

Reforming the International Investment Regime: Lessons from International Trade Law

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ABSTRACT

International trade law underwent a profound paradigm shift during the 1990's and into the 21st century as a response to globalization, and to a legitimacy crisis sparked by unresolved structural issues from the General Agreement on Tariffs and Trade (GATT) era and tensions surfacing in GATT case law around 'trade and' issues. Investment law today is undergoing a similar legitimacy crisis for similar reasons, particularly with respect to Bilateral Investment Treaties and investor–State arbitration. We argue that investment law is ripe for a similar paradigm shift, away from the dominant view of investment law as a private ordering system to protect capital, with roots in contract law and commercial arbitration, and towards recognition of the fact that investment law today is part of a comprehensive global economic governance system meant to ensure justice and the rule of law in one aspect of international economic relations, the allocation of investment capital. This paradigm shift has normative, structural and doctrinal implications, which we explore, and promises to help restore legitimacy to investment law as it also improves substantive outcomes.

I. INTRODUCTION: FRAMING THE ISSUE

We begin by painting a picture of an international regime in crisis. This regime emerged to manage a hugely important aspect of international economic relations involving trillions of dollars, and has had meaningful success in doing so, thus contributing to global welfare. Nevertheless, many parties from across the spectrum share a frustration with the structural defects of the system, which limps along with old treaty models and a multitude of disparate agreements. The quality of dispute resolution decisions varies greatly, as do outcomes on substantive law matters,

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and there is no comprehensive institutional mechanism to promote quality or coherence.

Further, this same regime has been criticized as generating controversial spillover effects across a range of other issue areas such as the environment, socioeconomic development, and human rights. These spillover effects raise serious concerns among developing and developed countries, as well as civil society and scholars, over their impact on vital domestic social issues. However, there is considerable resistance from many actors within the system to any suggestion that broader concerns have a place at the table. This resistance is expressed in part through an over-reliance on purely economic arguments and through a functionally specialized approach to legal regimes, which leads other voices to feel ignored if not deliberately shut out.

All of this culminates in a growing legitimacy crisis for the system despite its basic success in managing its core issue area. Its decisions are increasingly seen as failing to respond to pressing social needs, and its institutional processes criticized for failing basic rule of law criteria such as coherence, predictability, neutrality, and accountability.

Does this sound familiar? It may sound like we are discussing the international investment regime today, but we are actually describing the international trade regime of the late 1980's and early 1990's, which was a regime in crisis. Multilateral trade was then managed by the GATT, an out-of-date and imperfect treaty considered unamendable; and a set of side agreements with a scattering of membership.¹ This was supplemented (some might have said supplanted) by a confusing web of regional and bilateral trade agreements.² And before the World Trade Organization (WTO) and its Dispute Settlement Understanding (DSU), the GATT dispute settlement system had serious shortcomings, notable among them the susceptibility of the panel process to producing outputs of varying quality and inconsistent results and reasoning.³ Together, these defects and challenges amounted to a legitimacy crisis⁴ in the trading system that was well-recognized at the time.⁵

Recent high-profile controversies over investor-state arbitration Investor-State Dispute Settlement (ISDS)⁶ and lingering concerns over the structural implications

1 See John H. Jackson, 'The Puzzle of GATT: Legal Aspects of a Surprising Institution', in John H. Jackson (ed.), *The Jurisprudence of GATT & the WTO* (New York: Cambridge University Press, 2000).

2 See, e.g. Jagdish Bhagwati, 'Regionalism versus Multilateralism', 15 *World Economy* 535 (1992).

3 See, e.g. William Davey, 'Dispute Settlement in GATT', 11 *Fordham International Law Journal* 52 (1987).

4 By legitimacy we mean, quoting Thomas Franck, 'that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with the right process. The four indicators of rule legitimacy, as identified by Franck, are determinacy, symbolic validation, coherence, and adherence. See Thomas Franck, 'Legitimacy in the International System', 82 *American Journal of International Law* 705-59 (1988). Here the most salient aspects are determinacy and coherence.

