting that investment treaty arbitration fits

domestic regulator,[25] or the treaty law perspective of the host state.[26] As Part II concludes, each of these approaches logically becomes self-defeating because commercial expectancy is an inapposite measure for the legitimacy of regulatory (i.e., non-commercial) state conduct and vice versa.

Part III submits that the descriptive problems in the current literature can be overcome by more careful empirical analysis of the ISDS process.[27] How do ISDS tribunals arrive at decisions? Part III proposes that the ISDS process does not concern investor expectancy but rather concerns the protection of reciprocal reliance interests of the state and the foreign investor. In the context of long-term transactions, these reliance interests are necessarily reciprocal—each party constantly changes its position because of, and in response to, the conduct of the other (e.g., the investor commits money in response to regulatory approvals of a new turbine for a power plant, the state adjusts its plans for electricity generation because the investor promises to operate the turbine by a certain date, and so on).

Part III proposes that, by switching to a reliance perspective, ISDS can balance otherwise incommensurable interests of state, regulatory, and private actors.[28] Part III explains that, if this hypothesis is correct, ISDS would form part of a new, *supernational* law between classic international law, transnational law, and global administrative law.[29] This *super*-national law would do more than traditionally theorized *supra*-national law—a term that refers to "legal rules and procedures that are authoritatively interpreted by institutions existing outside of the legal and political structures of the sovereign states that establish those institutions."[30] Rather than refer to a set of rules and procedures for their interpretation beyond the realm of the sovereign to which these rules are applied, supernational law theorizes the common logic or process of their application. This supernational law incorporates transnational commercial, global

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with a "broad philosophical approach to transnational law" and "its own concept of transnational legal order for arbitration").

25. *See generally* SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT ARBITRATION 310 (2012).

26. *See* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 416 (2015) (proposing a treaty law based resolution) [hereinafter Roberts 2015].

27. *See* FREDERIC SOURGENS, A NASCENT COMMON LAW 244 (2015).

28. *See* HAROLD LASSWELL & MYRES MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY 99 (1992) (clarifying the need for a process-based theory that permitted harmonization of "the conflicting interests in a community into perspectives of common interest, balancing the effective power of different classes and interests" that a more accurate theory about law is feasible).

29. The Article coins the phrase supernational law to denote a law above municipal law that is not "inter"-national in the sense of being between states or transnational as in the sense of affecting all cross-border transactions.

30. Jay Lawrence Westbrook, *Legal Integration of NAFTA Through Supranational Adjudication*, 43 TEX. INT'L L.J. 349, 349 (2008).

administrative, and/or public international law norms as reference points to assess the reasonableness of reliance interests of each ISDS participant in turn, without subjecting the reasonableness of the other ISDS participants to that framework as a predicate for liability. Like the transactions giving rise to it, the ISDS process would then reflect and take seriously the interpenetrating interests of corporate profit and political commonweal that facilitate global investment flows in the first place.[31]

Part IV tests the supernational law hypothesis developed in Part III against ISDS state liability determinations. It begins this analysis with a question about the ISDS process itself: How can states incur binding obligations to arbitrate with non-state actors, at all? As Part IV explains, the drafters of the original ISDS framework convention instructively answered this question: ISDS consents are "unilateral acts" under international law.[32] This framework is in fact reflected in arbitral jurisprudence.[33]

The unilateral act framework has consequences for the substantive protections extended by states together with the ISDS consent. These protections are also unilateral acts. Significantly, for the supernational law hypothesis, unilateral acts protect the reasonable reliance interests of intended beneficiaries by operation of international principles of good faith.[34] Unilateral act analysis requires tribunals to employ a highly context-sensitive balancing test, taking into account the circumstances surrounding the making of the act and its likely reception by intended beneficiaries.[35] Part IV concludes that ISDS jurisprudence is reasonably faithful to the requirements of the context-sensitive balancing approach laid down by international law on unilateral acts, thus confirming the supernational law hypothesis.

Part V next tests the supernational law hypothesis against ISDS claims prosecuted by states. It begins its analysis by asking a second question about the ISDS process: How can commercial parties incur binding obligations to arbitrate statutory or tort-based counterclaims

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31. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 143 (discussing the interdetermination, interdependence, interstimulation, and interpenetration of global communities)

32. *See* Aron Broches, *Note Transmitted to the Executive Director*, *in* 2 HISTORY OF ICSID CONVENTION 5 (1968).

33. *See generally* David D. Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 649–74 (Mahnoush Arsanjani et al. eds., 2011); W. Michael Reisman & Mahnoush Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *in* VÖLKERRECHT ALS WERTORDNUNG – COMMON VALUES IN INTERNATIONAL LAW 409 (Pierre Dupuy et al. eds., 2006).

34. *See* Caron, *supra* note 33, at 654 ("[T]he ICJ linked the legal effects connected to unilateral declarations to the principle of good faith.").

35. *See id.*

like the ones states are likely to pursue against an investor? Part V explains that such claims are possible to the extent that commercial parties agree upon broadly worded arbitration clauses. This commercial approach has been adopted by ISDS jurisprudence.[36]

Part V continues with the question of what law is applicable to the substance of state claims against investors. Again drawing on jurisprudence, Part V establishes that arbitral tribunals look to principles of transnational good faith.[37] Transnational good faith, like unilateral act liability, also protects reliance interests, in this case, the reliance interest a state can place in its commercial counterparty.[38] Consistent with jurisprudence, principles of transnational law impose obligations on commercial parties to act reasonably and with due regard for the interests of their counterparties, even in the absence of contractual language to that effect.[39] Part V concludes that, by implication, such principles should be available, even in the context of treaty arbitration commenced by investors, and even if the treaty does not speak to questions of investor liability. Part V thus confirms the supernational law hypothesis in the context of state ISDS counterclaims.

Part VI then combines both elements of supernational law—unilateral act state liability and transnational investor liability—into a single process of decision. It showcases how ISDS reflects the reciprocal reliance interests of investors and states that are inherent in investment transactions. It thus overcomes the apparent asymmetry implicit in the current ISDS literature.

Part VII concludes with an appraisal of the value of such a supernational law and directly addresses the policy challenge raised by TPP critics.[40] It explains that the conception of ISDS developed in this Article supports the idea that existing ISDS mechanisms are both prudent and sustainable for three reasons. *First*, ISDS depoliticizes

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36. *See* Paushok v. Government of Mong., Award, Award on Jurisdiction and Liability, ¶ 689 (Apr. 28, 2011), IIC 490 (Perm. Ct. Arb. 2011); Saluka Investments BV v. Czech, Decision on Jurisdiction over the Czech Republic's Counterclaim, ¶¶ 21, 39 (May 7, 2004), IIC 209 (Perm. Ct. Arb. 2004).

37. *See* Inceysa Vallisolente SL v. El Sal., ICSID Case No. ARB/03/26, Award, ¶¶ 229–39 (Aug. 2, 2006), IIC 234 (2006).

38. *See* KLAUS-PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 81–82 (2010) (discussing the role of the arbitrator in transnational law).

39. *See id.* at 122, 142, 385 ("Each party has a good faith obligation to renegotiate the contract if there is a need to adapt the contract to changed circumstances and the continuation of performance can reasonably be expected from the parties.").

40. *See* Roberts 2015, *supra* note 26, at 389–94 (discussing the consequences of depoliticization); Andrea Bjorklund et al., *An Open Letter About Investor-State Dispute Settlement (April 2015)*, MCGILL (Apr. 20, 2015), https://www.mcgill.ca/fortier-chair/isds-open-letter [https://perma.cc/2QVV-QVGW] (archived Oct. 1, 2016) (the author is a signatory of the letter). For a cogent critique of depoliticization being used too loosely in current literature on investor-state dispute resolution, see Martins Paparinskis, *International Investment Law and the European Union: A Reply to Catharine Titi*, 26 EUR. J. INT'L L. 663, 664 (2015).

investment disputes.[41] Rather than yielding to coercion or corruption or influence or innuendo, ISDS looks to a legal process agreed to by all agents and actors involved.[42] It thus provides a mechanism to make effective the *ex ante* expectations of all participants in an investment relationship reflected in the underlying investment documents.[43] *Second*, by focusing on reliance interests, ISDS nevertheless remains policy-sensitive. Rather than yielding to purportedly apolitical rules, ISDS decision making is conscious of the policy implications of each actor's choices in arriving at an outcome.[44] It thus bestows authority upon legal decisions by rooting decisions in the respective community expectations of all participants in an investment relationship.[45] *Third*, ISDS stabilizes investment flows.[46] Rather than conceding to the inevitability of political risk, ISDS renders transparent the types of interests and the balance that will be brought to bear in the apportionment of future benefits and burdens flowing from the investment relationship.[47]

II. APPRAISING THE DOMINANT APPROACHES

Part II outlines and appraises the dominant approaches to ISDS. Section A below introduces the three dominant rival approaches to ISDS.[48] These approaches are that ISDS forms part of a transnational legal order, is a starting point for global administrative law, or is a

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41. *See* Bjorklund et al., *supra* note 40.

42. *See id.*

43. *See generally* W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY 95–104 (2012) (discussing the distinction between operational code and myth systems).

44. LASSWELL & MCDOUGAL, *supra* note 28, at 105 (unmasking the "widespread illusion[] that legislation is something 'political' and not 'legal' and that the principal concern of law is largely with the *application of* law") (emphasis in original).

45. *See id.* at 63 n.1 (defining authority as concordance with "expectations of members of a community what will be decided"). These expectations give rise to reasonable reliance, as opposed to an "expectation interest" in that they provide the predicate when a person is reasonably induced to change position to his or her detriment. *See* Fuller & Perdue, *supra* note 23, at 53–55 (defining reliance and expectation interests *vis-à-vis* community expectations).

46. See LASSWELL & MCDOUGAL, *supra* note 28, at 147 (global processes of effective power can "establish[] and maintain[] constitutive processes of authoritative power for the promotion and stabilization of more economic and human social routines").

47. *See* John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 165–69 (2009) (discussing the role of transnational law in allocating risk in general in the construction context); *see also* Michael Nolan, Frédéric G. Sourgens & Mark Rockefeller, *Political Risk Insurance and Guarantees from Public Providers*, *in* TRANSNATIONAL LAW OF PUBLIC CONTRACTS 737–71 (Stephan Schill & Matthias Audit eds., 2016) (discussing mechanisms for obtaining political risk coverage for parties to whom political risk is allocated in transnational transactions).

48. *See* Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 877–78 (2011) (discussing public international law, international commercial, and international public law discourses).

treaty-based mechanism to address state investment policy needs. Section B outlines the descriptive flaws of these approaches.

A. *The Dominant Approaches*

1. The Transnational Legal Order Perspective

The first view holding significant currency in the ISDS literature is that investment protection forms part of a broader transnational legal order.[49] The transnational perspective is fundamentally commercial in outlook and conceptualizes the relationship between the investment and the state principally from the perspective of the investor.[50] As discussed below, the transnational legal order has three constitutive elements: (1) the order applies to cross-border transactions involving a non-state actor, (2) the applicable law to those transactions is independent from the law of any one state, and (3) the applicable law is enforced in a forum that is similarly independent from any one jurisdiction. To function properly, this perspective requires an arbitration mechanism that is fully autonomous from any one jurisdiction—most centrally, the jurisdictions of the disputing parties.

Judge Philip C. Jessup introduced the concept of transnational law in 1956.[51] By the end of World War II, commercial cross-border transactions had significantly increased in number, size, and complexity, requiring a new form of law to address this bustling field of commercial endeavor.[52] Transnational law thus captures more than the law of state-to-state interaction, namely, all types of cross-border relationships beyond the state-to-state relationships covered by public international law.[53] Although there are varying definitions of transnational law, all agree that the scope of transnational law

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49. *See* Jeswald Salacuse, *Making Transnational Law Work Through Regime-Building: The Case of International Investment Law*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 406, 407 (Pieter Bekker et al. eds., 2010) (submitting that international investment law is "a vitally important part of transnational law"). For recent literature adopting an approach related to the transnational legal order discussed below, see Brower & Blanchard, *supra* note 7 *passim* (arguing for a transnational legal approach to investment arbitration).

50. *See supra* text accompanying note 47.

51. *See* PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

52. *See* GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 11–26 (2010) (discussing the global reception of Jessup's 1956 transnational law proposal); Donald E. Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1500–06 (2013) (discussing the origin and U.S. reception of Jessup's 1956 transnational law proposal).

53. Childress, *supra* note 52, at 1500; *see also* Math Noortmann, *Transnational Law: Philip Jessup's Legacy and Beyond*, *in* NON-STATE ACTORS IN INTERNATIONAL LAW 56–66 (Math Noortmann et al. eds., 2015) (noting a significant lack of clarity in Jessup's original proposal).

includes all interactions involving non-state actors.[54] This could refer to purely commercial relationships or to relationships that involve state or state-controlled entities, as well as commercial counterparties.[55]

Following the original proposal of transnational law by Jessup, scholarship on transnational law was mainly developed in Europe.[56] French scholars in particular posited the existence of a distinct transnational legal "order," coequal to, and independent from, municipal law and public international law.[57] This transnational legal order centrally rejects that all cross-border transactions must be subject to the laws of a state.[58] Classic legal doctrine, rejected by these transnationalists, provides that conflicts-of-law principles will ultimately determine the applicable law to any such cross-border transaction, even in the face of a choice-of-law clause.[59] Transnationalists argue instead that commercial practice supports the opposite conclusion: that cross-border transactions are governed by legal rules sourced from relevant industry practice, industry self-regulation, and the establishment of general principles of commercial law shared by the actors relevant to the transaction.[60] By severing the link to municipal law, transnationalists submit that the transnational legal order is truly, substantively autonomous from states.[61]

Finally, the transnationalists submit that the autonomous transnational rules applied to cross-border transactions are enforced in a truly international forum: international arbitration.[62] They thus submit that international arbitration is a means of enforcing delocalized legal rules that are themselves not anchored in a municipal system.[63] Instead, they argue that the widespread accession to international treaties requiring the enforcement of arbitration clauses and awards means that current practice has established a fully

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54. *See, e.g.*, Childress, supra note 52, at 1500.

55. *See* Andreas Maurer, *The Concept of Participation in the Making of Transnational Law: Legitimization and Normativity in the Transnational Sphere*, *in* REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE 203, 205–06 (Paulius Jurcys et al. eds., 2013).

56. *Compare* Childress, *supra* note 52, at 1500–05 (noting that transnational law in the U.S. laid dormant until the 1980s), *with* Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. TRANSNAT'L L. 369, 378–79 (2014) (outlining Berhold Goldman's contribution to transnational legal order scholarship in the 1960s).

57. *See* Maurer, *supra* note 55, at 203, 205 (discussing Goldman's contribution on transnational legal orders as borrowing from and developing Jessup).

58. *See* Cuniberti, *supra* note 56, at 378–79.

59. *See* BERGER, *supra* note 38, at 23–26.

60. *See id.* at 289–92.

61. *See* Cuniberti, *supra* note 56, at 378–79.

62. *See* EMMANUEL GAILLARD, ASPECTS PHILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL 66 (2008) (positing the necessity of an arbitral order autonomous from the municipal legal order).

63. *See id.* at 193 (discussing enforcement at the seat of arbitration and outside of the seat of the arbitration).

autonomous forum in which disputes arising out of cross-border transactions can be resolved.[64]

Proponents of the classic transnational legal order submit that transnational law operates according to basic principles.[65] They thus theorize a system of law that, in one form or another, can be made applicable to a transnational legal problem.[66] Transnationalists also work on the codification of such principles in various forms in order to lend greater certainty to commercial actors and international arbitrators.[67]

The existence of a transnational legal order is itself contentious.[68] Outside of the investment context, the view that arbitration is a truly autonomous enforcement mechanism has come under scrutiny by commentators from England and Wales, as well as the United States.[69] Without an autonomous enforcement mechanism, it would become increasingly difficult to theorize that the substantive rules applied to the dispute are themselves delocalized (as they remain subject to review of one sort or another by an enforcing local court).[70] This review would become particularly salient if commercial parties sought to contract around the applicable mandatory rules of the laws of the state most directly affected by the transaction.[71] Although much of that debate is beyond the purview of the current Article, it suffices to say that, as a matter of practice, a significant number of arbitral tribunals in fact apply transnational rules to their ultimate decisions, and a great many enforcing jurisdictions habitually give great deference to the substantive reasoning of commercial arbitrators, be it in the set-aside or the enforcement context.[72]

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64. *See* BERGER, *supra* note 38, at 289–92.

65. *See id.* at 282–83; *see also* Bryan H. Druzin, *Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Legal Order Is Emerging*, 47 VAND. J. TRANSNAT'L L. 1049, 1051 (2014) ("This transnational legal order represents a rich and growing body of jurisprudence functioning under dispute settlement mechanisms that boast principles and rules that are no longer restricted to specific spheres of influence but actually entail elements of integration as trade law is being partly or fully harmonized.").

66. *See* Linarelli, *supra* note 47, at 206 (discussing gap filling in the transnational commercial context).

