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From Business Plans to International Rights

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Corporate society takes care of everything. And all it asks of anyone, all it's ever asked of anyone, ever, is not to interfere with management decisions.†

– Rollerball (1975)

Multinational businesses have used a highly enforceable, specialized treaty regime to turn their plans into international rights that trump national laws. Through the investment regime, businesses have acquired substantial latitude to make decisions about the public impacts of their projects, including on sensitive issues of environmental protection, Indigenous Peoples' rights, and national development strategies, even when those decisions conflict with the law of the state in which they are operating. That reality is at odds with the standard, black-letter law account of the investment regime as playing a neutral role, protecting property rights defined by national law. It also provides a different framework for critical engagement with the field. Against a raft of scholarship arguing that investment law is inconsistent and incoherent, this Article argues that a clear line of cases follows discernible logic organized around protecting private profit expectations. That account has implications for an ongoing conversation about how to reform the governance of international investment.

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† Rollerball, Amazon Prime, at 1:15:35 (Algonquin Films 1975).

An account of why investment treaties protect private plans suggests that any specialized regime dedicated exclusively to protecting international capital will be pushed towards similar results. As a result, this account suggests that abolishing a specialized, single-purpose regime for protecting foreign investment, not institutionalizing it through a court, or domesticating it through national administration, is the way to avoid putting business plans above national law.

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Introduction

Like most states, Tanzania owns its metals in the ground.[1] Private miners cannot simply prospect and take what they find, or buy land and dig. To mine,

1. Mining Act, 2019, ch. 123, art. 5(1) (Tanz.) ("The entire property in and control of all minerals in, and under or upon any land, rivers, streams, water courses throughout Tanzania, area covered by territorial sea, continental shelf or the exclusive economic zone is the property of the United Republic and shall be vested in the President in trust for the People of Tanzania."); Inv. Climate Advisory Serv., WBG, Sector Licensing Studies: Mining Sector 25

they need permission from the state.[2] Licenses are staged: First, a mining company needs an exploration license to search for workable deposits.[3] If the mining company finds a deposit, it needs a mining license to dig the metals out.[4] To get the mining license, it needs a plan showing it can mine in a way that comports with regulatory criteria, such as by proving adequate funding, outlining plans to hire a local workforce, and indicating how it will manage the environmental and social impacts of the project.[5] The mining company must persuade the state to approve that plan, showing the government that the mining license will go to a company that will use it responsibly.[6] Only once the competent Tanzanian ministry finds that this is the case will it give the mining company the right to mine.[7] And only once the metals are out of the ground will title pass from the state to the mining company.[8]

In *Nachingwea v. Tanzania*, a British mining group ("Nachingwea") never mined anything and never got the right to do so.[9] Under an exploration license, it found a nickel deposit that it did not think was ripe for exploitation.[10] Nachingwea then got a retention license—basically, a right to wait for conditions to change before applying for a mining license.[11] While it waited, Tanzania decided to shorten the window for miners to squat on non-viable deposits, eliminating retention licenses as a category under its legislation.[12] After some back and forth, and after the mining group sued the state under an international treaty between Tanzania and the United Kingdom,[13] Tanzania did let

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(2009). This Part refers to the current version of the Tanzania Mining Act, which is the same for purposes of the discussion in the paragraph above as the 1998 and 2010 versions.

2. Mining Act, 2019, art. 6(1) (Tanz.).

3. *Id.* arts. 35–36.

4. *Id.* art. 28.

5. *Id.* art. 49; *see* WORLD BANK MINING UNIT, INDUS. AND ENERGY DIV., WORLD BANK TECHNICAL PAPER NO. 181, STRATEGY FOR AFRICAN MINING 23 (1992) [hereinafter WORLD BANK, STRATEGY FOR AFRICAN MINING] ("It is important to make sure that the regulations cause the mineral rights holder to actively explore or develop the land or return it so that it is accessible to others.").

6. Mining Act, 2019, arts. 49–50 (Tanz.).

7. *Id.* art. 51.

8. *Id.* art. 51(c).

9. *See generally* Nachingwea U.K. Ltd. (U.K.) v. United Republic of Tanz., ICSID Case No. ARB/20/38, Award (July 14, 2023) [hereinafter Nachingwea v. Tanzania].

10. *Id.* ¶ 63.

11. *Id.* For a description of retention licenses, see John P. Williams, *Legal Reform in Mining: Past, Present, and Future*, *in* INTERNATIONAL AND COMPARATIVE MINERAL LAW AND POLICY 37, 55 (Elizabeth Bastida, Thomas W. Wälde & Janeth Warden-Fernández eds., 2004).

12. Nachingwea v. Tanzania, Award, ¶¶ 77, 81.

13. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, Tanz.-U.K., Jan. 7, 1994, GR. BRIT. TS NO. 90 (1996) (Cd. 3453).

Nachingwea apply for a mining license.[14] The group declined to do so, conceding that it lacked the necessary funds.[15] Instead, it proceeded with its claim under the treaty, arguing that its project had been expropriated. In the arbitration, Nachingwea won compensation from the state based on the fair market value of the nickel deposit in the ground,[16] even though the relevant domestic law at all times made clear that the company had no right to that state-owned nickel, and even though Tanzania's mining laws required proof of funding precisely out of a concern that an underfunded applicant might lack the ability to advance the project.[17]

Nachingwea and similar cases show how businesses can elevate their plans above national law.[18] Through investment treaties, businesses can assert claims and recover damages based on the expected value of planned commercial activities, regardless of how rights underlying those plans are configured or whether those rights even exist. Domestic law provides a factual predicate for these business plans. But neither the limits of businesses' domestic rights nor the materialization of risks that businesses assumed under national law bar them from redress under international investment treaties.

This result has far-reaching consequences for the relationship between international and national law and for the role of powerful private actors in global legal ordering. But it is not an obvious or acknowledged consequence of the investment treaty system. Instead, according to treatises, academic commentary, and recitations of black letter principles in arbitral decisions, investment law follows the well-settled general rule of international law that international law merely protects property rights that national law defines.[19] By using national

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14. Nachingwea v. Tanzania, Award, ¶ 203.

15. *Id.* ¶¶ 203, 205.

16. *Id.* ¶ 203.

17. Mining Act, 2019, art. 5 (Tanz.).

18. This Article uses the term *business plans* in a general manner to describe anticipated commercial activity, which corporations may articulate at various levels of specificity and across multiple documents, including applications for regulatory approvals.

19. *See* discussion *infra* Section I.A; Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles ¶ 8.64 (2d ed. 2017). On the general rule in international law, see, for example, F.V. García Amador, Fourth Rep. of the Special Rapporteur, *Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens—Measures Affecting Acquired Rights*, [1959] 2 Y.B. Int'l L. Comm'n 1, ¶ 6 U.N. Doc. A/CN.4/119 ("Under international law, the acquisition of private rights of a patrimonial nature is governed entirely by municipal law."); Christopher Staker, *Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations*, 58 Brit. Y.B. Int'l L. 151, 155, 251 (1987) ("'Property' or the 'ownership' of specific objects is a legal status which is created by the municipal law of each State. . . . Thus international law does not create property rights as such. Initially they are conferred at the discretion of some system of municipal law, but they are protected by international law. International law merely decides which of various, potentially conflicting, municipal rights it will protect."); *see also* Monique

law to resolve questions about the content and scope of protected rights, international law in general and investment law in particular purport to let states govern their internal affairs, define legal rights and obligations, and regulate their own societies and economies in the interests of the general public. According to this view, international law only comes in to police arbitrary changes to national law which impair vested rights.[20]

As this Article shows, that is not how investment law actually works. A growing body of cases effectively treats private business plans as the object of international law's protection, allowing those plans to vary from and prevail over national laws. In doing so, these cases have construed investment treaties to create an internationally protected right to expected profits.

This latitude for private parties to define what it is that international law protects is extraordinary. Other fields of international law create international property rights, such as regimes governing deep seabed mining or intellectual property.[21] But in those regimes, the content of private rights is defined by states, actors that are at least theoretically accountable to their general publics. In these contexts, states draft treaties that set out the substantive content of private rights in a manner that binds signatory states and supersedes national law.

By contrast, the protection of business plans in international investment law has been enabled not by states' express creation of international property rights, but by vague, flexible treaty language,[22] lax supervision of arbitral awards by national courts[23] and background policy arguments among the arbitration community that focus on giving businesses as much certainty as possible as soon as possible and treat national law with suspicion.[24] As a result, multinational businesses that seek to maximize profit acquire substantial unilateral

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Sasson, Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law 104–12 (2d ed. 2017).

20. Even John Sprankling, who pioneered the concept of international law of property, characterizes international investment law as a field which "protects rights that arise under municipal law through uniform rules." John Sprankling, The International Law of Property 3 (2014).

21. For instance, intellectual property rights are defined by international conventions implemented through national law, and deep seabed mining rights are defined entirely through international instruments and administered by an international organization. *See id.* at 100–10, 162–64. José Alvarez has also described how the jurisprudence of the Inter-American Court of Human Rights has both recognized forms of property not recognized by national law, such as collective Indigenous property, and altered the contours of national law property rights. *See* José E. Alvarez, *The Human Right of Property*, 72 Mia. L. Rev. 580, 644–47 (2018).

22. *See* Simon Batifort & Andrew Larkin, *The Meaning of Silence in Investment Treaties*, 38 ICSID Rev.–Foreign Inv. L.J. 322, 322 (2023).

23. Arbitral awards can only be annulled for egregious procedural flaws. *See* description *infra* Part I.

24. *See, e.g.*, WCV World Cap. Ventures Cyprus Ltd. v. Czech., Case No 2016-12, 274 (Perm. Ct. Arb. 2023) (quoting Técnicas Medioambientales Tecmed, S.A. v. United Mex. States, ICSID Case No. ARB (AF)/00/2, May 29, 2003, Award, ¶ 154); Nicolás M. Perrone, Investment

leeway to decide how far they need to go to address environmental, social, and commercial risks, even where states sought to reserve authority to decide those questions.

This Article thus proposes a novel understanding of the international investment regime. Although investment law has received extensive academic attention, much of the literature focuses on inconsistencies, incoherence, and normative errors in the cases.[25] More sympathetic accounts provide policy rationales for the system as it stands, although without developing deeper theories of legal principles that could account for observed results.[26] And newer literature has moved on to surveying, criticizing, and lamenting the halting and uncertain progress of an endless reform discussion.[27] That reform discussion, to the extent it yields changes, seems most likely to further entrench the regime's basic contours through deeper institutionalization.[28]

By contrast, this Article provides a coherent legal account of international investment law, arguing that many of its apparent inconsistencies can be best understood as a legal choice to treat private business plans as internationally

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Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules 10–11 (2021).

25. *See, e.g.*, Stratos Pahis, *BITs and Bonds: The International Law and Economics of Sovereign Debt*, 115 Am. J. Int'l L. 242, 244–45 (2021); Julian Arato, *The Private Law Critique of International Investment Law*, 113 Am. J. Int'l L. 1, 9–10 (2019); Jonathan Bonnitcha & Emma Aisbett, *Against Balancing: Revisiting the Use/Regulation Distinction to Reform Liability and Compensation Under Investment Treaties*, 42 Mich. J. Int'l L. 231, 232–35 (2021); Joshua Paine & Elizabeth Sheargold, *A Climate Change Carve-Out for Investment Treaties*, 26 J. Int'l Econ. L. 285, 286–87 (2023).

26. *See generally, e.g.*, Charles N. 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 (2014). For instance, one prominent arbitrator claimed that "everyone knows what 'fair and equitable treatment' means," thereby dismissing controversy over the interpretation of one of the most challenging doctrines in international investment law. United Nations Commission on International Trade Law [UNCITRAL] & International Centre for Settlement of Investment Disputes [ICSID], *Draft Code of Conduct: Comments by Article and Topic as of January 14, 2021*, at 150 (2021), https://icsid.worldbank.org/sites/default/files/Code_of_Conduct_Comments_by_Article_UPDATED.pdf [https://perma.cc/3AML-2B5Z].

27. *See, e.g.*, José E. Alvarez, *ISDS Reform: The Long View*, 36 ICSID Rev.—Foreign Inv. L.J. 253, 276 (2021); Anthea Roberts & Taylor St. John, *Complex Designers and Emergent Design: Reforming the Investment Treaty System*, 116 Am. J. Int'l L. 96, 100–01 (2022); Ladan Mehranvar & Lea Di Salvatore, *Structural Barriers and Power Dynamics in UNCITRAL WGIII: Upholding the Status Quo?*, J. World Inv. & Trade 5 (forthcoming 2025) (arguing that reform proposals "largely preserve the system's core asymmetries and do little to address its underlying structural logic"). *See generally, e.g.*, Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 Am. J. Int'l L. 410 (2018).

28. Lisa Sachs et al., *The UNCITRAL Working Group III Work Plan: Locking in a Broken System?* Colum. Ctr. on Sustainable Inv. (May 4, 2021), https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system [https://perma.cc/BKP5-CBLW]; James Thuo Gathii & Harrison Otieno Mbori, *Reform and Retrenchment in International Investment Law*, 24 J. World Inv. & Trade 535, 536 (2021); George Kahale III, *The Wild, Wild West of International Practice*, 44 Brook. J. Int'l. L. 1, 10 (2018); Alvarez, *supra* note 27, at 276.

protected rights. In advancing this explanation, however, the Article does not purport to justify that doctrine. To the contrary, it suggests that this underlying rationale indicates that many controversial results of the investment treaty regime are a feature, not a bug. Capacious and ambiguous treaty language and a structural suspicion of national law lead arbitrators to prefer business plans over national property rights as a baseline against which to measure the propriety of state conduct. As a result, on issues ranging from climate action to Indigenous peoples' rights to national development strategies, investment treaties help businesses stand in the way of national plans.

To show how investment treaties protect business plans, the Article focuses on cases involving statutory licenses, which are domestic law assets that build in explicit advance restrictions on asset-holders' rights.[29] Statutory licensing is both undertheorized[30] and increasingly important as states resume overt control over the direction of their economies.[31] Operating by analogy to common law licenses—a form of property—statutory licenses are administrative artifacts in which a state prohibits certain activities, such as operating a casino, and then grants qualified applicants specific exceptions to that prohibition in the form of licenses, often subject to regulatory oversight.

Licensing allows states to dictate the terms on which regulated economic activities take place. That said, licensing regimes imply no default perspective on the appropriate relationship between the state and the market. In telecommunications, for instance, where spectrum licenses purport to create a good

29. A lack of theoretical or doctrinal coherence in dealing with statutory licensing regimes is the result of both limited sustained scholarly attention and the legal diversity of these regimes, and has resulted in inconsistent nomenclature. Scholarship variously refers to the permit power, new property, statutory property, statutory rights, and other permutations of these phrases. *See, e.g.*, Richard Epstein, *The Permit Power Meets the Constitution*, 81 Iowa L. Rev. 407, 407 (1995) (noting that the permit power "has received scant attention in the academic literature"); Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 Duke L.J. 133, 137 (2014) (noting that Epstein's observation "is no less true today"). The same is true in investment law, with major treatises such as August Reinisch's and Christoph Schreuer's merely referring in passing to licenses when recognizing that "intangible property" may be the object of an expropriation under an investment treaty, without apparent awareness of substantial debates in domestic law about whether and when statutory licenses give rise to a property interest. August Reinisch & Christoph Schreuer, International Protection of Investments ¶¶ 92–101 (2020).

30. *See* discussion *supra* note 29.

31. *See* Amy Kapczynski & Joel Michaels, *Administering a Democratic Industrial Policy*, 18 Harv. L. & Pol'y Rev. 279, 286, 290–91 (2024) (noting the resurgence of overt and "deliberate attempt[s] to shape different sectors of the economy to meet public aims"); *see also* Jonathan H. Adler, *Permitting the Future*, 75 Case W. Rsrv. L. Rev. 1, 13 (2024) (introducing a special issue highlighting the importance of permitting reform and consolidation to the clean energy transition); James Coleman, *Permitting the Energy Transition*, 75 Case W. Rsrv. L. Rev. 69, 75 (2024) (describing new political attention to permitting reform to facilitate a clean energy transition).

with market value (namely, a spectrum band free of interference),[32] licensing is a tool to create and safeguard useful assets, arguably a form of state action consistent with ordoliberal, market-oriented views.[33] At the same time, licensing builds in state control, which states can use to advance other policy goals. Thus, applicants for radio broadcasting licenses in the United States must show that their proposed broadcasts are in the "public interest," an obligation that the federal government, for years, used to impose moralistic restrictions on content and to require broadcasters to allocate equal time to opposing political viewpoints.[34] As discussed above, Tanzania uses mining licenses to require mining companies to make commitments about training a Tanzanian workforce, among other obligations.[35] A range of jurisdictions require casinos to obtain licenses, a maneuver that restricts the supply of a service with harmful externalities and builds in anti-money laundering supervision while rewarding regulatory "winners" with outsized profits.[36] Licensing, with its default prohibition of regulated commercial activity, matured precisely in order to safeguard residual state authority over private economic activity in contrast to a private property paradigm of presumptive freedom.[37]

This state control is particularly important in extractive industries, on which many Global South countries depend financially.[38] States retain control by giving private parties only a qualified privilege to search for and exploit state-owned minerals on statutorily defined terms. States can use that control to set resource development policy, mandate environmental protections, and safeguard Indigenous peoples' rights. At the same time, licensing regimes still

32. F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940). Scholars have long criticized the "scarcity" rationale for licensing the spectrum. *See, e.g.*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 207 (1982). The merits of that debate are beyond the scope of this Article. Instead, it suffices for my purpose to note that pro-market actors have advocated for licensing regimes as a means of facilitating market ordering. Sanders Bros., 309 U.S. at 474.

33. Sanders Bros., 309 U.S. at 474; Mark A. Lemley & Dan L. Burk, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575, 1586 (2003) (noting that market mechanisms drive intellectual property regimes); *see* Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism 11 (2018) (discussing ordoliberals' recognition of the role of states in constructing markets).

34. 47 U.S.C. § 307; Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 379 (1969); Syracuse Peace Council, 17 F.C.C. Rec. 5043 (1987). Any debate about whether government *should* be dictating morality through content-based restrictions on broadcasters is incidental to my point that licensing allows regulators to exert control in service of the government's own policy aims.

35. Mining Act, 2019, art. 41(3)(h) (Tanz.).

36. *See* discussion *infra* Section I.B.

37. Epstein, *supra* note 29, at 407.

38. *See* Andrew Bauer, *Three Proposals for Mineral-Dependent Countries During the Coronavirus Pandemic*, Nat. Res. Governance Inst. (May 1, 2020), https://resourcegovernance.org/articles/three-proposals-mineral-dependent-countries-during-coronavirus-pandemic [https://perma.cc/2TYR-R3WK].

attract foreign direct investment needed to buttress foreign currency reserves and manage debilitating debts by defining the conditions under which foreign investors can reap the bulk of the financial benefits of discovering a mineral deposit.[39] For example, Tanzania's Mining Law clarifies that the state owns all valuable metals in the grounds and that rights to mine those resources will only be given to qualified holders of an exploration license who demarcate a valuable commercial deposit and put forward a plan to mine it in an environmentally and socially acceptable way.[40]

Ultimately, statutory licensing regimes serve a broad range of goals. But at their core is a presumptive prohibition on private activity motivated by a public regulatory interest.

That unifying feature of presumptive prohibition helps showcase how the investment treaty regime privileges corporate plans over contrary state goals.[41] Investment treaty cases relating to statutory licenses demonstrate how the investment regime helps businesses "re-code" their business plans as formal legal sources with priority over national law, even where regulatory goals enshrined in national law operate as built-in limitations on investors' private rights from the outset of a project.[42] When states' reserved authority to assess risks conflicts with businesses' plans to accumulate profits, the investment regime prioritizes business plans.

39. *Id.*

40. Mining Act, 2019, arts. 5(1), 28, 35–36 (Tanz.).

41. This account thus suggests that the two most prominent lines of criticism of investment treaty arbitration—the so-called public law and private law critiques—stem from the same source. The public law critique has focused on arbitrators' undue willingness to intrude upon and second-guess states' regulatory authority. *See, e.g.*, GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 72 (2008); LISE JOHNSON ET AL., COLUM. CTR. ON SUSTAINABLE INV., COSTS AND BENEFITS OF INVESTMENT TREATIES: PRACTICAL CONSIDERATIONS FOR STATES 11 (2018) (highlighting "reduced policy space" as a cost of "expansive" interpretations of investment treaties). The private law critique has emphasized that even in those commercial law fields in which commercial arbitrators might be expected to have expertise, investment caselaw distorts fundamental principles and policy goals. *See* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1, 9–10 (2019). Statutory licensing cases, involving express ex ante limits on investor rights to safeguard broader policy goals, suggest that the regime's apparently puzzling treatment of public and private law is the result of its choice to elevate a different, nonlegal form of normative ordering—that of the private business plan.

42. *See* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 3–4 (2019) (examining how bare assets are coded into law to generate wealth). Julian Arato has previously noted how the investment regime allows corporations to unilaterally convert investor-state contracts into formal international law obligations, changing the normative status of private, domestic law rights. Julian Arato, *Corporations as Lawmakers*, 56 HARV. J. INT'L L. 229, 231 (2015).