5 On the legitimacy crisis in trade in the late 1980's and early 1990s, see Daniel C. Esty, 'The World Trade Organization's Legitimacy', 1 *World Trade Review* 7 (2002); John Jackson, 'Reflections on Constitutional Changes to the Global Trading System - The Institutional and Jurisdictional Architecture', 72 *Chicago-Kent Law Review* 511, (1996); Steve Charnovitz, 'Transparency and Participation in the World Trade Organization' 56 *Rutgers Law Review* 927 (2004); Robert F. Housman, 'Democratizing International Trade Decision-Making', 27 *Cornell International Law Journal* 699 (1994).

6 See *infra* notes 24 and 25 and accompanying text. Such concerns are behind recent efforts by Senator Elizabeth Warren to block US Trade Promotion Authority for the TPP and TTIP (see *infra* notes 124 to

of earlier cases from the 2001 Argentine financial crisis⁷ have suggested to many that the international investment regime faces a similar legitimacy crisis today.⁸ In response to its own legitimacy crisis, the trading system began a profound paradigm shift in the 1990's, toward the recognition that trade law was no longer (if it ever had been) simply a technical system for liberalizing economic flows.⁹ Instead, trade law had become a system of treaty-based governance for managing transnational economic resources for the good of society as a whole.¹⁰ Such a role requires more than liberalizing trade in goods and distancing oneself from the rest—it involves incorporating or accommodating the many policy dimensions implicated by a truly global economy into the law and structure of its regulatory system, and ensuring that system meets the basic requirements of legitimacy and justice we expect of any system of governance allocating economic resources.¹¹

In our view, the same applies—*mutatis mutandis*—to investment law today, and a similar paradigm shift, with similar implications for doctrine and institutional structure, is the key to successful resolution of the legitimacy crisis facing international investment.¹² In this article we look at how the international trading system, as a

142 and accompanying text) on the basis of her objection to ISDS mechanisms as threatening the integrity of US regulatory power. Elizabeth Warren, 'The Trans Pacific Partnership Clause Everyone Should Oppose', *Washington Post*, 25 February 2015, http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html (visited 22 May 2015).

- 7 William W. Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System', 3 *Asian Journal of WTO and International Health Law and Policy* 199 (2008), at 202 [hereinafter 'The Argentine Crisis'] (arguing that these cases might be the tipping point in a long-predicted investment legitimacy crisis).
- 8 On the legitimacy crisis facing investment, see, e.g. Jose Alvarez, 'Contemporary Foreign Investment Law: An 'Empire of Law' or the 'Law of Empire?', 60 *Alberta Law Review* 943 (2008–09); Julie A. Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach', 54 *Virginia Journal of International Law* 1 (2014); Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 *Fordham Law Review* 1521 (2005); Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', 57, 67 (2011), ('Public Law Challenge').
- 9 John H. Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited', 4 *Journal of International Economic Law* 67–78 (2001) ('trade regulation is only about trade liberalization' is an obsolete mantra); Lea Brilmayer, 'Trade Policy: The Normative Dimension', 25 *N.Y.U. Journal of International Law and Politics* 211 (1993) (normative aspects of trade policy insufficiently recognized, and the view of trade policy as an isolated, technical issue area increasingly challenged, in the early 1990's).
- 10 See, e.g. Andrew D. Mitchell and Elizabeth Sheargold, 'Global Governance: The World Trade Organization's Contribution', 46 *Alberta Law Review* 1061 (2008–09) (evolution of WTO parallels fundamental shifts in global governance since 1990's); Mike Moore, 'Ten Years of the WTO: A Success Story of Global Governance' 2 *Internationale Politik und Gesellschaft* 12–20 (2005) (WTO plays a vital role in managing a globalized world through the multilateral rule of law).
- 11 The rich literature on the constitutionalization—and constitutional deficits—of the WTO is a good example of one consequence of this shift. See, e.g. Deborah Z. Cass, *The Constitutionalization of the WTO* (New York: Oxford University Press, 2005); see also Moore, *ibid*, at 12 (celebrating WTO's success in evolving as an institution for global economic governance); Mitchell and Sheargold, *ibid* (as an element of global governance, WTO has been rightly subject to critiques on legitimacy and accountability grounds).
- 12 On the clash of paradigms in investment law, and the significance of the trade law model, see Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 107

