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Recalibrating the Investment Treaty Arbitration System Through Non-Compartmentalized Legal Thinking

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I. INTRODUCTION

A recent book honoring Detlev Vagts [1] takes stock of established fields of "transnational law,"[2] such as the protection of property and investment. The book

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also explores new areas of law that are in the process of detaching themselves from the nation-state, such as global administrative law and the regulation of cross-border lawyering, including in the arbitration context. Vagts' seminal coursebook, "Transnational Legal Problems," originally co-written with Henry Steiner in the 1960s, seeks to develop a conceptual framework for understanding transnational problems, i.e., those problems that involve more than one legal and political system. By reaching beyond traditional legal boundaries, that book has been instrumental in promoting non-compartmentalized legal thinking, and the same can be said about the transnational-law approach in general.

In his foreword to the *Vagts Festschrift*, Harold Hongju Koh, a former dean of Yale Law School and a prominent transnationalist, defines what he calls "transnational legal process" as "the theory and practice of how public and private actors interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law."[3] According to Koh, transnational legal process:

> focuses on the transnational, normative, and constitutive character of global legal process: transnational, in the sense of cutting across historical private-public, domestic-international dichotomies: normative, in the sense of illustrating how legal rules generated by interactions among transnational actors shape and guide future transnational interactions; and *constitutive*, in the sense of dynamically mutating from public to private, domestic to international and back again in a way that reconstitutes national interests.[4]

A particularly instructive example, or manifestation, of transnational legal process, as defined above, is the application and interpretation of norms of international economic law embedded in investment treaties in the course of resolving disputes

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[1] *See* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY—ESSAYS IN HONOUR OF DETLEV VAGTS (Pieter H.F. Bekker, Rudolf Dolzer and Michael Waibel eds., 2010) [hereinafter VAGTS FESTSCHRIFT]. Vagts was the Bemis Professor of International Law Emeritus at Harvard Law School. The author, who served as Vagts' research assistant in 1991, would like to dedicate this article to Vagts, who passed away at his home in Cambridge on August 20, 2013.

[2] In his 1956 Storrs Lectures at Yale, Philip Jessup defined transnational law as "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories." PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

[3] Harold Hongju Koh, *Foreword* to VAGTS FESTSCHRIFT, *supra* note 1, at xv, xvi.

[4] *Id.* at xvii; *see also* Harold Hongju Koh, *Transnational legal process*, 75 NEB. L. REV. 181 (1996); Craig Scott, *'Transnational Law' as Proto-Concept: Three Conceptions*, 10 GERMAN LAW JOURNAL 859 (2009) (presenting three contrasting approaches to the notion of "transnational law").

between foreign investors and states hosting their investments through the instrument of arbitration as an alternative to litigation.[5]

As such, investment treaty arbitration lies squarely at the interface between national and international developments. The disputing parties and their adjudicators, called "arbitrators," typically represent different legal and political systems. In investment arbitrations, the private sector, represented by individual or corporate investors, confronts the public sector, represented by host country governments. Moreover, public law, not only public international law but also host country regulations and administrative decision-making by state actors, meets private law, especially in cases involving an alleged breach of contract based on an "umbrella clause" in an investment treaty[6] and in cases governed by public international law as well as host state law. Rather than being governed by one set of laws, investment disputes routinely involve multiple sets of legal norms, i.e., various national laws and bilateral and multilateral treaties, all in the context of fact-intensive cases stemming from complicated long-term relationships between foreign investors and host countries.

A transnational-law based approach analyzes the complexities of investor-state arbitration from the perspective of an interactive process involving the various participants and stakeholders in investment arbitrations, i.e., both state and nonstate formal participants as well as nonstate actors as informal interlocutors.[7] In this context, the following stakeholders or actors who may influence the ultimate outcome of investor-state cases can be identified:

- Individual or corporate investors as claimants
- Sovereign states or state entities as respondents[8]
- Arbitrators as gatekeepers (jurisdiction) and decision-makers
- Party counsel and expert witnesses as decision-shapers
- Arbitral institutions as administrators

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[5] As such, the phenomenon of investment arbitration is perhaps more aptly described as a transnational "issue" or process transcending national frontiers, rather than assimilating it to the "actions" or "events" across borders that are mentioned in Jessup's famed passage. *See* Scott, *supra* note 4, at 864.

[6] *See, e.g.*, RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 153–62 (2008).

[7] *See* Scott, *supra* note 4, at 868.

[8] As parties to the underlying investment treaty, the respondent state and the investor's home state could also be described as "law-givers" and tribunals as "law-appliers." *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 62 (2013).

- NGOs as public interest representatives or *amici curiae*[9]

These various stakeholders have not been fully examined in the literature, but their roles and contributions need to be understood to appreciate the regime in which they operate and, especially, the challenges that regime faces. This article will argue that the challenge of recalibrating the investment treaty arbitration system to the satisfaction of the system's various stakeholders is best met through a transnational-law approach, given the advantages offered by the inherent non-compartmentalized nature of such an approach.