67. *See* BERGER, *supra* note 38, at 255–70 (discussing codification approaches).

68. Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Intervention*, 2012 J. DISP. RESOL. 83, 85 (2012).

69. *See* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 592 (2015) (outlining the spectrum of legal systems including England and the United States in permitting review of arbitral awards for mistake of law).

70. *See* GAILLARD, *supra* note 62, at 193 (describing the link between autonomy and enforcement).

71. *See* BLACKABY ET AL., *supra* note 69, at 590 (analyzing set-aside in the context of mandatory rules).

72. *See* Frédéric G. Sourgens, *Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration*, 8 PEPP. DISP. RESOL. L.J. 1, 18 (2007) (stating that the "art of using legal comparison to create a common normative language for the dispute . . . is an inherently case-driven exercise").

Transnationalists theorize that investment arbitration falls within the general scope of their project. Centrally, transnationalists seize upon the arbitration mechanism.[73] The principal investor–state arbitral institution is the World Bank International Center for the Settlement of Investment Disputes (ICSID). This forum was intended to make available a truly delocalized dispute resolution process.[74] Other investor–state arbitrations proceed pursuant to the New York Convention on the Recognition and Enforcement of Arbitral Awards, a core instrument of transnational legal scholarship in the commercial setting.[75] Investor–state tribunals operating in this context have refused to yield to state attempts at controlling their own jurisdiction over the dispute.[76] Any such delocalized process effectively supports a transnational process in that it is not subject to municipal legal supervision and does not limit recourse to state actors.

Substantively, transnationalists submit that it is reasonably intuitive that the law applicable to foreign investment protection disputes should not exclusively be the law of any one state.[77] At the very least, the principle that the host state has to fulfill its contractual promises cannot be subject to host state law.[78] If it were, the promise would be meaningless, as the state could escape its own obligations by legislative fiat.[79] Similarly, as the host state would be unlikely to agree to a choice of a municipal law other than its own, the choice of law, even in contractual arbitration, has typically been some form of general principles of law.[80] These general principles make applicable the same transnational commercial law crystallized in international commercial arbitral jurisprudence.[81] In short, transnationalists argue that a state obligates itself to act as a reasonable and diligent commercial actor towards the investor and thus provides legal certainty to that investor that the investment will not be unfairly or arbitrarily impaired for political reasons.

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73. *See* Ole Spiermann, *Applicable Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 89, 93 (Peter Muchlinski et al. eds., 2008) ("[T]he choice of international arbitration was seen by many as a reason in itself for internationalizing applicable law.").

74. *See* CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 899 (2009) ("[D]omestic courts have no power of review over ICSID awards.").

75. *See generally* Brower & Blanchard, *supra* note 7 *passim* (arguing against greater state influence over the investor-state arbitral mechanism).

76. *See* GAILLARD, supra note 62, at 193 (discussing the link between autonomy and enforcement).

77. *See* Spiermann, *supra* note 73, at 92–96 (discussing the development of the *pacta sunt servanda* internationalization of investment contracts).

78. *See id.*

79. *See id.*

80. *See id.* at 101 (noting that general principles of law will automatically be applied by an arbitral tribunal in investment disputes even in the absence of a choice of law clause to that effect).

81. *See id.*

Transnationalists point to the recent arbitral award in *Occidental v. Ecuador* as a paradigmatic case for their perspective.[82] The case concerned the termination of a participation contract between Petroecuador, the Ecuadorian national oil company, Occidental Exploration and Production Company, a foreign investor.[83] The dispute arose pursuant to an investment treaty that, like the TPP, contained an investment arbitration consent. Petroecuador terminated the agreement because Occidental had assigned its rights under the agreement in violation of the contract's express terms.[84] Occidental argued that this termination violated the treaty's provision that Ecuador shall extend fair and equitable treatment to foreign investors like Occidental.[85] The *Occidental* tribunal held that, while Petroecuador had not wrongfully terminated the contract as a matter of Ecuadorian law, the termination was not in keeping with best oilfield practices.[86] As such, it violated guarantees of fair and equitable treatment codified in the investment treaty.[87] Thus, transnationalists argued, the arbitration remedy permitted an internationalization of the contract that in turn protected the investor from unreasonable political action by a host-state government.[88]

2. The Public Law Perspective

The international public law perspective is a competing approach to evaluating investment arbitration. Responsive to an academic backlash against the transnational conception of investment arbitration, it focuses on the perspective of the local regulator.[89] As one author explained, "the main threat existing today is that [bilateral investment treaties] might be interpreted as providing standards . . . higher than those generally applied in developed countries" as part of their own public law traditions.[90] The answer proposed by these critics of the transnational legal order is premised in "public" or "administrative" law.[91] This position is the most critical

82. *See* Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), IIC 561 (2012); Garcia, *supra* note 24, at 570–71.

83. Occidental Petroleum Corp. v. Republic of Ecuador, *supra* note 82, ¶¶ 115, 237–43.

84. *See id.* ¶¶ 3, 244.

85. *Id.* ¶¶ 237–43.

86. *See id.* ¶ 452.

87. *Id.*

88. *See* Garcia, *supra* note 24, at 570.

89. Michael Waibel et al., *The Backlash Against Investment Arbitration: Perceptions and Reality*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY xxxvi (2010) ("Commentators increasingly see signs of such a backlash against the foreign investment regime.").

90. MONTT, *supra* note 25, at 75–76.

91. *See, e.g.*, GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 45 (2007) (defining investment treaty arbitration as "a public law system"); Becky L. Jacobs, *A Perplexing Paradox: "De-Statification" of "Investor-State" Dispute*

of investment arbitration as a form of dispute resolution and the most likely to submit that existing jurisprudence requires significant correction to reflect the domestic policy interests of the host state.[92]

Although proponents of an international public law perspective propose a number of different arguments, a few key common features to their appraisal of investment law have emerged.[93] *First*, they submit that early jurisprudence and literature were too focused on the commercial rights of investors.[94] This focus translated into a quasi-libertarian political economy imposed, by means of investor–state arbitration, on host states, particularly in the developing world.[95] This libertarian political-economic preference is deeply inconsistent with the political economic regime in place in developed countries, even the United States.[96] Their appraisal of international investment rights thus noted that a serious inequity resulted from jurisprudence inspired by the transnational legal order perspective: U.S. investors would enjoy greater rights against a foreign government than they do against their home government.[97] The United States, in essence, exported legal standards it was not willing to apply to itself.[98]

Second, adherents to the international public law perspective offer a common cure for the problem: the key to addressing an appropriate role for investment protection is to understand its function.[99] Investment protection must respect the regulatory sovereignty of host states first and foremost.[100] Investment protection must make sure

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Settlement?, 30 EMORY INT'L L. REV. 17, 48 (2015) (noting the need for greater public law deference in investor-state arbitration); Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 394 (2012) (same); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations for a New Public Law Approach*, 52 VA. J. INT'L L. 57, 98 (2011) [hereinafter Schill 2011] (outlining public law premise); MONTT, *supra* note 25, at 12–17 (outlining the public law premise).

92. *See* MONTT, *supra* note 25, at 155, 159; VAN HARTEN, *supra* note 91, at 180–84; Schill 2011, *supra* note 91, at 70 (promoting a better public law metric for dispute resolution).

93. *Compare* Gus Van Harten et al., *Public Statement on International Investment Regime*, OSGOOD HALL LAW SCH. (Aug. 31, 2010), https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ [https://perma.cc/8RJT-HL82] (archived Oct. 1, 2016) [hereinafter Van Harten Public Statement] (calling for dismantlement of investor-state arbitration), *with* MONTT, supra note 25, at 155–59 (calling for the reform of investor-state arbitration from within).

94. *See* MONTT, *supra* note 25, at 75–76; VAN HARTEN, *supra* note 91, at 142; Schill 2011, *supra* note 91, at 67.

95. *See* MONTT, *supra* note 25, at 77; VAN HARTEN, *supra* note 91, at 10, 139–43; Schill 2011, *supra* note 91, at 67.

96. *See* MONTT, *supra* note 25, at 75–77; VAN HARTEN, *supra* note 91, at 144; Schill 2011, *supra* note 91, at 68.

97. *See* MONTT, *supra* note 25, at 135–41; VAN HARTEN, *supra* note 91, at 145; Schill 2011, *supra* note 91, at 78–85.

98. *See* VAN HARTEN, *supra* note 91, at 145.

99. *See* MONTT, *supra* note 25, at 129–33; VAN HARTEN, *supra* note 91, at 58–71; Schill 2011, *supra* note 91, at 71–78.

100. *See* MONTT, *supra* note 25, at 135–41; VAN HARTEN, *supra* note 91, at 145;

that host states develop appropriate safeguards for the protection of investments in general (including foreign investment). In doing so, due regard must be given to the non-commercial nature of regulation governing investments and appropriate deference must be shown to host-state policy decisions to protect constitutive values of public welfare and democratic governance.[101] Under no circumstances should protections exceed the general principles of administrative law developed in capital-importing states. Better still, a comparative law exercise ought to identify global general principles of administrative law—a *lex mercatoria publica*—to govern investments, in keeping with a general public law consensus.[102]

Third, adherents to the international public law perspective submit that the use of arbitration to resolve international investment disputes and the jurisprudence it has generated deprive the current regime of a measure of legitimacy.[103] They note that investment arbitration has led to an informal system of precedent[104] and early decisions in such a system have a disproportionate ability to mold future legal developments.[105] As early decisions were informed by an inapposite commercial paradigm, a different, more authoritative mechanism is needed to alter the path-dependent course of existing jurisprudence.[106] This mechanism could consist in a wholesale replacement of the arbitration regime with a new judicial body.[107] It also could be satisfied by introducing a tightly controlled appellate review for arbitral awards to safeguard their legal correctness (measure pursuant to public law principles),[108] or by other less invasive reforms.[109]

In sum, the public law approach is most closely aligned with the TPP and Transatlantic Trade and Investment Partnership (TTIP) critics. It submits that investment arbitration is viable only if it can

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Schill 2011, *supra* note 91, at 78–85.

101. *See id.*

102. *See* MONTT, *supra* note 25, at 288–91, 310–18; VAN HARTEN, *supra* note 91, at 143–49; Schill 2011, *supra* note 91, at 85–90.

103. *See* MONTT, *supra* note 25, at 155; VAN HARTEN, *supra* note 91, at 152; Schill 2011, *supra* note 91, at 70.

104. *See* MONTT, *supra* note 25, at 109; VAN HARTEN, *supra* note 91, at 173–74 (noting the problem of bias in appointment decisions); Schill 2011, *supra* note 91, at 84.

105. *See* MONTT, *supra* note 25, at 90–103 (discussing path dependence and network effects in the investment law context).

106. *See* MONTT, *supra* note 25, at 158–59 (discussing coherence in the wrong direction).

107. *See* VAN HARTEN, *supra* note 91, at 180–84 (proposing the creation of an international investment court with extensive jurisdiction over investor claim adjudications).

108. *See* MONTT, *supra* note 25, at 155, 159 (promoting an appellate body plus more detailed treaty drafting).

109. *See* Schill 2011, *supra* note 91, at 69–70 (proposing a better public law metric for dispute resolution).

switch in time to a more deferential approach.[110] If arbitration fails to do so and undercuts the policy needs of host states, host states must band together to resist arbitration and bring about the wholesale replacement of the entire investment arbitration infrastructure.[111]

3. The Treaty Law Perspective

Recent literature has attempted to synthesize the insights of both the transnational legal order and international public law perspective through a treaty law perspective.[112] The treaty law perspective insists that investment relationships must be appreciated first and foremost through the lens of the constitutive treaty documents.[113] This means that tribunals must interpret the underlying treaties giving rise to investment claims by taking "seriously the interests of both home and host states in order to reach fair and balanced terms as judged from the collective perspective of both treaty parties."[114] This approach reveals the "platypus-like nature" of investment protection in combining commercial interests with public law imperatives.[115] But the treaty perspective insists that the source of any investor entitlements makes it unmistakably clear that investor claims remain subordinate to the sovereign will that made them possible.[116] The treaty perspective thus submits that no external reform of the current system is needed, as states have the ability to preempt interpretive questions that could arise in the investor–state context by agreement or, failing agreement, state-to-state dispute resolution.[117]

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110. *See* MONTT, *supra* note 25, at 155–59.

111. *See* Van Harten Public Statement, *supra* note 93 (calling for dismantlement of investor-state arbitration).

112. *See generally* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 *passim* (2010) [hereinafter Roberts 2010]; *see also* Anthea Roberts, *Clash of Paradigms: Acts and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 93 (2013) [hereinafter Roberts 2013]; Roberts 2015, *supra* note 26 *passim*.

113. *See* Roberts 2015, *supra* note 26, at 356–57 (stating a need for an interpretive theory that conceptualizes investment treaties in terms of the relationship they create between investors, home states, and host states).

114. *Id.* at 359.

115. *See* Roberts 2013, *supra* note 112, at 93 (discussing the platypus-type nature of investor-state arbitration by reference to the mammal and non-mammal, birdlike features of the platypus); Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L. J. 1, 28 (2014) [hereinafter Roberts 2014].

116. *See* Roberts 2015, *supra* note 26, at 406 ("Investors have investment treaty rights if and to the extent granted by states; these rights are not inherent in the notion of being an investor like certain human rights are inherent in the notion of being a human.").

117. *See id.* at 413 ("Investor-state tribunals do not have jurisdiction to review directly the legality of joint terminations and amendments or to impose compensation obligations on the treaty parties for such action.").

The bedrock of the attempted treaty law synthesis is that both the pure transnational legal order and international public law perspectives make a fatal formal mistake:[118] they seek to divorce investment protection from the law governing the principal source of investor rights—investment treaties.[119] The law of treaties anchors the relationship between a state and an investor in international law.[120] In fact, the investor is simply a third-party beneficiary of the treaty rights of its home state, as codified in the state-to-state context by Articles 34–37 of the Vienna Convention on the Law of Treaties (Law of Treaties).[121]

The treaty law perspective resolves the problem of how to interpret frequently open-ended and vague treaty standards.[122] The Law of Treaties facially mandates that treaties be interpreted like contracts—within their four corners, giving the terms of the treaty their ordinary meaning.[123] This method of interpretation can create problems when treaty parties use intentionally open-ended and vague treaty language.[124] As many treaties use open-ended language, this does not prove fatal to treaty interpretation;[125] rather, in those instances, the treaty must be interpreted in light of its stated object and purpose,[126] joint interpretation or amendment,[127] and relevant subsequent practice.[128]

The goal (or object and purpose) of investment treaties is to internationalize the review otherwise available to investors against state action.[129] This object and purpose places the treaty squarely within the context of administrative law (i.e., the area of law that would govern the investor's cause of action in the absence of a treaty).[130] In interpreting the specific language of the treaty, the object

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118. *See id.*

119. *See id.* at 412.

120. *See id.* at 405.

121. *See id.* at 369–70; Roberts 2010, *supra* note 112, at 211.

122. *See* Roberts 2015, *supra* note 26, at 357, 375–88 (interpreting investment treaties in light of their goals); Roberts 2010, *supra* note 112, at 209 n.143 (interpreting investment treaties according to object and purpose).

123. *See* Roberts 2010, *supra* note 112, at 201.

124. *See id.* at 210 (explaining that "many investment treaty provisions contain vague standards" with a variety of reasonable interpretations).

125. *See id.* at 201.

126. *See id.* at 209 n.143 (interpreting investment treaties in light of their goals); Roberts 2015, *supra* note 26, at 357, 375–88 (emphasizing party intention in investment treaties' interpretation); Roberts 2014, *supra* note 115, at 20–24 (discussing the purpose of investment treaties).

127. *See* Roberts 2015, *supra* note 26, at 403–08 (discussing joint termination); Roberts 2010, *supra* note 112, at 210 (discussing joint interpretation).

128. Roberts 2010, *supra* note 112, at 201.

129. *See* Roberts 2015, *supra* note 26, at 374–75, 381–82 (discussing the public law qualification).

130. *See id.* at 374 ("The literature has already clearly recognized the need to analyze the investor-*host* state relationship through a public law paradigm.").

and purpose thus preclude anything but deferential review of state action.[131]

The treaty law perspective submits that this functional interpretation remains subject to correction by the treaty states under any classic interpretive mechanisms provided for by the Law of Treaties.[132] Interpretation methodologies that place too great an emphasis on the object and purpose of a treaty give tribunals significant discretion—tribunals are free to choose almost any object and purpose to guide their interpretation. This means that there must be a control against tribunal overreach. The Law of Treaties resolves this question in favor of state-to-state agreement and dispute resolution.[133] Thus, when an important question arises in a cluster of cases, the treaty law paradigm gives primacy to the treaty parties to interpret and adapt their bargain to the current circumstance.[134] If such interpretation and adaptation cannot be achieved through negotiation, either treaty party has the right to state-to-state dispute resolution to determine how the issue should be resolved.[135] This safety valve thus keeps states in absolute control of the investment rights bestowed upon investors by means of international treaties.[136] In so doing, it provides an ironclad tiebreaker for any interpretive problem an investor–state tribunal might encounter.[137]

The key virtue of the treaty law perspective is that it provides a ready means for reform in the face of perceived arbitral excesses.[138] International public law proponents argue that existing jurisprudence deviates, at times significantly, from state expectations.[139] They therefore advocate for systemic reform.[140] Such reform is difficult if not impossible to achieve in practice.[141] By focusing on state-to-state dispute resolution as a safety valve, the treaty law perspective achieves the aim of legal reform within existing treaty design and thus is a more realistic tool for attempts at legal reform.[142]

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131. *See id.* at 380–81.