That account of the investment regime helps make sense of other controversial investment treaty doctrines.[43] In particular, idiosyncratic approaches of the investment regime to two issues make more sense considered in light of the regime's protection of business plans: first, the admission of shareholder reflective loss claims, or claims based on harm to the assets of companies in which the claimant holds shares; and, second, the protection of investors' "legitimate expectations." Investment law's unusually capacious approach to such claims is a logical outgrowth of the same commitment to protecting anticipated profits. That explanation, in turn, offers a plausible account of these doctrines' persistence in the face of treaty reform efforts and suggests that the problem of prioritizing business plans extends well beyond the statutory licensing context.

Most importantly, the account in this Article bears on reform. For years, investment arbitration was criticized for being insufficiently deferential to state regulatory goals.[44] Commentators argued that arbitrators' private law backgrounds and financial interests in being reappointed made them favor claimants' positions in investment treaty cases.[45] Under the auspices of the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group III, states have now spent eight years addressing problems with and possible reforms to the international investment regime, but their proposals have gone little further than modest procedural reforms that leave in place the arbitration of investor-state disputes under expansive treaty standards.[46]

One of the most ambitious current reform proposals is the European Union's (EU) attempt to establish a permanent investment protection court with judges appointed by states.[47] That court is proffered as a means to avoid arbitrators'

43. *See* discussion *infra* Sections III.A–B. On critiques of these doctrines, see, for example, Julian Arato, *The Elastic Corporate Form in International Law*, 62 Va. J. Int'l L. 383, 402–07 (2023); Lise Johnson, *A Fundamental Shift in Power: Permitting International Investors to Convert Their Economic Expectations into Rights*, UCLA L. Rev. (Feb. 28, 2018), https://www.uclalawreview.org/fundamental-shift-in-power/ [https://perma.cc/L5GU-Y7UW].

44. *See, e.g.*, Van Harten, *supra* note 41, at 72; Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 38 N.Y.U. L. Rev. 30, 35–38 (2003).

45. *See* Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, The Political Economy of the Investment Treaty Regime 29 (2017).

46. *See, e.g.*, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session—Part I, ¶ 6, U.N. Doc. A/CN.9/930/Rev.1 (2017) (describing the impetus for the working group); Mehranvar & Di Salvatore, *supra* note 27, at 6.

47. *Multilateral Investment Court Project*, Directorate-Gen. for Trade and Econ. Sec., Eur. Comm'n, https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en [https://perma.cc/3VHP-GSLB]. The European Union's proposal is under discussion in the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group III, a forum dedicated to discussing procedural reforms of international investment law. *See, e.g.*, Working Group III, UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes, U.N. Doc. A/CN.9/WG.III/WP.239 (Feb. 8,

incentives for reappointment in particular cases, to better protect the coherence of arbitral caselaw, and to better protect public law values that compete with private profit expectations.[48]

In offering a different diagnosis of the problem with investment law, this Article points toward a different solution. Rather than suggesting revised treaty language to fix the narrow problems identified in the caselaw, it argues that understanding the source of those problems has broader reform implications. Arbitrators' choice to use private plans rather than national law rights as a baseline for understanding the object of treaty protection is an unsurprising, albeit normatively untenable, response to the regime's basic structure. As an adjudicative body scrutinizing state conduct under the auspices of independent and controlling international law standards, arbitrators have a mandate to treat national law with suspicion. At the same time, many treaties' explicit identification of private foreign investment as a desirable means of ensuring growth encourages arbitrators to look to businesses, rather than states, as authorities on how to promote development.[49] And given that the regime has only one set of users—multinational businesses—any effort by arbitrators to expand their own authority indirectly expands the authority of the businesses that use the system. While the doctrinal consequences of these three structural aspects of investment law are most stark in the statutory licensing context, they appear to pervade a range of persistent, controversial investment treaty doctrines. And they are not features that would be altered by moving investment disputes from ad hoc arbitration to a permanent court. Instead, avoiding putting business plans above national law requires ending a regime of "special rights for special people."[50] An international regime uniquely devoted to foreign investment protection, which originated as a fantasy of European banking and oil lawyers anxious about the redistributive consequences of decolonization, needs to go.[51]

This Article proceeds in five parts. Following this introduction, Part I provides context for the black letter law that ostensibly governs investment treaties' application to statutory licensing disputes. Section I.A details relevant principles of international investment law, summarizing the conventional account of

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2024). In parallel, the Working Group has worked with International Centre for Settlement of Investment Disputes ("ICSID") representatives to prepare a code of conduct for arbitrators which would preclude them from acting concurrently as counsel in investment disputes. UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution art. 4 (2024).

48. Directorate-Gen. for Trade and Econ. Sec., *supra* note 47.

49. *See, e.g.*, Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment pmbl., Feb. 19, 2023, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8533/download [https://perma.cc/7Y35-2JKW].

50. *See* J. Benton Heath, *The Anti-Reformist Stance in Investment Law*, 24 J. World. Inv. & Trade 564, 568 (2023).

51. Slobodian, *supra* note 33, at 139–43 (describing the professional backgrounds of Josef Abs and Hartley Shawcross, who drafted an early prototype of modern investment treaties).

the field's relationship with domestic property rights while examining features of the regime that provide arbitrators the interpretive leeway that has allowed them to extend treaty protection to business plans. Section II.B then turns to statutory licensing, offering a high-level overview of the history and basic features of relevant licensing regimes and highlighting the unifying features of presumptive prohibitions, ex ante risk allocations, and ongoing regulatory supervision of private rights. Part II examines arbitral caselaw involving statutory licenses and shows how that caselaw protects corporate business plans that depend on hopes that the state will grant necessary licenses. Part III identifies indications that the account in Part II is a cross-cutting feature of the investment regime, offering an explanation for persistent puzzles in other areas of investment law, focusing in particular on the admission of shareholder reflective loss claims and the protection of investors' legitimate expectations. Part IV concludes with a reflection on the broader implications of protecting business plans for investment law, climate change, and the international order more generally.

I. Situating Statutory Licenses in the Investment Regime

A. *International Investment Law and Domestic Property*

Investment law consists of a diffuse network of thousands of bilateral and multilateral treaties, in which states commit to protect investments made by investors of the other treaty party.[52] Although the wording varies, the protections are often broadly similar. States generally undertake not to expropriate investments except upon certain conditions, to pay market-based compensation if they do expropriate, not to discriminate by nationality, and to treat investments fairly and equitably ("FET").[53]

Most importantly, investment treaties allow "investors"—individuals or companies from one state who invest in the other state—to bring arbitrations whenever they feel host states have fallen short of these standards. The investor creates an arbitration agreement by "accepting" an "open offer" to arbitrate that is set out in the investment treaty, usually by filing a request for arbitration. Because investors can create arbitration agreements after a dispute has arisen by accepting the treaty's open offer, they can bring claims even in the absence of any prior legal relationship with the host state.[54] Moreover, because

52. Bonnitcha et al., *supra* note 45, at 2–3, 15–16, 24.

53. *Id.* at 93–94 (explaining that the obligation of "fair and equitable treatment" ("FET") is capacious, providing the most common basis for liability).

54. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.—Foreign Inv. L.J. 232, 233, 236 (1995).

investors can generally assert claims arising out of harm to companies in which they have an indirect shareholding interest, a host state may not be aware that an investment treaty applies to a particular project until the investor initiates arbitration.[55]

In these arbitrations, private arbitrators can review any manner of conduct by any branch of the host state's government and grant investors substantial damages awards that are enforceable around the world.[56] Those awards are generally not subject to review on the merits by any authority, with only limited scope for national courts at the seat of the arbitration or International Centre for Settlement of Investment Disputes ("ICSID") annulment committees to assess grave procedural errors.[57]

As noted above, the conventional, black letter law account is that investment treaties do not create property rights, but instead protect rights created and defined by domestic law.[58] That view follows from the text of most treaties. The term "investment" in treaties is generally defined with reference to domestic law assets, effecting a *renvoi*, or reference, to host state law.[59] To be sure, protected domestic law assets extend beyond national *property* rights because treaties protect assets that are not forms of property.[60] For instance, contractual

55. Batifort & Larkin, *supra* note 22, at 336.

56. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention]; United Nations [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V*, opened for signature* June 10, 1958, 330 U.N.T.S. 3 (entered into force June 7, 1959) [hereinafter New York Convention].

57. An arbitration is "seated" in the national jurisdiction where it is deemed to have taken place. Courts at the seat have a greater supervisory role under the New York Convention and national arbitration laws than courts in other jurisdictions in which an award creditor seeks enforcement. *See* New York Convention, *supra* note 56, art. V. Awards covered by the ICSID Convention, rather than the New York Convention, can only be reviewed by an annulment committee, which can only annul awards for manifest excess of powers, improper constitution of a tribunal, failure to state reasons, corruption by a tribunal member, or departure from a fundamental rule of procedure. ICSID Convention, *supra* note 56, art. 52(1).

58. *See, e.g.*, Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 95 (2009) (noting that the "role of domestic law in defining and regulating the investor's acquired rights" is "entirely logical"); Sasson, *supra* note 19, at 9; Emmis Int'l Holding, B.V. v. Hung., ICSID Case No. ARB/12/2, Award, ¶ 162 (Apr. 16, 2014) ("Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law."); Hege Elisabeth Kjos, Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law 242, 246 (2013).

59. Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles ¶ 6.113 (2d ed. 2017) ("The typical definition of an investment found in a BIT [bilateral investment treaty] requires that the status of the asset claimed to be an investment must be considered under the host State's domestic property law.").

60. Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 Wm. & Mary L. Rev. 351, 365 (2016).

rights, claims to money, and licenses or permits are usually covered by investment treaties.[61] Nevertheless, domestic law defines the assets that the treaty protects.[62] For instance, if an investor's contract in a host state is void *ab initio* under that state's law, the contract will not attract investment treaty protection. As a result, "[a]ny dispute concerning the existence or extent of the rights *in rem* alleged to constitute an investment that arises in an investment treaty arbitration must be decided in accordance with the municipal law of the host state."[63]

That means that, in theory, investment law should have little to say when domestic law allocates risks to investors, including risks of adverse state action, so long as the rules are clear at the time when the investment is made.[64] That principle was applied to dramatic effect in the *Exxon v. Venezuela* annulment decision. *Exxon* involved a joint venture contract between an Exxon-led consortium and Venezuela's state-owned oil company PDVSA to exploit an oil block.[65] When PDVSA negotiated the contract, it anticipated that Venezuela might seek to nationalize the industry if oil prices surged.[66] The contract thus provided a price cap formula, stipulating that compensation due to the consortium in the event of an expropriation would be tied to the oil price prevailing when the contract was signed, in the 1990s.[67] This contractual price cap formulation was enshrined in Venezuelan legislation passed to authorize PDVSA to enter into the agreement in the first place.[68] When oil prices surged to historic heights in the 2000s, Venezuela nationalized, and Exxon sued.[69] In the arbitration, despite the statutory and contractual price cap, a tribunal awarded the consortium damages based on their expected profits from selling the oil at subsequent, higher prices, reasoning that international law trumped domestic law limits on recovery.[70]

61. McLachlan et al., *supra* note 59, ¶ 6.113.

62. *Id.*

63. Zachary Douglas, The International Law of Investment Claims 52, 70 (2009).

64. The "public law" critique argues, in part, that states generally have broader authority to do this as a matter of background "police powers" doctrine than arbitrators generally acknowledge. *See, e.g.*, Van Harten, *supra* note 41, at 94; Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham. L. Rev. 1521, 1584, 1625 (2005) (describing this view). Without challenging that account, this Article focuses on domestic assets where risks are expressly allocated to an investment at the outset.

65. Venezuela Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶ 55 (Oct. 9, 2014) [hereinafter Exxon v. Venezuela].

66. *See* Juan Carlos Boué, *Enforcing Pacta Sunt Servanda? Conoco-Phillips and Exxon-Mobil Versus the Bolivarian Republic of Venezuela*, 5 J. Int'l Disp. Settlement 438, 458–62 (2014).

67. Exxon v. Venezuela, Award, ¶ 61.

68. *Id.* ¶ 51.

69. *Id.* ¶¶ 1, 107, 112.

70. *Id.* ¶¶ 218, 224–25, 373.

Venezuela successfully applied to annul this award. For an annulment committee, the tribunal's approach failed to identify for what the investors were being compensated.[71] The committee found that the tribunal had exceeded its powers and failed to state reasons for its decision by failing to value the actual asset the consortium had lost.[72] That asset was the contract, with its express price cap provisions.[73] The committee annulled the award, drastically curtailing the consortium's damages.[74]

The latitude that the investment regime ostensibly affords to states to allocate risk ex ante through domestic law—recognized and applied in the *Exxon* annulment decision and other cases—operates in tension with a core policy justification of investment treaties, namely protecting investors against obsolescing bargains.[75] Obsolescing bargains are situations where an investment requires substantial upfront costs to yield a profit but becomes vulnerable to a state's ability to change the economic terms of the investment after those upfront costs are incurred. An investor may bargain with a state to make an initial investment on terms that allow it to recoup substantial profits at a later stage. But once the investor's costs are sunk, the investor has minimal leverage against a state seeking to revise that bargain—for instance, by drastically increasing taxes.[76] Mines, which require substantial up-front exploration, digging, infrastructure, and general planning work, are go-to examples of projects

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71. Exxon v. Venezuela, Decision on Annulment, ¶¶ 168–70, 184 (Mar. 9, 2017).
72. *Id.* ¶¶ 187–88.
73. *Id.*
74. *Id.*
75. *See* Bonnitcha et al., *supra* note 45, at 128–32; Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework*, *in* International Law and Litigation 363, 375–77 (Helene Ruiz Fabri ed., 2019). Raymond Vernon is credited with originating the concept prior to the emergence of the modern investment claims architecture. Raymond Vernon, Sovereignty at Bay: The Multinational Spread of U.S. Enterprises 46–59 (1971). Vernon's exposition is notably more nuanced than many modern recitations, reflecting that pressures on governments to revise bargains stem from more than simple investor vulnerability but from the growing governance challenges that a nascent local economy surrounding an extractive project presents as well as host states' own perceived vulnerability to foreign investors' decisions as dependence on tax revenues from extractive operations increases. *Id.* at 48–51. He goes as far as to argue that "foreign investors must resign themselves to the fact that the national goals and preferences to which they were responsive at the time they entered any country are likely to undergo periodic metamorphoses." *Id.* at 53. Moreover, the "obsolescing bargain" model has been increasingly criticized as oversimplified. *See* Bonnitcha et al., *supra* note 45, at 134; Lorraine Eden, Stefanie Lenway & Douglas A. Schuler, *From the Obsolescing Bargain to the Political Bargaining Model*, *in* International Business and Government Relations in the 21st Century 253, 253–54 (Robert Grosse ed., 2005) (acknowledging a widespread view that the obsolescing bargain model has "outlived its usefulness" and proposing a revised model based on iterative bargaining).
76. Bonnitcha et al., *supra* note 45, at 128.

susceptible to an obsolescing bargain.[77] Early advocates for foreign investor protection, early authorities on the investment treaty regime, and contemporary proponents of the status quo all argue that investment treaties protect investors from these risks.[78]

In theory, there is no conflict between defining investments by reference to domestic law and protecting investors from obsolescing bargains. Technically, an obsolescing bargain involves *changes* to domestic law that impair an investor's vested property rights. That situation differs from one in which an investor assumes risks of adverse state action that later materialize. Nevertheless, the broad policy goal of protecting investors from obsolescing bargains arguably encourages arbitrators to look with suspicion on state action that interferes with the profits which an investor hoped to make in taking an investment decision.

Compounding that suspicion is the context of investment claims. Investment treaty cases uniformly involve scrutiny of host state measures under the auspices of superior and flexible international law standards articulated in treaties, which often have the express goal of protecting investments and which identify private investment as a key instrument for development. As commentators have noted, arbitrators hearing claims under these treaties are thus suspicious of national law by design.[79] This suspicion arguably fosters, at a minimum, reduced attention to the finer contours of domestic law rights, and may, as in the *Exxon* tribunal's analysis, contribute to outright dismissal of efforts to assert those contours as restrictive of an international law claim.

This combination of a high-level commitment to protecting investors against adverse changes to their expected returns and a structural suspicion of domestic law makes arbitrators susceptible to creative claims challenging state action that interferes with an investor's business plans. That tension may explain *Conoco v. Venezuela*, another major arbitral challenge to Venezuela's oil

77. *See, e.g.*, Jason Webb Yackee, *Do BITs 'Work'? Empirical Evidence from France*, 7 J. Int'l Disp. Settlement 55, 59 (2016) ("A hard-rock mine provides the classic example.") (citing Theodore H. Moran, Multinational Corporations and the Politics of Dependence: Copper in Chile (1974)).

78. Rudolf Dolzer, Ursula Kriebaum & Christoph Schreuer, Principles of International Investment Law 27–28 (3d ed. 2022); Jesswald P. Salacuse, The Law of Investment Treaties 14, 96 (3d ed. 2021); Thomas W. Wälde, *Investment Arbitration Under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation*, 12 Arb. Int'l 429, 432 (1996); Vernon, *supra* note 75, at 46–59; *see also* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. Int'l L. 639, 658–60 (1998).

79. *See, e.g.*, David Schneiderman, Investment Law's Alibis: Colonialism, Imperialism, Debt, and Development 30–32 (2022); Fuad Zarbiyev, *'These Are My Principles. If You Don't Like Them I Have Others.' On Justifications of Foreign Investment Protection Under International Law*, 26 J. Int'l Econ. L. 525, 529–31 (2023); Sannoy Das, *Fine Balance: Empire, Neoliberalism, and the Fair and Equitable Treatment Standard in International Investment Law*, 24 J. World Inv. & Trade 659, 664 (2023).

nationalizations, which involved virtually the same facts as *Exxon*. In *Conoco,* a tribunal held that Venezuela unlawfully expropriated the claimants' interest in an oil project and awarded the profit those claimants would have made from selling the oil at higher, later-in-time prices.[80] As in *Exxon*, the *Conoco* claimants' joint venture agreement and the statutory framework permitting PDVSA to enter into it capped compensation due if the state reasserted control.[81] But unlike in *Exxon*, where the tribunal disregarded this price cap as superseded by international law, the *Conoco* tribunal found that Venezuela's actions went beyond the scope of the contractual price cap provision, and so the price cap was not triggered.[82] On that basis, the tribunal justified resorting to the default standard of full reparation under international law.[83] Because that finding purported to root itself in the terms of the contract, an annulment committee found that, irrespective of the merits of the tribunal's ruling, it was not amenable to annulment under the ICSID Convention's narrow standards.[84]

Together, *Exxon* and *Conoco* demonstrate that, on the one hand, tribunals are meaningfully constrained to consider the scope of domestic law rights—in those instances, contracts which arose under Venezuelan law whose terms were constrained by Venezuelan statutes. But on the other hand, creative tribunals concerned about obsolescing bargains have ample means to protect profit expectations despite national law limitations on the scope of investors' rights.[85]

Indeed, beyond the sort of technical factual finding at issue in *Conoco*, the terms of investment treaties themselves create latitude for arbitrators to grant relief that exceeds the value of the domestic law rights that were lost. Most obviously, the use of the term "investment" creates ambiguity about what, exactly, treaties protect.[86] While investments are generally defined as comprising "every kind of asset," the aggregation of a particular investor's assorted legal

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80. ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, ¶¶ 394, 401 (Sept. 3, 2013) [hereinafter Conoco v. Venezuela]; Conoco v. Venezuela, Interim Decision, ¶¶ 127–30, 151–55 (Jan. 17, 2017); Conoco v. Venezuela, Award, ¶¶ 169–88, 223–24 (Mar. 8, 2019).

81. Conoco v. Venezuela, Award, ¶¶ 160–67.

82. *Id.* ¶¶ 169–88.

83. *Id.* ¶¶ 193, 222–24.

84. Conoco v. Venezuela, Decision on Annulment, ¶¶ 760, 769–73 (Jan. 22, 2025).

85. Following the *Conoco* annulment decision, Venezuela's lead counsel in both *Exxon* and *Conoco* recently published an account of the two cases, highlighting their surprisingly divergent results despite the heavy overlap of legal and factual issues. *See* George Kahale III, *The Mobil and Conoco Cases Against Venezuela: The Good, the Bad, and the Ugly*, 16 J. Int'l Disp. Settlement 1, 39–40 (2025).

86. *See* Sasson, *supra* note 19, at 101.

rights into the single category of an "investment" suggest that treaties are concerned with more than that mere aggregation of domestic law assets, but with an overall venture—a business project, or plan, defined with reference to a private actor's intentions and legally constituted only on the international plane.[87]

Of the numerous interpretive disputes to which investment treaties give rise, the ambiguity about the term "investment" is unusual because states and investors regularly find themselves on both sides of the issue.[88] States often argue that the term "investment" has an inherent meaning that excludes certain domestic law assets, such as one-off contracts for the sale of goods.[89] Investors, faced with such arguments, will generally respond that the mere existence of a domestic law asset enumerated in the treaty is sufficient for treaty coverage.[90] By contrast, on the merits, states are likely to focus on the effect of challenged actions on an investor's particular domestic law assets, arguing, for instance, that challenged measures had no legal effect on particular domestic law rights attaching to those assets. Investors, by contrast, may complain about the impact of actions by various governmental authorities on the "investment," or project, as a whole, for instance in seeking to challenge criminal proceedings.[91] A range of other sub-issues, such as whether "partial expropriations" are actionable, may find states and investors again switching sides.[92] The shifting tactical incentives of disputants in arbitrations have served to perpetuate ambiguity about whether the term "investment" is simply a placeholder category encompassing domestic law assets or creates a distinct international legal object.