A transnational-law approach to analyzing and understanding contemporary issues of investment treaty arbitration with a view to accomplishing a widely acceptable recalibration of the investment treaty arbitration system best reflects the hybrid, *sui generis* nature of the developing phenomenon of investor-state arbitration[10] and the fact that "[t]he investment system exists at the intersection of multiple fields."[11] Investment treaty arbitration, which is the preferred method for resolving today's investment disputes, is best understood as a process blending the rules and customs or traditions pertaining to arbitration between commercial parties—itself a blending of Common Law and Civil Law concepts and developed domestically before being adapted to international settings—with the rules and customs or traditions of public international law, including institutions such as the International Court of Justice (ICJ). Clarifying and appreciating this blending of systems—not only the rules but also the customs and traditions associated with each—will guide arbitrators in defining the content of rules of international law they are charged with applying in individual cases, and will help those affected by their decisions in understanding and accepting the process underlying these decisions and the rulings themselves.

II. ADDRESSING CHALLENGES THROUGH NON-COMPARTMENTALIZED LEGAL THINKING

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[9] In addition, third-party funders or financiers increasingly have a stake in the outcome of investment arbitrations, but unlike other stakeholders they do not contribute to law formation or diffusion as part of the arbitral process. *See* CECELIA OLIVET & PIA EBERHARD, CORPORATE EUROPE OBSERVATORY & THE TRANSNATIONAL INSTITUTE, PROFITING FROM INJUSTICE—HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM 56–63, *available at* http://www.tni.org/briefing/profiting-injustice. As the above list of stakeholders shows, the notion of "transnational law" includes "contexts in which there are one or more actors with connections outside the jurisdiction in which all physical acts or events are taking place." Scott, *supra* note 4, at 865.

[10] *See generally* Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151 (2003); Roberts, *supra* note 8, at 75–93.

[11] Roberts, *supra* note 8, at 49. Remarkably, Roberts nowhere mentions transnational law.

By analyzing international investment law and arbitration through a comparison with regime theory developed by international relations theorists, Jeswald Salacuse has identified certain challenges that he believes "have the potential power to cause a divergence of State expectations and thus undermine the regime that has been painstakingly constructed over the last sixty years," leading him to conclude that "[t]he international investment regime will require wise management and flexible leadership in the future if it is to withstand the challenges."[12]

The international investment regime informs the body of law and procedure on which arbitrators charged with adjudicating investment disputes between legal or natural persons and host states rely in issuing rulings. However, that regime is far from uniform: It comprises over 3,000 bilateral and multilateral investment treaties addressing issues relevant to cross-border investments, usually for the purpose of protection, promotion, and liberalization of cross-border investment.[13] These treaties contain a wide variety of often broadly worded, cross-referencing provisions—making for a "spaghetti bowl" of investment agreements imposing overlapping obligations from which it is difficult to distill clear-cut rules for application in individual cases (see Fig. 1).

Salacuse also notes that "[f]or regime theorists, the endurance of a regime depends on two factors: regime effectiveness and regime robustness," the latter referring to "the ability of the regime to withstand external threats and challenges."[14] The greatest challenge to the investment treaty arbitration system or regime is coming from within, i.e., from the participants. There are no fundamental flaws in the regime's design. it is in fact the state and nonstate actors within the regime that constitute its greatest threat potential.

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[12] Jeswald W. Salacuse, *Making transnational law work through regime-building: the case of international investment law*, *in* VAGTS FESTSCHRIFT, *supra* note 1, at 406-30, 430. In Salacuse's view, the international investment regime faces four salient challenges: (1) The justification for the regime's continued existence becomes problematic if the regime is judged not to have achieved its objective of increasing international investment; (2) The regime's decision-making processes, especially the perceived lack of transparency and independence of arbitrators, are increasingly called into question by regime members; (3) Certain parts of the world are losing faith in the ability of the regime to stimulate global prosperity and economic development through increased investment; and (4) Serious regional and global economic crises of recent date pose external threats to the international investment regime. *Id.* at 428–30.

[13] *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT ("UNCTAD"), WORLD INVESTMENT REPORT 2012 84, *available at* http://unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf (last accessed May 1, 2013).

[14] Salacuse, *supra* note 12, at 428.