complex treaty-based system for managing significant transnational economic flows of great social and political import, charted a course out of its own legitimacy crisis, to see what lessons might be learned for the reform of investment law, another such system. We thus join a small but growing body of literature drawing parallels between trade law and investment law for reasons of convergence, synergy, functionalism, or teleology.¹³ Not all commenters fully accept the comparison or agree with the convergence thesis, for a variety of reasons.¹⁴ However, it is in the nature of any comparative exercise that there be enough difference to make the comparison illuminating, as well as enough similarity to make the comparison meaningful, and we believe that properly understood, the trade and investment regimes satisfy this condition.¹⁵ Moreover, as we will argue, there are systemic and normative reasons

American Journal of International Law 45 (2013); Gary Hufbauer, 'Rules of the International Trade, Investment and Financial Systems: What They Deliver, How They Differ, the Way Forward', 17 Journal of International Economic Law 833 (2014) [hereinafter 'Rules of IT'].

- 13 See, e.g. Tomer Broude, 'Investment and Trade: the "Lottie and Lisa" of International Economic Law?' in Dr. Todd Weiler (ed.), *Intersections: Dissemblance or Convergence Between International Trade and International Investment Law* (2011), available at www.transnational-dispute-management.com/article.asp?key=1741. (visited 8 November 2015); Sergio Puig, 'The Merging of International Trade and Investment Law', 33 Berkeley Journal of International Law 1 (2015); Roger Alford, 'The Convergence of International Trade and Investment Arbitration', 12 Santa Clara Journal of International Law 35 (2013); Roberto Echandi and Maree Newson, 'Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch', 17 Journal of International Economic Law 847 (2014); Hufbauer, *Rules of IT*, supra note 12; see also Joost Pauwelyn, 'The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists Are from Venus', 2 (29 July 2015) (acknowledging convergence between trade and investment despite distinct differences in history, goals and structure). Available at SSRN: <http://ssrn.com/abstract=2549050> or <http://dx.doi.org/10.2139/ssrn.2549050>. (visited 6 November 2015).
- 14 See, e.g. Joost Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged And How It Can Be Reformed', 29 ICSID Review Foreign Investment Law Journal (2014) [hereinafter 'At the Edge of Chaos'] (the distinct contours of foreign investment law reflect an organic process of development and should not therefore be too quickly harmonized towards international trade law models); Nicholas Di Mascio and Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', 102 American Journal of International Law 48, 53–55 (2008) (contrasting the trade and investment regimes in terms of goals and political economies); see also Alan O. Sykes, 'Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy', (John M. Olin Program in Law and Economics Working Paper No. 235, 2005) (trade and investment agreements follow divergent paths on issues like remedy because of their divergent functions). We use the term 'convergence' thesis here as shorthand for the range of arguments asserting a meaningful comparison and meaningfully related lines of development between the two systems, though we ourselves are not making a convergence argument *per se*, such as can be found in Puig, supra note 13.
- 15 Trade and investment law both involve states making commitments to *each other* with respect to how foreign nationals' economic interests will be treated within the domestic legal system, for fundamentally similar reasons. Trade bargains address the question of how a foreign national's products will be treated on deployment, i.e. importation into and sale within the domestic market; and investment bargains similarly address how a foreign national's capital will be treated on deployment, i.e. establishment and performance within the domestic market. Thus insofar as he is making a strong distinction between trade and investment on the basis of the bargaining structure, Sykes for example is framing the wrong comparison in distinguishing the two regimes on the basis of commitments to private actors (investment) versus states (trade). See supra note 14 at 13–19. The fact that states promise a private remedy to each other's nationals in one case (capital exporters) and not the other (goods exporters) is meaningful, but says more about the historical evolution of investment (colonialism and post-colonialism) and the particular, related, risks facing capital (nationalism in domestic law and judicial fora) than it does any fundamental difference in the regimes. Moreover, trade bargains make adjustments of their own where necessary for

for why both systems, playing certain similar roles, should be subject to certain similar norms.