132. *See id.* at 403–09 (discussing joint termination); Roberts 2014, *supra* note 115, at 63 (discussing state-to-state dispute resolution as "preliminary reference procedure").

133. *See* Roberts 2014, *supra* note 115, at 63.

134. *See id.* at 55; Roberts 2015, *supra* note 26, at 384–86.

135. Roberts 2014, *supra* note 115, at 63.

136. *See* Roberts 2015, *supra* note 26, at 406.

137. *Id.*

138. *See* Roberts 2015, *supra* note 26, at 403–09; Roberts 2014, *supra* note 115, at 63.

139. *See supra* subsection I.B.1.

140. *See supra* subsection I.B.1.

141. Andrea Menaker et al., *Is ICSID Losing Its Appeal . . . Again?*, 105 AM. SOC'Y INT'L L. PROC. 193, 211 (2011) ("[I]t is practically impossible to amend the ICSID Convention.").

142. Roberts 2015, *supra* note 26, at 403–09; Roberts 2014, *supra* note 115, at 63.

B. *Blind Spots of the Dominant Approaches*

The three approaches laid out in Section A have two blind spots in common that make them poor diagnostic or remedial tools. *First*, all three approaches are fundamentally asymmetrical—they theorize only host-state liability rather than proposing a framework for mutual rights and obligations between the state and the investor. This first flaw flows from the comparative dominance in the academic discourse of literature on investment treaty arbitration rather than a balanced approach that would keep in mind the contractual relationship underlying treaty claims as well.

Second, all three approaches can be deconstructed as relying on inapposite legal frameworks. Each approach seeks to assimilate the interests of investor or host state into the framework of the other. In doing so, the approaches ignore the fact that the predicate for such assimilation is not present: investors are not states, states are not commercial actors, and arbitral tribunals are not administrative agencies and do not respond to international administrative agencies.

1. The Core Asymmetry of Current Approaches

All three dominant approaches focus on state action.[143] Arbitration is a means to impose liability on a state for its wrongful conduct.[144] Wrongfulness is determined principally by reference to treaty norms, most prominently, fair and equitable treatment.[145] The dominant approaches merely disagree with one another on whether the predicate for liability is reasonableness from a commercial, administrative, or public international perspective.[146]

If this assessment is correct, investor–state arbitration is asymmetrical. It does not allow for claims *by* the state *against* the investor.[147] State recourse would only lie municipally, against the investment.[148] It would not lie internationally against the foreign investor.[149] This is a potentially significant limitation, as damages caused by an investor might well exceed the residual value of the investment.

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143. *See supra* Section I.A.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 26 (2012) (noting that counterclaims would require treaty amendments); DUGAN ET AL., *supra* note 21, at 153–54 (treating counterclaims skeptically).

148. MONTT, *supra* note 25, at 243–53.

149. *See id.* (explaining when municipal law is relevant and when investments and investors are protected).

Such asymmetry would support the view, advanced by TPP and TTIP critics, that arbitration overly favors multinational corporations.[150] The issue, then, would not be that investors recovered in a disproportionate number of cases—an assertion that has been quantitatively disproved[151]—rather, the issue would be that only investors can recover, potentially leading to excess state liability by denying states the ability to pursue and receive set-offs for their claims or otherwise hold investors liable should set-offs exceed state liability. Such asymmetry means that the investor–state dispute settlement system is "rigged" because the investor would have nothing to fear by prosecuting claims, even in the face of egregious investor wrongdoing.[152]

This asymmetrical view of investment treaty arbitration is inaccurate. For one, "governments continuously raise 'counter-claims' to reject or at least diminish the compensation obligation."[153] They, in fact, have done so from the very first investor–state arbitration at the World Bank's ICSID, the principal investor–state arbitral institution.[154] If raising such claims were futile, as the predominant position on investor–state arbitration intimates, states would cease to raise them.[155] Rather, it is fair to assume that such claims will be taken into account, at the very latest, at the quantum stage, as was done, for example, by the *Occidental v. Ecuador* tribunal.[156]

Beyond the investment treaty arbitration studied by the dominant approaches, it becomes even more apparent that any such asymmetry is perceived rather than real.[157] State entities face comparatively few hurdles in bringing contract claims against investors in the international commercial setting.[158] Prevalent arbitral jurisprudence further permits commercial counterparties to use international

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150. *See* Roberts 2015, *supra* note 26, at 403–09; Roberts 2014, *supra* note 115, at 63.

151. *See* Franck & Wylie, *supra* note 11, at 517–18.

152. *See* Kahale, *supra* note 15, at 191–200.

153. Thomas W. Walde & Borzu Sabahi, *Compensation, Damages and Valuation*, *in* OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 73, at 1049, 1097.

154. *See* Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123, 131 (1980) ("At a later date, a counter-claim, perhaps inevitably, was lodged by the Moroccan Government.").

155. *See* Roberts 2015, *supra* note 26, at 403–09; Roberts 2014, *supra* note 115, at 63–68.

156. *See* Occidental Petroleum Corp. v. Republic of Ecuador, *supra* note 82, ¶¶ 825, 866.

157. *See* Roberts 2015, *supra* note 26, at 365 ("I leave to one side considerations of whether and, if so, how investment treaty rights might be supplemented (or, more controversially, qualified) by contractual rights under an investor-host state agreement.").

158. *See* THE UNCITRAL ARBITRATION RULES: A COMMENTARY 426–29 (David Caron & Lee Caplan eds., 2013) (noting the ease with which counterclaims can be commenced).

arbitral proceedings to resolve tort or statutory disputes that have a sufficient connection to the document containing the arbitration consent.[159] Depending on the structure chosen by the parties, arbitration could cover far more than is currently addressed in the literature.

Current approaches, in other words, fall meaningfully short of providing a complete picture of the rights and obligations that could, at any point in time, be subject to arbitration. In choosing their vantage point, these approaches thus leave behind significant value that arbitration might hold for the host state.

2. Deconstructing the Dominant Approaches

All three dominant approaches are not only asymmetrical, but also defend a view of investment arbitration that is untenable. As discussed below, the transnational perspective makes inapposite assumptions about state action, the administrative law perspective makes inapposite assumptions about tribunal (and host-state) competences, and the treaty law perspective makes inapposite assumptions about investor status. Each of these failings showcases that, while the dominant approaches provide a valuable perspective on investment arbitration, they are too positionally limited to provide a basis to formulate a coherent response to current arbitration critics.

a. Transnational Law

Investment arbitration cannot tenably be conceptualized from a transnational law perspective. Transnational law submits that investment arbitration is and must be appropriately responsive to commercial needs in imposing liability on states (to limit political risk).[160] It argues that such arbitral decisions are not rigged or biased because they measure state conduct against a truly neutral, autonomous, global, and commercial yardstick that does not pass judgment on the policy decision, as such—just its commercial reasonableness.[161] This view of investment arbitration is ultimately self-defeating. It draws on transnational *commercial* best practices to assess conduct that is by definition *non-commercial*, that is, state regulation.[162]

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159. *See* BLACKABY ET AL., *supra* note 69, at 79.

160. *See supra* subsection I.A.1.

161. *See* Markus A. Petsche, *International Commercial Arbitration and the Transformation of the Conflict of Laws Theory*, 18 MICH. ST. J. INT'L L. 453, 487 (2010).

162. *See* DOLZER & SCHREUER, *supra* note 147, at 216–27 (discussing the importance of the distinction in the attribution context). Rather than dealing with the issue in the attribution context, the architecture of investment treaties and contracts would suggest that the problem could better be dealt with on the merits. *Cf.* Tulip Real Estate Inv. & Dev. Neth. B.V. v. Turk., ICSID Case No. ARB/11/28, Separate Opinion

If investment arbitration operated according to truly transnational legal principles, arbitrators would seek to discern whether global commercial actors would have acted like the host state.[163] Commercial actors are not in the business of social welfare.[164] States, however, frequently are.[165] Consequently, any social welfare program impairing an investment would be commercially unreasonable (i.e., it would redistribute social goods according to fairness concerns).[166] In other words, arbitral tribunals would act as libertarian caricatures because they would impose liability for every social welfare program that negatively affected investor profitability.[167] Even the most aggressive investors do not make so radical a claim.[168]

Alternatively, a transnational law perspective could meet its goal of a value-neutral appraisal of policy by establishing whether there was a rational basis for state action.[169] Avoiding the need to test the substantive validity of host-state policy, this analysis would be reduced to ascertaining whether the state acted with animus or bad faith.[170] This view would run directly counter to investment arbitration jurisprudence. In any event, it would do little to limit investors' political risk exposure.

To avoid both extremes, decisions heralded by transnational legal scholarship typically apply some form of proportionality analysis.[171] This jurisprudence borrows its proportionality analysis from administrative or human rights law.[172] This proportionality analysis, in point of fact, does test the substance of state policy choices.

(Mar. 10, 2014), IIC 641 (2014) (rejecting the majority's attribution analysis on similar grounds). The author served as consulting expert for the claimant in annulment proceedings.

163. *See* BERGER, *supra* note 38, at 97.

164. *See* AMARTYA SEN, COMMODITIES AND CAPABILITIES 1–2, 12–16 (1999) (discussing the problem of utility in welfare economics).

165. *See id.*

166. *See* AMARTYA SEN, THE IDEA OF JUSTICE 269–90 (2009) (discussing the importance of fairness as a modifier for utility in policy choices).

167. *See* MONTT, *supra* note 25, at 75–77 (discussing BIT jurisprudence).

168. Even in the most extreme of cases, claimants do not contend that a state does not have the right to regulate. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 166 (July 2, 2013), IIC 597 (2013) ("The Claimants do not contest Uruguay's right to adopt non-discriminatory, legitimate regulation to protect public health.").

169. *See* Locke v. Warner Bros., Inc., 66 Cal. Rptr. 2d 921 (Ct. App. 1997) (interpreting the implied contractual duty of good faith and fair dealing). Review in such cases may lie most promisingly in the context of proven animus. *See generally* Susannah Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 *passim* (2012) (discussing a similar problem from a U.S. constitutional law perspective).

170. *See* MONTT, *supra* note 25, at 137–41.

171. Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003), IIC 247 (2003); Occidental Petroleum Corp. v. Republic of Ecuador, *supra* note 82, ¶ 404.

172. *See* Tecmed S.A. v. United Mexican States, *supra* note 171, ¶ 122.

Importing such an analysis is ultimately inconsistent with the view advanced by transnational law proponents that transnational tribunals are apolitical. Transnational law thus must rely on precisely the kind of decision making it sought to avoid in order to produce acceptable results.[173] This, however, means that it is results-oriented, and, as such, openly political rather than rule-based, and thus exclusively legal in tenor.

b. Public Law

Global administrative law also fails to adequately conceptualize investment arbitration. This scholarship seeks to integrate arbitral decision making into a broader administrative law framework.[174] It argues that arbitrators should apply the public law deference shown by municipal courts to administrative agency decisions.[175] It submits that this approach functionally takes account of the regulatory interests at stake in investment arbitration.[176]

This perspective is not tenable because it divorces municipal standards of review from their immediate context—municipal administrative agency decisions.[177] Municipal public law seeks to embed the growth and legitimacy of administrative agencies in (written) constitutions.[178] Agencies are created in order to develop subject matter expertise in effectuating social policy choices.[179] For example, an administrative institution such as the U.S. Food and Drug Administration (FDA) has unique expertise in how to ascertain the safety and efficacy of new pharmaceuticals brought to market in the United States, in accordance with its congressional mandate to do

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173. *See supra* subsection I.A.1.

174. MONTT, *supra* note 25, at 137–41.

175. *Id.* at 337; *see* VAN HARTEN, *supra* note 91, at 150; Schill 2011, *supra* note 91, at 71.

176. *See* MONTT, *supra* note 25, at 137–41.

177. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 155; *see also* Benedict Kingsbury, Niko Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005) (linking global administrative law to emerging but scattered global administrative bodies notably lacking an investment agency); Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 27 (2009) ("Global administrative law cannot be understood as a simple transposition to the global administrative space of the functions performed, let alone of the specific rules and institutional interactions, that have been painstakingly made and remade in the crucibles where national administrative law is produced and refined.").

178. *See* David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 175 (2015) (noting that in the U.S. context, there has arisen a "enormously powerful, yet constitutionally insecure, administrative machine"); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 691–92 (2000) (discussing the constitutional legitimacy of administrative law).

179. *See* Ackerman, *supra* note 178, at 696 ("[P]arliaments have neither the time nor the expertise to sift the changing scientific data in search of responsible regulatory solutions.").

so.[180] An FDA decision is not easily second-guessed by a U.S. court as a matter of institutional expertise.[181] Further, it is, at least arguably, not easily second-guessed for separation-of-powers reasons.[182]

There are no analogous international administrative agencies to which international investment tribunals would respond.[183] There are also no constitutive processes in the international context that would resemble the U.S. separation of powers.[184] These institutional differences make it imprudent to require investment tribunals to apply the kind of deference shown by municipal courts to administrative agencies.[185] The administrative law perspective seeks to address the lack of international administrative agencies by treating the arbitral tribunal as the relevant administrative actor.[186] This argument does not provide support for a view that investment tribunals should apply a deferential review to state action. The tribunal would become the administrative agency rather than the reviewing court and thus would have full rule-making power.[187] This would expand rather than limit the powers of investment tribunals.[188] It would, in any event, be inconsistent with the underlying consents to arbitration, as these consents empower tribunals to decide disputes rather than make policy.[189]

To avoid this extreme, public law advocates draw upon the effects of regulation of property rights.[190] They suggest that investment tribunals sitting as quasi-administrative agencies should impose liability by reference to whether the state regulation in question affects core or only peripheral property rights.[191] This move threatens to collapse back into the transnational legal position of examining the value of the right taken from a commercial vantage point—a right is considered to be at the core if it deprives similarly situated actors of

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180. *See* James T. O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 965 (2008).

181. *See id.* at 941–42.

182. *See* Ackerman, *supra* note 178, at 691–92 (discussing the constitutional legitimacy of administrative law); Rubenstein, *supra* note 178, at 175 (noting that in the U.S. context, there has arisen a "enormously powerful, yet constitutionally insecure, administrative machine").

183. *See* Kingsbury, Krisch & Stewart, *supra* note 177, at 17.

184. *Cf.* Tecmed S.A. v. United Mexican States, supra note 171, ¶ 122.

185. *See id.*

186. MONTT, *supra* note 25, at 137–41.

187. *See* Ray Diamond & Frederic Sourgens, *Administrative Law*, *in* 3 ANGLOAMERIKANISCHE RECHTSSPRACHE (Franz Heidinger ed., 2016).

188. *See id.*

189. *See* LARS MARKERT, STREITSCHLICHTUNGSKLAUSELN IN INVESTITIONSSCHUTZABKOMMEN 156 (2009) (discussing the scope of all prevalent forms of treaty arbitration consents).

190. *See* MONTT, *supra* note 25, at 186, 252, 264 (defining administrative law protections by reference to the core–peripheral property rights distinction).

191. *Id.*

nearly all of the value for which they acquired it.[192] By defining the impairment of property rights commercially, the measure of liability—when investment tribunals sitting in a supposedly quasi-administrative capacity should impose liability—is no longer responsive to sovereign needs.[193] It no longer justifies the subordination of property rights to reasonable sovereign regulation.[194] Such a justification becomes a matter of naked policy preference that is without ultimate defense in public law theory. The lack of global administrative agencies to set informed policy thus is not ephemeral: it threatens to undermine the viability of a global public law approach to investor–state relationships.

c. Treaty Law

Finally, the treaty law perspective also is not a tenable theory of investor–state arbitration. The treaty law perspective seeks to achieve goals similar to the public law perspective but looks to a different form of delegation to achieve this end: delegated authority from the host and home state (as opposed to delegated authority in the constitutional law setting).[195] This delegated authority is intended to provide legal security for the application of broadly worded treaty norms in specific instances.[196] But, as delegated authority, arbitral jurisdiction remains beholden to the intention of the states that created it, and, as such, is ultimately subject to state modification or termination.[197] Presumably, to avoid such corrective measures, tribunals should be conservative in their approach to imposing state liability.[198]

The treaty law perspective falls prey to the most common form of international law deconstructive critique.[199] It both wishes to impose positive norms constraining state behavior ("increase confidence and enforcement of . . . rights"[200]) and to state that all norms arise exclusively from state consent ("the tribunal should defer to [state] decision in order to respect party autonomy"[201]). Treaty parties enter into investment treaties in order to promote investment and depoliticize investment disputes.[202] To arrive at these norms, treaties

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192. *Id.*
193. *Id.* at 165.
194. *Id.*
195. *See* Roberts 2010, *supra* note 112, at 183–84 ("To increase confidence in and enforcement of those rights, states have delegated the power to resolve investor-state disputes to arbitral tribunals.").
196. *See id.*
197. *See id.* at 185–91.
198. *See* Roberts 2015, *supra* note 26, at 369.
199. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 67 (2005) (laying out the deconstructive critique).
200. Roberts 2010, *supra* note 112, at 183.
201. Roberts 2015, *supra* note 26, at 369.
202. *See id.* at 373.

are classic pre-commitment devices.[203] They can achieve these ends because the obligations contained in investment treaties are reasonably stable and are given independent normative force.[204] Failing such normative force, treaties would be uniquely ineffective in achieving any goals; they do not give rise to *ex ante* reliance interests on the part of investors.