A recent contribution to this Journal refers to "the slow-burn crisis of legitimacy that has dogged the [international investment] regime for more than a decade,"[15] while a recent report published by the United Nations Conference on Trade and Development (UNCTAD) points to a number of "cross-cutting issues and concerns" and "systemic challenges."[16] The latter source describes "[t]he continuing trend of investors challenging generally applicable public policies, contradictory decisions issued by tribunals, an increasing number of dissenting opinions [and] concerns about arbitrators' potential conflicts of interest" as illustrative of "the problems inherent in the system."[17] UNCTAD laments the fact that "[w]hile reform options abound, their systematic assessment . . . remains wanting . . . ."[18] Assuming those problems are indeed "inherent" in the system, the emphasis on arbitrators is unmistakable and we will, therefore, focus on these actors.

If one agrees that the investment arbitration regime, as supported by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[19] and a number of treaty and non-treaty instruments expressing arbitral consent, is in need of recalibration to withstand the challenges identified by Salacuse and others, how should such a recalibration be approached or undertaken? Recent studies have focused on public/private law paradigms in comprehending the complex concept of investment treaty arbitration,[20] or have analogized the investment law regime to a domestic administrative agency.[21] Whatever value such approaches may offer, the goal should be to find, through non-compartmentalized thinking, "attractive ways to modulate the regime and soften the too-frequent posture of the problem as a binary choice between preserving the regime in its precise current form or abandoning it entirely."[22] As Koh has pointed out:

> The central challenge for international lawyers in the 21st century is "confronting complexity." What that means—in this and every setting that modern international lawyers face—is avoiding simplistic analogies and short-sighted solutions in favor of thoughtful, nuanced approaches

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[15] Julian Davis Mortenson, *Reciprocity and the Regulatory Function of International Investment Law*, 54 HARV. INT'L L.J. ONLINE 124 (2013).

[16] UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA ISSUES NOTE, No. 1, at 23–25, (May 2013), *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

[17] *Id.* at 25.

[18] *Id.*

[19] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 17 U.S.T 1270, 575 U.N.T.S. (1966) [hereinafter ICSID Convention].

[20] *See* Roberts, *supra* note 8.

[21] *See* Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391 (2012); *see also* Mortenson, *supra* note 15, at 124 (responding to Yackee's article).

[22] *See* Mortenson, *supra* note 15, at 136.

> that might deliver lawful and durable solutions to complex global problems.[23]

Claims that the current international investment regime "is neither fair, nor independent, but deeply flawed and business-biased" and in need of "a root-and-branch review"[24] should be dismissed as belonging to the "abandoning" category. It has rightly been pointed out that "suggestions of pro-investor bias may not quite match the data."[25] According to UNCTAD's latest report, of the overall number of concluded known treaty-based cases in 2012, totaling 244, "approximately 42% were decided in favour of the State and approximately 31% in favour of the investor," while 27 percent of the cases were settled.[26]

The abovementioned challenges feature in a context in which investment arbitration continues to boom. Recent figures indicate that the total number of known treaty-based arbitrations reached 518 in 2012, a record year for public case filings.[27] The majority of these cases, which have involved some 95 states, rely on bilateral investment treaties. The number of cases brought before the International Centre for Settlement of Investment Disputes (ICSID), the World Bank's arbitration institution, while remaining steady during the past decade, has peaked in the past two years.[28]

Taking a transnational-law approach, one that cuts across legal systems and focuses on the roles and contributions of multiple stakeholders as part of an interactive process of decision-making, could usefully guide any recalibration, which need not take the shape of a formal process of revision.[29] Formal revision may not be feasible anyway,

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[23] Harold Hongju Koh, Legal Adviser, U.S. Department of State, Statement regarding Syria at the American Society of International Law Annual Meeting (Mar. 30, 2012), *available at* http://opiniojuris.org/2012/03/30/statement-regarding-syria/.

[24] OLIVET & EBERHARD, *supra* note 9, at 72.

[25] Mortensen, *supra* note 15, at 131 (citing various studies).

[26] *See* UNCTAD, *supra* note 16, at 1.

[27] *See id.*

[28] *See* ICSID's website, https://icsid.worldbank.org/ICSID/Index.jsp. In 2012, ICSID registered a record of 48 new arbitration cases. As of December 31, 2012, ICSID had registered 419 cases under the ICSID Convention and Additional Facility Rules. *See* INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, THE ICSID CASELOAD – STATISTICS (ISSUE 2013-1), at 7, 21, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics

[29] Indeed, ICSID introduced a number of changes to the arbitration mechanism administered by it through a series of amendments to its Rules of Procedure for Arbitration Proceedings in 2006, affecting the independence of ICSID arbitrators, the ability of non-parties to intervene and attend hearings in ICSID proceedings, the ability to use fast-track procedures for indicating interim relief and dismissing groundless claims, and the public disclosure of ICSID awards. *See* Rules of Procedure for Arbitration Proceedings, §§ 6, 32(2), 37(2), 41(6), 48(4), *in* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES,

given that amendments to the ICSID Convention require a majority vote of two-thirds of the members of ICSID's Administrative Council, currently comprising 148 member states.[30] The existing system does not seem to be in need of formal revision, given that only three countries, namely, Bolivia, Ecuador, and Venezuela, have recently withdrawn from the ICSID Convention—hardly the sign of a system-in-crisis.