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87. *See* Christoph Schreuer, *The Unity of an Investment*, 19 ICSID Rep. 3, 3 (2021) (noting that "tribunals . . . have not dissected investments into their individual legal components but have treated them as an integral whole"); ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, ¶ 96 (May 18, 2010) ("[A]n investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing.").

88. By contrast, for instance, state respondents generally argue for narrower interpretations of "fair and equitable treatment" clauses and investor claimants argue for broader ones. *Cf.* Batifort & Larkin, *supra* note 22, at 323.

89. Stratos Pahis, *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 Yale J. Int'l L. 69, 86 (2020).

90. *Id.* at 71–72.

91. *Rompetrol Group v. Romania*, for instance, focused on a prosecution against principals in the claimant's business, something against which the domestic law rights attached to the business offered no protections. *See generally* Rompetrol Group N.V. v. Rom., ICSID Case No. ARB/06/3, Award (May 6, 2013).

92. For instance, in *Lone Pine v. Canada*, a claimant's expropriation claim failed because it held multiple permits, only some of which were revoked by a challenged measure. Thus, the investor focused on the complete elimination of certain permits to press an expropriation claim, while the state argued that the "investment" as a whole had not been taken. Lone Pine Resources Inc. v. Gov't of Can., ICSID Case No. UNCT/15/2, Award, ¶¶ 508, 517, 527 (Nov. 21, 2022).

Other investment treaty provisions further drive a wedge between domestic property rights and the object of treaty protection. For instance, many treaties expressly protect investors' "indirectly-held" investments.[93] That has been understood to mean that, unlike in domestic law or general international law, shareholders can assert claims based on harm to assets owned by the companies in which they hold shares—thus, for instance, initiating "expropriation" claims that in substance amount to breach-of-contract claims regarding contracts to which they were not a party.[94] As a general matter, shareholders have no such rights in national legal systems.[95] The implications of these "shareholder reflective loss claims" will be dealt with in greater detail in Part III, but for now, it suffices to note that they operate in tension with investment treaties' *renvoi* to domestic law to identify the scope of protected rights.

Moreover, as Antony Anghie discusses, the conventional account that investment treaties protect national law assets struggles to explain the basic fact that foreign asset-holders and domestic asset-holders have different rights because they have differentiated access to international arbitration.[96] For instance, a German purchaser of shares in an Argentine company acquires something more than an Argentine purchaser of those same shares.[97] Treaty-protected investors acquire different and greater rights than other investors when they acquire assets in a host state. Thus, the conventional account is, at a minimum, incomplete in stating that treaties involve a *renvoi* to domestic law to determine the content of the investor's protected rights.

In sum, the prevailing black-letter law account of international investment law is that investment treaties protect domestic law rights. But that account is necessarily incomplete, because by virtue of the investment treaty itself, covered investors have different protections and remedies than other owners of the same assets. That incompleteness, coupled with expansive treaty terms, creates space for arbitrators to enforce the presumption that profits expected to flow from an upfront expenditure must be protected against adverse state action. In addition, given that their mandate is always and solely to scrutinize state conduct against

93. Kenneth J. Vandevelde, U.S. International Investment Agreements 115 (2009).

94. Arato, *supra* note 42, at 256–58.

95. David Gaukrodger, Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency 14–20 (OECD, Working Papers on Int'l Inv. No 2013/03, 2013), https://uncitral.un.org/sites/uncitral.un.org/files/2013-11_1st_reflective_loss_paper_-_final_website_version_ilibrary_version.pdf [https://perma.cc/62UE-HJ88].

96. Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 Eur. J. Int'l L. 7, 89 n.382 (2023); *see also* Joseph Charles Lemire v. Ukr., ICSID Case No. ARB/06/18, Dissenting Opinion of Dr. Jürgen Voss, v-vii (Mar. 1, 2011).

97. Pahis has observed that this creates particular issues in the sovereign debt context, giving treaty-protected investors additional leverage to hold out for higher settlements and interfere with efficient restructuring. *See* Pahis, *supra* note 25, at 245.

international law standards, arbitrators are structurally suspicious of domestic law and so, unsurprisingly, may tend to disregard the limitations imposed by domestic law on the scope of investors' rights. It is hardly surprising that in such a regime, corporations began to bring claims challenging host state action that affected their anticipated profits, and arbitrators found themselves sympathetic to those claims and empowered through a range of flexible mechanisms to vindicate them.

B. *Presumptive Prohibitions and Statutory Licenses*

States often regulate important economic sectors through licensing regimes. In these regimes, states prohibit economic activities and then grant exceptions to the prohibition in the form of licenses to individual applicants who meet specified statutory criteria.[98]

Licensing can serve a range of state goals. It can restrict entry into sensitive sectors, facilitate industrial policy, or simply protect health and safety. One typology describes five purposes for licensing, namely: (1) restricting entry into high-externality sectors, (2) obtaining information from private license applicants, (3) tailoring regulations to particular projects, (4) overcoming political obstacles to regulation, and (5) facilitating enforcement.[99] Licensing requirements can also generate public revenue,[100] or, more amorphously, protect "the public interest."[101] Some criticize licensing regimes for generating outsized profits for favored industries.[102] But for scarce resources, license requirements are often justified on the basis that they "can help ensure that the public receives the best service from private use of a scarce asset, whether a national park or band of electromagnetic spectrum."[103]

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98. Biber & Ruhl, *supra* note 29, at 138 ("[T]he permit power is at its core about legislatures demanding that public and private actors seek permission from administrative agencies before they engage in proscribed activities.").

99. *Id.* at 178–206.

100. *See* Ronald Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 24 (1959).

101. The U.S. government, for instance, issues radio broadcasting rights "only after determining which applicant would best serve the public interest." Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 Vand. L. Rev. 1705, 1721 (1999). Similarly, Mongolia's general business licensing law, for example, imposes an obligation to obtain a license on any "business activities that may negatively affect the public interest, human health, environment and national security." Licensing Law art. 1 (2001) (Mong.). Business activities that do not carry such negative risks "may be freely conducted in accordance with relevant laws," but "[t]he right to conduct a business activity that requires a license shall come into force upon obtaining such license in accordance with this law." *Id.* arts. 5.2, 5.4.

102. *See* Reza Dibadj, *Regulatory Givings and the Anticommons*, 64 Oh. St. L.J. 1041, 1046 (2003) (citing Charles A. Reich, *The New Property*, 73 Yale L.J. 733, 764 (1964)).

103. Krent & Zeppos, *supra* note 101, at 1709.

As a general rule, licenses or permits are mere administrative benefits rather than a form of intangible property.[104] Given that they frequently come with restrictions on use and transfer, that is unsurprising. The principal consequence is remedial; courts oversee agencies' issuance, revocation, and supervision of licenses and rely on administrative law to sanction procedural errors, but licenses often lack the heightened protections or compensatory remedies associated with property.[105] Where courts have recognized licensees' proprietary interests in licenses, the context has typically been bankruptcy disputes, rather than revocations or non-issuance of licenses.[106]

Nevertheless, regardless of the precise legal character of licenses, at a minimum, the benefits they bestow on licensees are subject to carefully crafted restrictions against a background of prohibition. While licensing regimes vary across countries and industries, this survey focuses on three sectors in which licensing regimes have come under the scrutiny of investment arbitrators: extractive industries, telecommunications, and gaming.

1. Extractive Licenses

In extractive industries, licensing is the legal regime of choice. In mining, oil, and gas, licensing is a logical consequence of the widespread principle that

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104. *See, e.g.*, 5 U.S.C. §§ 551, 558 (defining licensing as a form of rulemaking and stipulating procedures for their "suspension, revocation, and expiration"); Sanders Bros., 309 U.S. at 475 ("The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."); Anita Rønne, *Public and Private Rights to Natural Resources and Differences in Their Protection?*, *in* PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES 60, 78 (Aileen McHarg et al. eds., 2010) (noting that licenses are non-proprietary administrative benefits in most civil law systems). For an overview, see Barry Barton, *Property Rights Created Under Statute in Common Law Systems*, *in* PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES, *supra* note 104, at 80, 98.

105. *See, e.g.*, 5 U.S.C. § 558; Mobile Relay Associates v. F.C.C., 457 F.3d 1, 12 (D.C. Cir 2006) (finding that an Federal Communications Commission ("FCC") license "does not constitute a property interest protected by the Fifth Amendment").

106. *See, e.g.*, In re Gull Air, Inc., 890 F.2d 1255, 1259–60 (1st Cir. 1989); *see also* Barton, *supra* note 104, at 90–91, 99 (surveying varied approaches to the issue and suggesting that we may wish to "encourage development of the law in directions that allow a wide range of principles of private law to apply to disputes *inter partes* where there is no significant policy point in issue" while remaining wary of conceptions that would "deter an agency regulator from reducing entitlements"). For one attempt to highlight types of property-like interests in spectrum licenses, see William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 F. COMMC'NS L.J. 1, 6 (1997). Arbitrators have been reluctant to cede authority over expropriation claims arising out of license terminations. In *Khan Resources v. Mongolia*, for instance, an underlying investment law applied only to tangible and intangible property. An arbitral tribunal purported to distinguish the Mongolian Supreme Court's determination that mining licenses did not constitute a property right, finding instead that the same Mongolian law asset constituted a form of intangible property. Khan Res. Inc. v. Mong., UNCITRAL, Award on the Merits, ¶¶ 302–08 (Mar. 2, 2015).

states own the natural resources in the ground.[107] "Licensing is fundamentally about ownership," the World Bank explains.[108] "In most countries, all mineral resources belong to the State regardless of ownership of the surface land. No one can legally extract and sell any mineral commodity without first obtaining authorization from the government."[109] Pursuant to those principles, "[i]n most countries—the [United States] is almost the only exception—the government controls the allocation of rights to explore and develop mineral deposits."[110]

States that own resources in the ground thereby adopt systems generally referred to as "domanial."[111] The domanial system developed as a means to facilitate mining.[112] Government ownership of natural resources helps prioritize mining by empowering the government to ensure that a project goes ahead and by divesting surface landowners of veto powers over those projects.[113] The United Kingdom, for instance, pivoted to a domanial system following difficulties in the development of its coal mining industry during the 19th century, when the challenges miners faced in bargaining with multiple surface landowners above a coal deposit frequently inhibited exploitation.[114] By requiring minimum investment amounts and setting terms, licensing regimes can also ensure that mineral resources are developed rather than squatted on for speculative purposes.[115] One view of the domanial system thus sees it as little more

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107. As Daintith and Ely note, the principle of state ownership of underground resources and the principle followed in the United States in which surface landowners own such resources both stem from Roman law, which moved from the ad coelum rule found in common law states (but frequently abrogated by statute outside of the United States) to the rule of state ownership as states acquired territory by conquest. *See* Terence Daintith, Finders Keepers? How the Law of Capture Shaped the World Oil Industry 364 (2010) (citing Northcutt Ely, *Changing Concepts of the World's Mineral Development Laws*, *in* World Energy Laws: Proceedings of the IBA Seminar on World Energy Laws 4 (1975)). There are significant practical differences between oil and gas extraction and mining solid materials deriving from the migratory character of oil and gas resources in situ, as described in Daintith, but for purposes of the foundational legal principles discussed here, those differences and their implications for legislative design are immaterial.

108. World Bank Investment Climate Advisory Services, Sector Licensing Studies: Mining Sector 24 (2009) [hereinafter World Bank, Mining Sector].

109. *Id.*

110. *Id.* at 25.

111. Daintith, *supra* note 107, at 364.

112. *See* Bernard Mommer, Global Oil and the Nation-State 9 (2002). Mommer emphasizes 18th-century France and Mirabeau's role in elaborating rationales for state ownership of mineral resources. *Id.* Daintith, by contrast, traces the modern origins of this system and its diffusion to Central and South America to 18th century Spain. Daintith, *supra* note 107, at 365 (discussing Francisco Xavier de Gamboa's 1761 Commentaries on the Mining Ordinances of Spain).

113. Daintith, *supra* note 107, at 368.

114. Mommer, *supra* note 112, at 44–48.

115. *See, e.g.*, Nat'l Res. Governance Inst., Granting Rights to Natural Resources: Determining Who Takes Natural Resources Out of the Ground 4 (2015), https://resourcegovernance.org/sites/default/files/nrgi_Granting-Rights.pdf [https://perma.cc/H8UK-6LVN].

than an administrative tool designed primarily to facilitate getting resources into the hands of private actors who can and will develop them.[116]

The decolonization era challenged that understanding. Although some newly independent states inherited a domanial system from colonial laws aimed at facilitating extraction,[117] independence throughout Asia and Africa, and a newfound assertiveness throughout Latin America, vested state ownership of natural resources with new ideological dimensions. For newly independent states, ownership of natural resources was part and parcel of self-determination.[118] That ownership supplied a justification for newly independent countries to revise onerous concession contracts that had given colonial companies long-running, priority claims to huge reserves with few concomitant obligations.[119] Numerous African and Asian states enshrined state ownership of mineral resources in their constitutions upon acquiring independence as an expression of the principle of permanent sovereignty over natural resources.[120] Domanial regimes provided important recognition of the state's ownership of its mineral wealth, ending an era of legally dubious and morally disastrous extraction of that wealth by colonial companies.[121] Emphasis on sovereignty over natural resources also

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116. *See, e.g.*, Peter Cameron, Property Rights and Sovereign Rights: The Case of North Sea Oil 51–56 (1983).

117. *See* Jody Emel, Matthew T. Huber & Madoshi H. Makene, *Extracting Sovereignty: Capital, Territory, and Gold Mining in Tanzania*, 30 Polit. Geog. 70, 73 (2011) (arguing that "the colonial construction of a specifically national territorial mode of mineral sovereignty was seen as a critical foundation of capital investment" up to the present); Daintith, *supra* note 107, at 361, 371 (describing Spanish and British imperial practices). As described in several World Bank reports, initial periods of resource nationalism were also marked by nationalizations and use of state-owned enterprises to exploit reserves. World Bank Indus. & Mining Div., Indus. & Energy Dep't, World Bank Technical Paper No. 345, A Mining Strategy for Latin America and the Caribbean vii (1996) [hereinafter World Bank, A Mining Strategy for Latin America].

118. Nico Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties 57, 83 (1997); Antony Anghie, Imperialism, Sovereignty, and the Making of International Law 198 (2005); *see also* Sundhya Pahuja, Decolonising International Law: Development, Economic Growth, and the Politics of Universality 127 (2011) (noting the emphasis by newly-independent states on their proprietary ownership of natural resources).

119. *See* Williams, *supra* note 11, at 44; James Coleman, *The Third Age of Oil and Gas Law*, 95 Ind. L.J. 389, 408, 418 (2020); Hasan S. Zakariya, *New Directions in the Search for and Development of Petroleum Resources in the Developing Countries*, 9 Vand. J. Transnat'l L. 545, 547 (1976). For a description of the Zambian experience, see Muna Ndulo, *Mining Legislation and Mineral Development in Zambia*, 19 Cornell Int'l L.J. 1, 9–10 (1986).

120. Schrijver, *supra* note 118, at 37–39; World Bank, Strategy for African Mining, *supra* note 5, at 23; *see also* World Bank, A Mining Strategy for Latin America, *supra* note 117, at 10–11. For a survey of African constitutional and statutory provisions on resource ownership, see Hanri Mostert, *Custodial Resource Holding as an Expression of Constitutional and Economic Intent*, *in* Constitutionalism and the Economy in Africa 241, 246–55 (Fombad & Steytler eds., 2022).

121. *See* Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960, at 98–178 (2002) (surveying shifting and generally

preempted nascent calls by wealthy Western countries for cooperative international management of critical resources such as oil.[122]

Despite the ideological importance many of these states placed on ownership of natural resources, core similarities of mining laws throughout the Global South in many ways reflect the New International Economic Order's failure. As nations saddled by the debt crises of the 1980s turned to foreign private investment to bolster their economies and foreign exchange reserves, they frequently worked with World Bank advisors to develop investor-friendly mining and petroleum legislation to facilitate that goal.[123] Two influential World Bank reports from the mid-90s thus represent significant early descriptions of the Bank's work on designing mining laws throughout Latin America and Africa, efforts which it periodically revisits.[124] Modern mining licensing laws thus often represent a Washington Consensus palimpsest written over the principle of permanent sovereignty over natural resources.[125]

Governments did not completely sacrifice autonomy over their mineral resource policies in welcoming foreign investors. Contrary to certain voices that continue to seek to maximize security of tenure—the principle that the party that discovers a mineral deposit will be entitled to exploit it—modern licensing legislation builds in regulatory safeguards, many of which kick in only after an investor has defined a viable deposit.[126] Beyond the baseline prohibition generally enshrined in statutory licensing, mining licensing regimes generally do not give even licensees any right to extract minerals at the outset.[127] Rather,

unsuccessful theories to provide contemporaneous legal justifications of European colonialism, particularly in Africa); Anghie, *supra* note 96, at 34–35.

122. Schrijver, *supra* note 118, at 37–39.

123. *See, e.g.*, Thomas Walde, *Investment Policies and Investment Promotion in the Mineral Industries*, 6 ICSID Rev.—Foreign Inv. L.J. 94, 95–96 (2011); Paulo de Sa, *Mineral Policy: A World Bank Perspective*, *in* International and Comparative Perspectives of Mineral Law and Policy 493, 497, 502 (Elizabeth Bastida, Thomas Waelde & Janeth Warden-Fernández eds., 2004); William T. Onorato, Peter Fox & John F. Strongman, World Bank Technical Paper No. 405, World Bank Group Assistance for Minerals Sector Development and Reform in Member Countries 4, 14–15 (1998); World Bank, A Mining Strategy for Latin America, *supra* note 117, at 14–17; World Bank, Strategy for African Mining, *supra* note 5, at 21–22, 52; William T. Onorato, Legal Dep't, WBG, World Bank Pol'y Rsch. Working Paper No. 1420, Legislative Frameworks Used to Foster Petroleum Development 2 (1995).

124. *See* World Bank, A Mining Strategy for Latin America, *supra* note 117, at 14–17; World Bank, Strategy for African Mining, *supra* note 5, at 21–22, 52.

125. *See* World Bank, Strategy for African Mining, *supra* note 5, at 23; *see also* Mostert, *supra* note 120, at 266.

126. World Bank, Strategy for African Mining, *supra* note 5, at 23–24; *cf.* Williams, *supra* note 11, at 55 (explaining how alternatives to this two-stage model "eliminat[e] the risk of not obtaining the necessary mining title" after a successful exploration program). Australia's Industry Commission prepared a detailed comparative assessment of its own, similar regimes to other mineral rights allocation systems, such as the United States's ad coelum principle. Aus. Industry Comm'n, Mining and Minerals Processing in Australia 9 (1991).

127. *See* sources cited *supra* note 126.

exploration licensees must identify and define a resource, apply for the right to mine that resource, and then obtain approval of their plans to manage the environmental, social, and fiscal impacts of the proposed mining operation.[128] In other words, subject to general guarantees of priority and exclusivity,[129] prospectors look for mineral resources subject to the risk that, even if they find anything, their right to exploit it is subject to the host state's assessment of whether they can do so in an environmentally or socially tenable manner.

Efforts to maximize predictability, limit discretion, and strengthen the proprietary characteristics of mining assets thus exist in tension with the regulatory model's effort to accommodate other interests, such as those of Indigenous people or local communities whose livelihoods could be affected by the project. That tension is often most acute when a mining project transitions from the exploration to the exploitation stage. The World Bank highlights core protections that it recommends for mining laws, including security of tenure in progressing from the exploration to the exploitation phase.[130] By contrast, human rights advocates, environmentalists, and advocates for Indigenous peoples often contend that the process of reviewing environmental and social impact assessments can and should involve broad-based participation and the possibility of rejecting an application for a mining permit due to a project's impacts.[131] Licensing procedures in these contexts are thus critical to safeguard the interests of third parties, including Indigenous peoples that may have their own internationally-protected entitlements to prohibit mining in their communities.[132] States have adopted varied approaches to implementing these recommendations, with some retaining purely discretionary authority to allocate or withhold mining licenses even *after* a miner has successfully proved up a deposit.[133]

The tension can also be understood as a tension between proprietary and administrative models. The World Bank notes that "[s]tate ownership" of mineral resources "does not preclude the creation of a secure property right attached

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128. *Id.*

129. *See, e.g.*, Ndulo, *supra* note 119, at 17.

130. World Bank, Mining Sector, *supra* note 108, at x.

131. *See, e.g.*, Samantha Hepburn, *Public Resource Ownership and Community Engagement in a Modern Energy Landscape*, 34 Pace Env't L. Rev. 379, 382 (2017); Ginevra le Moli, *Beyond Externalities: Human Rights as a Foundation of Entitlements Over Energy Resources*, 26 J. Int'l Econ. L. 649, 661 (2023). For an overview of these competing perspectives, see Intergovernmental F. on Mining, Min., Metals & Sustainable Dev., Background Document: Legal Framework of Environmental and Social Impact Assessment in the Mining Sector 8 (2019), https://www.iisd.org/publications/background-document-legal-framework-environmental-and-social-impact-assessment-mining-sector [https://perma.cc/S278-4GUQ] [hereinafter ESIA Legal Framework].