At the same time, the treaty law perspective invokes state consent as sovereign and able to displace *ex post* any reasonable bargain struck in investment treaties.[205] It thus undoes the function of investment treaties as legal pre-commitment devices.[206] It expressly submits that investment treaties provide protections *de facto* rather than *de lege*.[207] States, in other words, use investment treaties as pre-commitment devices unless they change their mind at some point in the future when the pre-commitment devices could be invoked. This proposition is nakedly nonsensical.

The treaty law perspective cannot ultimately claim to be a "hybrid" system of any kind.[208] Rather than organize the reliance interests of states and investors coherently, it eviscerates the interests of investors.[209] This result is not warranted by the theory it develops. It too thus proposes an arbitrary, result-oriented rubric rather than a theoretically sound systematization of investment disputes.

III. THE SUPERNATIONAL LAW HYPOTHESIS

"[T]ext-books, law journal articles, and casebooks are characteristically organized and written in terms of technical legal concepts and rules, not in terms of factual problems."[210] This critical observation is directly applicable to the core problem plaguing current academic theories seeking to make sense of legal transactions between states (or state-controlled actors) on the one hand and multinational corporations on the other: they sacrifice the factual complexity of such transactions for doctrinal coherence.[211] They then cannot achieve such coherence because the policy preference that each theory seeks to impose unravels as a matter of its own methodological commitments.[212]

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203. *See* Craig Martin, *A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 BROOK. L. REV. 611, 672–92 (2011) (laying out the constitutive function of pre-commitment devices).

204. *See* Roberts 2015, *supra* note 26, at 375.

205. *See id.* at 413.

206. *Cf.* Martin, *supra* note 203, at 673–79.

207. *See* Roberts 2015, *supra* note 26, at 414–16.

208. *Contra* Roberts 2013, *supra* note 112 *passim* (explaining the hybridity of investment treaties).

209. *Cf.* Roberts 2015, *supra* note 26, at 414–16.

210. LASSWELL & MCDOUGAL, *supra* note 28, at 272.

211. *See infra* Section I.B.

212. *See id.*

This Article addresses this shortcoming by looking at the entirety of the factual problem posed by investment transactions and disputes. Most immediately, this approach must overcome the asymmetry plaguing the current approaches to investment arbitration discussed above. In other words, any approach to investment transactions and disputes must be able to make sense of the observation, made by one investment treaty tribunal, that investment agreements "oblige governments to conduct their relations with foreign investors in a transparent fashion. Some reciprocal if not identical obligations lie on the foreign investor."[213]

From a factual perspective, it is evident that a legal regime creating rights in multinationals must operate with some reciprocity.[214] Politics and money, sovereign leviathans and corporate behemoths, are in constant intercourse.[215] To be sustainable, investment relationships cannot be totally one-sided but rather must assign risks and rewards to all participants, sovereign and corporate alike.[216]

In order to respond to the factual problem posed by investment transactions and disputes, this Part takes a process approach. The approach is, in the first instance, empirical. It seeks to gather and understand "information relevant to making social choices."[217] It begins not with legal characterization of social choice but with the choice itself.[218] This empirical approach makes readily apparent that "[a]greement is often based on disagreement."[219] In a small setting, agreement to buy and sell a certain stock for $5 can occur when the buyer and the seller have different views on stock value because they have different interests.[220] This difference in value or interests between buyer and seller results in a transaction when the interests

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213. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award, ¶ 402 (Aug. 16, 2007), IIC 299 (2007). The author served as counsel to Fraport AG Frankfurt Airport Services Worldwide in the arbitration proceedings.

214. The literature is replete with discussions of systemic benefits to be received by the host state as a result of entering into investment treaties and contracts. What current literature ignores is that such benefits per force must exist on a transaction-by-transaction basis to rise to the level of systemic importance; it assumes conceptual abstractions without due regard for the brick and mortar benefits which must exist to give reality to its academic musings. *See, e.g.*, MONTT, *supra* note 25, at 57–75 (discussing host-state benefits from BITs); Roberts 2015, *supra* note 26, at 357, 375–88 (same); Salacuse & Sullivan, *supra* note 16 *passim* (same); *see also* Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 *passim* (2011) (same).

215. *See* SUSAN STRANGE, THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY 91–96 (1996) (discussing the diffusion of authority in world society).

216. *See supra* note 214 and accompanying text.

217. REISMAN, *supra* note 43, at 175.

218. *Id.*

219. ROGER FISHER & WILLIAM URY, GETTING TO YES 75 (2011).

220. *See id.*

dovetail (I want to sell at $5, you want to buy at $5).[221] Social choice writ large is no different—it becomes plural, and inconsistent value demands by process participants support a single decision, albeit for different reasons.[222]

Thus, to make sense of the rules governing social choice, a process approach must unpack the diverging interests supporting a decision, or, in more abstract terms, integrate the pluralist demands and identifications of process participants.[223] In the current context, the decision is the arbitral award resulting from a clash of the pluralist demands and identifications of investors and host-state agents.[224] Less visibly, decision making transcends the realm of disputes and is part and parcel of transactions, the largest proportion of which will be effectuated without need for formal dispute resolution processes.[225]

Theorizing and explaining such decision-making requires a strong contextual perspective.[226] Rather than seeking clarity through textual abstraction, integrative decision making is immanent in and inseparable from the specific facts giving rise to it.[227] Decisions integrate new problems and solutions in the frame of reference of states, commercial actors, and administrative agencies, respectively.[228] They thus internalize the obligations each owes to others by reference to their own respective normative horizons.[229] It renders new phenomena intelligible to each actor by placing them in the context of the linguistic web of each process participant.[230] Further, it translates the linguistic web of other process participants through reciprocal appreciation and engagement of the same factual predicate.[231]

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221. *Id.*

222. *Id.* at 76 (including welfare motives in dovetailing interests).

223. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 280; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203–05 (1996) (founding transnational legal process theory and discussing the importance of internalization as a part of that process).

224. *See* REISMAN, *supra* note 43, at 180 (discussing the role of investment tribunals as decision-makers).

225. *See* DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE AND INVESTMENT 373–76 (2015) (applying this mode of decision making to investment design); REISMAN, *supra* note 43, at 183–90 (discussing context-policy decision-making in international law in general).

226. *See* REISMAN, *supra* note 43, at 180, 183–90 (discussing the role of context in decision making).

227. *See* Frédéric G. Sourgens, *Reconstructing International Law as Common Law*, 47 GEO. WASH. INT'L L. REV. 1, 35–37 (2014) (discussing the inductive, creative nature of public international law decision making).

228. *See supra* note 214 and accompanying text.

229. *Id.*

230. *See* Ludwig Wittgenstein, *Philosophische Untersuchungen*, *in* WITTGENSTEIN WERKAUSGABE VOL. I 238–41 (Suhrkamp Verlag ed., 1984) (discussing the concept of language games); SOURGENS, *supra* note 27, at 27–28 (using language game theory in the context of investor-state arbitration).

231. *See* Sourgens, *supra* note 227, at 44–50 (discussing the translative function

The hypothesis this Part proposes is that it is possible to reconstitute a supernational law by reference to reciprocal reliance analysis. Reliance at its core describes the interests arising out of detrimental changes in position undertaken by one party premised on the trust of future stability and potential reward.[232] All types of law, in one form or another, protect reliance interests: international law recognizes such reliance interests through unilateral acts;[233] transnational commercial law gives effect to reliance by means of principles of good faith;[234] and administrative law appreciates reliance interests by looking to proportionality.[235] This Article will theorize how these various conceptions of reliance permit the integration, translation, and balance of dovetailing interests in the investment context.[236] It will demonstrate that the arbitration provisions currently under attack by TPP and TTIP critics play a constitutive role in protecting and integrating each of these divergent reliance interests by remaining operationally open to the divergent functions of each reliance interest and cognitively open to the prescriptive context giving rise to them.[237]

IV. THE UNILATERAL ACT ELEMENT OF SUPERNATIONAL LAW

States look to the world economy to attract capital and expertise.[238] In order to attract capital and expertise, a state must be able to bind itself to non-state actors.[239] Pragmatically, this means that the non-state actor must be able to reliably enforce any obligations entered into by the state and thus requires some form of international dispute resolution, typically arbitration.[240] As it is unlikely that the host state would assist in the enforcement of an award against it, awards must be globally enforceable.[241]

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of good faith in international law).

232. E. ALLAN FARNSWORTH, CONTRACTS §1.6 (2004).

233. *See infra* Part IV.

234. *See infra* Part V.

235. *See infra* Part VI.

236. *See id.*

237. *See* Julie A. Maupin, *Public and Private International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 372, 418 (2014) (submitting that a systems approach (as opposed to a process approach) must at a minimum treat arbitration as operationally closed and cognitively open).

238. *See* SALACUSE, *supra* note 5, at 345 (noting the intention to attract capital and technology as a key state motivator).

239. *See id.*

240. *See id.* at 331 (noting the importance of enforceability of commitments).

241. *See* Jean-Paul Dechamps, *Argentina: Appeal Court Rules on Enforcement of ICSID Awards*, GLOBAL ARB. REV. (Aug. 26, 2015), http://globalarbitrationreview.com/article/1034718/argentina-appeal-court-rules-on-enforcement-of-icsid-awards [https://perma.cc/L49U-3ZV8] (archived Oct. 17, 2016) (discussing opposition to enforcement of ICSID awards in Argentina).

Both states and non-state actors would want state obligations to be reasonably context-sensitive. A regime that would require a transitional society, such as Ukraine, to develop the regulatory stability of the United States overnight would be facially absurd.[242] Similarly, a regime that would excuse actions by transitional societies—Kazakhstan is another example—simply because they are transitional would render obligations under it meaningless.[243] The regime thus has to look to context and determine the appropriate level of protections extended to non-state actors, that is, it must be tailored to protect reasonable reliance interests.[244]

The international doctrinal basis for protecting such reliance interests is the law of unilateral acts.[245] A unilateral act is an obligation incurred by a state to a specific addressee without a need for international legal privity.[246] Classic international law recognizes that unilateral acts can serve as a basis for state obligations to non-state actors.[247] Unilateral acts, therefore, are particularly helpful to protect the reliance interests of actors lacking treaty capacity.[248] When combined with international arbitration, these acts permit the kind of enforceable dispute resolution that is most meaningful to investors.

Although it may at first appear artificial to treat state obligations to non-state actors as unilateral acts, perhaps particularly when a state entity has entered into a contract with an investor, the artifice is one of legal form rather than pragmatic substance. As discussed below, as a matter of substance, the law of unilateral acts is superior in addressing the needs of investor–state dispute resolution because it is context-sensitive. The predominant treaty paradigm is decidedly

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242. *See* Generation Ukraine, Inc. v. Ukr., ICSID Case No. ARB/00/9, Award, ¶ 20, 37 (Sept. 16, 2003), IIC 116 (2003) (noting the importance of Ukraine's economic development for purposes of setting legitimate expectations); Peter Muchlinski, *'Caveat Investor'? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard,* 55 INT'L & COMP. L.Q. 527, 545 (2006) (discussing *Generation Ukraine*). For recent case law adopting a similar approach, see Oxus Gold PLC v. Republic of Uzb., Award, ¶ 793 (Dec. 17, 2015), (giving due regard to Uzbekistan's state of development, political and legal framework).

243. *See* Rumeli Telekom A.S. v. Republic of Kaz., ICSID Case No. ARB/05/16, Award, ¶ 618 (July 29, 2008), IIC 344 (2008), (holding that Kazakhstan violated applicable treaty standards because a working group decision "lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle").

244. *See* Todd J. Grierson Weiler & Ian A. Laird, *Standards of Treatment, in* OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 73, at 259, 282 (linking investment treaty protection to reasonable reliance interests).

245. *See* Nuclear Tests (Austl. V. Fr.), Judgment, 1974 I.C.J. Rep. 253, 267 (Dec. 20) [hereinafter Nuclear Tests].

246. *See* Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements,* 11 SANTA CLARA J. INT'L L. 335, 396 (2013) (discussing unilateral acts in international investment law).

247. *See* Reisman & Arsanjani, *supra* note 33 *passim.*

248. *See also supra* note 45 and accompanying text.

context-hostile.[249] It is this hostility to relevant context that, perhaps ironically, reveals the predominant treaty paradigm as the truly artificial construct of legal habituation.

A. *The Constitutive Function of Dispute Resolution*

The existence of a right requires a remedy for its breach.[250] This means that the reliance an investor places in state promises or representations is only as reasonable as the dispute resolution mechanism available to enforce them.[251] The consent to arbitration included in treaties like the TPP and TTIP thus has a constitutive function: it makes available a decision process to determine the respective consequences of promises and representations.[252] The availability of this decision process is itself *super*-national in the sense of being "above" national remedies because it (1) provides a process above and beyond those of national law, (2) is global in nature, and (3) is anchored in a state's international legal obligations.

Arbitral jurisprudence confirms this functional insight. Questions of arbitral consent, that is, jurisdiction, are deemed different in a way that is more important than any other aspect of the legal regimes set up to protect foreign investment.[253] The importance of jurisdiction is that it is the condition *sine qua non* for any investor remedy and thus any substantive international investor rights.[254]

The law of unilateral acts explains the constitutive function of dispute resolution provisions for the creation of international reliance interests. Unilateral acts give rise to reasonable reliance interests when a state communicates its intent to incur a legal obligation.[255] Not every governmental statement can reasonably be relied on so as to give rise to a legal obligation for the state making it under international

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249. *See* Myres McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 990, 992 (1967) (criticizing the current treaty interpretation paradigm as overly *textual* and insufficiently *con*textual).

250. *See* Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration*, 35 PA. J. INT'L L. 829, 848 (2014) (highlighting the triple function of remedies in investor-state arbitration for investment law more generally).

251. *See* SALACUSE, *supra* note 5, at 335 (discussing the importance of dispute resolution from a drafter's perspective).

252. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 28.

253. The discussion has flared particularly in the context of jurisdictional invocations of most-favored-nation clauses in bilateral investment treaties. For articulations by state-centered arbitrators, see Impregilo SpA v. Arg. Republic, ICSID Case No. ARB/07/17, Stern Dissent (June 21, 2011), IIC 498 (2011). For a discussion of this jurisprudence, see SOURGENS, *supra* note 27, at 150–56.

254. *See id.*

255. *See* Int'l Law Comm'n, Rep. on the Work of its Fifth-Eighth Session, U.N. Doc. A/61/10 (2006), at 366–80 (discussing the "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations") [hereinafter ILC Guiding Principles]; Nuclear Tests, *supra* note 245, at 267.

law.[256] Quite to the contrary, diplomatic statements are presumptively puffery—political statements made to support a state's foreign policy or appeal to a domestic audience.[257] For instance, the promise made by then-Senator Obama to close prison camps at Guantanamo during his 2008 presidential campaign could not reasonably give rise to a cause of action for breach of contract even though the prison camps remain open at the time of writing, some seven years later.[258]

Promising to submit disputes relating to a promise to submit to international review of stat conduct is clear evidence that the state sought to incur a legal obligation.[259] It assumes that the underlying promise can give rise to a *legal* dispute in one form or another (as opposed to a purely political disagreement).[260] As a matter of classic international law, this entails that the promise creates some form of legal right.[261] In other words, a dispute resolution provision is a signal that the statement can in fact reasonably be relied upon.[262] The inclusion of a dispute resolution clause therefore constitutes a sufficient condition for the creation of an international legal obligation by means of a unilateral act: it signals the intent on the part of the state making it to create international legal rights in the recipient and makes reliance by the recipient on such a representation reasonable.[263]

Dispute resolution also defines the scope of intended beneficiaries.[264] Not every person can submit a claim for breach of a unilateral act;[265] rather, only the addressee—the intended beneficiary

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256. *See* ILC Guiding Principles, *supra* note 255, at 370 (noting the importance of finding an intent to be bound).

257. *See id.* at 377 (explaining that a state act creates a legal obligation "only if it is stated in clear and specific terms").