Informally, the various participants and stakeholders in investment arbitrations, which can be said to be the source of the threats or challenges to the investment arbitration regime, each have a role to play in staying true to the nature of the unique process to which they signed up or in which they take an interest, and in perfecting it.

III. UNDERSTANDING THE ROLES AND CONTRIBUTIONS OF KEY PARTICIPANTS

Before discussing the role and contributions of arbitrators in investment treaty cases, this section will begin by briefly addressing the position of the disputing parties and of the institutions administering investment arbitrations, the two stakeholders that are involved in appointing the arbitrators. These three stakeholders are at the heart of the investment treaty arbitration system and understanding their role with regard to any recalibration of the kind discussed here is, therefore, key.

A. Private claimants and sovereign respondents as formal participants

Salacuse assigns a central role to "the parties' expectations" in the context of the challenges facing the international investment regime.[31] Given that the arbitration process is only as good as the quality of the arbitrators conducting it, the parties to investment arbitration cases have the primary responsibility to appoint competent arbitrators, keeping in mind that the arbitrators are not only the gatekeepers and decision-makers, but in their decision-making also play the role of being the guardians of the system or regime in which they function.[32]

The parties also have an implied duty to participate in the arbitral process in good faith.[33] In accordance with this duty, the parties, especially the respondent states,

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CONVENTION, REGULATIONS, AND RULES, Doc. ICSID/15 (Apr. 10, 2006), *available at* https://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

[30] *See* ICSID Convention, *supra* note 19, art. 66(1).

[31] *See* Salacuse, *supra* note 1, at 428.

[32] *See* OLIVET AND EBERHARD, *supra* note 9, at 35 ("… investment arbitrators become the guardians of investment arbitration, and confidence in the system is based on their perceived independence.").

[33] *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 218 (2004).

should not entrust the adjudication of their case to individuals who are not well-versed in the applicable governing law, which typically is or includes public international law, or who might be perceived as lacking the requisite independence and impartiality or the time needed to provide a speedy award that is well-reasoned and is sound in international law.

B. Arbitral institutions as administrators

Institutions administering investment treaty arbitrations have the responsibility to appoint suitable arbitrators whenever they are called upon to make appointments for, or in lieu of, the parties. ICSID bears a special responsibility with regard to the appointment of members of Annulment Committees charged with deciding challenges to ICSID awards, often including post-award enforcement issues.[34] Thus, they should not appoint individuals who have a reputation for taking a uniquely "nationalist," as opposed to transnationalist, approach to core aspects of international arbitration, including the controversial national law instrument of discovery.[35] Moreover, it may not be prudent for arbitral institutions to appoint human rights scholars to sit as presidents of tribunals likely to assess claims regarding environmental degradation or exculpatory defenses derived from human rights law in cases revolving around property protection.

The arbitral institutions also should be mindful of the aspects of the international arbitral process that have attracted criticism. This includes the apparent lack of understanding, on the part of users as well as the outside world, of the criteria such institutions apply in appointing arbitrators, the criteria for serving as arbitrator with a given institution, the bases for decisions pertaining to arbitrator challenges, which are especially prevalent in the context of investment arbitrations, and the quality control that users can expect from the review or scrutiny of awards.[36]

C. Arbitrators as decision-makers

In this section, our focus will be on the arbitrators' central role as decision-makers regarding claims brought by foreign investors against host states. We will examine how arbitrators have acquitted themselves of their task of administering justice in arbitral disputes governed by public international law and how their legal analysis in such disputes might profit from the transnational-law approach advocated here and might assist in the system's recalibration.

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[34] *See* ICSID Convention, *supra* note 19, at arts. 38, 52, para. 3.

[35] By selecting the law of a certain jurisdiction as the governing law, the parties are not considered to have chosen the conflicts of law rules, let alone the rules of procedure, of that jurisdiction.

[36] *See* posting of Sophie Nappert, snappert@3VB.com, to ogemid@ogeltdm.com (Mar. 28, 2013) (on file with author).

It was pointed out above that the arbitration process is only as good as the quality of the arbitrators conducting it. The arbitrators should be especially aware of the transnational legal process in which they are engaged, not only in recognizing that the parties opted for international arbitration as a dispute resolution *alternative* to litigation ("*A*DR"), but also, and especially, in ruling on the substance of the applicable law, particularly when that law is public international law. Arbitrators should be mindful of the fact that "[i]nvestment treaties [from which they derive their authority] are clearly creatures of public international law" and, as such, they "are substantively governed by public international law."[37] The fact that these treaties typically feature broadly worded, cross-referencing provisions means that arbitrators are confronted in individual cases with complex questions of international law and are called upon to interpret such provisions.