132. *See* U.N. Declaration on the Rights of Indigenous Peoples art. 26 (2007).

133. ESIA Legal Framework, *supra* note 131, at 12–14; *see also* discussion *infra* Section II.C (discussing, inter alia, mining laws in the Pakistani province of Balochistan).

to a mineral lease or concession."[134] For instance, in Peru, mining concessions are a form of real property distinct from ownership of the surface of the land or ownership of minerals in situ.[135] But this proprietary character of mining exploration rights does not change the fundamental issue. Even in Peru, miners' right to mine on proprietary concessions is conditioned on the issuance of a mining license, which is in turn conditioned on other administrative approvals, such as approval of an environmental and social impact assessment.[136] In other legal regimes, mining rights are purely administrative, rather than proprietary, subject to administrative termination for failure to fulfill statutory conditions.[137] One of the key consequences of the administrative as opposed to the proprietary model is remedial. In jurisdictions where exploration licenses do not convey a property interest, remedies for license termination or for refusal to grant expropriation licenses are administrative, with relief generally limited to judicial remand to a competent ministry to reconsider its decision.[138]

Regardless of the level of security of tenure in a given mineral resources law, one key feature in many of these regimes is the allocation of authority and discretion to agencies with supervisory authority over license approvals and performance. The World Bank argues that this authority should be clear, centralized, and preeminent, stating that as a matter of best practice, licensing regimes for mines should "explicitly supersede any other legislation such as investment laws or commercial codes that may provide contradictory instructions."[139] While the World Bank's report did not address investment treaties, it noted that where "an investment promotion agency or investment authority" retains concurrent authority over mining arrangements, "the lack of clear distinctions makes it harder to attract the right kind of investments while increasing the likelihood of environmental or social abuses by mine operators, and of labor and civil unrest."[140] In other words, licensing frameworks and the

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134. World Bank, Mining Sector, *supra* note 108, at 25.

135. General Mining Act, Sup. Decree No. 014-92-EM, § 9 (Peru).

136. General Mining Act § 9 (Peru). For an overview, see Patrick Weiland, *Going Beyond Panaceas: Escaping Mining Conflicts in Resource-Rich Countries Through Middle-Ground Policies*, 20 N.Y.U. Env't L. J. 199, 211–16 (2013).

137. World Bank, A Mining Strategy for Latin America, *supra* note 117, at 12; Ndulo, *supra* note 119, at 20. One way to think about this tension is as echoing U.S. New Deal tensions between regulatory and common law models of managing economic assets. In using the term "echoing," this Article does not mean to suggest that legal debates within the United States should be seen as paradigmatic, but merely that they gave rise to legal debates reflecting similar tensions.

138. World Bank, A Mining Strategy for Latin America, *supra* note 117, at 12; *see* Elizabeth Bastida, *A Review of the Concept of Security of Mineral Tenure: Issues and Challenges*, 19 J. Energy & Nat. Resources L. 31, 33 (2001).

139. World Bank, Mining Sector, *supra* note 108, at ix; *see also* World Bank, Strategy for African Mining, *supra* note 5, at 23 ("It is most important that the power to grant mineral rights should reside with one authority and not be subject to overlapping or concurrent jurisdictions.").

140. World Bank, Mining Sector, *supra* note 108, at ix.

values enshrined therein are often meant, through express legislative terms, to occupy the field governing licensee protection, lest miners attempt to use other legal protections to reduce their obligations to meet environmental and social standards of conduct.

This makes sense. Licensing laws represent a delicate balance, accommodating competing interests such as the state's interest in revenue maximization, competing community interests in environmental protection and in economic opportunity, Indigenous peoples' interests in the protection of their land and cultural heritage, and foreign investors' interest in maximizing legal certainty at the outset of a project.[141] At the domestic level, competing actors seek to rebalance these interests in various ways, seeking to have courts or legislatures strengthen their respective entitlements.[142] Despite these World Bank-endorsed best practices, international investment law distorts these balancing efforts. Investment treaties generally do not address their interaction with comprehensive national mining laws, allowing miners to use arbitration to interfere with national regulators' exercise of discretion. Investment treaties strengthen the protection afforded to miners' commercial interests at the expense of all competing interests that the licensing regime attempts to accommodate.

2. Spectrum Licenses

Extractive licensing prioritizes and facilitates mining, allocates mining rights to competent private actors, addresses tensions between various stakeholders affected by a project, and builds in state regulatory authority as a check on exploitation. That is a complex mandate. By contrast, spectrum licensing is arguably simpler: The regime exists to create a valuable asset, namely a spectrum band free of interference.[143] By providing a commercial user with a revocable, non-proprietary right to use specified technology to broadcast within a specified band, government licensing steps in to help private sector coordination and maximize the utility of the spectrum, whether to radio broadcasters, cell phone service providers, or other users.

Those broadcasters are not exclusively private actors. The earliest impetus to regulate broadcasting in the United States was less commercial demand than concern about public safety: The 1910 Wireless Ship Act was spurred by a demonstration of the effectiveness of wireless broadcasting in saving lives during

141. *See, e.g.*, U.N. Environment Programme, Assessing Environmental Impacts: A Global Review of Legislation 21 (2018).

142. *See, e.g.*, Ricardo Pereira & Orla Gough, *Permanent Sovereignty over Natural Resources in the 21st Century*, 14 Melb. J. Int'l L. 451, 479 (2013) (referring to efforts to strengthen domestic legal frameworks to require Indigenous peoples' consent to extractive projects on their land and competing demands from the mining industry for greater security of tenure).

143. Sanders Bros., 309 U.S. at 474.

maritime disasters.[144] Congress quickly required oceangoing steamers to have wireless communication capabilities, while interference with maritime distress calls became a growing concern.[145] Herbert Hoover,[146] who began to administer a de facto licensing regime as Secretary of Commerce in the 1920s that was influential on the later Federal Communications Act, thus "set aside certain parts of the wave bands for public broadcasting, certain parts for the Army and Navy and public services" as a matter of priority before allocating bands to various industry players.[147] While spectrum resources and technologies have evolved considerably since the 1920s, governments continue to require reserved spectrum access for security and diverse public purposes.[148] Moreover, as satellite-based transmissions create interference risks beyond national boundaries, transnational cooperation is increasingly necessary to effectively allocate spectrum.[149]

The allocation of spectrum to public services is less controversial than how governments should allocate spectrum among private competitors. Technological innovation creates demand for bandwidth to accommodate new services.[150] Regulators also have to consider the technical desirability of different spectrum bands for different uses, mindful that some propagate farther while others are better suited to urban areas.[151] At the same time, regulators frequently have difficulty identifying actual spectrum use, making any real assessment of congestion difficult. Licensees are wary of sharing information on their actual usage or otherwise facilitating the reallocation of spectrum, eager to protect the regulatory "givings" they have received.[152] Due to a lack of political will, licensees also tend to benefit from de facto overprotection from licenses once issued, despite their lack of property rights in those licenses.[153] Conservative commentators have argued that to avoid forestalling technological innovation,

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144. Hugh R. Slotten, Radio and Television Regulation: Broadcast Technology in the United States, 1920–1960, at 6 (2000).

145. *Id.*

146. Intriguingly, Hoover's professional background was in mining, and, with his wife Lou Henry, he prepared a translation of an influential 16th century text on metallurgy, *De re Metallica*. Georgius Agricolus, De Re Metallica (Herbert & Lou Henry Hoover trans., 1950). In a footnote in this volume, the Hoovers contended that "[t]here is no branch of the law of property, of which the development is more interesting and illuminating from a social point of view than that relating to minerals." *Id.* at 82 n.6.

147. Herbert Hoover, The Memoirs of Herbert Hoover: The Cabinet and the Presidency 1920–1933, at 141 (1952).

148. *See generally ITU-R: Managing the Radio-Frequency Spectrum for the World*, Int'l Telecomm. Union, https://www.itu.int/en/mediacentre/backgrounders/Pages/itu-r-managing-the-radio-frequency-spectrum-for-the-world.aspx [https://perma.cc/X9FJ-E4PS].

149. *Id.*

150. Jennifer A. Manner, Spectrum Wars: The Rise of 5G and Beyond 24 (2022).

151. *Id.* at 26–27.

152. *Id.* at 26; Dibadj, *supra* note 102, at 1052–55.

153. Dibadj, *supra* note 102, at 1055.

the government should simply sell spectrum outright rather than license its use, letting the market and specialized "interference courts" solve any ensuing interference problems.[154]

Other market-oriented reform proposals are less dramatic. Ronald Coase, in an early criticism of U.S. practice, argued that scarcity of the spectrum failed to differentiate it from any other asset, and that, consequently, broadcasting licenses should be auctioned.[155] At the same time, Coase and subsequent commentators have criticized the authority the Federal Communications Commission exercised over permissible speech in allocating licenses.[156] While auctioning was introduced into the allocation of spectrum in 1993, revisions to the Federal Communications Act have retained federal restrictions on broadcast content through various means.[157] For countries outside of the United States, this control over content has served important purposes, such as preserving the use of a national language. Czech regulators, for example, thus focus on broadcasters' proposals to promote Czech music, language, and culture in allocating licenses, concerned that a market left to its own devices will drown out cultural heritage.[158]

Despite contentious public debate about the need for and exercise of regulatory authority over the spectrum, the clearer and more unified purpose served by telecommunications licensing generally allows such systems to avoid the recurrent tensions visible in extractive licenses. But like extractive licenses, these regimes build in state authority to pursue various national interests. As this Article shows below, investment law, in prioritizing countervailing private plans, has repeatedly overridden those policy goals.

3. Casino Licenses

The regulatory issues embedded in casino licenses are in many ways secondary to the fundamental policy issue about gambling, namely whether to permit it at all—a decision that, at least with brick-and-mortar casinos, can be made on a much smaller scale than decisions about spectrum licensing.[159]

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154. *See* THOMAS WINSLOW HAZLETT, THE POLITICAL SPECTRUM: THE TUMULTUOUS LIBERATION OF WIRELESS TECHNOLOGY, FROM HERBERT HOOVER TO THE SMARTPHONE 7, 302–310 (2017).

155. Coase, *supra* note 100, at 30. European regulators have begun introducing rural access requirements in spectrum auctions, thus imbuing the regulatory process with more overt policy-oriented goals. MANNER, *supra* note 150, at 32.

156. *See, e.g.*, Dibadj, *supra* note 102, at 1073–77.

157. *See, e.g.*, Fishman, *supra* note 106, at 48; 47 U.S.C. § 309; Dibadj, *supra* note 102, at 1073–77.

158. *See* discussion *infra* Section II.D.

159. *See* Jorge Godinho, *The Macau SAR Regulation of Casino Gaming: Structural Features After the Reforms of 2022–2024*, 15 U. NEV. LAS VEGAS GAMING L.J. 1, 2 (2024) (noting that "[t]he business operation of casino games of chance is regulated locally, not regionally or globally"). Internet gambling poses new regulatory challenges, including to jurisdictions' authority to

Many jurisdictions prohibit gambling altogether in response to some combination of popular moral anxiety about gambling and the real, odious social externalities associated with letting individuals bankrupt themselves for entertainment.[160] Other jurisdictions (or the same jurisdictions at different times) allow gambling as an important revenue source.[161] The tensions that governments face between raising revenue and protecting public welfare lead to regulatory approaches that vary widely, even where gambling is allowed, from the more free-market approaches of jurisdictions like Las Vegas, which generally permit gambling activities that range from private parties to open casinos, to carefully circumscribed regulatory approaches that may authorize only a single casino operation.[162]

Casino licensure requirements are, in a key sense, the opposite of spectrum licensing: Rather than trying to create a valuable good, these requirements constrain the supply of a good with high externalities.[163] These regimes often allocate only a small number of licenses. The allocation of those licenses also serves various functions, such as screening for unrelated criminality and ensuring the integrity of the games.

These functions arise out of distinct concerns. The large and random cash transactions that gambling involves are often perceived to attract and provide cover for money laundering and other criminal operations.[164] As a result, gambling licensing tends to screen applicant entities and their controlling personnel

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enjoy revenue benefits from local, controlled gambling operations, which are beyond the scope of this Article. For a recent examination of these new tensions, see generally John T. Holden, *Access or Sovereignty*, 74 Emory L.J. 919 (2025).

160. Michael Belletire, Nat'l Gambling Impact Study Comm'n, Legislating And Regulating Casino Gaming: A View from State Regulators 2, 11 (1999), https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-gambling-impact-study-commission-final-report [https://perma.cc/BZ73-39QX].

161. *See, e.g.*, Jorge Godinho, *How to Win a Casino Concession: A Pragmatic Look at the Dynamics of Gaming Legalization Within Integrated Resorts*, 24 Gaming L. Rev. 255, 257 (2020) (noting that "operation of casino games of chance is authorized, regulated, and taxed among an often-confusing mix of stated and unstated economic goals and moral concerns").

162. *Id.* at 4–5. Macau, which extends a limited number of concessions to entities thereby authorized to run an open-ended number of casinos, offers something of a midway point between these paradigms. *See* Jorge Godinho, *Casino Gaming in Macau: Evolution, Regulation and Challenges*, 15 U. Nev. Las Vegas Gaming L.J. 1, 3 (2014). For a survey of approaches, see generally Linda Hancock & Zhidong Hao, *Gambling Regulatory Regimes and the Framing of "Responsible Gambling" by Transnational Casino Corporations: Asia-Pacific Regimes in Comparative Perspective*, 38 Asia Pac. J. Pub. Admin. 139 (2016).

163. Belletire, *supra* note 160, at 5.

164. *See, e.g.*, James Banks, Gambling, Crime, and Society 132–33 (2019); Jim Orford, The Gambling Establishment: Challenging the Power of the Modern Gambling Industry and Its Allies 146–47 (2019); Belletire, *supra* note 160, at 8; Godinho, *supra* note 162, at 14–15 (describing regulatory efforts around money laundering in Macau); 25 U.S.C. § 2702(2).

for "suitability" according to broad discretionary criteria.[165] Gamblers may also worry about the honesty of games, leading to industry demand for regulatory oversight as a guarantee of the integrity of casino operations.[166]

But, after a regulator completes initial screening of the entities and individuals involved in a casino, the solution to both concerns is the same. Once a casino is licensed, regulatory oversight often involves "a rigorous and comprehensive set of internal procedural operating controls."[167] As one former U.S. state regulator noted, given the volume of cash moving through casinos every day, "only a stringent, well organized and properly executed set of controls can track transactions, assure proper taxation of revenues, prevent theft, loss or embezzlement and provide for public confidence in the integrity of casino operations."[168] While enforcement is occasionally achieved through onsite officers, "regulatory bodies also rely upon the casinos to maintain logs that document irregularities and to 'self-report' casino violations to gaming agent," with self-reporting itself required by applicable regulations.[169]

Gambling licensing thus constrains, polices, and supervises the allocation of a commodity for which there is often ample demand, doing so both to ensure the integrity of the games and to address distinct police power concerns about industry participants. It often does so with substantial support from industry incumbents, who benefit from artificial scarcity through outsized returns, of which governments themselves take an ample share.[170] In investment arbitration cases involving casino licenses, the issue is often as simple as the substitution of non-expert oversight of licensee performance for the bargained-for, expert oversight of local gambling regulators.

In sum, states license economic sectors for a range of purposes and with varied application and oversight procedures. Ultimately, these licensing regimes represent an attempt to balance the interests of varied constituencies, including the government itself, the public, private economic actors, communities particularly affected by regulated activities, and the environment. For licensing regimes to achieve this balance, they must effectively constrain private actors.

165. Belletire, *supra* note 160, at 6; Godinho, *supra* note 162, at 5 (noting that similar requirements apply to gambling promoters in Macau).

166. *See* Belletire, *supra* note 160, at 1–3.

167. *Id.* at 8.

168. *Id.*

169. *Id.* at 8; *see also* Anthony Cabot, António L. Vilela & Pedro Cortés, *Comparing Gaming Regulatory Systems in Civil and Common Law Countries: How Different Approaches Can Achieve the Same Policy Goals*, 13 Univ. Nev. Las Vegas Gaming L.J. 135, 156 (2023) (quoting policy goals of Macau's gaming law including the "fair . . . operation" of games of chance "free from criminal influence" to promote "sustainable development of the economy of" Macau, as well as to ensure that "the persons involved in the supervision, exploitation, management and operation of casino games of chance are suitable to perform such functions").

170. Belletire, *supra* note 160, at 5.

Consequently, their core legal features remain presumptive prohibitions, conditioned access to economic privileges, and qualified exercise of those privileges. By protecting investors' business plans instead of their national law rights, the investment regime subverts these regimes.

II. Business Plans and the Vested Rights Problem

The basic rules canvassed in Part I would, in theory, imply straightforward results across a range of scenarios involving the application of international investment law to a licensing dispute.

The simplest illustration involves a company intending to engage in a commercial activity for which it needs a license that it does not have. Such a company should not be able to assert investment treaty claims based on state action affecting that commercial activity.

A slightly more complicated illustration involves a company with a license or other asset providing particular procedural rights, as with an exploration license holder with a priority claim to consideration for a mining license. In such cases, admissibility would not be the issue. The company's license constitutes an investment under the treaty. But as in the simplest case, such a company should not be able to assert claims based on commercial activities it has no right to engage in, for example, a right to mine. Instead, such a company may assert two categories of claims.

First, it may assert claims where a state interferes with rights attached to the assets it *does* have. For instance, if a company holds exploration rights for an area that gives it an exclusive, priority claim to apply for a mining license for that area, the company will have a claim where the state violates that exclusivity or priority, such as by arbitrarily diverting mining rights to a favored competitor. However, the company will not generally have a claim for lost profits arising from a mining license that it never had and may not have obtained. Instead, remedies for such claims should be restitutionary; the company, for instance, might be refunded the money it invested based on the expectation of priority.

Second, a company may assert claims based on procedural misconduct by the state that interferes with the company's right to seek additional licenses. For instance, if a mining ministry relies on improper considerations in denying an application for a mining license, the applicant may have an investment treaty claim. But the remedy in such a case should presumptively be declaratory. Setting aside the procedural breach, the company had no right under the applicable law to engage in the activity for which it needed a license, irrespective of any actionable administrative impropriety.

The illustration involving the most protection involves an investor with a license to engage in a commercial activity that is terminated. Most investment treaties define investments to include licenses and so recognize that licenses may be expropriated, entitling the company to assert expropriation claims and potentially recover damages based on the value of the licensed commercial activity. However, such claims must be viewed with caution. The licensee's rights are subject to and limited by the regulator's oversight authority. Where the regulator in good faith terminates or could have terminated a license over which it has supervisory authority, the licensee has simply been confronted with the limited scope of its rights. In the absence of bad faith, arbitral tribunals appear to have little role to play in such scenarios, and no expropriation or fair and equitable treatment claims should arise.

None of this negates the possibility of international liability for misconduct by host states in dealing with license applications or supervising licensees. But it does limit the types of conduct that imply liability. More importantly, it substantially constrains the availability of damages, making them unavailable for rights that an investor does not have. Put simply, domestic law prescribes the commercial activity on which any possible profits for the investor would depend, and those domestic law limitations should be respected by arbitral tribunals.

Some cases have followed these principles. Tribunals have refused to allow companies to recover compensation for the loss of rights associated with licenses that the companies never obtained, while at times granting declaratory relief based on procedural misconduct by a host state (Section II.A).

In other cases, arbitrators have refused to enforce the limits of investors' domestic rights, instead protecting the investor's planned business ventures. To do so, arbitrators have substituted their own approval of investor plans for host state authorities' scrutiny of licensees (Section II.B). They have shifted the risks of license applications to the host state, compensating investors whose applications were unsuccessful in circumstances that could or would have barred them from obtaining licenses (Section II.C). Arbitrators have also granted compensation to investors who had merely planned to apply for licenses but never did so, using the investors' plans as a basis for assessing damages (Section II.D). In doing so, arbitrators have allowed corporations to elevate their private business plans above national law.

A. *Limited Redress for Limited Rights*

Some cases have paid attention to the circumscribed nature of exploration rights in mining licensing regimes. In *Pac Rim Cayman v. El Salvador* and *Red Eagle v. Colombia*, tribunals dismissed claims by frustrated mining license applicants because the claimants had failed to show any entitlement to mine. And in *Eco Oro*, a tribunal found that an investor's application to mine was mismanaged, giving rise to liability, but ultimately found that the investor could not show any resulting harm.