258. *See* Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 570–85 (2013) (discussing the legal implications of the promise to close the Guantanamo camps); Missy Ryan & Adam Goldman, *Time Is Running Out for Obama to Fulfill Promise to Close Guantanamo*, WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/world/national-security/time-is-running-out-for-obama-to-fulfill-promise-to-close-guantanamo/2015/10/07/0d42dd20-6778-11e5-9223-70cb36460919_story.html [https://perma.cc/4KE7-XQ63] (archived Sept. 29, 2016) (detailing current progress on President Obama's campaign promise).

259. *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 143 (1952) (noting the centrality of dispute resolution provisions for the bestowal of rights on non-state actors in international law).

260. *See* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 45–57 (2007) (analyzing the predominant dispute resolution provisions included in international investment agreements and noting the centrality of submission of legal disputes).

261. *See* Certain Property (Liech. v. Ger.), Judgment, 2005 I.C.J. Rep. 6, ¶ 24 (Feb. 10) (defining "legal dispute" in international law).

262. *See* ILC Guiding Principles, *supra* note 255, at 370 (linking unilateral acts to the reliance interests they create).

263. *See* KELSEN, *supra* note 259, at 143 (noting the centrality of dispute resolution provisions for the bestowal of rights on non-state actors in international law).

264. *See* ILC Guiding Principles, *supra* note 255, at 376 (noting that unilateral acts can be addressed to specific recipients or the international community at large).

265. *Id.*

of the act—may reasonably rely on it.[266] A dispute resolution provision typically identifies either directly or by specific description who may bring a claim.[267] The dispute resolution therefore identifies the specific addressee, namely a specific investor or class of investors.[268] It identifies not only that someone may reasonably rely on a promise or representation, but who may reasonably rely.[269]

A unilateral act approach therefore showcases the constitutive dimension of including international dispute resolution clauses, benefiting foreign investors in both investment treaties and investment contracts.[270] Their inclusion creates a new kind of reliance-based right and a process to enforce it,[271] and anchors this legal right in international law.[272] But, it also expands the scope of international law to global non-state actors, going beyond the normal scope of state-to-state international law proper.[273]

B. *Unilateral Acts and Non-State Actors*

The unilateral act approach explains and further refines the common trope that the dispute resolution clause "internationalizes" the obligations of the state to the investor.[274] The dispute resolution clause anchors the legal obligations incurred by the state in international law;[275] it signals a unilateral act.[276] But, the obligation to the investor, though it is anchored in international law (i.e., the law between states), leaves behind the state-to-state context of

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266. *Id.*

267. *See* MCLACHLAN ET AL., *supra* note 260, at 45–57 (outlining key provisions of dispute resolution clauses).

268. *See id.*

269. *See id.*

270. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 28–32.

271. *See* Daniel Davison-Vecchione, *Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty*, 16 GERMAN L.J. 1163, 1167–68 (2015) (discussing that unilateral acts do not require actual reliance and are anchored in good faith); Sourgens, *supra* note 227, at 22–23 (explaining that reliance, in other words, refers to objective reliance interests of like-situated third parties rather than subjective reliance by the addressee of the statement).

272. *See* KELSEN, *supra* note 259, at 143 (noting the centrality of dispute resolution provisions for the bestowal of rights on non-state actors in international law).

273. *See* Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543, 1548 (2009) ("For all the prestigious internationalists' recent efforts to address nuances of the issue in standard legal texts, international law continues to be mainly a law between states—one in which the person occupies a secondary, even peripheral, place.").

274. *See* Julien Cantegreil, *The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, 22 EUR. J. INT'L L. 441, 445 (2011) (articulating the link between internationalization and the arbitration clause in early oil and gas arbitration awards).

275. *See supra* Section III.A.

276. *See id.*

international law.[277] It becomes one strand in a supernational web of legal obligations between states and non-state actors.

For unilateral acts to anchor legal obligations to non-state actors, international law must permit states to incur legal obligations to non-state actors. If international law did not permit such a creation of rights, any promise by the state to non-state actors could be retracted upon consent of the non-state actor's home country.[278] This would undermine a key purpose of states when entering the global marketplace.[279]

The law of unilateral acts is unique in that it recognizes that states can bind themselves to non-state actors as a matter of classic international law.[280] The framework convention for much of investor–state arbitration—the ICSID Convention drafted under the auspices of the World Bank in the early 1960s—sought assurance that state consents to arbitration made by states to investors would constitute an international legal obligation of the states making them.[281] The answer was in the affirmative, and the basis the drafters provided was that consents constituted internationally binding unilateral acts of state.[282]

Anchoring a state's legal obligations in classic international law is important because it frames state liability in a familiar way for the state incurring the obligation. It remains within a legal context that a state habitually follows in ordinary diplomatic correspondence.[283] The unilateral act lens thus is deferential to state expectations, as demanded by more critical observers.[284]

But it is also this international legal nature of the right in question that gives the investor pragmatic comfort. What if the host state fails to comply with its legal obligation? There would be preciously little an investor could do with a domestic legal right against the host state if the host state's judiciary refuses to cooperate.[285] A

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277. *See* Domingo, *supra* note 273, at 1548.

278. *See generally* Roberts 2015, *supra* note 26, at 368.

279. *See* Salacuse & Sullivan, *supra* note 16, at 71 (noting the intention to attract capital and technology as a key state motivator).

280. *See* Reisman & Arsanjani, *supra* note 33, at 414–15 (discussing unilateral acts in the investment treaty context); *see generally* Caron, *supra* note 33 (discussing unilateral acts in the context of consents to arbitration in legislation).

281. *See* Broches, *supra* note 32, at 2.

282. *See Note by the President to the Executive Director, (Dec. 28, 1961), in* 2 HISTORY OF ICSID CONVENTION 5 (1968) ("Jurisdiction might be conferred on the Center either by a unilateral declaration of a State agreeing in advance to the submission of particular types of disputes to arbitration or conciliation by the Center, or by agreement between a State and a particular investor.").

283. *See* SURYA PRAKESH SHARMA, TERRITORIAL ACQUISITIONS, DISPUTES AND INTERNATIONAL LAW 206–07 (1997) (discussing unilateral acts in the context of diplomatic correspondence on the status of Greenland).

284. *See* MONTT, *supra* note 25.

285. *See generally* Saipem S.p.A. v. Bangl., ICSID Case No. ARB/05/7, Award (June 30, 2009), IIC 378 (2009) (discussing such a scenario and the use of investor-state

transnational legal right is also far from self-executing: it too requires judicial cooperation from the judiciary of the states in which a transnational award debtor holds assets.[286] If an investor holds international legal rights, this problem can be mitigated.[287] As scholarship has demonstrated, states comply with their international legal obligations because there are existing authoritative processes that internalize compliance demands with international legal obligations.[288] Although lacking formal international legal capacity, unilateral acts are transformative because the investor can now benefit from these processes, which range from purely state-to-state international legal prescriptions to state-to-person supernational applications.

The point is less metaphysical than it might at first appear. By signing onto framework conventions for the recognition of arbitral awards, much of the global community has set up a ready process for the enforcement of legal rights.[289] The investor is in possession of an international legal right from the host state and a matching legal enforcement remedy against each and every host-state member of these framework conventions.[290] A failure to enforce this legal right may, under the right circumstances, give rise to additional claims against the non-enforcing state.[291] These third states in effect step in to support the performance of the original sovereign obligation of the host state by making available enforcement mechanisms in their respective jurisdictions in case of nonperformance. In so many ways, states thus act as guarantors for the performance of awards against sovereign award debtors. The combination of the unilateral act of the host state and acts by third states standing for its performance is a particularly powerful signal to the investor that the international legal rights granted by the state have monetary value.

The flexibility of unilateral acts to cover non-state-actor international legal rights meaningfully sets it apart from existing analytic lenses.[292] The treaty lens assumes, incorrectly, that an investor has the treaty capacity to enter into conventional obligations

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arbitration to address it).

286. *See* BLACKABY ET AL., *supra* note 69, at 607 ("[I]f the losing party fails to carry out an award, the winning party needs to take steps to enforce performance of it.").

287. *See generally* Teddy Baldwin et al., *Limits to the Enforcement of ICSID Awards*, 23 J. INT'L. ARB. 1 *passim* (2006).

288. *See* Koh, *supra* note 223, at 203–05.

289. *See* BLACKABY ET AL., *supra* note 69, at 617–60 (discussing the predominant treaty enforcement regimes).

290. *See id.*

291. *Compare* Saipem S.p.A. v. Bangl., *supra* note 285, ¶ 133 (claim for treaty breach premised upon non-enforcement of arbitral award successful), *with* GEA Group Aktiengesellschaft v. Ukr., ICSID Case No. ARB/08/16, Award, ¶ 237 (Mar. 31, 2011), IIC 487 (2011) (claim for treaty breach premised upon non-enforcement of arbitral award unsuccessful).

292. *See supra* Part II.

with a state under international law.[293] The transnational lens blocks from view the fact that, without more, states may well be excused from performing "simple" contractual rights by operation of the act of state doctrine.[294] The administrative lens wrongly argues that investment arbitration sets up international administrative agencies—agencies whose decisions would have immediate legal implications beyond a specific case.[295] The unilateral act lens, for the first time, explains how and why a state could create meaningful obligations to a non-state actor, renders them enforceable for the investor's benefit, and maintains a focus on the specific relationship between the host state as the maker of a unilateral act and the investor as its addressee.

C. *Contextual Construction of Unilateral Acts*

Unilateral acts protect two kinds of reliance interests: first, jurisprudence confirms that unilateral acts protect reasonable subjective reliance interests when such reliance is present;[296] second, international courts and tribunals will impose liability when a third party similarly situated to the party bringing a claim would have so relied.[297] Such reliance interests are context-specific.[298]

The construction of unilateral acts looks beyond the text of the instrument to all factors giving rise to reliance interests.[299] Construction naturally begins with the text of the instrument,[300] but it also includes contextual factors outside of the four corners of the documents that evidence the intent and reception of the unilateral acts in question.[301] This focus on context significantly distinguishes the construction of unilateral acts from the interpretation of treaty instruments—an interpretation that is formally confined to the text of the treaty itself.[302]

Focus on reliance interests takes into account host-state needs and relative position. The "circumstances attending their making" are central to interpreting the intent of the state making a unilateral act.[303] Such "circumstances" include the motive for making the act and

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293. *See supra* subsection I.A.3.
294. *See supra* subsection I.A.1.
295. *See supra* subsection I.A.2.
296. CHRISTIAN ECKART, PROMISES OF STATES UNDER INTERNATIONAL LAW 206–07 (2012).
297. *Id.* at 209–11.
298. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 36 (1994) ("A unilateral act is either binding or not, depending upon all the circumstances and whether it was intended to create a legal obligation between the parties.").
299. *See* SOURGENS, *supra* note 27, at 59.
300. *See id.*
301. *See id.*
302. *See id.*
303. Nuclear Tests, *supra* note 245, ¶ 51.

the general position of the state,[304] which are sufficiently capacious to account for the deference given by international tribunals to a host-state's developmental status in interpreting the scope of the obligation the host state was likely willing to incur.[305]

Focus on reliance interests also takes into account host-state conduct in addressing these needs. Conduct indicating an intention to induce or entice investment may well be relevant to overcoming even host-state developmental status.[306] The measure of such conduct *vis-à-vis* the state's needs and relative position is measured by reference to the likely reaction by the intended recipients.[307] The more emphatic the conduct, the more pronounced its effects.

Investor conduct is also important to interpreting reliance interests. Proof that conduct did in fact provoke reliance on the part of some actors is directly relevant to the scope of the intended message.[308] If the recipient community at large would have or did react to the state, it supports the finding that an obligation was incurred.[309] This makes immediately relevant an investor's own due diligence in making investment decisions, as the investor only receives protections commensurate with a reasonable investor.[310]

The construction of unilateral acts confirms that host-state obligations must be viewed, not in the abstract, but with a full view to all relevant conduct. Obligations are inferred by balancing the position and experience of the host state against the reception its conduct received or ought to have received. Such analysis is, by definition, fact-specific.[311] When two tribunals interpret the same language differently they are not necessarily inconsistent, as might appear from a purely linguistic perspective, but rather appropriately sensitive to different

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304. *Id.* ¶ 49.

305. *See* Generation Ukraine, Inc. v. Ukr., ICSID Case No. ARB/00/9, Award, ¶ 20.37 (Sept. 16, 2003), IIC 116 (2003); Muchlinski, *supra* note 242, at 545.

306. *See* Rumeli Telekom, *supra* note 243, ¶¶ 615–18 (holding that state mechanisms lacking transparency violated legitimate expectations when those mechanisms operated in derogation of specifically negotiated investment contract cancellation mechanisms).

307. *See* Nuclear Tests, *supra* note 245, ¶ 51.

308. *Id.* ¶ 51.

309. *See id.*

310. *See* MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 178 (May 25, 2004), IIC 174 (2004).

311. *See* Stanmir Alexandrov, *Remarks*, *in* 2 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 205 (Ian Laird & Todd Weiler eds., 2009) ("My second point is, okay, are there really inconsistencies? And let me focus on three areas here. First of all, on the facts, my argument is that the outcome of the case is determined by the facts. And I have that at other forums, and I want to say it here again. Many of those who comment on awards and focus on the legal conclusions of the tribunal and completely ignore the facts of the case. If anybody is willing to do an exercise, just read the facts of the case from an award as established by a tribunal, not as alleged by the parties, but as established by the tribunal. Then stop reading and take a guess at what the outcome is . . . and I will posit to you that, in nine out of ten cases, you will guess right.").

record contexts.[312] In other words, the unilateral act perspective is more accurate than alternative lenses because it can make sense of the contextual analysis already adopted by investment tribunals.[313]

D. *Deference to Governmental Action*

Anchoring supernational law in unilateral acts permits an appropriate, context-sensitive conception of arbitral deference to governmental acts. Unilateral acts, as a general rule, will be construed restrictively.[314] As noted by the International Court of Justice, "[w]hen States make statements by which their freedom of action is to be limited" outside of the conventional treaty setting "restrictive interpretation is called for."[315]

Jurisprudence has resulted in an exception to such deference: unilateral acts made pursuant to a treaty.[316] In this context, the unilateral acts in question are considered clear and determinative because of the conventional link.[317] It is no longer a question of whether the state sought to incur an obligation.[318] By linking the undertaking to a treaty, the state has unequivocally communicated as much.[319]

The principal unilateral acts, on which an investor relies, have been made pursuant to a treaty—the instrument containing arbitration consents. These consents were given pursuant to the framework conventions that provide for arbitration, such as the ICSID Convention.[320] They may themselves be part of a treaty—or given pursuant to host-state legislation or contract.[321] These instruments are

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312. *Id.*

313. *Id.*

314. *See* ILC Guiding Principles, *supra* note 255, at 377 ("In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.").

315. Nuclear Tests, *supra* note 245, ¶ 44.

316. *See, e.g.*, Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment, 1952 I.C.J. Rep. 93, 105 (July 22); Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. Rep. 432, ¶¶ 47–49 (Dec. 4); Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, ¶ 107 (Apr. 14, 1988); Mobil Corporation, Venezuela Holdings B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 90–94 (June 10, 2010), IIC 435 (2010); Cemex Caracas Investments B.V. v. Bolivarian Republic of Venez., ICSID Case No ARB/08/15, Decision on Jurisdiction, ¶¶ 80–88 (Dec. 30, 2010), IIC 470 (2010); Tidewater Inc. v. Bolivarian Republic of Venez., ICSID Case No. ARB/10/5, Decision on Jurisdiction, ¶¶ 101–02 (Feb. 8, 2013), IIC 573 (2013); Michael D. Nolan & Frederic G. Sourgens, *Limits of Consent*, *in* LIBER AMICORUM BERNARDO CREMADES 873–911 (M. Fernandez-Ballesteros & David Arias eds., 2010).

317. *See* ILC Guiding Principles, *supra* note 255, at 372–73.

318. *See id.*

319. *See id.*

320. *See id.*

321. *See id.* at 379–80.

not, and should not be, interpreted restrictively.[322] Rather, they should be interpreted in good faith and in keeping with the contextual lens otherwise appropriate for unilateral acts.[323]

Other unilateral acts relied on by investors may or may not be made pursuant to a treaty.[324] The investor may alternatively rely on administrative acts or representations by state entities.[325] These entities may be unaware of the larger international implications of their pronouncements, whether singularly or cumulatively,[326] thus, when international legal significance is attached to such representations, caution is appropriate.[327]

Arbitral deference given to administrative acts outside of the conventional context is not a symptom of the emergence of a global administrative law but of restrictive interpretation of a certain kind of unilateral act.[328] These acts may not have independent legal force or may only be given limited contextual weight precisely because an investor would not reasonably independently rely on them.[329] When there is doubt about whether an investor would so rely, the rule in favor of the host state is prudent so as to encourage appropriate investor diligence and clarity in its communications with the host state.[330] The point, in other words, is not an assumption of particular state competency (which underlies the administrative law rationale) but a premise that communications may be given too great a significance in light of the lack of clarity and international competence of the governmental counterparty.[331]

Here again, the unilateral act perspective is more accurate than alternative lenses because it can make sense of the levels of deference to state conduct visible in the jurisprudence. To the extent that the investor relies on an act made pursuant to a treaty, tribunals will give little to no deference to state action or interpretation.[332] The further afield from such acts that state conduct ventures—such as

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322. *See id.*

323. *See id.* at 377.