In addressing questions of international law, international lawyers typically turn to Article 38 of the ICJ Statute, which includes what is perhaps the most authoritative listing of the formal sources of international law.[38] Paragraph 1 of Article 38 mentions three such sources: (a) "international conventions," or treaties, establishing rules expressly recognized by the states parties to a given treaty; (b) "international custom, as evidence of a general [state] practice accepted as law;" and (c) "general principles of law."[39] Article 38 is relevant in the context of ICSID arbitrations, because the ICSID Convention is modeled after the ICJ Statute and is understood to incorporate Article 38.[40]

Article 38 also identifies two subsidiary means for the determination of rules of international law, namely, "judicial decisions" and "the teachings of the most highly qualified publicists of the various nations."[41] In other words, decisions, including arbitral awards, and scholarly writings are not formal sources of international law, but they may provide evidence of rules of international law.

While Article 38 provides the classic toolbox that international lawyers have at their disposal to determine rights and obligations under international law, it has its shortcomings.

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[37] *See* Roberts, *supra* note 8, at 45.

[38] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19 (6th ed. 2003); Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 677 (Andreas Zimmerman et al. eds., 2006).

[39] *See* Statute of the International Court of Justice art. 38(1) [hereinafter ICJ Statute].

[40] The Report of the Executive Directors on Article 42 of the ICSID Convention, which addresses choice-of-law issues, confirmed that "[t]he term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 4 I.L.M. 524, 530 (1965).

[41] ICJ Statute, *supra* note 39.

First, formal sources merely give a rule its legal validity. They are only the starting-point for defining the substantive content of a given rule—what is called the "material" source of a rule.

Second, the ICJ Statute dates back to 1945, when international law was not as well-developed as it is today. The period following World War II saw the development of a body of international human rights law, international humanitarian law, international economic law, as well as the emergence of "soft law." Given that international law is constantly evolving, the sources of international law listed in Article 38 of the ICJ Statute are not necessarily exhaustive. If it were possible to amend the ICJ Statute, Article 38 probably would be re-written to include other sources such as declaratory resolutions of intergovernmental organizations.

In 1945, international law was generally referred to as "the law of nations," or *jus gentium*, a term reflecting a state-centered view of norm-making.[42] The post-War emergence of intergovernmental organizations, which were recognized as possessing international legal personality by the ICJ in 1949,[43] and the development of fundamental human rights belonging to the individual, in combination with the increasing mobility of people, capital and goods, has brought state and nonstate subjects and the laws that apply to them into a single social and legal context. Investment treaty arbitrators operate within this context.

In an interconnected world, investors, whether they are companies or individuals, must understand their rights and obligations under international law with a view to determining their remedies against host states and assessing the potential impact of extraterritorial regulation of transboundary activity and of such activity itself, including on the local population. Host countries must understand the limits of their influence over foreign investors. This new reality requires an expansion of the legal horizon beyond classical international law and a state-centered view of norm-making. It also requires arbitrators to appreciate this dynamic in selecting their methodology for resolving investment disputes.

In this connection, a review of a database such as Investor-State LawGuide,[44] a search engine comprising hundreds of investment awards, reveals a troubling trend. The "Article Citator" tool offered by that database enables one to search for references in

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[42] *See* VAGTS FESTSCHRIFT, *supra* note 1, at 1. The titles of the leading U.S. textbooks of the first half of the 20th century also reflect this view. *See, e.g.*, JAMES L. BRIERLY, THE LAW OF NATIONS (1928); PHILIP C. JESSUP, A MODERN LAW OF NATIONS (1948).

[43] *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (April 11, 1949); *see also* PETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS 58-59 (1994).

[44] *See* INVESTOR-STATE LAWGUIDE, http://investorstatelawguide.com (last accessed Jan. 30, 2013).

the arbitral case law to Article 38 of the ICJ Statute. Because of the public nature of ICSID arbitration, most of the awards in the database concern ICSID awards. One would expect arbitral tribunals charged with adjudicating international law disputes to make regular references to Article 38 in their merits decisions, if only to set a methodological framework for analyzing the legal issues presented by an applicable investment treaty. Surprisingly, my search yielded only a handful of hits pointing to ICSID merits decisions out of a pool of some 250 concluded treaty-based cases.