We will first highlight a few aspects of the current international investment regime that are driving this paradigm shift for investment, as they did for trade. Second, we look at how this paradigm shift took place in trade, and lay out some of the tools and strategies used in the trade area that may be useful for investment law reform. We close by returning to the role of paradigms in strengthening legitimacy.

II. THE INTERNATIONAL INVESTMENT LAW REGIME AND ITS CHALLENGES

A. A brief history of investment law

International investment law evolved out of the customary international law rights of aliens and in particular their economic rights linked to property.¹⁶ A foreign national whose investment was threatened by the actions of a host state had little recourse but to petition his or her home state to espouse the claim. Not only was the investor's petition subject to the goodwill of the home state's government and the vagaries of international relations, there was also no mechanism for the investor to represent herself in any resulting exchange between the home and host country.¹⁷ This unbalanced relationship between the host state and the investor was compounded by the fact that the investor would typically have no political voice regarding changes in the host state's domestic laws affecting the investment. Contemporary foreign investment arose to address, albeit imperfectly, this imbalance.

similar historical reasons, such as special and differential treatment and the NAFTA Chapter 19 binational panel process for review of domestic AD/CVD actions, the latter also offering private actors an alternative legal forum for reasons resembling the reasons cited in investment bargains.

We are also of the view that theoretical accounts of how systems function cannot fully address the question of a system's normativity, i.e. how a system *should* function and therefore how it should be reformed. Pauwelyn's account of investment law is a skillful application of complexity theory to account for how the investment regime currently operates despite certain seeming peculiarities, and he succeeds in capturing and explaining much of how investment law does manage to function despite these peculiarities. Pauwelyn, 'At the Edge of Chaos', *supra* note 14. However, by its nature his argument cannot be an argument for how the investment regime *should* operate—the latter normative point is the one we seek to address, and we argue it from an implicitly normative perspective as one does in a comparative law exercise (if one accepts the comparison to trade, one may be persuaded of the aptness of the reforms implied thereby) and a more explicitly normative perspective (justice and governance norms are relevant to the social role of investment law). If Pauwelyn's theoretical analysis of how investment law operates today were to be pushed farther into a normative argument that investment law *should* function the way it does, because it *does* function this way (and Pauwelyn is too careful a scholar to fall into this trap), it would be akin to arguing that frontier justice in the US West during the 19th century, or the imperfect legal systems of many newly independent states in the 20th century, *should* have continued to function in the way they did (with systemic characteristics that can be usefully analyzed by complexity theory) because that is the way they did indeed manage to function.

16 Thus investment law has its roots in human rights. See Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law', in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009); Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in Pierre-Marie Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) [hereinafter 'Investment Tribunals'].

17 Vaughan Lowe *International Law* (Oxford: Oxford University Press, 2007) 197–99.

First, the bilateral Friendship, Commerce, and Navigation (FCN) Treaties of the late 18th, 19th, and early 20th centuries,¹⁸ forerunners of today's Bilateral Investment Treaties (BITs), evolved as tools to begin to address some of these shortcomings. FCNs began as largely commercial instruments but after World War II embraced a wider range of areas including trade, investment, navigation, human rights and, later, consular relations.¹⁹ Although FCNs granted a number of rights to the nationals of their signatories, they did not create a private right of action.²⁰ Even if a private right of action could be construed, it was before domestic courts.²¹

Modern international investment treaties arose during the 20th century decolonization period, when newly independent states were eager to eliminate the political and economic influence of their former colonizers and assert the power of their own laws, leading to anxiety among foreign investors, often nationals of former colonial parent states.²² BITs addressed that anxiety through clauses granting foreign investors fair and equitable treatment and national and most-favored-nation treatment, as well as rules governing expropriation. When the former colonizers were the exclusive exporters of foreign direct investment, BITs acted as a one-way protection program benefiting the nationals of those countries.²³