In *Pac Rim*, the claimant's local subsidiary ("Pac Rim") had pending applications for mining and environmental licenses in El Salvador when the country announced a mining ban in 2008.[171] The ensuing dispute focused on whether Pac Rim could have obtained those licenses. El Salvador had issued Pac Rim's underlying exploration licenses pursuant to a revised 1995 mining law, which, unusually, required applicants to prove ownership of surface lands or legal authorization from surface landowners above the deposit.[172] Pac Rim, however, had leased only the land on which it planned to install above-ground facilities and had not obtained surface landowners' consent to mine.[173]

The dispute focused on whether Pac Rim in fact needed authorization from surface landowners.[174] Ultimately, the tribunal agreed with El Salvador that those authorizations were required, finding as a result that Pac Rim "had no legal right to any concession at El Dorado and no rights of property in any part of its sub-soil or any of its deposits under Salvadoran law," and so had no interests that were affected by the 2008 mining ban.[175]

The tribunal's analysis is not entirely satisfactory and, in several ways, foreshadows the trend described below of placing investors' plans above national law. Notably, despite the authorization issue being one of Salvadoran law on which numerous Salvadoran authorities issued formal legal opinions, the tribunal did not defer to Salvadoran agencies on the requirements for a mining license. Instead, the arbitrators relied largely on the fact that Pac Rim eventually acceded to the regulators' position on the requirements for a mining license. Rather than try to meet those requirements, the company had shifted to a strategy of lobbying for legislative change to elide the required authorizations from surface landowners.[176] Nevertheless, as reflected in the tribunal's

171. Pac Rim Cayman LLC v. Republic of El Sal., ICSID Case No. ARB/09/12, Award, ¶¶ 3.9, 3.15 (Oct. 14, 2016) [hereinafter Pac Rim v. El Salvador].

172. *Id.* ¶ 6.8. As described in Section I.B.1, mining licensing laws generally do not give surface landowners a veto right over the development of an underground mine. The authorization language in the statute was identical for quarries, surface mines, and underground mines, precluding an interpretation that limited the scope of authorization required for underground mines.

173. Pac Rim v. El Salvador, Award, ¶ 8.24. Ironically, the claimant's mining engineer thought that requiring authorization from all surface landowners above the deposit was untenable because it would give private landowners "the final say as to whether the state minerals can be developed or not." *Id.* ¶ 6.8.

174. *Id.* ¶ 8.11.

175. *Id.* ¶ 10.5.

176. *Id.* ¶¶ 8.29–8.33 (reflecting that only one tribunal member considered deference to the Salvadoran government's interpretation to be a decisive factor, with one compelled by Pac Rim's acquiescence to Salvadoran authorities' interpretation of a legislative amendment and another by their own interpretation of the statute).

reasoning quoted above, the expiry of Pac Rim's exploration licenses and the acknowledged defects of its application for mining rights doomed its treaty claims. Because Pac Rim had no right to mine, it lost nothing from the mining ban.

The *Red Eagle v. Colombia* and *Eco Oro v. Colombia* disputes arose from the same contested process by which Colombia designated high-altitude wetlands, *páramos*, for environmental protection and mining bans. Both Red Eagle and Eco Oro had rights to explore for minerals in high-altitude mountainous regions of Colombia. Exploitation rights would not vest until the applicants obtained environmental licenses.[177] Red Eagle had acquired its mining titles, granting exploration rights, between June 2010 and October 2013. However, by that point, another company, Eco Oro, had seen Colombian authorities reject its environmental impact statement submitted in support of its application for an environmental license. While Eco Oro was revising its application for that license, a significant portion of its concession area was designated as a protected *páramo* environment.[178] At that point, Red Eagle had not begun seeking necessary environmental licenses when its own concessionary areas were designated as protected *páramos*, against a backdrop of a protracted and shifting designation process.[179] Both companies pursued treaty arbitrations.

The *Red Eagle* tribunal rejected all claims because Red Eagle never acquired a right to mine. Instead, Red Eagle "had planned to carry out a mining project in the *páramo* area, but was never granted the legal right to do so."[180] The tribunal found that Red Eagle was on notice that Colombia was restricting mining in the *páramos* when it invested and should have considered that Eco Oro's application for an environmental license had already been rejected in 2011.[181] Assessing Red Eagle's expropriation claim, the tribunal noted that the company had failed to identify a "vested right of which it has been deprived,"

177. Eco Oro Min. Corp. v. Republic of Colom., ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 102–03 (Sept. 9, 2021) [hereinafter Eco Oro v. Colombia]; *see also id.* ¶ 499; Red Eagle Expl. Ltd. v. Republic of Colom., ICSID Case No. ARB/18/12, Award, ¶ 65 (Feb. 28, 2024) [hereinafter Red Eagle v. Colombia] ("Respondent has explained that . . . to acquire vested rights [it] is necessary to obtain an environmental license and an approved mining works program (plan de trabajos y obras or 'PTO'). A requisite for the license is the preparation and approval of an EIA (Environmental Impact Assessment).").

178. Red Eagle v. Colombia, Award, ¶ 297.

179. *Id.* ¶ 63. In a third case arising out of the same measures, a tribunal found that Colombia had validly exercised its police powers in enacting the mining ban, rejecting a claim by a company with an option agreement to acquire ownership of a concession for an existing small-scale mining operation that it intended to convert into a larger project. *See* Montauk Metals Inc. v. Republic of Colom., ICSID Case No. ARB/18/13, Award, ¶¶ 796, 826 (June 7, 2024).

180. Red Eagle v. Colombia, Award, ¶ 307.

181. *Id.* ¶ 297.

noting that the "existence of such a right is a matter of domestic rather than international law."[182] Red Eagle's "'right' to carry out mining . . . was always conditional on being granted an environmental permit . . . which was at the discretion of" Colombia.[183] The tribunal thus rejected the claim.

The *Eco Oro* tribunal inverted this analysis in key respects. Although the tribunal rejected an expropriation claim after finding that Colombia's mining ban was a permissible exercise of police powers,[184] it found that Eco Oro had been deprived of its rights. Due to the mining ban, "Eco Oro suffered the complete deprivation of a potential right to exploit."[185] Although the company "would have faced significant difficulties in obtaining" necessary environmental and other licenses, that difficulty did not itself defeat the deprivation showing because "the Tribunal cannot say that Eco Oro had no prospect of success."[186] Next, in addressing Eco Oro's claim that it had been treated unfairly by Colombian regulators in a manner that frustrated its project under the treaty's FET clause, the tribunal recognized the challenges Eco Oro would have faced in getting a mining license. Nevertheless, the arbitrators found that these challenges did not bear on the merits of the company's claim, stating, confusingly, that "such anticipated challenges would have related to the nature of the project itself and not to Colombia's actions."[187] The "inconsistent" process by which Colombia had delimited the *páramos* that were subject to a mining ban constituted an FET breach.[188]

Despite finding that Colombia had mistreated Eco Oro's investment, the tribunal focused its damages assessment on the investor's domestic law right, that is, its right to apply for an environmental license for the part of its concession not covered by the otherwise lawful mining ban.[189] In the process, the tribunal rejected Eco Oro's contention that "the loss of its acquired right to exploit

182. *Id.* ¶ 399.

183. *Id.* The tribunal also found that the process leading to the mining ban was appropriate. It was "a deliberative process considering a variety of interests and factors" in which the state "gave meaningful consideration as to how to weigh these competing economic, environmental and social interests to produce a balanced policy" which, while it could have been reached in "an infinite number of other ways," was legitimate. *Id.* ¶ 308.

184. Eco Oro v. Colombia, Decision on Jurisdiction, ¶ 699.

185. *Id.* ¶ 634. A dissenting arbitrator (who formed part of the majority in *Red Eagle v. Colombia*) emphasized that "the right to exploit was premised on the relevant environmental authorisations being obtained, in circumstances in which the Claimant was aware at the time of its investment that the grant of such authorisations was uncertain." Eco Oro v. Colombia, Partial Dissent of Prof. Philippe Sands Q.C., ¶ 16. Thus, the claimant's "right or ability to go beyond exploration to exploit the Concession area was subject to the overriding need to protect the environment." *Id.*

186. Eco Oro v. Colombia, Decision on Jurisdiction, ¶ 632.

187. *Id.* ¶ 771.

188. *Id.* ¶¶ 820–21.

189. Eco Oro v. Colombia, Award of Damages, ¶ 303 (July 15, 2024).

is equivalent to the destruction of the value associated with the Project."[190] Because Eco Oro failed to show that its "right to apply" for a license had any value, the tribunal declined to award compensation.[191]

These cases indicate that arbitrators can and do give effect to the limited scope of license applicants' domestic rights. That said, their reasoning does not entirely vindicate the primacy of domestic rights. The *Pac Rim* tribunal emphasized that, for at least two members of the tribunal, the investor's conduct in acquiescing to Salvadoran authorities' interpretation of their own law was the most compelling factor in its decision, reaffirming the overriding relevance of investor expectations and planning. The *Red Eagle* tribunal relied in important respects on the investor's lack of due diligence. And the *Eco Oro* tribunal found that Eco Oro suffered a relevant deprivation. For that tribunal, the company's "potential right to exploit" prevailed over Colombia's power to delineate *páramos* in which mining was environmentally unacceptable—even though Colombia's environmental scrutiny was a precondition for Eco Oro ever obtaining any mining rights.[192]

Moreover, both *Red Eagle* and *Eco Oro* attracted dissents. In essence, both dissenters argued that investors' profit expectations were protected once the investors acquired any domestic rights to which treaty protection attached, a line of thinking that echoes the analysis of the *Conoco* and *Exxon* tribunals addressed above. In *Red Eagle*, José A. Martínez de Hoz emphasized the claimant's extensive due diligence and found that "Colombia's general statements and regulations as to environmental protection could not reasonably be considered to have alerted Red Eagle to very specific issues" associated with delimiting the *páramos*.[193] Hoz found that Red Eagle's mining titles entailed a vested right to mine, subject to an obligation to do so consistent with Colombia's environmental regulations. He found it uncertain that Red Eagle's application for an environmental license "would have been inevitably denied," and so he would have found Colombia liable for interfering with Red Eagle's expectations.[194] In *Eco Oro*, Horacio A. Grigera Náon argued that the validity of the claimant's concession implied that the claimant had a "legitimate expectation that its rights thereunder would be respected including, without limitation, its right to make a profit."[195] Náon argued that the state was at fault for granting a concession covering areas that might be subject to a mining ban, and that its choice

190. *Id.* ¶ 292.
191. *Id.* ¶¶ 303–04.
192. *Id.* ¶ 634.
193. Red Eagle v. Colombia, Dissenting Opinion of José A. Martínez de Hoz, ¶¶ 44, 54 (Feb. 28, 2024).
194. *Id.* ¶¶ 88, 97, 141.
195. Eco Oro v. Colombia, Dissenting Opinion of Horacio A. Grigera Naón, ¶ 7 (July 15, 2024).

to restrict mining in concessionary areas thus constituted a taking for which compensation was due.[196] As demonstrated below, Hoz and Náon's views appear to represent the prevailing approach in the investment regime.[197]

B. Stepping into or Stealing the Regulator's Shoes?

Other tribunals have neglected to respect the limits of licensees' rights. The most straightforward cases are those involving a company with a license subject to regulatory oversight. In *Stans Energy v. Kyrgyzstan* and *Casinos Austria v. Argentina*, arbitral tribunals have displaced regulatory oversight by awarding compensation for a state's termination of licenses, siding with corporations' interpretations of regulatory requirements over their plain meaning or the interpretation of the state regulator.

In *Stans Energy v. Kyrgyzstan*, a mining company was required as a condition of its license to submit a plan for mine development by a specified deadline.[198] The mining company never did so to the satisfaction of the national mining agency.[199] Ultimately, for reasons which included the company's involvement in a local corruption scandal, its license was terminated following a determination by Kyrgyz courts that it had been unlawfully issued.[200]

With scarcely any analysis of the license conditions, the tribunal deemed this termination expropriatory.[201] The arbitrators found that they did not need to consider the company's failure to fulfill the license conditions because that failure had not provided the basis for the license's revocation, even though it might have independently justified the state's conduct.[202] The tribunal provided little explanation for how a voidable asset that had in fact been voided by the host state had been wrongfully taken from the mining company.

Similarly, in *Casinos Austria v. Argentina*, a gaming agency revoked a casino company's operating license for repeated regulatory infractions, only for a tribunal to second-guess the agency's assessment and award the company lost

196. *Id.* ¶ 23.

197. In other cases, such as *Churchill v. Indonesia* and *Cortec Mining v. Kenya*, arbitrators declined to hear claims arising out of mining licenses that investors obtained improperly. *See* Churchill Mining PLC v. Republic of Indon., ICSID Case No. ARB/12/14 and 12/40, Award, ¶ 528 (Dec. 6, 2016); Cortec Mining Kenya Ltd. v. Republic of Kenya, ICSID Case No. ARB/15/29, Award, ¶¶ 365, 387 (Oct. 22, 2018). *WalAm Energy v. Republic of Kenya* also turned on the valid revocation of an exploration license due to the claimant's failure to undertake exploration activities as required, although the case was governed by Kenyan law. WalAm Energy v. Republic of Kenya, ICSID Case No. ARB/15/7, Award, ¶¶ 347, 440, 445, 548 (July 10, 2020).

198. Stans Energy Corp. v. Kyrg. Republic, PCA Case No. 2015-32, Award, ¶¶ 214, 216, 235–36, 268, 272–73 (Aug. 20, 2019).

199. *Id.* ¶¶ 229, 250, 274, 307–08.

200. *Id.* ¶ 334.

201. *Id.* ¶¶ 579–80.

202. *Id.* ¶ 604.

profits.[203] The license at issue explicitly provided that it was subject to forfeiture for non-compliance with the provincial gaming law.[204] That law created an agency with regulatory oversight of licensees, obliged licensees to seek the agency's advance approval before engaging other operators to manage games of chance, and contained detailed anti-money laundering provisions focused on record-keeping and restricting cash payments, consistent with international best practices.[205] Over several years, the agency repeatedly fined the casino for infractions including making large payments in cash, failing to record transactions and, at one point, losing its transaction record.[206] As suggested by the analysis in Section I.B.3, these violations go to the core policy purposes of casino licensing, namely ensuring proper accounting of financial flows through casinos to prevent money laundering and guarantee the integrity of the games. These repeated infractions culminated in the agency's revocation of the casino's gaming license.

Casinos Austria brought a treaty arbitration and persuaded a tribunal that the Argentine agency's revocation of the permit constituted an unlawful expropriation.[207] The tribunal purported to base its determination on the agency's "arbitrary" constructions of the governing statute.[208] But as applied, this standard amounted to the tribunal's mere disagreement with the agency about necessary and effective anti-money laundering strategies, a topic on which the tribunal had no notable expertise.[209] The tribunal ultimately determined that the revocation of the license was a disproportionate response to the company's

203. Casinos Austria Int'l GmbH v. Arg. Republic, ICSID Case No. ARB/14/32, Award (Nov. 5, 2021) [hereinafter Casinos Austria v. Argentina].

204. *Id.* ¶ 69.

205. *Id.* ¶¶ 83–84.

206. *Id.* ¶ 94. Oddly, the tribunal framed its inquiry as concerning whether Argentina had properly exercised its police powers, rather than as concerning the scope of rights of which the claimants were allegedly deprived.

207. *Id.* ¶ 116. A dissenting arbitrator argued that because conditions for maintaining the license were not fulfilled, the property right validly ceased on its own terms; there was nothing to expropriate. Casinos Austria v. Argentina, Dissenting Opinion of Dr. Santiago Torres Bernárdez, ¶ 110.

208. Casinos Austria v. Argentina, Award, ¶ 378.

209. For instance, the regulator had frequently required that payments over a certain sum be made by check, rather than cash, lest they be qualified as "suspicious transactions" prohibited by anti-money laundering provisions of the criminal code, and the casino had acquiesced in the regulator's approach. *Id.* ¶ 383. However, regulations expressly clarifying that this requirement also applied under the gaming law only came into force later, leading the tribunal to find that the regulator had acted improperly in enforcing that rule before specific gaming regulations were enacted. *Id.* As to other issues, the tribunal found that the regulator had properly identified material infractions. *Id.* ¶ 380.

infractions.[210] In the tribunal's view, the casino's efforts to comply with the law should have allowed it to keep the license despite its recurring infractions.

These cases establish a simple point. Arbitrators set aside domestic law limits on investors' rights, including limits based on ongoing regulatory oversight, to protect investors' plans. To be sure, investors in these cases held rights that they lost, and investment treaties offer international oversight of license revocations. But tribunals in these cases failed to recognize that those rights were always conditional and contingent on just the sort of regulatory oversight that led to their revocation.[211] The investors did not lose anything that they were entitled to keep.

C. Re-allocating Risks of License Applications

In other cases, tribunals have shifted risks away from mining license applicants, in effect prioritizing investors' plans to manage those risks over their actual rights. In *Nachingwea v. Tanzania*, a tribunal not only rejected arguments that limits on the scope of an investor's domestic rights might constrain its claims but also invoked those limits to support a liability finding. In *Bear Creek v. Peru*, *Odyssey Marine v. Mexico*, and *Rockhopper v. Italy*, tribunals found that investors were deprived of the possibility of obtaining mining licenses even though barriers to granting those licenses had materialized. Lastly, a tribunal in *Tethyan v. Pakistan* awarded an exploration license holder six billion dollars in damages after disagreeing with a domestic regulator's discretionary denial of the company's application for a mining license. This Section addresses these examples in turn.

As discussed at the outset of this Article, *Nachingwea v. Tanzania* involved the termination of Nachingwea's retention license. Under Tanzanian law, miners could obtain prospecting licenses for fixed terms subject to fixed renewals, with priority consideration for a right to mine if they found a viable resource and presented "adequate" plans for exploiting the resource, hiring local labor, and managing environmental impacts.[212] If licensees found a resource that was

210. *Id.* ¶ 393.

211. For instance, the *Casinos Austria v. Argentina* tribunal mistakenly conflated the regulator's authority to supervise the license with general public authority to enact regulatory measures, even though the former authority was built in as an express limitation of the investor's rights from the outset of the project. *See id.* ¶¶ 357–96. By contrast, tribunals have generally been more permissive of contract terminations that were at least arguably based on an investor's breach of contract. Lopez-Goyne Fam. Tr. v. Republic of Nicar., ICSID Case No. ARB/17/44, Award, ¶ 470 (Mar. 1, 2023). It would be difficult to argue that Argentina's gaming regulator failed to satisfy a test of revoking the license on bases at least arguably tied to the gaming legislation.

212. Mining Act, 1998, art. 38 (Tanz.); Mining Act, 2010, art. 41 (Tanz.). For a high-level overview of Tanzania's current mining sector, see *Dentons Global Mining Guide: Tanzania,* Dentons (2022), https://www.dentons.com/en/insights/newsletters/2022/january/17/dentons-global-mining-guide/dentons-global-mining-guide-2022/tanzania [https://perma.cc/QHP6-85U2].

not commercially viable but might become so within ten years, they could seek a retention license—essentially an extension of the prospecting license.[213] The retention licenses carried a risk of cancellation. Specifically, Tanzania was entitled to order a retention licensee to "show cause" for why a deposit was not ripe for exploitation.[214] If a licensee failed to do so, Tanzania could cancel the license.[215] Still, retention licenses provided miners additional incentives by extending the period over which they could hold a priority claim to a deposit.

Tanzania amended its mining legislation to eliminate retention licenses in 2017, a measure which Nachingwea successfully challenged as expropriatory. That categorical elimination, to be sure, deprived Nachingwea of an asset. The mining company might, for instance, have relied on the duration of possible retention licenses to determine that exploration risks were worth assuming. But the tribunal's reasoning reflects its concern with protecting Nachingwea's plans, not its rights.

That concern emerges clearly from the tribunal's treatment of Tanzania's efforts to resolve the dispute. During the arbitration, Tanzania offered Nachingwea the opportunity to apply for a mining license.[216] The group declined, acknowledging that it would not qualify,[217] and the tribunal found that this offer did not remedy any deprivation. The tribunal noted that a mining license entailed different rights from a retention license.[218] The tribunal further emphasized that "what was offered was not an actual mining license, but an invitation to apply for a new license" where there was "no guarantee" of success.[219] Those distinctions are irrelevant. The value of the claimants' retention license was that it provided a right to apply for a mining license with no guarantee of success—and indeed, no value insofar as the claimants could not meet the requirements. In other words, Tanzania offered Nachingwea the same rights it had under the retention license, and the arbitrators found that offer inadequate.[220]

Moreover, while the tribunal acknowledged Tanzania's authority to cancel the retention license according to its terms, it found this factor to weigh in the

213. These retention licenses existed under 1998 and 2010 versions of the Tanzanian mining law, both of which applied at different points to Nachingwea. Mining Act, 1998, art. 34 (Tanz.); Mining Act, 2010, art. 38 (Tanz.).

214. Mining Act, 1998, art. 34 (Tanz.); Mining Act, 2010, art. 38 (Tanz.).

215. Mining Act, 2010, art. 38 (Tanz.); Mining Act, 1998, art. 34 (Tanz.).

216. Nachingwea v. Tanzania, Award, ¶ 203.

217. *Id.*

218. *Id.*

219. *Id.*

220. One arguable distinction concerns the window within which Nachingwea had to make an application for a mining license under a retention license versus under Tanzania's mid-arbitration offer. But relevant considerations such as the copper price and the availability of financing would have been similar for both the application and the decision to bring an arbitration, suggesting that this distinction was likely immaterial.

claimants' favor, finding the state's existing authority inconsistent with any public need to cancel retention licenses categorically.[221] According to the tribunal, because Tanzania was *already* entitled to cancel retention licenses on an individualized basis, it could not justify depriving Nachingwea of its retention license through categorical legislation. The tribunal proceeded to assess the fair market value of Nachingwea's investment, granting seventy-six million dollars in damages.[222]

In *Bear Creek v. Peru*, *Marine Odyssey v. Mexico*, and *Rockhopper v. Italy*, investors were unable to obtain mining rights in circumstances that reflected the realization of risks that they had assumed.