Because investment tribunals are confronted with broadly worded treaty norms—e.g., "fair and equitable treatment" or "treatment in accordance with international law"—calling for application and interpretation in individual cases, one would assume the case law to include routine references to Article 31 of the Vienna Convention on the Law of Treaties.[45] While my search yielded over 100 case references to the general rule, or canon, of treaty interpretation reflected in Article 31, paragraph 1, of the Vienna Convention, the remainder of Article 31 and Article 32, concerning supplementary means of interpretation, yielded only a few hits. This is surprising, given that the ICJ has stated that the principles reflected in these two articles "may in many respects be considered as a codification of existing customary international law on this point."[46] Article 31, paragraph 3(c), of the Vienna Convention, which provides that in treaty interpretation "[t]here shall be taken into account, together with the context . . . [a]ny relevant rules of international law applicable in the relations between the parties," offers an opening for arbitrators to address any imbalance in the rights and obligations of the parties to an investment arbitration by taking into account norms outside of the applicable investment treaty, including those derived from human rights or trade law. My search yielded only 15 case references to Article 31, paragraph 3(c) from among the above-mentioned pool of cases.

These findings suggest that arbitrators by and large are not working with these key provisions of international law in approaching questions of methodology for resolving investment disputes governed by public international law.[47] In denial of its nature and origins, some arbitrators apparently treat investment arbitration as a modern type of Common Law litigation largely, or even uniquely, based on precedent, even though Article 38(d) of the ICJ Statute identifies "decisions" as a subsidiary means for finding international law, and not as a formal source. My search yielded only a dozen case references to Article 38(d).

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[45] Vienna Convention on the Law of Treaties, arts. 31, 32, *opened for signature* May 23, 1969, 1155 UNTS 331. *See also* Roberts, *supra* note 8, at 50 ("[i]nvestment treaties are creatures of public international law because they are interstate agreements that must be interpreted in accordance with the Vienna Convention on the Law of Treaties.").

[46] Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, 1991 I.C.J. 53, at 69–70, para. 48 (Nov. 12).

[47] *See* Andrea Saldarriaga, *Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement*, 28 ICSID REVIEW 197 (2013).

The use of private arbitrators to adjudicate investor-state disputes undeniably has led to a shift away from the formal sources of international law toward what is known in Common Law legal systems as "judge-made" law, even though it is widely accepted that international law does not recognize a doctrine of precedent.[48] Ruling from the bench, private arbitrators of widely differing national and legal backgrounds assess, and sometimes correct, the measures taken by sovereign states vis-à-vis foreign investors, and they define the content of broadly worded conventional norms in the process. The emerging case law suggests that investment arbitrators are increasingly addressing the problems that are placed before them by exclusively or preliminarily resorting to soft law and case law, instead of engaging in a thorough independent analysis of the formal sources of international law.[49]

While the role of precedent in investment treaty arbitration has received scant attention,[50] in the absence of a doctrine of precedent applying to international courts or tribunals and in light of the distinction between primary sources and subsidiary means in Article 38 of the ICJ Statute, any investment tribunal wishing to assign value to arbitral precedent would be well-advised to adhere to the methodology followed by the ICSID tribunal in *Gas Natural*.[51] That tribunal emphasized that it had "rendered its decision *independently*, *without considering itself bound by any other judgments or arbitral awards*," but "thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties."[52]

Moreover, the following authoritative statement from the ICJ can be said to apply by analogy to every investment tribunal adjudicating investment treaty disputes governed by international law:

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[48] *See* Roberts, *supra* note 8, at 62; Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, J. INT'L ARB. 129, 134 (2007).

[49] Commission, *supra* note 48, at 132 ("international investment law now principally develops through case law . . . ."), 148 ("As is obvious from even a cursory review of the practices of ICSID tribunals manifested in their awards and decisions, citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate.").

[50] The study by Commission, *supra* note 48, remains one of the few empirical analyses of the role of precedent in investment treaty arbitrations.

[51] Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, June 17, 2005, *available at* http://italaw.com/cases/documents/477.

[52] *Id.* at para. 36. Another tribunal has pointed out that "in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State." SGS Société Générale de Suveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, Jan. 29, 2004, para. 97, *available at* http://ita.law.uvic.ca/documents/SGSvPhil-final_001.pdf.

> The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute.[53]

An approach that does not focus on independent international law analysis, but takes previous rulings by other tribunals as the starting-point from which further analysis flows, could threaten the integrity of the investment treaty law regime, especially if arbitrators not well-versed in public international law affirm rulings of similarly placed arbitrators that are not sound in international law.[54] If, on the other hand, arbitrators in investment treaty cases were to adhere to the aforementioned guidelines and methodology, they would reduce concerns about contradictory and flawed rulings and they could usefully contribute to the process of diffusion of international economic law, especially what William Twining has called cross-level diffusion, i.e., transplantation and reception of law among, between, and across various legal systems—domestic and international.[55] This concept, derived from the social sciences literature, is particularly suited to identifying and explaining the content of ambiguous rules of international law.

What is especially interesting about the interdisciplinary approach offered by the combination of transnational law and diffusion studies is that, instead of focusing on legal rules in isolation—what is referred to as "black-letter law" in the United States—such an approach emphasizes the roles and contributions of a variety of actors, termed "agents of diffusion," in shaping legal content in an interactive setting. In the investor-state arbitration context, the agents of diffusion are individual or corporate claimants and sovereign respondents as parties, arbitrators as decision-makers, party counsel and expert witnesses as decision-shapers, arbitral institutions as administrators, and non-governmental organizations as public interest representatives (see Fig. 2).