From the 1950s, when the first BIT was concluded, to the 1970's only a small number of BITs entered into force.²⁴ It was not until the 1980s that a massive surge in the number of BITs occurred as developing countries overcame initial reluctance and entered into investment agreements with developed countries,²⁵ resulting in the

18 See e.g. Sykes, *supra* note 14, at 4. However, Wolfgang Alschner argues that although the US abandoned the FCN program for the BIT program in the 1970's, FCN treaties influenced the US BIT program and are thus of more than historical interest. 5 *Goettingen Journal of International Law* 455 (2013).

19 For a comprehensive discussion of FCNs see John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era at Columbia Journal of Transnational Law*, Vol. 51, (2013) 304, 312–15. ('The substantive rights to which one of these standards will attach fall into four general categories: (1) navigation rights, (2) trading rights, (3) rights of entry and establishment and (4) human rights.')

20 See e.g. Sykes, *supra* note 14, at 4.

21 For example, the Restatement (Third) of Foreign Relations states that '[i]nternational agreements., generally do not create private rights or provide for a private cause of action in domestic courts.' § 907 cmt. a. (1987). Historically however, US courts have accepted that FCNs create private rights of action for foreign nationals before US courts. See David Sloss, 'When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in *Hamdan and Sanchez-Llamas*', 45 *Columbia Journal of Transnational Law* 20, 101–02 (2007) (discussing cases where foreign nationals successfully filed suit in US courts based on rights granted by FCNs); see Sital Kalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 *Stan. J. Int'l L.* 63 (2008).

22 M. Sornarajah describes investment law as a power struggle between capital-exporting developed countries and capital-importing countries developing states. *The International Law on Foreign Investment*, 3rd ed. (New York: Cambridge University Press, 2010). See Sykes, *supra* note 14, at 4; Di Mascio and Pauwelyn, *supra* note 14, at 52.

23 Andrew Newcombe and Luis Paradell, 'Historical Development of Investment Treaty Law' in *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International, 2009) 43 (noting that '[a] characteristic of BITs during this period was the asymmetrical economic and political relationship that existed between capital exporting and importing states. Although the obligations on the state parties to BITs were formally reciprocal, BITs were developed by capital exporting states to protect the economic interests of their nationals abroad').

24 Indeed, by 1979 only approximately 100 BITs had been concluded. See *ibid* at 46.

25 On developing country concerns, see e.g. Stephen M. Schwelb, 'The Influence of Bilateral Investment Treaties on Customary International Law', 98 *American Society of International Law Proceedings* 27 (2004); Newcombe and Paradell, *supra* note 23.

conclusion of 265 BITs by 1987.²⁶ This great wave of BITs can be attributed in part to internal pressures faced by developing countries, which viewed BITs as one of the few means to increase capital resources in the face of collapsing import-substitution economies.²⁷ Facing such pressures, fearing the loss of foreign investment to other states, and in the face of concerted advocacy on the part of development banks and the Bretton Woods institutions,²⁸ developing countries embraced the BIT program, and the last decade of the 20th century saw an exponential increase in BITs,²⁹ including a number of BITs between developing countries.³⁰ By 2010 the rate of expansion in the international investment regime was such that more than three agreements were being concluded per week,³¹ and today there are over 2500 BITs in force.³²

B. Pains, growing pains, and labor pains

1. The 'Investment and' problem

This treaty-based system for investment protection has come under increasing scrutiny due to a number of high-profile investment disputes involving social issues implicated by investment. These include the many cases arising from the Argentine economic crisis of the early 2000's (investment and human rights),³³ and more recent cases involving developing country host states such as Tanzania (investment

26 See Newcombe & Paradell at 47, *supra* note 23.

27 See *ibid.*, at 48.

28 See *ibid.* at 16 (citing World Bank's Guidelines on the Treatment of Foreign Direct Investment). The Bretton Woods institutions have been instrumental in the promotion of trade liberalization. Specifically, the World Bank has made clear that developing countries should attract foreign investors as the only means to socioeconomic progress:

[T]he future of the developing countries is largely in their own hands. . . . The right strategy for the developing countries, whether external conditions are supportive or not, is to

- Invest in people, including education, health, and population control
- Help domestic markets to work well by fostering competition and investing in infrastructure
- Liberalize trade and foreign investment
- Avoid excessive fiscal deficits and high inflation.'