In *Bear Creek*, the claimant, as part of obtaining authority to mine, had completed exploration work and was seeking ministerial approval of an environmental and social impact assessment. As part of the review, the claimant had to show that it had consulted with local Indigenous peoples. Peru's Ministry of Energy and Mines had provided an initial round of comments on the impact assessment, noting that Bear Creek had adopted an overly narrow definition of "impacted communities" and needed to consult a broader range of stakeholders.[223] The administrative review process was interrupted, however, by massive regional protests against the proposed mine.[224] Protestors shut down a local airport and vandalized government offices.[225] To deal with the crisis, Peru first suspended its review of Bear Creek's application, and, as the protests continued, ultimately revoked the company's exploration rights on the ground that they had been issued improperly.[226]

At a threshold, jurisdictional stage of its analysis, the tribunal rejected Peru's argument that Bear Creek was asserting claims of interference with a "right to mine" that the company had "never acquired."[227] It held that Bear Creek's claims pertained to the right to apply for that right and so arose out of an investment subject to treaty protection, emphasizing that "an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project such as mining activity."[228] In other words,

221. Nachingwea v. Tanzania, Award, ¶ 248.

222. *Id.* ¶ 388. Tanzania settled several other cases by holders of retention licenses. *See* Damien Charlotin, *Tanzania Settles Third ICSID Dispute Arising from Mining Sector Overhaul*, IA Rep. (Nov. 21, 2024), https://www.iareporter.com/articles/tanzania-settles-third-icsid-dispute-arising-from-mining-sector-overhaul/ [https://perma.cc/A2RV-8FCF]; Damien Charlotin, *Canadian Miner Discloses Completion of 30 Million USD Settlement with Tanzania in Relation to ICSID Dispute*, IA Rep. (Oct. 16, 2023), https://www.iareporter.com/articles/tanzania-settles-third-icsid-dispute-arising-from-mining-sector-overhaul/ [https://perma.cc/2TYT-K8ML].

223. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, ¶¶ 177, 190 (Oct. 6, 2015).

224. *Id.* ¶ 190.

225. *Id.* ¶¶ 190, 196–97.

226. *Id.* ¶ 202.

227. *Id.* ¶ 295.

228. *Id.* ¶¶ 296–97.

because Bear Creek had a domestic law right triggering the treaty's application, its overall project benefited from treaty protection.

The tribunal then found that Peru had wrongfully deprived Bear Creek of "all the major rights it had obtained *and needed* for the realization of its mining project."[229] It found that social unrest did not justify Peru's decision to revoke Bear Creek's exploration rights.[230] But in reaching that decision on liability, the tribunal neglected to consider whether the unrest would have prevented Bear Creek from acquiring any of the "major rights it . . . needed" for its project—in other words, whether the unrest bore on whether Bear Creek had lost anything of value.

That omission is surprising because, in its damages analysis, the tribunal found insufficient evidence that the project could "obtain the necessary social license to be able to proceed."[231] Despite recognizing that the project was likely not viable and that Bear Creek did not yet have any right to mine, the tribunal awarded Bear Creek damages for the "fair market value" of its investment, which, in the absence of certainty as to the project's future prospects, it deemed equivalent to the company's historic expenditures of roughly eighteen million dollars.[232] The tribunal did not explain how Peru's conduct caused Bear Creek to lose any value associated with that eighteen-million-dollar expenditure, or how Bear Creek could have hoped to recoup its investment when it needed consent of the Indigenous peoples that would be affected by its mine to proceed.

In *Odyssey Marine v. Mexico*, a tribunal found that a miner's development of a state-of-the-art environmental impact study entitled it to a permit, over and above the national regulator's determination that the environmental risks of the project were too great. That case involved a novel proposal to mine phosphates from the seabed of the Gulf of Ulloa, on the Pacific coast of Baja California, through suction tubes, literally sucking up the seafloor for processing.[233]

The project required approval of an environmental impact assessment by Mexico's Secretariat of the Environment and Natural Resources.[234] The tribunal emphasized that in preparing the assessment, the claimant's subsidiary "was advised by several experts, from different fields," naming several of the most

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229. *Id.* ¶ 375 (emphasis added).

230. *Id.* ¶¶ 400, 408.

231. *Id.* ¶ 598. A "social license" is an informal term denoting social approval of a project, although obtaining a "social license to operate" may be relevant to obtaining formal ministerial approval of an environmental and social impact assessment. *Id.* ¶ 24.

232. *Id.* ¶¶ 596, 658, 660.

233. Odyssey Marine Expl., Inc. v. United Mex. States, ICSID Case No. UNCT/20/1, Final Award, ¶¶ 117–18 (Sept. 17, 2024) [hereinafter Odyssey Marine v. Mexico]. Notably, Stanimir Alexandrov, the arbitrator appointed by the claimant in *Odyssey Marine v. Mexico*, who joined the majority in finding Mexico liable, was lead counsel for Peru in *Bear Creek v. Peru*.

234. *Id.* ¶¶ 96, 115.

prominent individuals and firms involved.[235] Local fishing communities and environmental activists opposed the project, citing concerns about impacts on local fisheries, endangered turtles, and migratory whales.[236]

The Secretariat rejected Odyssey Marine's environmental impact assessment in a lengthy determination, which the company successfully challenged in a first instance administrative court.[237] The administrative court found that the Secretariat had failed to adequately substantiate its environmental concerns.[238] But the court declined to order the Secretariat to approve the project, noting that there appeared to be legitimate environmental concerns, that a final decision was ultimately the Secretariat's to make, and that the court lacked the technical capacity to evaluate Odyssey Marine's assessment.[239] On remand, the Secretariat again denied the application, citing more detailed evidence, such as the project's potential impact on the habitat of the *Caretta caretta* turtle and on migratory whales.[240] While Odyssey's challenge to this second denial was pending, it initiated arbitration.

The arbitral tribunal found that the Secretariat's denial of the permit amounted to a breach of the minimum standard of treatment under customary international law—a more state-friendly, harder to satisfy version of the FET standard.[241] The tribunal acknowledged that it could not "replace the judgment of a specialized administrative body with its own or . . . become a court of appeal of the decisions of the former" because it lacked the "technical competence" and mandate to do so.[242] Instead, the tribunal found that the circumstances of the permit's denial suggested that "environmental considerations were used as a pretext," and the denial was in fact motivated by "extraneous and personal motives" of a bureaucrat helming the Secretariat.[243] It concluded that due to these extraneous motives, the Secretariat "denied a permit that otherwise would have been granted."[244] While the tribunal did not grant Odyssey Marine its requested billions of dollars in damages, the arbitrators still found that the claimant was entitled to the market value of the investment.[245] Significantly, the tribunal found that this value should be determined by setting aside the

235. *Id.* ¶ 90.
236. *Id.* ¶ 109; Odyssey Marine v. Mexico, Dissenting Opinion of Prof. Philippe Sands, ¶¶ 22–23 (Aug. 27, 2024) [hereinafter Odyssey Marine v. Mexico, Sands Dissent].
237. Odyssey Marine v. Mexico, Award, ¶¶ 114, 126, 127, 129.
238. *Id.* ¶ 129.
239. *Id.* ¶ 137.
240. *Id.* ¶ 141.
241. *Id.* ¶ 333.
242. *Id.* ¶ 334.
243. *Id.* ¶ 335.
244. *Id.* ¶ 333.
245. *Id.* ¶¶ 558, 599.

state's wrongful conduct and looking at what would have happened "on the basis of . . . the proper State's decision, i.e., the approval of the" impact assessment.[246] By purporting not to assess the sufficiency of the investor's plan under national law while deeming it sufficient for the investor's project to proceed, the tribunal effectively elevated the plan above Mexican law and awarded Odyssey Marine compensation based on the planned project's value.

The dissent's concerns highlight that the majority decided to defer to the company's plan. The dissent pointed to extensive scientific evidence presented to the Secretariat raising serious environmental concerns about the project.[247] The dissent's survey of that scientific evidence shows how the majority effectively substituted its own assessment of the project's environmental impacts for that of the competent Mexican agency, largely on the theory that circumstantial evidence from motivated witnesses sufficiently impugned the Secretariat's good faith. The majority's decision can alternately be understood as a determination that an impact assessment prepared upon the advice of "several experts, from different fields" was sufficient to attract international law's protection.[248]

Rockhopper v. Italy involved a challenge to environmental legislation to ban oil drilling off the Italian coast. The claimants, Rockhopper, held a permit to explore an offshore oil block and a pending application with Italy's Ministry for Economic Development for a production concession.[249] While that application was pending, Italy passed legislation banning oil drilling within twevle nautical miles of the coast, including in Rockhopper's exploration block, leading Rockhopper to bring an arbitration.[250]

The tribunal found that the drilling ban constituted an expropriation. It acknowledged the "profoundly important distinction" between Rockhopper having "a right to be granted the production concession" and actually having the concession.[251] But it found that Rockhopper had applied for and met the criteria to obtain a production concession before the enactment of the drilling ban. Most importantly, the Italian environmental ministry had approved the company's environmental impact assessment.[252] The tribunal thus explained that Rockhopper "held a right to be granted the production concession."[253] At that point, it found that Italy could no longer rely on environmental grounds to refuse to grant a mining license.[254] Thus, the denial of Rockhopper's application

246. *Id.* ¶ 568.
247. Odyssey Marine v. Mexico, Sands Dissent, ¶¶ 21–24.
248. Odyssey Marine v. Mexico, Final Award, ¶ 90.
249. Rockhopper Italia S.p.A. v. It. Republic, ICSID Case No. ARB/17/14, Final Award, ¶ 122 (Aug. 23, 2022) [hereinafter Rockhopper v. Italy].
250. *Id.* ¶ 122.
251. *Id.* ¶¶ 131, 191.
252. *Id.* ¶¶ 194, 199.
253. *Id.* ¶ 150.
254. *Id.* ¶ 198.

based on a subsequent change in the law “wiped out” the company’s entitlement to a mining license.[255] In turn, the tribunal held that the claimants were entitled to damages based on the fair market value of the oilfield, emphasizing that “the reserve exists and could have been exploited.”[256]

In the arbitration, the tribunal rejected Italy’s numerous justifications for why a mining license might have been withheld, including on environmental and economic grounds. The tribunal did not purport to reject them as indefensible or untenable, but as inconsistent with prior conduct by the environmental ministry.[257] The *Rockhopper* tribunal also objected to the delay by Italy’s Ministry of Economic Development, finding it to amount to mistreatment, rather than to corroborate outstanding concerns about granting the production license. In sum, it did not matter that Rockhopper lacked mining rights, that mining rights were conditional upon the project’s environmental suitability, or that Italy ultimately prohibited the project on environmental grounds. The administrative procedure had come close enough to vesting Rockhopper’s mining rights that the tribunal felt it could equate that right with what, in the tribunal’s determination, was an Italian law entitlement to acquire that right.[258] The award was later annulled due to an arbitrator’s failure to disclose his personal criminal history, but the annulment committee did not address any challenges to the arbitrators’ reasoning.[259]

Lastly, in *Tethyan v. Pakistan,* a provincial government essentially usurped a mining project from a foreign investor after the investor had defined the resource. But the province did so largely due to the foreign investor’s unwillingness to sufficiently develop local processing capabilities, in a context where relevant mining legislation entitled the province to assess whether granting a mining lease was in the interest of the province’s development and whether the applicant was “fit and proper.”[260]

Tethyan, the mining company, held several exploration licenses through a contractual joint venture with the Balochistan Development Authority and invested substantial sums in proving up enormous copper deposits over more

255. *Id.* ¶ 169.
256. *Id.* ¶¶ 210, 277.
257. *Id.* ¶¶ 158, 166.
258. In a separate opinion, one arbitrator agreed with this expropriation finding while arguing that Rockhopper could never have legitimately expected to receive an exploitation permit. Rockhopper v. Italy, Opinion of Pierre-Marie Dupuy.
259. Rockhopper v. Italy, Decision on Annulment, ¶ 415 (June 2, 2025).
260. *See* Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pak., ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, ¶ 321 (Nov. 10, 2017) [hereinafter Tethyan v. Pakistan].

than a decade.[261] When Tethyan applied for a mining lease, however, its application was rejected in part because the company had failed to show that its lease application was "in the interest of the development of the mineral resources of Balochistan," a statutory requirement for granting an application.[262] Balochistan's formal rejection of Tethyan's application was poorly drafted and often specious, criticizing Tethyan's failure to prove deposits more quickly, even though Tethyan had timely requested and obtained numerous extensions due to the magnitude of the deposit it had found.[263] However, Balochistan also criticized Tethyan for failing to address "the processing, smelting, and refining" of extracted copper in its proposal.[264] The province cited this defect in the context of repeated efforts to obtain undertakings that Tethyan would build a refinery within the province and refine the copper locally, something Tethyan considered undesirable but which the province considered important and which a rival Chinese mining company was interested in pursuing.[265] Eventually, Balochistan decided to advance the project itself, refining copper locally.

After Tethyan's application for a mining lease was rejected, the company filed a treaty claim. In the arbitration, the tribunal acknowledged Balochistan's discretion over the decision to grant a mining lease under the applicable law. But it purported to find that Tethyan had legitimate expectations arising from government conduct outside of the regulatory review process, and particularly through the joint venture agreement, which included a term indicating that Tethyan could obtain a mining lease subject to "routine regulatory requirements."[266] For the arbitrators, this term:

> created the impression that such discretion had either already been exercised or that it would be exercised in Claimant's favor because [the joint venture parties] recognized the general principle that, after having invested millions of dollars into the exploration of the area, Claimant should also be the one that would later reap the benefit of its exploitation together with its Joint Venture partner.[267]

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261. In minutes of a meeting discussing contractual amendments, Balochistan agreed to relax the regulatory restrictions on obtaining a mining lease, but that agreement was struck down as invalid by Pakistan's Supreme Court as recognized by a commercial arbitration tribunal. *Id.* ¶ 909. The tribunal found that it could ignore applicable Pakistani law in favor of the international law of legitimate expectations. *Id.* Thus, while it found that Tethyan's application for a mining lease was governed by superseding regulations, it in effect lowered the standard it considered applicable to Tethyan's application based on a legally invalid waiver of requirements in a superseded law.
262. *Id.* ¶ 1203.
263. *Id.* ¶¶ 513, 519.
264. *Id.* ¶ 513.
265. *Id.* ¶¶ 424, 426, 455, 461.
266. *Id.* ¶ 958.
267. *Id.*

The tribunal's reasoning on this point is circular. The tribunal recognized that the "routine" regulatory requirements with which the contract required Tethyan to comply were those set out in the mining regulations, for example, that Tethyan be a fit and proper applicant and that its mining proposals be in the interest of the development of the province.[268] But the tribunal also found that the licensing authority, in scrutinizing those aspects of Tethyan's proposal under the law, was required to do so mindful of the company's contractual entitlement to a mining lease—even though that contractual entitlement was subject to Tethyan satisfying the requirements of the mining law.[269] The contract's actual terms gave the company nothing more than what the law provided. The tribunal then found that Balochistan could not cite Tethyan's refusal to build up local refining capabilities pursuant to its discretion to assess whether a proposal was "in the interest of the development of the mineral resources of Balochistan" because Tethyan's contract gave rise to a legitimate expectation that this discretionary aspect of the law would be assessed in the company's favor, despite the province's repeated requests that Tethyan process copper locally.[270]

The tribunal also noted that under applicable law, Balochistan could only enter into a joint venture agreement if doing so was "in the interest of the development of the mineral resources" of the province, meaning that the province had considered the project to be in its interest in 1993. For the arbitrators, this earlier determination bound Balochistan in its later assessment of Tethyan's mining lease application.[271] But the tribunal failed to explain why a decision in 1993 about whether prospecting was in the province's interest was preclusive of an assessment in 2010 of whether a particular exploitation proposal—one that would not provide for local refining—was also in Balochistan's interest.[272] The tribunal went on to assess the value that Tethyan's investment "would have had" if the mining lease application had been granted, ultimately awarding the company nearly six billion dollars based on the expected future cash flows of the project.[273]

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268. *Id.* ¶ 924.
269. *Id.*
270. *Id.* ¶ 1246.
271. *Id.* ¶¶ 928–29.
272. Pakistan further argued that misconduct during the making of Tethyan's investment exploration activities, including conduct which led Pakistan's Supreme Court to annul the joint venture agreement to which Tethyan had succeeded, had similarly warranted exercising discretion against the company. The tribunal, however, was unsatisfied of the evidence of relevant misconduct, leading it to conclude not that Pakistan had abused its discretion in relying on that evidence to deny the mining lease, but that in the arbitrators' own view the allegations were insufficiently supported. Tethyan v. Pakistan, Decision on Respondent's Application to Dismiss Claims (with Reasons), ¶¶ 1487, 1495 (Nov. 10, 2017).
273. Tethyan v. Pakistan, Award, ¶¶ 273, 1858 (July 12, 2019); *see also* Press Release, Antofagasta PLC, Reko Diq Project—Arbitration Award (July 12, 2019) (quantifying pre-award interest at $1.753 billion).

Tethyan involves greater complexity than the other cases surveyed in this Section. Motivating the tribunal's ultimate liability determination was its finding that Balochistan had decided to develop the resource itself, persuaded that it could do so in a manner that would ensure more processing and refining took place within the province.[274] Unlike in *Odyssey Marine*, *Bear Creek*, and *Rockhopper*, Pakistan was not choosing to leave the resource in the ground, but instead planned to profit from its development, in a context where Tethyan was entitled to be first in line.

At the same time, Tethyan developed its plan subject to the regulator's discretion to assess whether the company had an adequate plan for developing the province's mineral interests, as well as repeated expressions of concern by provincial officials about where refining would take place. Tethyan repeatedly sought more robust legislative and contractual protections against the province's statutory discretion but failed to obtain that assurance, despite the backing of major global mining firms and bargaining power that allowed it to negotiate for ICSID arbitration in its joint venture agreement. Had Tethyan been willing to bear the costs of refining copper locally, there is little in the arbitration record that suggests the company would not have been permitted to advance the project. Moreover, subsequent developments have proven Pakistan's concerns prescient—refining capability for critical resources such as copper has become both an important part of the development strategies of mineral-rich states, and the absence of such capabilities is posing geopolitical hindrances for even advanced economies.[275]

In sum, Tethyan at first glance presents one of the strongest cases for compensation, involving a mining company whose priority claim to a deposit it defined was abrogated because the state decided to mine the deposit itself. But a closer look shows that Balochistan at all times reserved discretion to assess the developmental stakes of mining lease proposals, a reservation that was always a concern for Tethyan. Balochistan communicated its concerns about Tethyan's proposals, but the latter was unwilling to budge on an issue that has since proven to have significant developmental and geopolitical stakes, namely the development of local copper refining capacities. The express efforts of a conflict-ridden Pakistani province to retain the authority for itself to assess the developmental stakes of major mining projects were displaced by an investment treaty's bare reference to "fair and equitable treatment."

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274. Tethyan v. Pakistan, Decision on Jurisdiction and Liability, ¶¶ 1125, 1151.

275. Mandy Meng Fang, *Climbing up the Critical Mineral Value Chains: The Global South and Green Industrialization in an Era of Disruption*, 57 Vand. J. Transnat'l L. 795, 798 (2024).

D. Compensation for Licenses an Investor Planned to Acquire

In the cases surveyed in Sections II.B and II.C above, investors generally had domestic rights—predominantly licenses, but occasionally contracts that required licenses for underlying exploitation rights to vest—that were necessary initial steps in their plans. In the cases discussed in Section II.C, those plans justified awards of compensation for commercial rights that the investors never obtained.

Other cases have protected business plans even further removed from relevant domestic rights. In cases such as *Lemire v. Ukraine* and *Deutsche Telekom v. India*, tribunals have awarded investors compensation for losses associated with licenses that the investors never even applied for. Far beyond the cases in Section II.C, which conflated procedural rights to apply for a license with substantive rights to engage in the licensed activity, these cases involve arbitrators elevating a private plan to apply for a license into an internationally protected right.

In *Lemire v. Ukraine*, a tribunal awarded damages on the assumption that but for Ukraine's treaty breaches, the claimant would have been awarded licenses for which he never applied. *Lemire v. Ukraine* involved an American operator of a radio broadcaster in Ukraine called Gala. Under Ukrainian legislation, the National Council awarded broadcasting frequencies according to numerous statutory criteria.[276] However, the Council did not provide written explanations for its decisions. Moreover, despite its nominal independence, its members were removable at will by the Ukrainian President.

Lemire challenged the process by which several frequencies had been awarded, including tenders in which his station, Gala, had not participated. In one, the Ukrainian president had instructed the council to consider another station's applications, and Lemire presented circumstantial evidence that the other station was owned by an individual with ties to the president. The tribunal agreed that the president's instructions interfered with the council's independence, construing this to amount to an FET breach.[277] In another tender, the National Council deadlocked, with one member voting for Gala, four members voting for a second applicant, and another four members voting for a third.[278] The tender was cancelled and reannounced, and Gala did not participate in the second tender.[279] Again, the arbitrators found an FET breach, reasoning that the evidence that one tender procedure had been tainted suggested that

276. Lemire v. Ukr., ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 143 (Jan. 14, 2010) [hereinafter Lemire v. Ukr.].
277. *Id.* ¶ 356.
278. *Id.* ¶ 364.
279. *Id.* ¶ 368.

the same was true of the other.[280] In a third tender proceeding, the tribunal deemed Gala more capable than the winning bidder of fulfilling a requirement that forty percent of broadcast programming be in Ukrainian, and so found that the National Council's contrary judgment was an FET breach.[281] The tribunal also found that Ukraine breached the treaty because, during a two-year period in which the National Council lapsed for lack of quorum, radio licenses were issued to other broadcasters outside of normal processes.[282] Gala had not sought or obtained licenses during this period.