The approach outlined here enables one to move away from an isolated, single-dimension focus on rules or legal systems—i.e., what are the rules?— and to focus instead on the context in which rules develop and are applied.[56] Understanding the

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[53] Fisheries Jurisdiction (U.K. v. Iceland), Judgment, 1974 I.C.J. 3, at 9, para. 17 (July 25).

[54] *See also* Commission, *supra* note 49, at 154 (citing AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Jurisdiction, Apr. 26, 2005, para. 22, *available at* http://ita.law.uvic.ca/documents/AES-Argentina-Jurisdiction_000.pdf ("[r]epeating decisions taken in other cases, without making the factual and legal distinctions … may affect the integrity of the international system for the protection of investments.")).

[55] WILLIAM TWINING, DIFFUSION OF LAW: A GLOBAL PERSPECTIVE 15 (Dec. 2004) (unpublished manuscript, University College London), *available at* http://ucl.ac.uk/laws/academics/profiles/twining/diffusion.pdf.

[56] That context includes the application of legal norms by arbitrators against immensely fact-intensive backgrounds, a factor that is insufficiently appreciated by the existing literature.

context of a developing rule that informs an arbitral decision enables those involved and affected to gain a better appreciation for, and acceptance of, the content of that rule, which in turn makes it easier to apply and enforce the rule in individual situations, including in arbitrations used by foreign investors and their host states in settling high-stakes differences.

By embracing the approach outlined above, arbitrators could ensure that their rulings in investment disputes not only are consistent, but are arrived at in accordance with sound methodology regarding legal and factual analysis. Uniform adherence to sound methodology is the best guaranty for consistent decision-making.

IV. CONCLUSION

Today's interconnected world, involving relationships and disputes that are governed by multiple sets of legal norms, requires an expansion of the legal horizon beyond classical public international law and state-centered law-making. The approach introduced by transnationalist scholars like Jessup and Vagts is particularly suited to undergird such an expansion. It has been pointed out that "Jessup posited 'transnational law' as an expansive umbrella category for all 'law' involved in regulation – what is called, with increasing frequency, the 'governance' – of *the transnational* ('actions or events that transcend national frontiers' whether involving state or non-state actors)."[57] As such, it can be "a useful way to approach aspects of law in the contemporary world,"[58] the investment treaty system being a prominent example. Investment treaty arbitration involves both the sovereign regulation of foreign investment by state actors and the adjudicatory "regulation," through assessment, and sometimes correction, of host state actions by private arbitrators charged with resolving investment disputes brought by foreign investors according to international law standards.

Transnational law studies, in combination with diffusion studies and international relations theories such as regime theory, can advance our understanding of how laws are being shaped, transplanted, and adopted from one legal system to another through the investment arbitration process, thereby clarifying the content of inherently vague rules of international law with which arbitrators and disputing parties in investment treaty arbitrations are routinely confronted in a fact-intensive setting. Such an approach, and its inherent legal pluralism, stands in contrast to a state-centered traditionalist approach and a one-directional perception and thereby offers the added benefit of discouraging a retreat to a system of state control and unilateralism that serves neither developing host countries nor foreign investors.

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[57] Scott, *supra* note 4, at 859.
[58] *Id.* at 860.

Whatever the challenges facing the investment treaty arbitration system, the primary responsibility for addressing those challenges rests with the arbitrators, who not only are the law-appliers and decision-makers but who also can be viewed, and should view themselves, as the guardians of the system and as potential agents of diffusion. The advent of investment tribunals, especially the wide dissemination of the rulings resulting from this manifestation of transnational legal process through use of new information technologies and increased transparency, coupled with the content-defining role of arbitrators operating within a developing field of law that is predisposed to development by case law,[59] has been a catalyst for the development of contemporary international law. It has turned these nonstate actors into potentially prominent diffusionists. In this connection, the methodological approach followed by some tribunals, especially those placing precedent before independent international law analysis, is problematic from the perspective of the formal sources of international law, which do not include arbitral decisions, and could threaten the integrity of the regime. This is by consequence an area where empirical research can play an important role: By understanding the background of arbitrators, especially their academic and professional training and activities, we can develop a better appreciation of their beliefs and rulings that help shape the international investment regime.[60]

If the investment treaty law and arbitration regime is to withstand the threats and challenges identified by Salacuse and others, all those engaged or interested in investment treaty arbitration, whether they are active participants such as disputing parties and arbitrators or external commentators and scholars, should approach the intricacies and sensitivities inherent in the developing regime of investment treaty arbitration through non-compartmentalized thinking, by taking account of all those involved in and affected by this hybrid regime, and by staying true to the basis, and basics, of public international law, as reflected in Article 38 of the ICJ Statute and Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The former informs proper decision-making methodology, while the latter allow arbitrators to consider sources extraneous to the applicable investment treaty in appropriate cases.