324. *See* Reisman & Arsanjani, *supra* note 33, at 419 (noting potential investor reliance upon unilateral acts of high government officials).

325. *See id.*

326. *See* Parkerings Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 305–07 (Aug. 14, 2007), IIC 302 (2007) (discussing the implications of conduct and representations of city officials addressing pricing structures for a parking garage).

327. *See* ILC Guiding Principles, *supra* note 255, at 377.

328. *See supra* subsection I.A.2.

329. *See* ILC Guiding Principles, *supra* note 255, at 377 (asserting in the commentary that unilateral declarations "must be interpreted in a restrictive manner").

330. Parkerings-Compagniet AS v. Republic of Lith., *supra* note 326, ¶¶ 306–9; *see* MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 178 (May 25, 2004), IIC 174 (2004) ("[T]he Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen.").

331. ILC Guiding Principles, *supra* note 255, at 377.

332. *See id.* at 380.

administrative correspondence with local officials—the more restrictive the tribunal's approach.[333] This approach makes little sense from a treaty or transnational law perspective.[334] It also tends to invert administrative competence rationales for administrative deference, as a federal agency acting with due deliberation certainly is more competent than a local official acting with all the haste and care of routine correspondence.[335] However, this approach makes a lot of sense from the point of view of unilateral acts.

V. THE TRANSNATIONAL GOOD FAITH ELEMENT OF SUPERNATIONAL LAW

So far, the focus of this Article has followed traditional lines of scholarship. The state is liable to the non-state actor under international law for an infraction of the investor's legal right or interest.[336] This analysis, however, is incomplete—it does not provide a means to understand what legal obligations the non-state actor incurs.

This question is at first perplexing. While counterclaims are straightforwardly possible in contractual arbitration, the current scholarly focus rests on disputes arising under treaty instruments.[337] How could an investor have incurred an obligation under a treaty between the investor's home state and the host state to the investment, a treaty to which the investor never became a party in its own right?[338]

The unilateral act approach shifts this focus. Consistent with jurisprudence, particularly in the natural resource sector, the stark dividing line between treaty arbitration and contract arbitration disappears.[339] The host-state's obligation to the investor under a concession agreement and under a treaty are functionally and formally the same: both are unilateral acts by the state.[340] It is natural that a state would secure for itself rights under a concession agreement in consideration for the obligation it incurs *vis-à-vis* the foreign investor.

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333. *See supra* subsection I.A.2.

334. *See supra* Section I.A.

335. *See id.*

336. *See supra* Part IV.

337. *See supra* Section II.A.

338. *See* Roussalis v. Rom., ICSID Case No. ARB/06/1, Award, ¶¶ 868–69 (Dec. 7, 2011), ICC 516 (2011).

339. *See supra* Part IV; *see also* Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Environmental Counterclaim (Aug. 11, 2015), IIC 699 (based upon a treaty and a concession agreement); Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No ARB/08/5, Liability, ¶¶ 513–18 (Dec. 14, 2012) (interweaving production sharing contract and treaty analysis to determine whether an internationally wrongful act occurred); Occidental Petroleum Corp. v. Republic of Ecuador, *supra* note 82, ¶ 345 (combining transnational oilfield practices, contract standards and treaty standards to determine whether an internationally wrongful act occurred).

340. *See supra* Part IV.

Given that foreign investors may well operate by means of thinly capitalized special purpose vehicles in the state issuing the concession, the host state may insist on making the state's own rights under the concession actionable beyond the boundaries of the host state. There must thus be a global legal process that gives effect to and permits a sound conception of these rights of state against the investor. This legal process should similarly be applicable in the context of disputes that arise in the absence of a contract between the investor and the state. It is when this process is combined with the process of state liability that a true supernational legal process arises to transcend the international legal focus on state liability and the transnational legal focus on investor rights.

A. *The Constitutive Function of Dispute Resolution, Redux*

Proper analysis of the respective "internationalized" supernational rights of states and obligations of investors again must begin with the means by which to make them actionable and by which their violation may be remedied.[341] Analogously to international *investor* rights, a *state* has an "internationalized" right against the investor when it has the ability to seek a remedy for a violation internationally.[342] Just like in the context of the investor's rights, the key provision to determine whether such an international forum exists is the arbitration clause.[343]

In the context of concession agreements or other contracts, this question is non-controversial.[344] Typically, both the state and the investor agree to submit disputes arising out of or relating to the contract to arbitration.[345] The state has a straightforward right to

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341. *See id.*

342. *See supra* Part IV.

343. SCHREUER ET AL., *supra* note 74, at 756.

344. Controversy may arise if the arbitration clause calls for ICSID arbitration as the ICSID Convention requires an additional jurisdictional hurdle that the dispute arise directly out of an investment in keeping with Article 25(1) of the ICSID Convention. In those instances, it may be the case that allegations of violation of purely domestic law may not satisfy this requirement. DUGAN ET AL., *supra* note 21, at 153–54. This conclusion is currently contested in the jurisprudence. *See* Roussalis v. Rom., *supra* note 338 (discussing the dissenting opinion of Professor Reisman ("In rejecting ICSID jurisdiction over counterclaims, a neutral tribunal — which was, in fact, selected by the claimant — perforce directs the respondent State to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant. (And if an adverse judgment ensues, that erstwhile defendant might well transform to claimant again, bringing another BIT claim.) Aside from duplication and inefficiency, the sorts of transaction costs which counter-claim and set-off procedures work to avoid, it is an ironic, if not absurd, outcome, at odds, in my view, with the objectives of international investment law.")). In any event, the majority of significant contractual arbitrations between investors and host-state entities are not subject to ICSID arbitration. *See* Goldhaber et al., *supra* note 4 (listing the fora for contractual arbitrations).

345. A typical example is the arbitration clause included in the Association

bring claims against the investor.[346] This right may go beyond the rights actionable under breach of contract; for example, in the commercial context, words such as "relating to" or "connected to" in a contract's arbitration clause permit tribunals to hear any form of tort or statutory claim.[347]

In the treaty context, the question is more complicated. Some treaties may well echo the broad formulation used in contracts.[348] In such a case, the state is consenting to arbitrate any claims arising out of or related to the investment.[349] Two treaties that contain arbitration provisions deemed by jurisprudence to be, in principle, sufficiently broad to permit such counterclaims are the Dutch–Czech and the Mongolian–Russian bilateral investment treaties.[350]

Agreement between ExxonMobil's subsidiary Mobil Cerro Negro Ltd. and Venezuela's national oil company, PDVSA. *See* Mobil Cerro Negro, Ltd. v. Petroleos de Venez., S.A., ICC Arbitration Case No. 15416/JFR/CA, Award, ¶ 5.2.2 (Dec. 23, 2011) (quoting the arbitration clause in full).

346. *See id.* ¶ 803 ("For the same reasons for which the Tribunal has accepted its jurisdiction above regarding the claims raised by Claimant, in view of the very broad wording of the arbitration clause in Article 18.2 AA, the Tribunal also has jurisdiction over the counterclaims raised.").

347. *See* BLACKABY ET AL., *supra* note 69, at 79.

348. *See* Agreement between the Swiss Confederation and the Republic of Venezuela Concerning the Promotion and Reciprocal Protection of Investments, Switz.-Venez., art. 9, Nov. 18, 1993, IC-BT 300, http://www.wipo.int/edocs/lexdocs/treaties/en/ch-ve/trt_ch_ve_001en.pdf [https://perma.cc/8FS6-EG2Z] (archived Oct. 2, 2016) [hereinafter *Agreement between the Swiss Confederation and the Republic of Venezuela*] (submitting to dispute resolution including arbitration "disputes between a Contracting Parties and an investor of the other Contracting Party") (author's translation).

349. *See id.*

350. *See* Saluka Investments B.V. v. Czech Republic, Jurisdiction, ¶ 21 (May 7, 2004), IIC 209 (2004) ("All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall, if possible, be settled amicably. . . . Each Contracting Party consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within [a stated] period."). The tribunal affirmed that the language was sufficiently broad to permit counterclaims in principle. *Id.* ¶ 39 ("The Tribunal agrees that, in principle, the jurisdiction conferred upon it by Article 8, particularly when read with Article 19.3, 19.4 and 21.3 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims. The language of Article 8, in referring to 'All disputes,' is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. The need for a dispute, if it is to fall within the Tribunal's jurisdiction, to be 'between one Contracting Party and an investor of the other Contracting Party' carries with it no implication that Article 8 applies only to disputes in which it is an investor which initiates claims."); Paushok v. Government of Mong., *supra* note 36, ¶ 689 ("[The Mongolian-Russian treaty] states in particular that 'the jurisdiction conferred upon it (the tribunal) by Article 8, particularly when read with Article 19.3, 19.4 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims. The language of Article 8, in referring to "all disputes" is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met.' Article 8 of the Saluka BIT is similar to Article 6 of the Treaty, the first one referring to 'all Disputes' while the second refers to "disputes" and there is no reason to make a difference between the two.").

Such provisions on their face confirm that absolute opposition to investor liability under investment treaties would be artificially limiting.[351] The dispute resolution provision communicates an intention to accept and incur internationalized liability.[352] When the investor matches this provision with its own consent to arbitration, the investor communicates the same intention as the state.[353]

The question is more complicated when the treaty language is more narrowly tailored. Some treaty consents appear to be limited to disputes arising under the treaty.[354] In such instances, the question arises whether the scope of the arbitration consent is broadened by reference to the arbitration instruments pursuant to which it is given.[355] As counterclaim skeptics concede, many arbitration rules in fact expressly contemplate that the parties consent to a tribunal hearing counterclaims that arise out of the same transaction and occurrence as the main claim.[356] This incorporation may well operate to expand even narrowly drafted arbitration consents—although the construction of the consent and the nexus between the counterclaim and the treaty claim will remain an issue of delicate contextualization in each case.[357]

In all cases, the dispute resolution provision is constitutive of the internationalized reliance interests the parties can have of each other. These interests do not arise as a matter of legal absolutes; rather, they require a careful study of the arbitration consents themselves, in light of their full context. In principle, however, there is no bar to stating counterclaims if they are appropriately articulated as a matter of applicable law.

B. *Applicable Law*

Even with jurisdiction established, counterclaims by states against investors raise the question of which law would be applicable

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351. *See* DUGAN ET AL., *supra* note 21, at 153–54.

352. *See Agreement between the Swiss Confederation and the Republic of Venezuela*, *supra* note 348, at art. 9.

353. *See* Nolan & Sourgens, *supra* note 316, at 4.

354. Roussalis v. Rom., *supra* note 338, ¶¶ 868–69.

355. *See See* Roussalis v. Rom., ICSID Case No. ARB/06/1, Declaration of W. Michael Reisman (Nov. 28, 2011), ICC 516 (2011) [hereinafter Reisman Declaration] ("[I]n my view, when the States Parties to a BIT contingently consent, *inter alia*, to ICSID jurisdiction, the consent component of Article 46 of the Washington Convention is *ipso facto* imported into any ICSID arbitration which an investor then elects to pursue.").

356. *See* DUGAN ET AL., *supra* note 21, at 153–54.

357. *See* Oxus Gold PLC v. Republic of Uzb., *supra* note 242, ¶¶ 948–53 ("The wording of Article 8(1) of the BIT is for this Arbitral Tribunal a clear indication that the Parties' consent to arbitration under the BIT only cover claims from investors against the host State, but not claims from the host State against the investors, to the possible exception of counter-claims having a close connection with the investor's claims, as mentioned below (see below, para. 951)."); Reisman Declaration, *supra* note 355.

to the counterclaim itself. Various sources of applicable law are theoretically conceivable, including the host-state's law and the law chosen by the parties in a concession contract. The first option would allow the assertion, by the host state, of violations of its own laws in counterclaims.[358] This is a typical manner in which states frame their counterclaims.[359]

With few exceptions, arbitral jurisprudence has rejected such assertions on a jurisdictional basis: disputes of violations of host-state law should be tried in the competent (administrative) fora rather than the international fora.[360] This stated reasoning is applied asymmetrically, however, as investor–state tribunals do in fact accept claims by an investor premised upon a host-state's applicable law but reject same or similar host-state claims.[361] Thought through to its logical conclusion, such jurisprudence comes dangerously close to denying the state equal treatment because it gives only one party access to redress. Equal treatment of the litigants is a core aspect of international due process.[362] Such due process failures can lead to the annulment or setting aside of a resultant award.[363] It is therefore prudent to analyze the jurisprudence in question in more functional terms to avoid the consequence of a due process failure.[364]

A more charitable explanation of this jurisprudence is to cast it as other than strictly "jurisdictional" in the sense that tribunals are not empowered to hear claims raised by states as a matter of law (i.e., that

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358. *See* DUGAN ET AL., *supra* note 21, at 153–54.

359. For a recent example, see Paushok v. Government of Mong., *supra* note 36, ¶ 678. For a discussion of earlier jurisprudence, see DUGAN ET AL., *supra* note 21, at 153–54.

360. For a case applying the law of the host state (as incorporated in the governing contract) as applied in country, see Perenco Ecuador Ltd. v. Republic of Ecuador, *supra* note 20, ¶¶ 364 n.898 ("[T]he Tribunal must seek to apply Ecuadorian law as the Ecuadorian courts have applied it."). As discussed below, it is at the very least arguable that the decision was ultimately motivated by an internationalist view of liability: the tribunal notes that "proper environmental stewardship has assumed great importance in today's world." *Id.* ¶ 34. It then justifies its reliance upon Ecuadorian applicable law by express reference to a state's "wide latitude under *international law* to prescribe and adjust its environmental laws, standards, and policies in response to changing views and a deeper understanding of the risks posed by various activities, including those of extractive industries such as oilfields." *Id.* ¶ 35 (emphasis added). The tribunal's factual conclusion was that the claimant materially deceived the Ecuadorian government about its environmental compliance. *Id.* ¶ 447. As discussed below, such conduct would be inconsistent with transnational obligations of good faith— and not in compliance with international prescriptions (as opposed to purely municipal ones).

361. *See* DOLZER & SCHREUER, *supra* note 147, at 169–75 (analyzing umbrella clause jurisprudence); NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE 220 (2009) (noting the municipal law predicate of umbrella clause claims).

362. *See* R. DOAK BISHOP & SILVIA M. MARCHILI, ANNULMENT UNDER THE ICSID CONVENTION 130–34 (2012) (analyzing jurisprudence establishing that equality of the parties is an international due process principle).

363. *See id.*

364. *See id.* at 133 (noting the functional analysis required for annulment).

tribunals categorically lack jurisdiction to do so).[365] Tellingly, the influential reasoning for denying counterclaims, announced in *Amco v. Indonesia*, is that legal disputes concerning rights and obligations that are applicable to legal or natural persons who are within the reach of a host-state's jurisdiction "in principle fall to be decided by the appropriate procedures in the relevant jurisdiction unless the general law generates an investment dispute under the Convention."[366] This jurisprudence ultimately draws a distinction between types of disputes, namely host-state legal disputes and investment disputes.[367]

The *Amco* distinction assumes that some, but not all, host-state legal disputes "generate[] an investment dispute."[368] The case, as pled by Indonesia, lacked a necessary element:[369] the link between the host-state law asserted to have been violated and a truly transnational, or, more precisely, supernational dispute. This treatment is consistent with the now-prevalent understanding of umbrella clauses invoked by investors, namely that trivial and/or commercial breaches of contract by the host state are not a predicate for liability.[370] In both instances, the relevant element is the applicable law, not the jurisdiction. It asserts that there is an applicable law or legal process that a claim or counterclaim failed to satisfy. In the counterclaim context, the jurisprudence has, so far, failed to elaborate in detail what the applicable law or legal process is.

Recasting this jurisprudence in terms of applicable law can benefit from the related choice-of-law discourse in international commercial arbitrations.[371] Just as in the investor–state context, the jurisprudence has rejected the strict use of conflict-of-law rules for a similar reason: these rules do not take into account the "transnational" or "internationalized" legal character of the transaction at issue.[372] This line of arbitral jurisprudence and scholarship instead applies transnational law, that is, the law chosen by the parties as augmented by legal principles derived by reference to comparative law research, applicable trade usage, and factually instructive arbitral

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365. The bar would operate "*ratione voluntatis*" or because of the scope of the consent itself. Soufraki v. U.A.E., ICSID Case No. ARB/02/7, Annulment, ¶ 42 (June 5, 2007), IIC 297 (2002).

366. Amco Asia Corp. v. Republic of Indon., ICSID Case No. ARB/81/1, Jurisdiction, ¶ 125 (May 10, 1988), 1 ICSID Rep. 543 (1998). For a discussion of the impact of *Amco* on the later *Saluka* decision, see DUGAN ET AL., *supra* note 21, at 153–54. For the influence of *Saluka*, see Paushok v. Government of Mong., *supra* note 36, ¶¶ 689–93; SCHREUER ET AL., *supra* note 74, at 756.