World Development Report 1991: The Challenge of Development, at 148 New York: Oxford University Press, available at <https://openknowledge.worldbank.org/handle/10986/5974> (visited 6 Nov 2015).

29 Newcombe and Paradell, *supra* note 23, at 47–48.

30 *Ibid.*, at 43–44.

31 United Nations Conference on Trade and Development, *World Investment Report: Non-Equity Modes of International Production and Development* (2011), http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf (visited 6 Nov 2015).

32 United Nations Conference on Trade and Development, *World Investment Report: Non-Equity Modes of International Production and Development* (2014), http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf (visited 6 Nov 2015).

33 Leading cases involving water include *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19. Leading cases involving gas include *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8; *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/; *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16. Indeed, Burke-White wrote in 2008 that these cases might become the tipping point in the long-predicted legitimacy crisis. See Burke-White, 'The Argentine Crisis', *supra* note 7, at 202.

and public health),³⁴ newly industrialized host states such as Mexico (investment and environmental protection),³⁵ and developed host states such as Australia (investment and public health),³⁶ and Germany (investment and environmental safety).³⁷ As was the case with the 'trade and ___' disputes in the GATT/WTO system, these linkage conflicts raise what is in our opinion one of the most important issues facing investment law today: whether it can consistently and effectively acknowledge and weigh the countervailing social concerns of host states, and the affected human rights and other social values implicated in many investment disputes.

The Phillip Morris case involving Australia has done much to illustrate the conflict and unsettle international investment law, since it involves a claim against a major developed country for a significant piece of social welfare legislation.³⁸ In 2011, the Australian Parliament passed a bill mandating plain uniform packaging for all cigarette brands and prohibiting companies from printing logos and bright images on cigarette packets, in an effort to protect the health of Australian citizens by making smoking less appealing.³⁹ Philip Morris, one of the world's largest tobacco companies, challenged the legislation as a taking under Australian law, claiming that the effect of the bill amounted to an expropriation of its intangible property and goodwill associated with its cigarette brand in Australia.⁴⁰

In a move typical of foreign investors faced with an adverse measure, Phillip Morris also initiated investment arbitration proceedings against Australia.⁴¹ In this

34 *Biwater Gauff (United Republic of Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (foreign investor initiated arbitration proceedings against the Tanzanian Government after the latter terminated the contract due to the investor's alleged failure to meet certain performance guarantees (specifically, the investor raised prices while failing to improve the water and sewage system in Dar Es Salaam). *Biwater* is interesting because although the panel found in favor of the investor on the substantive legal claims, the panel declined to award monetary damages to the investor because at the time of expropriation the company had no value, and each party was responsible for its own legal and arbitration costs, raising the possibility that this was at least in part an equitable adjustment.

35 *Técnicas Medioambientales Tecmed, S.A. v United Mexican States* (Case No. ARB(AF)/00/2) (tribunal ruled in favor of the foreign investor despite the host state's allegations of violations of its environmental laws related to investor's waste management operations).

36 *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

37 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No. ARB/09/6.

38 Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours', 12 *Santa Clara Journal of International Law* 7, 13 (2014) (USA shifting to narrow FET stance out of concern to defend against inbound suits involving right to regulate).

39 Tobacco Plain Packaging Bill 2011 available at <http://www.yourhealth.gov.au/yourhealth/publishing.nsf/Content/tpp-bill2011> (visited 6 Nov 2015).