Turning to compensation, the tribunal found the question of Gala's actual participation in tender procedures irrelevant. It explained that to assess the value of the investment but for the breach, it "can and must take into account, as a fact, Mr. Lemire's historic plans" to acquire broadcasting rights covering the entire Ukrainian territory.[283] The tribunal acknowledged that broadcasting without a license was illegal, but did not consider this a barrier to awarding compensation. Instead, it found that "the effect of the irregular denial of licences was that Gala Radio's business plans could not be achieved, that its planned development was curtailed, its market position eroded, its capacity to generate profits impaired and its potential market value was never achieved."[284] "Mr. Lemire's initial business plans" were "decisive,"[285] the tribunal found, and his damages were equal to the difference between his business plans and what he was actually able to achieve.[286] The tribunal agreed with the claimant that, after acquiring licenses covering twenty-two percent of Ukrainian territory, he should have been given 14 additional licenses, which he did not seek while the National Council was inoperative, to allow him to extend his programming to AM stations and throughout the remaining seventy-eight percent of the country.[287] The key issue for the tribunal was not "whether Claimant participated or not in the irregular practices and rigged tenders," but what would have happened under proper tender procedures had he participated.[288] A dissenting opinion criticized this approach as amounting to using the "Claimant's business plans" to determine "the scope of Respondent's liability."[289]

280. *Id.* ¶ 370.
281. *Id.* ¶ 384.
282. *Id.* ¶ 418.
283. Lemire v. Ukr., Award, ¶ 90 (Mar. 28, 2011).
284. *Id.* ¶ 161.
285. *Id.* ¶ 162.
286. *Id.* ¶ 161.
287. *Id.* ¶¶ 175–77.
288. *Id.* ¶ 182.
289. Lemire v. Ukr., Dissenting Opinion of Dr. Jurgen Voss, ¶ 331 (Mar. 1, 2011).

Subsequent tribunals have relied on the reasoning in *Lemire v. Ukraine*. For instance, in *Deutsche Telekom*, a German company's indirect Indian subsidiary, Devas, entered into an agreement with Antrix, a state-owned telecommunications company, to lease a substantial portion of India's internationally allocated electromagnetic spectrum from satellite transponders.[290] Devas planned to commercialize that spectrum band, a plan that required regulatory approvals from various Indian agencies. Antrix undertook to secure "frequency and orbital slot clearance," and Devas undertook to secure a novel, first-of-its-kind telecommunications license that would authorize "terrestrial reuse" of the satellite spectrum.[291] The agreement provided that if Antrix could not secure required clearances before a certain deadline, it would reimburse Devas's associated fees, and the agreement would terminate.[292]

In parallel, the Indian military determined that it should reserve portions of the same spectrum band for military and strategic purposes.[293] After interministerial consultations, the government annulled the contract and elected to withhold orbital clearances from Antrix.[294] Antrix notified Devas of the termination of the contract, citing *force majeure* and its inability to obtain required clearances.[295] An arbitral tribunal found that India had thereby breached its investment treaty with Germany, finding that ministers had improperly prejudged their decision without sufficient consultation or evidence that the agreement was strictly incompatible with military needs.[296]

In a subsequent damages phase of the arbitration, India argued that Devas "should not be entitled to compensation for rights it never had," arguing that but for the termination of the contract, "Devas would not have obtained the necessary licenses to enable it to roll out its proposed business."[297] The tribunal found that Devas's value "was derived from Devas's proposed business," and that India's annulment of the contract and satellite lease annulled that value.[298] Given that finding, the tribunal decided that questions about further regulatory requirements, such as Devas's need for the first-of-its-kind telecommunications license, were only relevant to the amount of damages Deutsche Telekom suffered, not to whether those damages were caused by India's treaty breach.[299]

290. Deutsche Telekom AG v. Republic of India, PCA Case No. 2014-10, Interim Award, ¶ 59 (Dec. 13, 2017) [hereinafter Deutsche Telekom v. India].

291. *Id.* ¶ 63 (first and third bullets); Deutsche Telekom v. India, Final Award, ¶ 138 (May 27, 2020).

292. Deutsche Telekom v. India, Interim Award, ¶ 64.

293. *Id.* ¶¶ 74, 100.

294. *Id.* ¶ 82.

295. *Id.* ¶ 92.

296. *Id.* ¶¶ 363–90.

297. Deutsche Telekom v. India, Final Award, ¶ 13.

298. *Id.* ¶ 123.

299. *Id.* ¶¶ 130–31.

In valuing "the *extent* of the loss," it thus looked at "the probability . . . of the relevant licenses being received" rather than treating the absence of necessary licenses as "an element interrupting the causal chain."[300] Thus, while there was "a certain degree of uncertainty" surrounding the license "of which [Deutsche Telekom] was aware when it made its investment," this was "not determinative" of the damages issue.[301] The tribunal proceeded to award the company $93.3 million.[302]

The facts, domestic legal regimes, challenged state conduct, and theories of international liability vary considerably across the cases surveyed above. Despite this variation, the absence of necessary domestic commercial licenses is a critical throughline. Across a range of theories and ostensibly fact-bound determinations, arbitrators in each case prioritized corporate business plans to manage or acquire rights over the limitations and assumptions of risk built into their domestic rights.

III. Business Plans as the Object of International Protection

Part II showed that businesses can win compensation for interference with their plans to acquire rights or for the loss of licenses subject to regulatory oversight when their plans were inadequate to meet regulators' concerns. Profit expectations embedded in business plans prevail over government plans to allocate risks to businesses.

These business plans can be private, as in *Lemire* or *Casinos Austria*—internal documents reflecting intentions for how to operate or expand a company.[303] They can also be highly technical, specialized plans, such as environmental impact statements prepared by experts and submitted to governments by companies applying for additional rights, as in *Bear Creek* or *Odyssey Marine*.[304] Compensating different kinds of plans gives rise to different concerns, ranging from the lack of evidentiary value of mere private intentions, such as those in *Lemire*, to the risk of effectively privatizing sensitive environmental decision-making, such as that at issue in *Odyssey Marine*. But while national law dictates the risks around which licensees must plan, investment law reduces that planning

300. *Id.* ¶ 131.

301. *Id.* ¶ 156. Mauritian shareholders of Devas also sued under a different investment treaty and likewise prevailed, with a tribunal finding that but for the annulment of the contract, "a WPC [wireless planning and coordination] License would have been issued in favor of Devas for the provision of BWA [broadband wireless access] and AV [audio-visual] services." CC/Devas (Mauritius) Ltd. v. Republic of India, PCA Case No. 2013-09, Award on Quantum, ¶ 380 (Oct. 13, 2020).

302. Deutsche Telekom v. India, Final Award, ¶ 298.

303. *See* discussion *supra* Sections II.B, D.

304. *See* discussion *supra* Section II.C.

requirement to a mere formality, requiring investors to do no more than show the work of making commercially reasonable preparations.

Part II thus demonstrated that investment arbitration protects investors' plans over and above their domestic law rights. In doing so, it creates a distinct international right that businesses have significant unilateral authority to define, and which can involve lower levels of environmental protection, social outreach, and other safeguards than national regulators and national laws require.

This Part shows that protecting business plans is not limited to the statutory licensing context. Instead, that account of international investment law offers a new perspective on two controversial doctrines. First, it provides a new account of why international investment law has a unique rule allowing shareholders to recover for losses suffered by companies in which they own shares. Second, it accounts for divergences between the protection of "legitimate expectations" in international and national law. By showing how the protection of business plans offers insight into other controversial features of investment law, this Part suggests that, far from an issue unique to the statutory licensing context, it reflects a pervasive understanding by investment law adjudicators of their proper role.

A. Shareholders as Planners

Investment treaty arbitration is unique in generally allowing shareholders to bring "reflective loss" claims, or claims for harm to the value of their shares based on harm to the legal rights of the subsidiary in which the claimant has an equity interest.[305] Commentators have noted that this approach creates arbitrary and indefensible interference with basic precepts of corporate law, undermines the feasibility of dispute settlement by allowing different companies in a corporate chain to make independent decisions about pursuing a claim, and subjects states to a potentially open-ended number of claims with respect to

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305. David Gaukrodger, Shareholder Claims for Reflective Loss in Investment State Dispute Settlement: A "Component-by-Component" Approach to Reform Proposals ¶ 16 (Dec. 2021). Notably, the legal standards arbitrators have articulated to admit reflective loss claims have no apparent limits, effectively treating an "indirect" interest in an investment as equivalent to some manner of legal relationship with it and an expectation of realizing revenues from it. *See, e.g.*, Theodoros Adamakopoulos v. Republic of Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 300 (Feb. 7, 2020) (finding that a contract between two Greek parties for a life insurance policy whose value was defined by reference to Cypriot bonds gave the contracting parties a qualifying indirect investment in Cyprus). Thus, creative claimants are now bringing investment treaty claims arising out of the extension of credit to companies whose subsidiaries suffered harm to their assets in host states. *See* Andrew Larkin, *Dutch Finance Company Lodges ICSID Arbitration Against Ukraine*, IA Rep. (Feb. 17, 2025), https://www.iareporter.com/articles/dutch-finance-company-lodges-icsid-arbitration-against-ukraine/ [https://perma.cc/GA9C-NMNW].

any particular project.[306] Most importantly for present purposes, this rule fundamentally distorts municipal law by giving shareholders direct, enforceable rights in their subsidiaries' assets.[307] Shareholders have no such rights under domestic law or in other international law regimes as a corollary of their limited liability for their subsidiaries' debts and to protect management's control of the entity.[308]

Early investment treaty decisions failed to grapple seriously with these problems.[309] In effect, they found that because investment treaties protect shares, shareholders could claim in their own name for losses suffered by subsidiary companies.[310] That inference is a non sequitur, since treaties could more naturally be read to simply protect the rights which inhere in share ownership. Nevertheless, despite a growing chorus of academic criticism of this practice,[311] and a new wave of defenses[312] and reform proposals aimed at eliminating shareholder reflective loss claims,[313] such claims remain generally admissible in investment treaty cases.

Understanding investment treaties as protecting corporate plans provides one way to understand the persistence of this trend. Tribunals frequently refer to planned corporate structures to justify reflective loss claims. For instance, in an early decision, the *Sedelmayer v. Russia* tribunal noted that it was common practice that an individual investing abroad "uses a company as a tool" to

306. Arato, *supra* note 25, at 29–44; Gaukrodger, *supra* note 305, ¶ 2.

307. Gaukrodger, *supra* note 305, ¶ 16.

308. *Id.* In certain circumstances, shareholders in domestic legal regimes may stand in the place of the company and sue on its behalf, with recovery going to the company. By contrast, in investment law, shareholders sue in their own name and recover on their own behalf for harm to the company's assets.

309. Douglas, *supra* note 63, at 401 (noting that a "survey" of investment treaty cases demonstrates that they have "failed to grapple with the problem [of shareholder reflective loss claims] directly").

310. *See, e.g.*, CMS Gas Transmission Co. v. Republic of Arg., ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 65, 68 (Jul. 17, 2003).

311. *See, e.g.*, Arato, *supra* note 25, at 29–44; Gabriel Bottini, Admissibility of Shareholder Claims Under Investment Treaties 6 (2020); Gaukrodger, *supra* note 95, at 14–20; Vera Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. Pa. J. Int'l L. 189, 190 (2018). *See generally* Mark Clodfelter & Joseph Klingler, *Reflective Loss and Its Limits Under International Investment Law*, *in* Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration 57 (Christina L. Beharry ed., 2018).

312. *See, e.g.*, Julien Chaisse & Lisa Zhuoyue Li, *Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss*, 52 Stan. J. Int'l L. 51 (2016); Jan Paulsson, *Why Investment Treaties Should Not Be Subverted by* Barcelona Traction, *in* 21 ICCA Cong. Series 145, 158 (Cavinder Bull, Loretta Malintoppi & Constantine Partasides eds., 2023).

313. *See, e.g.*, Rep. of Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Procedural and Cross-Cutting Issues, at 10, U.N. Doc. No. A/CN.9/WG.III/WP.244 (2024).

invest.[314] Other tribunals have since echoed that rationale, noting that use of intermediary companies is not only "not unusual" but "widespread."[315] In these circumstances, arbitral tribunals have held, "[t]he legal form of the investments would change; but the underlying commercial reality would not."[316] Arbitrators have thus asserted their authority to protect "commercial reality." Broad treaty language can "encompass what is today the very common situation of a foreign company making an investment through a subsidiary incorporated in the host State," according to these tribunals.[317] Treaties may protect investors' "financial or other commercial interest" in a project irrespective of a claimant's lack of any associated legal rights.[318] Commentators have elaborated on this rationale, arguing for the functional necessity of admitting shareholder reflective loss claims in light of the widespread adoption of complex corporate structures.[319]

On its face, this justification is a non sequitur. Corporations elect, for instance, the tax benefits of holding assets through subsidiaries in exchange for the loss of direct ownership rights in those assets. But if plans, not rights, are what arbitrators understand themselves as protecting, then this reasoning is easier to understand. The factual reality of complex corporate structures becomes a sufficient basis for disregarding the adverse legal risks assumed by investors who structure their business plans through intermediary entities. Because investment treaties protect businesses' anticipated profits, the legal structures through which those profits are expected to flow are immaterial.

That understanding is borne out by more nuanced discussions of reflective loss issues. Consider the 2020 decision in *Kappes v. Guatemala*.[320] There, a tribunal was faced with interpreting a treaty provision that dealt expressly with reflective loss, allowing shareholders who owned or controlled companies incorporated in a host state to make claims either on their own behalf or on behalf of the local entity.[321] In the latter case, both the claimant and the local entity

314. Franz Sedelmayer v. Russ. Federation, SCC, Arbitration Award, at 57 (July 7, 1998).
315. Bernhard von Pezold v. Republic of Zim., ICSID Case No. ARB/10/15, Award, ¶ 321 (July 28, 2015).
316. Hochtief AG v. Arg. Republic, ICSID Case No. ARB/07/31, Decision on Liability, ¶ 164 (Dec. 29, 2014).
317. Eur. Am. Inv. Bank AG v. Slovk. Republic, PCA Case No. 2010-17, Award on Jurisdiction, ¶ 321 (Oct. 22, 2012); *see also* Mera Inv. Fund Ltd. v. Republic of Serb., ICSID Case No. ARB/17/2, Decision on Jurisdiction, ¶ 129 (Nov. 30, 2018).
318. Azurix Corp. v. Arg. Republic, ICSID Case No. ARB/01/12, Decision on Application for Annulment of Argentine Republic, ¶ 108 (Sept. 1, 2009).
319. *See* Christoph Schreuer, *Shareholder Protection in International Investment Law*, 2 Transnat'l Disp. Mgmt. 1, 1, 4–5 (2005).
320. Kappes v. Republic of Guat., ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objection (Mar. 13, 2020) [hereinafter Kappes v. Guatemala].
321. Dominican Republic–Central America–United States Free Trade Agreement art. 10.16.1(a)–(b), Aug. 5, 2004, 2025 U.S.T.I.F. 97.

were required to waive their right to bring the same claims in other forums, such as domestic courts.[322] These treaty provisions were modeled on the former North American Free Trade Agreement, whose state parties have all clarified through briefing and non-disputing party submissions that they understand the provisions to bar reflective loss claims.[323] For Guatemala, these provisions made clear that reflective loss claims were generally barred, since there would be no other reason to articulate particular circumstances in which the investor could claim on behalf of a Guatemalan company that it owned.[324]

The tribunal rejected Guatemala's position. It noted that controlling investors could have reasons for seeking recovery for the same harm in their own name or in the name of the company. In particular, a shareholder in a locally incorporated "going concern" could want to ensure that the enterprise makes a full recovery, whereas a shareholder in a non-operative enterprise might prefer to pursue only its own pro rata share of compensation.[325] To ensure complete protection for various plans an investor might have, the tribunal construed the treaty to generally permit reflective loss claims.

A dissenting arbitrator criticized this approach to treaty interpretation for seeking to ensure "the broadest possible flexibility to controlling shareholders."[326] But the majority's interpretive posture is understandable if it is understood that the broader purpose of the investment regime is to protect investors' commercial plans. Because a claimant-friendly interpretation of the treaty allowed it to protect a wider configuration of private plans, the tribunal adopted that interpretation. *Kappes* is thus not merely an example of more detailed treaty language failing to remedy persistent problems in investment law, but an example of private plans offering a key point of reference for the evolution of the field.

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322. *Id.*

323. *See* Clayton v. Gov't of Can., PCA Case No. 2009-04, Award of Damages, ¶¶ 376, 379 (Jan. 10, 2019) (describing the North American Free Trade Agreement parties' views). Although the North American Free Trade Agreement parties' views are not binding on the DR–CAFTA parties, they offer additional evidence that the treaty language at issue can be readily understood as prohibiting reflective loss claims, an understanding shared by the host state and the investor's home state in *Kappes v. Guatemala*.

324. Kappes v. Guatemala, Decision on Respondent's Preliminary Objection, ¶ 145.

325. *Id.* ¶¶ 133, 146–47.

326. Kappes v. Guatemala, Partial Dissenting Opinion of Prof. Zachary Douglas, ¶ 14 (Mar. 13, 2020) ("The assumption is that the idea animating the State Parties . . . was to confer the broadest possible flexibility to controlling shareholders in advancing their claims against the respondent States. There is no basis for that assumption in the treaty itself.").

B. Legitimate Expectations as Factual Predicates of Business Plans

The same point can be made about the protection of investors' "legitimate expectations" in international investment law. Under that doctrine, state conduct that fosters a belief by an investor that a particular business plan may go ahead can support a claim for damages if that expectation is frustrated.[327]

This doctrine has attracted extensive criticism. Scholars have pointed out that there is little international practice justifying such an approach,[328] that it lacks the safeguards or rigor of domestic law concepts from which it borrows, such as quasi-contract and estoppel,[329] and that the most analogous domestic administrative law concept supporting the existence of an international obligation to protect legitimate expectations involves stricter standards and more limited remedies.[330] Fundamentally, these critics have demonstrated that protecting legitimate expectations entails the creation of a new international right on the basis of undertakings or representations that are not binding as a matter of domestic law.[331]

New treaties have attempted to circumscribe or exclude the doctrine, including by limiting the treatment required by investment treaties to the minimum standard required by customary international law.[332] Nevertheless, arbitrators have simply determined that customary international law protects legitimate

327. *See* Jonathan Bonnitcha, Substantive Protection under Investment Treaties: A Legal and Economic Analysis 168 (2014).

328. Josef Ostřanský, *An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law Under the Fair and Equitable Treatment Standard*, *in* General Principles of Law and International Investment Arbitration 344, 346, 357 (Andrea Gattini, Attila Tanzi & Filippo Fontanelli eds., 2018); Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, 49 Alta. L. Rev. 203, 208 (2011).

329. Johnson, *supra* note 43. ("[I]nvestment tribunal decisions do not establish . . . that domestic legal systems permit the doctrine of estoppel to be applied against the government to enforce ultra vires, illegal, or otherwise nonbinding acts of officials or entities.").

330. *See* Jarrod Hepburn, *The Legal Justifications for the Doctrine of Legitimate Expectations in International Investment Law*, 36 Eur. J. Int'l L. 43, 47 (2025); Zeyl, *supra* note 328, at 211.

331. Johnson, *supra* note 43.; Clara Lopez, *Mining in Investment Arbitration: An Analysis of Mining Companies' Legitimate Expectations*, 27 J. Int'l Econ L. 297, 309 (2024); Sasson, *supra* note 19, at 119; Bonnitcha, *supra* note 327, at 190 (describing a line of cases which protected "expectations based on the business plans of the investor, when the state knew, or should have known, that the impugned conduct would upset the investor's business plans").

332. For instance, Canada's 2021 model bilateral investment treaty sets out a closed list of obligations encompassed by the minimum standard of treatment which excludes protection of investors' legitimate expectations. *See* Gov't of Can., 2021 Model FIPA (2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng [https://perma.cc/UBY8-8ZVY].

expectations, relying on other arbitral awards and rejecting the relevance of contrary state practice and a decision by the International Court of Justice.[333]

This Article's account provides a frame of reference for the doctrine's persistence. If investment treaties protect investor plans, it does not matter that those plans are based in part on undertakings by state officials that are non-binding or made without proper authority. What matters about the undertaking is the factual support it provides for the business plan. A factually well-founded plan attracts greater protection against future adverse state conduct.

Formulations of the legitimate expectations standard reflect this. For instance, the *Tecmed* tribunal, generally credited with originating the doctrine,[334] focused less on state conduct than on investor plans in finding that fair and equitable treatment required "treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[335] Other tribunals have tied the standard to a need for a "predictable framework" for "business planning."[336] Recent tribunals, even in circumscribing the doctrine, have tied it to investor planning. For instance, the *ELA v. Estonia* tribunal emphasized that expectations should be based on reasonable due diligence and have contributed to making the investment.[337] In other words, where state conduct provides factual support to an investor's business plan and then interferes with profits expected from that plan, there is a treaty breach.