367. *See* Amco Asia Corp. v. Republic of Indon., *supra* note 366, ¶ 125.

368. *Id.*

369. *Id.* ¶ 126–27.

370. *See* DOLZER & SCHREUER, *supra* note 147, at 169–75 (analyzing umbrella clause jurisprudence).

371. BERGER, *supra* note 38, at 50–51.

372. *See id.*

jurisprudence.[373] If states asserted counterclaims premised on transnational or transnationalized legal principles, their claims should overcome the hurdle created by current jurisprudence by asserting "investment dispute[s]" as opposed to domestic regulatory disagreements.[374]

This hypothesis is consistent with investor–state jurisprudence addressing investor misconduct in the jurisdictional context.[375] In order to benefit from treaty protection, an investor must often satisfy a condition precedent set out in the treaty itself, namely that the investor "made" the investment "in accordance with law."[376] The first threshold question for such jurisdictional objections by host states against claims raised by the investor is timing: When is a violation of law jurisdictionally relevant?[377] As treaties typically link the condition precedent to the making or acceptance of an investment, the answer to this first question is reasonably straightforward: only a violation of law during the acquisition of the investment is jurisdictionally relevant.[378] It is thus natural to surmise that investor misconduct that would have been relevant but for its timing should be treated in the context of claims for set-off or counterclaims by the host state.[379]

The second threshold question is more complex: What is the law incorporated in the condition precedent of treaty protection? Just as in the context of contractual disputes, choice-of-law principles mandate that the law incorporated in the condition precedent is the law of the host state. Using conflicts-of-laws terminology, one tribunal noted that the treaty effects a *renvoi* (send back) to the law of the host state.[380] But, as the same tribunal was quick to point out, this *renvoi* does not operate perfectly.[381] Rather, an investor's good faith in making the investment would excuse a violation of host-state law in the making of the investment.[382] The law applicable to investor misconduct, just like the law applicable to state misconduct, is "internationalized."[383] The process of internationalization in both instances (state misconduct and

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373. *See id.* at 289–93.

374. Amco Asia Corp. v. Republic of Indon., *supra* note 366, ¶ 125.

375. For a discussion of this jurisprudence, see Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473 *passim* (2011).

376. *See id.* at 1476–81 (analyzing treaties containing such provisions).

377. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., *supra* note 213, ¶ 345.

378. *See id.*

379. *See* MONTT, *supra* note 25, at 247–48.

380. *See* Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., *supra* note 213, ¶ 394.

381. *See id.* ¶ 396.

382. *See id.*

383. *See id.*

investor misconduct) relies on the same principle—the principle of good faith.[384]

Investor–state arbitration has developed a nascent jurisprudence regarding some of the relevant principles of good faith with which an investor must comply. Most glaringly, jurisprudence establishes that good faith, in the guise of international public policy, precludes protection of investments acquired by means of bribes.[385] Similarly, tribunals have followed general principles of law to flesh out the idea that good faith prohibits fraudulent conduct.[386] Even in the absence of tortiously fraudulent conduct, tribunals have held that good faith prohibits an investor's abuse of rights in the acquisition of an investment.[387] In its most comprehensive form, good faith requires investor due diligence proportionate to the scope of the investment; this means learning the salient points of the host state's legal regime and making honest and reasonable attempts, consistent with industry best practices, to comply with that regime, as incorporated in the investment structure.[388]

The same principles can and are straightforwardly applied in the liability context. The core question is whether the contracting parties conducted themselves in good faith, taking into account the specific contractual obligations they have undertaken to one another and the principles of applicable law they have incorporated into their bargain or relationship by reference.[389] To answer this question, tribunals typically must determine whether a party abused its rights or acted fraudulently in derogation of best industry practice or in violation of basic international public policy.[390]

The recent *Perenco v. Ecuador* decision functionally applied such a rubric to its preliminary decision on Ecuador's counterclaim against a multinational oil and gas company.[391] That counterclaim concerned

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384. *See id.*

385. *See* ALOYSISUS LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION 194–98 (2014) (discussing the jurisdictional jurisprudence addressing corruption allegations).

386. *See* Inceysa Vallisolente S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award, ¶¶ 240–44 (Aug. 2, 2006), IIC 234 (2006); Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award, ¶¶ 130–42 (Aug. 27, 2008), IIC 338 (2008).

387. *See* Phoenix Action Ltd. v. Republic of Bulg., ICSID Case No. ARB/06/5, Award, ¶¶ 101–13 (Apr. 9, 2009), IIC 367 (2009).

388. *See* Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., supra note 213, ¶ 396.

389. *See* BERGER, *supra* note 38, at 122 ("Objective values such as reliability, loyalty, fairness, reasonableness and good conduct are essential elements of the behavioral standard required from contract parties by the principle of good faith. There is an inherent correlation between these blanket clauses and the 'discretion' of the judge in applying the law. [They allow] the judge to escape from the application of abstract black-letter law and to take account of the particularities of the individual cases . . . .").

390. *See id.* at 139–43.

391. Perenco Ecuador Ltd. v. Republic of Ecuador, supra note 20, ¶ 611.

alleged failures by the investment vehicle (and Perenco) to abide by their environmental obligations.[392] The tribunal tacitly concluded that the Ecuadorian regime in fact complied with and furthered the international goals of environmental stewardship.[393] The tribunal expressly concluded that operators consistently complied with this regime.[394] It was this regime—the municipal legal regime, as consistently followed by international operators in keeping with international legal principles on environmental protection—that the tribunal ultimately applied.[395] The analysis of the tribunal formally followed a *renvoi* to Ecuadorian law.[396] But it did so only after ascertaining the importance of corporate environmental stewardship as a matter of global practice.[397] It then confirmed the existence of a "wide latitude" within which states may adjust their environmental regimes governing investors.[398]

The *Perenco* tribunal did not base its determinations on picayune points of Ecuadorian law; rather, the *Perenco* tribunal determined, premised on the claimant's internal documents, that the investor "was less than forthcoming" with regard to its environmental compliance efforts.[399] Rather than further characterize the conduct in question, the tribunal let the internal document speak for itself: "the 'State will probably assume that we are hiding many more [environmental] damages and will scrutinize the operations area in such for more damages and it will probably find them.'"[400] Such conduct is exactly the kind of pronouncement that has led to jurisdictional dismissals for failure to abide by applicable law.[401] They are fundamentally inconsistent not only with host-state law, but also with transnational commercial good faith obligations to take seriously the interests and needs of the counterparty to a transaction.[402]

Viewed functionally, *Perenco* thus stands for the legal proposition that counterclaims that allow for a host-state remedy for an investor's purposeful and deceitful disregard for the basic environmental

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392. *Id.* ¶ 34 ("Ecuador presented the environmental counterclaim on the basis that its experts had determined the existence of an 'environmental catastrophe' in the two oil blocks situated in the country's Amazonian rainforest that had been worked by the consortium under Perenco's operatorship.").

393. *See id.* (implying in the application of Ecuadorian law that it remains within the stated latitude).

394. *Id.* ¶ 321 (holding that Ecuadorian law was "administered in a generally consistent manner by regulators *and operators* alike") (emphasis added).

395. *Id.* ¶ 321–24.

396. *Id.* (holding that Ecuadorian law was to be applied to the dispute because it presented a regulatory regime administered in a generally consistent manner by both operators and regulators).

397. *Id.* ¶ 34.

398. *Id.* ¶ 35.

399. *Id.* ¶ 447.

400. *Id.*

401. *See id.* ¶¶ 34, 321–24.

402. *See* BERGER, *supra* note 38, at 122.

interests of the host state, as habitually implemented by peer investors, have legal merit.[403] They constitute instances in which an investor knows about the interest of the state, understands that other like-situated investors habitually comply with the laws and regulations codifying these interests, consciously decides to disregard them, and then misleads its state counterparty to prevent its understanding the full effect its actions will have.

In sum, in the context of a capacious arbitration clause—no matter whether that clause is included in a treaty or a contract—there is an internationalized liability regime in place for investor misconduct. This liability regime is the mirror image of the one theorized in the context of unilateral acts: good faith conduct. In the words of one tribunal,

> BITs oblige governments to conduct their relations with foreign investors in a transparent fashion. Some reciprocal if not identical obligations lie on the foreign investor. One of those is the obligation to make the investment in accordance with the host state's law. It is arguable that even an investment which is not made in accordance with host state law may import economic value to the host state. But that is not the only goal of this sector of international law. Respect for the integrity of the law of the host state is also a critical part of development and a concern of international investment law.[404]

C. *The Reference Point of Transnational Law*

This leaves the question of how one determines the specific content of good faith obligations of the investor to the host state in a given context. Good faith is a largely malleable principle.[405] *Good faith*—or, more precisely, the absence of good faith giving rise to investor liability—rivals *obscenity* in that both are difficult to define, but impossible to miss.[406]

Current efforts in the field of international commercial law inductively codify rules of good faith in the context of long-term contracts.[407] These efforts review relevant commercial

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403. *See id* at 265.

404. *See* Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., *supra* note 213, ¶ 402. The Fraport decision was jurisdictional in nature; one of the arbitrators has since expressed that the same logic may well apply beyond the strictly jurisdictional confines of that dispute. W. Michael Reisman, *Remarks*, *in* 9 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 117 (Ian Laird et al. eds., 2016).

405. *See* Bernardo Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT'L L. REV. 761, 761, 765 (2012) ("It is difficult to find any international arbitration award not based on, or that does not at least mention, good faith . . . nevertheless, it is not clear what the concept of good faith actually means.").

406. *See* David Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 915 (2016) ("Because bad faith is so difficult to define and deter *ex ante*, courts and commentators in non-constitutional fields have relied heavily on inductive reasoning to fashion general rules out of concrete cases.").

407. *See* Harnany Veytia, *The Requirement of Justice and Equity in Contracts*, 69 TUL. L. REV. 1191, 1205 (1995) (discussing the principle of good faith in the "most

jurisprudence[408] and supplement this jurisprudence with comparative legal research in commercial law and industry self-regulation.[409] By combining jurisprudence with general principles of commercial law and industry practice, these efforts have assembled a sufficiently comprehensive set of rules and principles that can be applied with reasonable certainty to specific transactions and disputes.[410]

These transnational codification efforts serve as a useful guide in determining the liability of the non-state actor in the supernational context (i.e., transactions between state actors on the one hand and foreign non-state actors on the other). These principles and rules measure the commercial good faith of the foreign non-state actor, as determined from an industry perspective.[411] They provide guidance on what efforts a commercial actor can be reasonably expected to undertake, in the sense that they set a context-specific point of reference for commercial minimum and optimum practices.[412]

The application of such transnational principles is appropriate given the reliance interests of state actors. The reason states seek out investment is that they have identified a policy goal that can better be accomplished with market help.[413] Sometimes, the state is incapable or unwilling to finance the venture independently.[414] Other times, the state lacks commercial or technical expertise.[415] In either instance, the state looks for commercial actors to fill the gap between the policy goal and policy implementation. Transnational legal principles impose

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significant codification effort by international organizations" for "long-term international contracts").

408. *See id.* at 1204; *see also* Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 176–80 (2005) (noting the inductive lawmaking process of bottom-up lawmaking in transnational law).

409. *See* Vanessa Johnson, *Codification of the Lex Mercatoria: Friend or Foe?*, 21 L. & BUS. REV. AM. 151, 165 (2015) (discussing the link between the UNIDROIT Principles and general principles of law recognized in mature jurisdictions).

410. UNIVERSITY OF COLOGNE, GERMANY, TRANS-LEX.ORG, www.trans-lex.org (last visited Oct. 26, 2016) [https://perma.cc/L9KQ-V6Y3] (archived Oct. 4, 2016) (exemplifying the efforts to construct a collaboration of sources).

411. *See* BERGER, *supra* note 38, at 292.

412. *Compare* Alan Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689, 744 (2013) (discussing good faith measures on industry minimum), *with* Antonis Patrikios, *Resolution of Cross-Border E-Business Disputes by Arbitration Tribunal on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Mercatoria*, 28 U. TOL. L. REV. 271, 293 (2006) (discussing decisions based on self-regulation as best practices).

413. *See* Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1366 (2011) (noting the promise of "promoting social norms through private-public partnerships"); SALACUSE, *supra* note 5, at 77 (identifying the bargain as "promise of protection of capital in return for the prospect of more capital in the future").

414. *See* SALACUSE, *supra* note 5, at 77.

415. *See id.*

liability when commercial actors act for functionally non-commercial reasons and thereby deprive the state of its reliance interests.[416]

The application of such transnational principles to the liability of commercial actors (as opposed to state actors, as previously theorized) also appropriately reflects the reliance interests a commercial actor could expect to induce. Commercial actors know and expect that they will be held liable whenever they act inconsistently with basic minimum commercial requirements, as recognized by and codified in commercial practice.[417] There is no reason to hold commercial actors harmless from a violation of these minimum requirements because they happened to contract with a state entity rather than a formally commercial counterparty.

VI. COMBINING THE ELEMENTS OF SUPERNATIONAL LAW

The appraisal of both state and investor conduct is anchored in good faith.[418] In each case, good faith looks to the contextually applicable understanding of the law of unilateral acts to appraise state conduct and to transnational law to appraise commercial conduct.[419] These apparently distinct phases of appraisal of state conduct and commercial conduct must be combined into a single process. So far, state action and commercial action have been treated in isolation for analytical purposes.[420] In the real world, state action and commercial action cannot be isolated so neatly from one another.[421] The point of a transaction between the state and the non-state actor is that each party to the transaction reacts to, works with, and profits from the investment.[422]

The resulting process is, of necessity, cooperative and contextual. On the transactional side, it requires communication between the relevant actors to ascertain that policy ends and commercial goals are effectively met.[423] Failure to meet these goals requires adjustment by both parties to retain the original bargain.[424] These adjustments require the state to be responsive to the reliance interests its conduct has brought about[425] and require the commercial actor to be responsive to the commercial disequilibrium that new and unanticipated market

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416. *See* Veytia, *supra* note 407.
417. *See* BERGER, *supra* note 38, at 292.
418. *See supra* Parts III–IV.
419. *See id.*
420. *See id.*
421. *See* LLAMZON, *supra* note 385, at 3–6 (explicating corruption between seeking commercial stability and non-commercial advantage).
422. *See id.* at 4–5 (setting out the terms of mutual advantage of foreign investment).
423. *See* DESIERTO, *supra* note 225, at 373–76, 382.
424. *See id.* at 379.
425. *See supra* Part IV.

forces may have caused.[426] When a dispute arises, liability could only be imposed by taking into account the context of these cooperative efforts.

This appraisal cannot be satisfied by simple rule application. Supernational law requires the engagement by state and commercial actors of the other's ends,[427] ends that are often incommensurate with one another.[428] Thus, resolving differences requires a balance of such incommensurate ends,[429] and this balance can only be struck by reference to the weight and complexity of specific reliance interests.[430] It is thus not enough to impose rules from one set of liability principles—either unilateral acts or transnational law. Rather, these rules must be placed in the context of specific conduct and translated based on the entanglement of the mutual reliance interests they have brought about.

This entanglement of mutual reliance interests of state and non-state actors means that good faith in supernational law is meaningfully different in application from good faith in international or transnational law. Conceptually, good faith always requires a respect for, and engagement with, the different perspective of one's respective counterparty.[431] Applied to supernational law, these starting points are radically different[432] because they are constitutive of the value each party can achieve: the state actor can only achieve desired policy ends because of private participation, and the commercial actor can only unlock monetary value because of the state's decision to implement these policy ends.[433] Thus, neither the policy end nor the monetary value can be preferred to the other.

This divergence of good faith in application and between supernational law and international and transnational law explains some of the apparent inconsistency of decisions in investor–state arbitration.[434] Many commentators have pointed out that liability decisions reached in disputes between states and non-state actors are doctrinally inconsistent because they use incommensurate rationales

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426. *See supra* Part V.

427. *See supra* Parts III–IV.

428. *See* DESIERTO, *supra* note 225, at 379 ("There has been a disquieting automatic tendency on the part of several arbitral tribunals to equate the fair market value of the investment as the level of compensation for breaches of the IIA that do not amount to expropriation.").

429. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 856–59 (1994).

430. *See id.*

431. *See* Pozen, *supra* note 406, at 915.

432. *See supra* Parts III–IV.