If this were to happen and transnational law were to be embraced as "an idea that pushes the boundaries of the legal imagination" rather than "something extraordinarily fuzzy,"[61] it should be possible to find ways to modulate, or recalibrate,

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[59] See Commission, *supra* note 49, at 141.

[60] Empirical studies reveal that white male jurists holding American, Australian, British, and Canadian passports, and with Common Law backgrounds, are disproportionally represented in arbitration cases administered by the World Bank, the leading investment arbitration institution. *See* Commission, *Precedent*, *supra* note 49, at 138-41; *see also* Michael Waibel & Yanhui Wu, Are Arbitrators Political? (unpublished manuscript) (on file with author) (noting that fewer than one-third of ICSID arbitrators are full-time academics and specialists in public international law).

[61] Scott, *supra* note 4, at 876.

the existing regime that satisfy both its proponents and its critics and to make investment arbitration "work toward generating a *jurisprudence constante* and creating convergence rather than faction" in an increasingly multifaceted and complex investment treaty universe.[62] It is in this area that scholarly analyses as well as arbitral rulings can make especially useful contributions toward attaining the ultimate goal: The good administration of justice.

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[62] Stephan Schill & Marc Jacob, *Common structures of investment law in an age of increasingly complex treaty-making*, COLUM. FDI PERSP., No. 94 (Vale Columbia Center on Sustainable International Investment), May 6, 2013, *available at* http://www.vcc.columbia.edu/content/common-structures-investment-law-age-increasingly-complex-treaty-making.

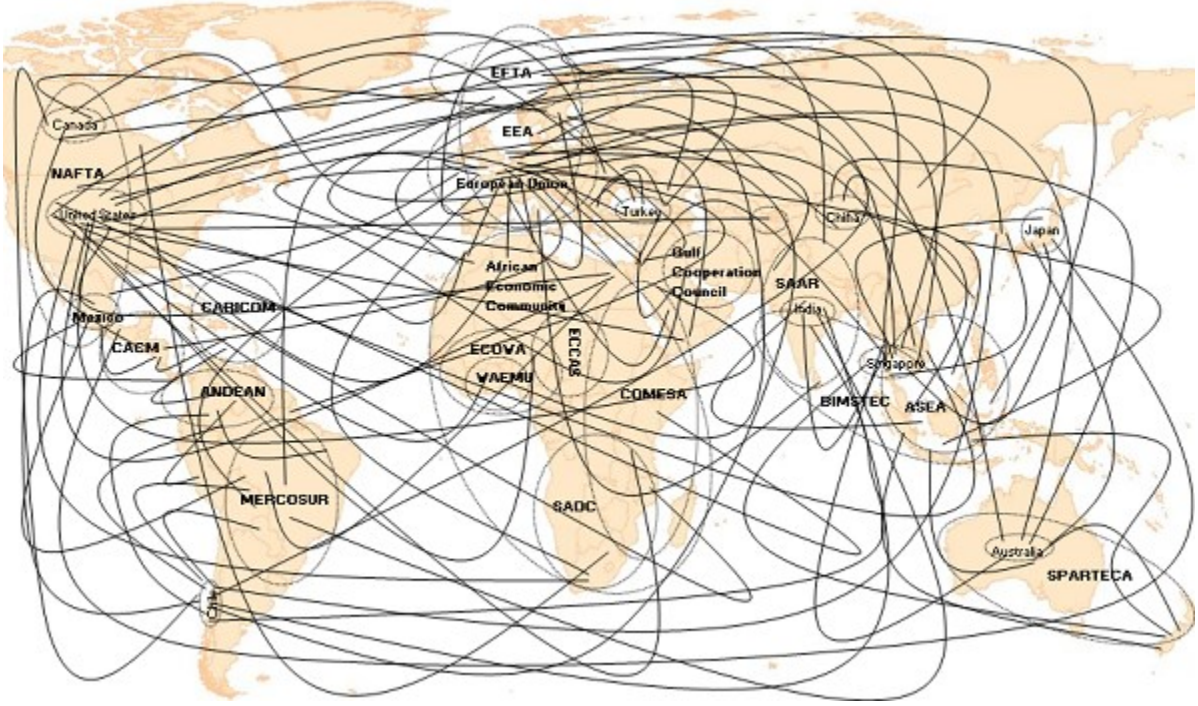

Fig. 1: "Spaghetti bowl" of investment treaties. *Source*: UNCTAD.


Arbitrators
Parties
Party counsel and expert witnesses
Law Content
Arbitral institutions
NGOs

Fig. 2