The point of this analysis is not to defend prevailing approaches to legitimate expectations or to the reflective loss issue. This account of the genealogy and underlying logic of those approaches provides them with no new justifications. Instead, the point is to highlight how the elevation of private plans into internationally protected private rights is pervasive in international investment law, accounting for the origin and persistence of two troublesome, persistent doctrines. That account suggests that the issues commentators have identified with these two doctrines stem from deeper normative conflicts about the regime's purpose and operation. Indeed, given the legal and practical problems with both reflective loss claims and protection of legitimate expectations, this

333. Michael Anthony Lee-Chin v. Dom. Rep., ICSID Case No. UNCT/18/3, Final Award, ¶ 434 (Oct. 6, 2023); IC Power Ltd. v. Republic of Peru, ICSID Case No. ARB/19/19, Final Award, ¶ 306 (Oct. 3, 2023). Arbitrator Marcelo Kohen dissented in the former case. On the International Court of Justice, see Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. 507, ¶ 162 (Oct. 1).

334. *See, e.g.*, Hepburn, *supra* note 330, at 43.

335. Técnicas Medioambientales Tecmed, S.A. v. United Mex. States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003).

336. Metalclad Corp. v. United Mex. States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000); *see also* CMS Gas Transmission Co. v. Republic Arg., ICSID Case No. ARB/01/8, Award, ¶ 278 (May 12, 2005).

337. ELA U.S.A., Inc. v. Republic of Est., PCA Case No. 2018-42, Award, ¶¶ 783–89 (Feb. 21, 2025).

account should heighten concerns about investment law's disconnect from any recognized principles of law, international or domestic, that would constrain businesses' accumulation of profit. In effect, an investor's ownership of assets under host state law does little more than trigger a treaty's application, with the scope of those rights defined by the investor itself, through corporate structures, in reliance on non-binding domestic undertakings, and in contravention of express advance limitations of those rights designed to protect other groups.

IV. What It Means to Protect Business Plans

This Part canvasses the implications of this Article's claims for diverse stakeholders. It begins by trying to make sense of how we got here. It argues that the results described above are not occasional or idiosyncratic errors that can reliably be addressed through changes to investment treaty drafting or the venue in which investment disputes are heard, but instead are a consequence of structural features of an international law regime that exists solely to protect multinational businesses. It then highlights the practical implications of this empowerment of businesses beyond the context of investment law, turning first to climate change, a matter of utmost urgency, and then to broader international law implications. It shows how protecting business plans directly and substantially increases the costs of climate action, discouraging decarbonization. But it also outlines policy paths available to governments willing to comply with other international law obligations on climate to address that existential threat. Lastly, it reflects on private power in the global order, arguing that arbitral interpretations of investment treaties have effectively reversed the basic principle of sovereignty over natural resources in a manner that will pose increasing challenges to states seeking to pursue their own developmental agendas.

A. A Jurisprudence of Domestic Rights

As surveyed above, businesses in a substantial number of cases have successfully persuaded arbitrators that investment treaties protect planned commercial activities even when those activities are prohibited under national law. In effect, an investor's possession of domestic law assets in the host state triggers an investment treaty's protection, but the scope of that protection is defined by the investor's plans. This result is neither uniform nor consistent with black letter law accounts of the investment regime or, arguably, with the best reading of investment treaties. But it is a foreseeable consequence of arbitrators' structural suspicion of national law, investment treaties' express trust in private actors as agents of development, and policy justifications for the investment regime, all of which encourage arbitrators to use business plans rather than national law rights as a baseline against which to measure state conduct. The very features that make these results unsurprising counsel against reform options that would preserve an international regime dedicated solely to protecting investor rights.

In academic literature criticizing the investment regime, the normal move after identifying particular flaws in the caselaw is to propose reforms. To be sure, there are interpretive approaches in investment law that better respect the contours of statutory licenses, as highlighted by the cases surveyed at the beginning of Part II. Moreover, states *have* made efforts to clarify that investors cannot obtain treaty protection for alleged interference with potential or hypothetical rights. In a non-disputing party submission in the *Eco Oro* case, for instance, Canada argued that "[a] potential property right or one that is conditional, in that it may or may not materialize, is not vested and is not capable of being expropriated."[338] Similarly, the recent India–Brazil investment cooperation and facilitation agreement expressly excludes from coverage "any expenditure incurred before the obtainment of all necessary licenses, permissions, clearances and permits required under the law of a Party."[339] While that instrument lacks an investor–state arbitration clause, the incorporation of similar definitions into other investment treaties arguably may have precluded many of the claims discussed in Part II.

However, the shortcomings of that genre of reform have also attracted attention. New literature has surveyed how contested arbitral approaches have persisted even in cases decided under newer and more detailed investment treaties.[340] And, as surveyed above, contested and controversial doctrines such as the admission of shareholder reflective loss claims and the protection of investors' legitimate expectations persist in the face of widespread criticism and more detailed treaties frequently designed to circumscribe such claims.[341] Canada's non-disputing party submission similarly failed to persuade arbitrators in the *Eco Oro* case on the deprivation issue. In other words, there are good reasons to doubt that normal reform proposals, such as redrafting treaties or even better supervising arbitrators, will remedy the problems surveyed in this Article, or other controversial issues in the investment regime.

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338. Eco Oro v. Colombia, Non-Disputing Party Submission of Canada, ¶ 5 (Feb. 27, 2020).

339. Brazil–India Investment Cooperation and Facilitation Agreement art. 2.4.1(iii), Braz.-India, Jan. 25, 2020, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateralinvestment-treaties/4910/brazil---india-bit-2020- [https://perma.cc/3T4Q-J8W9].

340. *See* Wolfgang Alschner, Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes 1–2 (2022) (observing that "innovations" in recent investment treaties "have had little effect in practice, because new agreements are interpreted like old ones").

341. *See* discussion *supra* Part III.

What is more interesting and fruitful than reform proposals is to assess how the approach described in this Article emerged. That is particularly true because that approach is both persistent and arguably inconsistent with the text of investment treaties. In other words, if arbitrators are already misreading investment treaties, why should better drafting fix the problem?

The protection of business plans emerged naturally from background policy discourse about the obsolescing bargain, from arbitrators' structural suspicion of national law, and from the investment regime's commitment to private actors' reliability as agents of development. That approach, with diverse doctrinal repercussions, is an unsurprising outcome of the creation of a single-purpose regime existing solely to provide "special rights for special people."[342] And reform proposals focused narrowly on particular issues, such as investment treaties' application to statutory licenses, are unlikely to solve the problems with that approach.

In fact, the investment regime has already been through this. In 2008, Gus Van Harten published a landmark critique in which he attributed flaws in the regime to the adjudication of public law issues by private arbitrators with misaligned incentives.[343] He argued that these structural features led to incoherent decisions and insufficient deference to public policy goals, and he called for the creation of a standing multilateral investment court.[344] Those criticisms likely influenced the European Union's major current reform proposal, namely that of creating a permanent court for investment disputes, potentially subject to an appellate mechanism.[345] Critics, however, have realized that this court is likely to only further entrench doctrinal trends that have emerged in investment law through *ad hoc* arbitration, and increasingly warn of the risk of "locking in a broken system."[346]

This Article suggests a different posture towards the investment regime. Instead of identifying particular flaws with a view to particular reform proposals, it suggests that the ineffectiveness of incremental reforms points towards the value in trying to understand how the investment regime got to where it is. In particular, this Article argues that across a range of doctrinal issues, investment law makes more sense if it is understood as protecting private business plans. It also argues that this deep logic of the investment regime is an unsurprising outcome of its basic structural features. The regime only operates to protect one constituency, multinational businesses. It treats those businesses as reliable agents of development entitled to special protection. And, like any

342. *See* Heath, *supra* note 50, at 568.
343. Van Harten, *supra* note 41, at 152–53, 180.
344. *Id.*
345. Directorate-Gen. for Trade and Econ. Sec., *supra* note 47.
346. *See* sources cited *supra* note 27.

international body, it applies standards that prevail over national law. Expanding those international standards in deference to businesses as agents of development expands businesses' power over the states subject to the regime.

The implications of that account are beyond what model treaty provisions can solve. And notably, the structural features of the regime that contribute to these outcomes would all persist in a standing investment court. This account thus suggests that to avoid letting business plans prevail over national law, it is necessary to move away from a specialized, unaccountable, and enforceable global regime dedicated solely to the protection of businesses.

B. State Tools to Reassert the Primacy of Domestic Rights (and Cancel Oil and Gas Exploration Permits)

Climate change is arguably the most pressing challenge to human society and is on track to produce global catastrophe. Given the issue's importance, the use of licensing regimes to regulate oil and gas projects, and the frequency with which hydrocarbon disputes give rise to investment treaty arbitrations, this Article directly addresses the implications of the claims set out above for climate policy.

Licensing laws often allow regulators to make decisions about proposed projects in light of their environmental impacts.[347] The impacts regulators can consider are wide-ranging and can arise in a wide range of projects, including critical minerals.[348] They are at their most acute, however, in fossil fuel projects. But the protection of business plans through investment treaties undermines regulatory latitude to consider climate risk.[349] That is an urgent problem. To achieve net-zero emissions by 2050, according to the International Energy Agency's 2021 assessment, would require approving the exploitation of no new oil and gas fields,[350] even though roughly ten percent of expected future

347. Babatunde Anifowose et al., *A Systematic Quality Assessment of Environmental Impact Statements in the Oil and Gas Industry*, 572 Sci. Total Env. 570, 572 (2016) ("In most countries, the EIA process is part of the project permit or project approval procedure stipulated by the relevant authorities. Financial institutions like the World Bank, European Bank for Reconstruction and Development and the International Finance Corporation also require the submission of a detailed EIS as part of environmental due diligence for project financing."); *see also Environmental Impact Assessment Law Matrix*, Env't L. All. Worldwide, https://elaw.org/eia-procedure [https://perma.cc/9TUU-JA9C].

348. *See, e.g.*, A. Anantha Lakshmi & Diana Mariska, *Indonesia Launches Rare Crackdown on Nickel Mines in 'Last Paradise'*, Fin. Times (June 13, 2025), https://www.ft.com/content/b8dcbafb-6d67-420c-a9e7-b20d83e655bd [https://perma.cc/L4P3-WB5H].

349. *See* Phoebe Weston & Patrick Greenfield, *Why Fear of Billion-Dollar Lawsuits Stops Countries Phasing Out Fossil Fuels*, Guardian (Mar. 6, 2025), https://www.theguardian.com/environment/2025/mar/06/isds-fear-of-billion-dollar-lawsuits-stops-countries-phasing-out-fossil-fuels-aoe [https://perma.cc/SLV6-QM9G].

350. Int'l Energy Agency, Net Zero by 2050: A Roadmap for the Global Energy Sector (2021), https://www.iea.org/reports/net-zero-by-2050 [https://perma.cc/275Y-SACV].

emissions are from treaty-protected projects that are currently in exploration phases.[351] Put simply, for governments to take climate action, they need to cancel all outstanding oil and gas exploration permits.[352]

Despite this Article's pessimistic assessment of the investment regime, states nevertheless have more tools available than they have used to cancel these projects in ways that limit their exposure to damages awards under the investment regime. These tools include regulatory clarifications of the risks assumed by exploration permit-holders, amendments and joint interpretations of existing investment treaties, and treaty termination. While this Article argues that anything short of treaty termination is unlikely to be sufficient to avoid paying polluters, each of these actions can place additional pressure on arbitrators, and actions short of treaty termination may affect dispute outcomes at the margins. States' failure to take climate action, while enabled by the investment regime, is primarily a failure of political will, which can be overcome.

First, licensing regimes routinely require impact assessments.[353] Regulators can and should clarify that these impact assessments require assessment of greenhouse gas emissions and that they will not approve projects that increase emissions. There is widespread consensus among impact assessment professionals that greenhouse gas emissions should be addressed in environmental impact assessments, and some countries have taken steps to strengthen requirements that these assessments include end-use emissions, for example, the burning of oil extracted from an oil-drilling project.[354] Whether national laws include the same requirements or may justify denying project permits due to their emissions impacts may vary by country.[355] But a major component of liability in cases like *Bear Creek* and *Rockhopper* was the cancellation of projects outside of the framework of normal review processes. By clarifying through regulatory measures that impact assessments include emissions assessments, and by refusing to approve applications for licenses to exploit oil and gas deposits due to their environmental impact within that regulatory framework, states can

351. Kyla Tienhaara et al., *Investor-State Disputes Threaten the Global Green Energy Transition*, 376 Science 701, 702 (2022).

352. Kyla Tienhaara et al., *Investor-State Dispute Settlement: Obstructing a Just Energy Transition*, 23 Climate Pol'y 1197, 1202 (2023).

353. *See* Env't L. All. Worldwide, *supra* note 347.

354. *See, e.g.*, Philip Bryer et al., *Climate Change in Impact Assessment: International Best Practice Principles*, *in* Int'l Ass'n for Impact Assessment, at 2 (Special Publ'n Ser. No. 8, Mar. 2018), https://iaia.org/wp-content/uploads/2025/02/BEST-PRACTICE-Climate-Change.pdf [https://perma.cc/S4G4-AGRP]; U.N. Env't Programme, Assessing Environmental Impacts: A Global Review of Legislation 38 (2018); Natalie Jones, *What Integrating End-Use Emissions into Environmental Impact Assessments Means for UK Oil and Gas Projects*, Int'l Inst. for Sustainable Dev. (Aug. 1, 2025), https://www.iisd.org/articles/deep-dive/integrating-end-use-emissions-environmental-impact-assessments-uk [https://perma.cc/4FMB-2P4K].

355. U.N. Env't Programme, *supra* note 354, at 66.

maximize their chances of defeating investment treaty claims through the types of arguments that prevailed in the cases surveyed in Section II.A.

Second, although treaty reform may not be sufficient to preempt the problems with international investment law, states that are unwilling to terminate their investment treaties can and should issue joint interpretations, amendments, and unilateral statements clarifying that these treaties do not protect profit expectations associated with anticipated future exploitation licenses.[356] The Indian model in its facilitation agreement with Brazil is the most ambitious in this respect, clarifying that projects that lack all necessary domestic law rights are simply not covered by the instrument.[357] That instrument also omits investor–state arbitration.

For the reasons surveyed in Section IV.A, these measures are unlikely to be sufficient to ensure that states will not have to pay polluters for preventing their projects from advancing. As a result, the best course of action is for states to terminate their investment treaties. Kyla Tienhaara and her team of researchers have identified particular treaties that cover the largest number of fossil fuel projects.[358] States should prioritize these treaties for termination jointly with their treaty partners, including through termination of any relevant "sunset" clauses (which allow investment treaties' protections to continue to apply to existing projects for a period of ten to twenty years) as a matter of urgency. The European Union's treaty on the termination of intra-European Union Bilateral Investment Treaties is an excellent model instrument for achieving effective exit.[359] And exit is ultimately the most useful step to avoid the risk that the investment regime and its elevation of private profit expectations above national law will undermine necessary governmental strategies to deal with the climate crisis.

C. Private Power, Public Questions, and the Failure of the Global South's Quest for Sovereignty

The novel claim of this Article is that, through the investment regime, businesses are making substantive, unilateral policy choices that constrain states as a matter of international law. The practical results are telling. In the *Tethyan* case described above, Pakistan was unable to pay the award and ultimately settled with the miner by granting it exploitation rights on the deposit at issue.[360]

356. *See generally* LISE JOHNSON & MERIM RAZBAEVA, STATE CONTROL OVER INTERPRETATION OF INVESTMENT TREATIES, CCSI POLICY PAPER (Apr. 2014).

357. *See* Brazil–India Investment Cooperation and Facilitation Agreement, *supra* note 339, art. 2.4.1(iii).

358. *See* Tienhaara et al., *supra* note 351, at 702.

359. *See* Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, *opened for signature* May 29, 2020, 63 J. EUR. UNION (entered into force Aug. 29, 2020).

360. Vladislav Djanic, *Parties Announce Settlement of High-Stakes Mining Dispute Between Tethyan Copper and Pakistan*, IA REP. (Mar. 21, 2022), https://www.iareporter.com/articles/

In *Odyssey Marine*, publications on the firm's website indicate that it is using its arbitral award to pressure Mexico to authorize its phosphate mining project.[361]

Those results have implications for basic, formal accounts of public international law. The movement for permanent sovereignty over natural resources and a new international economic order, at its most ambitious, was a movement by states newly independent from European colonialism to achieve practical economic independence as opposed to merely symbolic political independence.[362] From an economic perspective, this movement largely failed.[363]

At its least ambitious, the movement was simply affirming an application of general, basic principles of territorial sovereignty. The United States, for instance, voted in favor of early United Nations declarations on permanent sovereignty over natural resources on the theory that it was merely a specific application of general international law principles.[364]

The investment regime has denuded even that minimal version of state authority, in effect hollowing out the state form to which newly independent countries acceded.[365] In effect, these states' sovereignty over their natural resources and adoption of legislation protecting that sovereignty were preempted by the private plans of foreign investors. Substantively, that occurred not due to any express cession of sovereignty over natural resources by states, but due to creative private leveraging of a powerful international regime with underdeveloped standards.

That effect portends a more sinister role for the investment regime in constraining developing states going forward, particularly in light of many states' efforts to use critical minerals shortages to facilitate technology transfer, industrial development, and growth.[366] As rare earths become a geopolitical flashpoint between China on the one hand and the United States and the European Union on the other, developing states such as Tanzania and Indonesia may face

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parties-announce-settlement-of-high-stakes-mining-dispute-between-tethyan-copper-and-pakistan/ [https://perma.cc/DXD5-K7Z5].

361. Odyssey Marine Expl., Minerals for the Future: Investor Presentation Q2 2025, at 6, 11 (June 3, 2025), https://s28.q4cdn.com/902533721/files/doc_presentations/2025/Jun/03/Q2-2025-IR-Deck-Energing-Growth-Conference.pdf [https://perma.cc/P6W8-BSRS] ("NAFTA arbitration win strengthens our position in Mexico.").

362. *See* Mohammed Bedjaoui, Towards a New International Economic Order 12–13 (1979); Makau Mutua, *What Is TWAIL?*, 94 ASIL Procs. 31, 35 (2000); Adom Getachew, Worldmaking After Empire: The Rise and Fall of Self-Determination 2 (2019).

363. Getachew, *supra* note 362, at 55; Umut Ozsu, Completing Humanity: The International Law of Decolonization 1960–82, at 107 (2024).

364. Schrijver, *supra* note 118, at 75–76.

365. B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 Int'l Comm'ty L. Rev. 3, 8–9 (2006). Chimni describes this dynamic arising in general terms from the internationalization of property rights.

366. Fang, *supra* note 275, at 798.

mounting pressure to facilitate exports of raw minerals to Western powers.[367] Insofar as Canadian, American, and Australian mining companies are already present in these countries, those companies may be able to use the investment regime to interfere with state efforts to leverage ownership of resources in the ground to benefit from mounting demand. Windfall profits, which these states could use to expand value-added industrial processing domestically, may, through the investment regime, be seized by Western companies treating their profit expectations as a form of international property.

The investment regime is not exceptional in giving overriding authority to global capital.[368] Indeed, international organizations sensitive to business interests helped diffuse many of the legislative licensing models undermined in investment treaty arbitration, and despite businesses' success in the investment regime, those same interests often continue to advocate for more business-friendly versions of those laws than states chose to implement.[369] Investment treaty arbitration, and its facilitation of one pathway for corporate plans to prevail over national government plans, provides an unusually salient display of corporate power. That example is significant. But it is only a small part of the story.

In sum, this Article highlights one path by which businesses remain critical architects of the global legal order and calls for a continuing theorization and historical examination of their role in constructing that order, and the natural persons and institutional incentives through which they do so. It also calls for the abolition of the investment regime as a normatively indefensible structure and as a near-term barrier to dealing with the existential threat of climate change.

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367. *Id.* at 796.

368. Businesses' ability to exert authority over the Global South has existed for most of the period since the joint stock company matured in 17th-century England and the Netherlands. *See generally* Ron Harris, Going the Distance: Eurasian Trade and the Rise of the Business Corporation 1400–1700 (2020); Philip J. Stern, The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India (2012). And even during periods when businesses' authority was veiled or formally disavowed, their influence has been unmistakable. *See generally, e.g.*, Doreen Lustig, Veiled Power: International Law and the Private Corporation 1886–1981 (2020).

369. *See, e.g.*, de Sa, *supra* note 123, at 497. For a critical analysis of the power of corporations and wealthy states in the extractive industries and those industries' role in perpetuating racial and gender hierarchies, see E. Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance), *Report: Global Extractivism and Racial Equality*, U.N. Doc. No. A/HRC/41/54, ¶¶ 11, 16 (May 14, 2019). Mining licensing regimes thus reflect similar tensions at stake in proposals to "domesticate" investor–state relations through national investment ombudspersons, which critics have warned may simply lead states to internalize dubious policy choices developed by the international investment regime. *See* Jonathan Bonnitcha, *What Is the Problem with Investment Disputes? The Case of the Draft Legislative Guide on Investment Dispute Prevention and Mitigation*, 118 AJIL Unbound 230, 234 (2024).