433. *See id.*

434. *See* Frederic G. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection as Common Law*, 34 NW. J. INT'L L. & BUS. 181, 203–04, 209–10 (2014) (discussing the inconsistency of decisions in investor-state arbitration).

in interpreting the same treaty language or contractual clause.[435] This inconsistency, commentators point out, creates legitimacy issues because it creates problems of predictability in current transactional practice and for future disputes.[436]

This apparent inconsistency identified in the literature is the direct result of an appropriate application of supernational law by tribunals. The decisions are indeed facially inconsistent. But the differences between decisions can be fully explained by the arbitral process—and record—leading up to them.[437] This process balances the respective reliance interests of the parties in light of the full factual record before the tribunal.[438] The tribunals then express their conclusions in the language of the legal framework pled by the prevailing party.[439] The case law thus operationalizes a factual balancing test without fully expressing its significance in the legal discussion of the tribunal's ultimate holding.[440] Once revealed, however, this operational code of the arbitral process can explain the apparent inconsistency of arbitral decisions: the inconsistency is resolved by focusing on the narrow, factual decision-making process within the arbitration rather than the facially general discussion of legal authorities by tribunals in their awards.[441]

Such an operational code could equally support the argument that the jurisprudence is the result of a rigged system.[442] The result is predetermined by an appreciation of facts that escapes clear doctrinal expression by tribunals in their rationales for judgment. Problematically, the same people are reappointed in a large number of tribunals, meaning that the same kind of factual appreciation will determine a growing number of cases without providing a legally compelling rationale for each decision. This gives rise to questions of capture.[443] As the dynamics of reappointment are a proven fact of investor–state arbitration,[444] more is necessary to show that arbitral conduct is authoritative as opposed to corrupted or rigged. One means to do so may be to further delve into quantitative analysis of ultimate awards or outcomes.[445] But, a qualitative analysis is similarly desirable.

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435. *See id.*
436. *See id.*
437. *See id.* at 215–20.
438. *See id.* at 224–44.
439. *See id.*
440. *See id.*
441. *See id.* at 215–20.
442. *See* Warren, *supra* note 1.
443. *See* VAN HARTEN, *supra* note 91, at 167–75.
444. *See* Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 423–24 (2014).
445. *See* Franck & Wylie, *supra* note 11, at 520–21 ("The variables most likely to predict outcomes [in this study] were arguably case selection effects, including investor identity and the presence of experience counsel.").

What supernational law theorizes, beyond the current literature, is that there is a substantive reason for arbitral conduct. Inconsistencies in jurisprudence do not creep up because of the operational design of arbitration (though the operational design of arbitration does promote inconsistency);[446] rather, inconsistencies in jurisprudence are a substantive necessity no matter the institutional design chosen for the structuring of supernational transactions between states and foreign non-state actors, due to the incommensurable interests involved.[447]

Thus, supernational law posits that inconsistencies in the jurisprudence are a symptom of the necessarily incommensurable interests underlying the transactions themselves. The complex, cooperative, and contextual nature of supernational intercourse requires that the ultimate decision in a dispute be formulated in terms of the reference points of international or transnational good faith.[448] These reference points themselves are, of necessity, inconsistent because they aim to meet different constitutive values, namely commonweal and commercial profit.[449] Balancing such incommensurate values will necessarily lead to facially inconsistent decisions, depending on how the balance between the values was ultimately struck in light of the factual make up of each case.[450] As the analysis is heavily contextual, abstraction from context will likely lose the regard given to incongruent concerns raised by the losing party.[451] The arbitral process of decision making thus does not distort the law or "rig" the decision;[452] rather, it reflects the balancing of the incommensurate but entangled reliance interests of both state and commercial actors.[453]

VII. CONCLUSION: THE VALUE OF SUPERNATIONAL LAW

This Article, so far, has focused on retheorizing these supernational legal processes to avoid the pitfalls of existing approaches to investor–state arbitration. The framework developed overcomes the internal incoherence of existing approaches and points out how existing processes overcome the apparent asymmetries in investor–state arbitration. There is, however, one remaining question: What is the independent value that makes supernational legal processes worth pursuing?

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446. *See* Sourgens, *supra* note 434, at 224–44.
447. *See* Sunstein, *supra* note 429, at 856–59 (discussing incommensurability).
448. *See supra* Parts III–IV.
449. *See id.*
450. *See* Alexandrov, *supra* note 311, at 205.
451. *See id.*
452. *But see* Warren, *supra* note 1.
453. *See supra* Part III.

A. Depolitization

The most significant constitutive value of international economic law identified in the literature is depolitization.[454] The history of international trade is replete with armed interventions as a means to resolve trade and investment disputes.[455] The current infrastructure for the resolution of investor–state disputes arose directly out of such aborted armed interventions: France and the United Kingdom invaded Egypt following Egypt's nationalization of the Suez Canal;[456] the United States refused to support the intervention and the dispute between the shareholders in the Suez Canal Company and Egypt was resolved by the President of the World Bank.[457] In light of this experience, the World Bank negotiated and adopted the ICSID Convention, discussed in more detail in Part IV, Sections B and D.[458]

It is fair to surmise then that, in the absence of legal processes to resolve large scale natural resource disputes, these disputes would have been resolved by more traditional foreign policy means.[459] Although it is, by and large, unlikely that they would have led to armed interventions to protect expropriated assets, such disputes would probably have been resolved by sheer political and economic might.[460] A pattern of settlements on political terms would then have become part of the expectation of the global community. The resolution of disputes in such a manner, however, would seriously undermine the authority of legal institutions in the global community.[461]

This Article applies and expands upon this depolitization rationale. *First*, supernational law is a theory of how law supplants force[462] because decisions are made by reference to legal principles rather than sheer physical or economic might.[463] But, supernational law also deepens the depolitization rationale: it supplies an independent source of authority for supernational legal processes.[464] A decision is authoritative if its rationale follows the expectations process

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454. *See* Bjorklund et al., *supra* note 40; MONTT, *supra* note 25, at 370–74; *see generally* Sergio Puig, *Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 FORDHAM INT'L L.J. 465, 495–98 (2013) (evaluating and providing a framework for critiquing the claim that the ICSID, through depolitization, balances power between unequal states); Roberts 2015, *supra* note 26, at 388–95.

455. *See* MONTT, *supra* note 25, at 36–38; *see generally* TODD WEILER, THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION, AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT 115–28 (2013).

456. *See* ANTONIO R. PARRA, THE HISTORY OF ICSID 23 (2012).

457. *See id.* at 23–24.

458. *See id.* at 23–24, 94.

459. *See* DUGAN ET AL., *supra* note 21, at 8 (addressing diplomatic protection).

460. *See id.*

461. *See* REISMAN, *supra* note 43, at 101 (discussing dysfunctional operational codes).

462. *See* Bjorklund et al., *supra* note 40.

463. *See id.*

464. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 26 (defining authority).

participants have in legal decision making more generally.[465] This Article showcases how decision processes predictably anchor decision making in the reasonable expectations state and commercial parties have based on the larger liability rules governing their own respective behavior.[466] Decisions thus are not authoritative because they were made by arbitrators empowered to resolve them—a rationale that is itself "political" if the institutions making decisions have been captured[467]—but rather are authoritative because they are in keeping with the expectations process participants have of legal process more generally.[468]

In other words, depolitization is more than mere myth.[469] What drives decision is not unbridled (i.e., "political") arbitrator discretion.[470] Arbitrator discretion is guided by an operational balance of international and transnational interests.[471] This operational code of arbitral decision making may not always be readily apparent on the face of a tribunal's reasoning[472] but emerges when this reasoning is placed in the context of the sections of an award summarizing party submissions.[473] As such, supernational law explains how international economic law remains actually authoritative despite the supposed shortcomings of dispute resolution. Quite contrary to current criticisms, this operational overlap between community expectations and actual decision outcome supports the claim that arbitration is in fact healthy and robust rather than rigged or corrupt.[474]

Second, supernational law moves away from the dispute-based paradigm underlying much of the literature. This Article thus contributes to the growing literature that provides a means of strengthening transactional processes of cooperation between states and commercial actors.[475] This Article identifies principles that inform

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465. *Id.*

466. *See supra* Parts III–IV.

467. *See* KOSKENNIEMI, *supra* note 199, at 589.

468. *See supra* Parts III–IV (detailing the unilateral act and transnational good faith elements of supernational law).

469. *See* REISMAN, *supra* note 43, at 95–104 (distinguishing myth from operational code).

470. *See* SOURGENS, *supra* note 27, at 123–38 (describing the role of discretion in the arbitral decision process).

471. *See supra* Parts III–IV.

472. SOURGENS, *supra* note 27, at 215–20.

473. *See id.*

474. *See* REISMAN, *supra* note 43, at 101–03 (warning of operational codes that "may be profoundly dysfunctional, serving only to protect the entrenched position of elites or particular groups, for example, allowing rewards to be granted on the basis of 'old-boy' crony contacts or class, gender, caste, tribal, or ethnic ties rather the performance merit prescribed by the myth system." Such dysfunction is minimized when the operational code "secure[s] greater and greater realization of many of those values" at the heart of the myth system constitutive of community expectations.).

475. *See* DESIERTO, *supra* note 225, at 373–76, 382.

the rights and obligations of *both* state and commercial entities.[476] In doing so, it assists in avoiding the germination or escalation of disputes by providing a cooperative paradigm that could be used in transaction design, renegotiations of failed settlements, conciliation, or mediation.[477] It thus depoliticizes disputes by providing a collaborative roadmap to prevent them.

B. *Repolitization*

The second constitutive value of supernational legal processes is the appropriate repolitization of decision. A potential flaw of depolitization is the possible assumption that law and politics are fundamentally distinct: legal science is concerned with the derivation of pure results from abstract axioms.[478] It thus places the decision fully beyond the reach of politics.[479]

A full depolitization of law, however, is not logically tenable. Any proposed "pure" or apolitical conception of law still favors certain distributive value outcomes over others.[480] These distributive outcomes are, by their very nature, political in that they actually constitute just one possible distribution of value rather than the only conceivable distribution of value.[481] In simple terms, the law makes winners and losers; a pure conception of law determines who wins and who loses, not why winners should win and losers should lose.[482] The choice of distributive paradigms imposed by legal decision is beyond any purely legal analysis.[483] Advocating "purely" legal solutions to distributive problems thus tends to justify deeply political choices as formally legal ones by sleight of hand.[484] The critique of international economic law, unsurprisingly, draws attention to this problem:[485] it bitingly regards international legal instruments as quasi-colonial

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476. *See supra* Part VI (combining the unilateral act state liability and transnational investor liability elements of supernational law into a single process of decision).

477. *See* Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 196–201 (2007) (discussing first-tier dispute resolution and its problems); DESIERTO, *supra* note 225, at 373–76, 382.

478. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 106–07.

479. *See id.*

480. *See* Franck & Wylie, *supra* note 11, at 494–97 (analyzing investment treaty arbitration outcomes).

481. *See* KOSKENNIEMI, *supra* note 199, at 589 (discussing the "political" element of international law).

482. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 107–08.

483. *See generally id.*

484. *See* KOSKENNIEMI, *supra* note 199, at 589 (discussing the "political" element of international law).

485. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 305 (2010); VAN HARTEN, *supra* note 91, at 174–75.

politics propagated by the tip of a pen rather than the barrel of a gun.[486]

To be desirable and to have authority, supernational law must not divorce law from policy.[487] It submits instead that supernational legal processes are authoritative *because* they take seriously the policy concerns of the state, as well as those of the commercial counterparty.[488] The values of commonweal and sustainable profitability are central to the supernational decision-making process because of the broadly contextual approach to decision making it adopts.[489] These values are deeply political because they mediate between different conceptions of political economy, from libertarian regard for property to social democratic concerns for the broader distributive repercussions of unbridled competition.[490]

Put differently, supernational legal processes create legal rights and obligations because of the entangled reliance interests created by global investment flows.[491] These reliance interests make sense because the state and the investor seek to create collaborative advantages neither could achieve on its own.[492] It is the difference in their interests that permits the collaborative advantages to materialize.[493] Thus they each must pay heed to the interests of the counterparty to achieve their own end.[494] By placing this collaborative rationale at the heart of the decision-making process, supernational law makes the policy motivations of both actors relevant to legal decision. It embraces the policy needs of host states as a core operative piece of its decision-making process.

Supernational law does not blindly impose quasi-colonial politics under the guise of legal documents.[495] Its prescriptions are premised in the reasonable reliance interests created by supernational cooperation. Understanding the specific content of such prescription requires an appraisal of the policy implications of the international investment flows in question. This appraisal balances the policy goals of the state against the interests of commercial actors as an instrument to their achievement. It is only following such an appraisal that

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486. *See* MONTT, *supra* note 25, at 370 (discussing the potential of gunboat arbitration).

487. *See* LASSWELL & MCDOUGAL, *supra* note 28, at 26 (defining authority).

488. *See supra* Parts III–IV.

489. *See id.*

490. *See* Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 654 (2007) (discussing the possible political economies of investment law).

491. *See supra* Part V.

492. *See id.*

493. *See* FISHER & URY, *supra* note 219.

494. *See supra* Part V.

495. *See* MONTT, *supra* note 25, at 370.

supernational prescriptions can be applied to a specific dispute, be it in an arbitral award, or in a more informal mediation or conciliation.

Supernational law thus explains why legal decision making in its field of application is desirable for the host state. Decision making in matters central to a state's wellbeing is not subject to *ad hoc* military, political, or economic pressure, as it might otherwise be.[496] Decision making further comports with the expectations that states have of legal process more generally.[497] But decision making still takes seriously the host-state's policy goals for international investment flows and integrates these goals within the legal decision-making process.[498] It imposes the same kind of obligation on the state and the foreign investor and protects mutual interests rather than unilateral interest.[499] Far from rigged, supernational legal processes are fully operationally and cognitively open.

C. *The Allocation Function of Commercial Risks and Responsibilities*

If supernational law is beneficial to host states, it is a natural inclination to think that it stands to the detriment of commercial actors. It is typical to view international legal decision as a zero-sum game where whatever favors the host state must be commercially disadvantageous. From this perspective, supernational law would prove commercially unpalatable. The perception that international investment law is a zero-sum game is premised in a dispute-based paradigm.[500] Because much of the legal material on international investment arises out of disputes, legal scholarship frequently tracks the contentious mode underlying these materials.[501] This zero-sum-game mentality is puzzling, however, because investment flows in particular are considered to lead to positive gains for all involved.[502] Commercial interests, in fact, are best served if a zero-sum-game approach is abandoned;[503] commercial actors enter into transactions to see them come to fruition not to litigate disputes arising under them.

If all commercial transactions were zero-sum games, incentive for breach of contract would be high, as any future change to deal

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496. *See generally* Bjorklund et al., *supra* note 40.

497. *See supra* Part IV.

498. *See id.*

499. *See id.*

500. *See generally* Franck & Wylie, *supra* note 11, at 494–97 (analyzing investment treaty arbitration outcomes).

501. *See supra* Part II.

502. *See* Stephen M. De Luca, *Historical Retrospective and the Future Role and Jurisdiction of the U.S. Court of International Trade in the New Millennium*, 26 BROOK. J. INT'L L. 801, 810 (2001) ("The international trade regime was based on Smithian free trade theory, which holds that free trade promotes mutual gains through greater specialization.").

503. *See id.*

parameters would bring about the conditions for an efficient breach.[504] One party could achieve more value by defecting from the transaction than remaining in it.[505] If, however, transactions generate value for both parties, there is an incentive for cooperation even in the context of changed circumstances. Logically, commercial actors would only be willing or able to enter into short-term transactions under a zero-sum-game paradigm because of the risk of adverse market changes. As investment contracts are the exact opposite of short-term investment—often running for a quarter century or more—investment would seem a commercially silly enterprise if commercial actors considered these transactions to be zero-sum games.

In order to achieve value-added benefits, the law must assist in assigning commercial risks and responsibilities. Commercial actors must be able to price transactions to determine whether the rate of return presented by an opportunity is adequate and sustainable for their business. To make such a calculation, commercial actors use legal instruments to assign risk. As not every situation can be anticipated in the contractual instruments, commercial actors rely on the underlying applicable law in order to fill the gaps for any unforeseen issues.

Supernational law assists commercial actors in generating positive value because it provides a clearly identifiable process for decision making. This process imposes obligations on commercial actors premised on commercial practice.[506] It thus permits commercial actors to make efficient predictions of their own exposure.[507] This process further grants rights to commercial actors that significantly limit country risk.[508] This limitation is not absolute, nor would a commercial actor expect it to be, given the recognition of country risk in almost every *force majeure* clause in international commerce.[509] But, it does create a reasonable window for economic cooperation with a state actor: the state can be expected to keep its word in good faith because failure to do so leads to enforceable liability consequences.

The benefit of a supernational law conception of international economic relations is its ultimate simplicity. It is anchored in an understanding of good faith. When parties with fundamentally different interests and experiences transact with each other, they must confront the fact that they will each create reliance interests in the other. These reliance interests will combine to create sustainable cooperative enterprises when each side gives due regard to the policy

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504. For a fuller theoretical discussion of efficient breach and cooperative rationality, see Frédéric G. Sourgens, *Reason and Reasonableness: The Necessary Diversity of the Common Law*, 67 ME. L. REV. 73, 113–16 (2014).

505. *See id.*

506. *See supra* Part V.

507. *See id.*

508. *See id.*

509. *See id.*

interests of the other. Failing that, future transactions will be encouraged if the disputes are resolved with an eye to the value of the cross-entanglement of mutual reliance interests. Supernational law achieves both because it takes seriously the incommensurability of the interests of supernational actors and conceives of law as their intermediation rather than as the imposition of one set of interests as supreme.