40 Lenore Taylor, 'Health Issue Irrelevant Tobacco Firms Tell Court', *The Sydney Morning Herald*, 12 March 2012, available at <http://www.smh.com.au/national/health/health-issue-irrelevant-tobacco-firms-tell-court-20120312-1uwjg.html> (visited 12 March 2012).

41 Phillip Morris also initiated an investment dispute against Uruguay in ICSID challenging a similar tobacco plain packaging law, as constituting expropriation of trademarks. International Centre for Trade and Sustainable Development, *Debate on Australian Cigarette Packaging Law Reignites at TRIPS Council*, 16 Intellectual Property Programme, 7 March 2012 available at <http://ictsd.org/i/news/bridgesweekly/127872/> (visited 12 March 2012). Arbitration was scheduled for 18–22 October 2012. El Observador, *Definieron Primer Arbitraje entre Uruguay y Philip Morris*, (12 March 2012) available at <http://www.elobservador.com.uy/noticia/220339/definieron-primer-arbitraje-entre-uruguay-y-philip-morris/> (visited 20 March 2012). On 2 July 2013 the tribunal found jurisdiction to hear the dispute. *Successful and Unsuccessful*

case, it meant filing under the 1993 Hong Kong–Australia BIT, but not until Phillip Morris had shifted its corporate ownership to Hong Kong to avail itself of that forum.⁴² The Australian Government responded to this threat by challenging jurisdiction on the basis of the ownership shift,⁴³ although such forum shopping is a common occurrence in investor–state arbitration, and arbitration tribunals have done no more than acknowledge the issue.⁴⁴

This dispute reflects precisely how far the balance has tipped in favor of investors in investor–state arbitration. Philip Morris will have its day in front of an United Nations Commission on International Trade Law (UNCITRAL) arbitral panel,⁴⁵ where it is far more likely to prevail than it was in Australian High Court, and despite its failure in that forum⁴⁶ and evidence of treaty shopping. The Phillip Morris case also illustrates how the challenges facing international investment law are symptoms of a larger systemic problem: a structural inability to adequately or consistently address both the investment risks and the social risks involved in foreign investment. These inadequacies have deep roots in the structure of investment treaties and in the dynamics of investment treaty negotiation (below), and in the rule of law deficits of the investment arbitration system itself, particularly when deployed to address disputes such as these involving regulatory challenges with social welfare implications.⁴⁷

2. *Asymmetry in investment treaties*

International investment law is highly asymmetric in its basic normative structure.⁴⁸ Initially there was an imbalance in the overall legal regime protecting investors

Jurisdictional Objections: recent ICSID decision in Philip Morris v Uruguay and Burimi v Albania, (1 October 2013) available at <http://www.lexology.com/library/detail.aspx?g=410cc9f8-b9e8-49e8-944c-a37ad46ba2fa> (visited 15 January 2014).

- 42 Philip Morris Asia Challenge under Australia–Hong Kong BIT, available at <http://www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge> (visited 6 Nov 2015). Chris Kenny, ‘Big tobacco ignites legal war’, *The Australian*, 27 June 2011, <http://www.theaustralian.com.au/national-affairs/big-tobacco-ignites-legal-war/story-fn59nix-1226082403380> (visited 12 March 2012) (quoting Philip Morris spokeswoman Anne Edwards saying ‘[Philip Morris] will be seeking the loss in value of its investments in Australia that will result from plain packaging’ . . . ‘The damages may amount to billions of dollars.’).
- 43 *Ibid.*
- 44 See e.g. Roeline Knottnerus and Roos van Os, ‘The Netherlands: A Gateway to ‘Treaty Shopping’ for Investment Protection’, *Investment Treaty News*, 12 January 2012, <http://www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping/> (visited 20 March 2012); Paul M. Blyschak, ‘Access and Advantage Expanded: Mobil Corporation v. Venezuela and Other Recent Arbitration Awards on Treaty Shopping’, 4 *Journal of World Energy Law and Business* 39 (2011).
- 45 The UNCITRAL tribunal was constituted on 15 May 2012.
- 46 Case No. S389/2411: *British American Tobacco Australasia Limited and Ors v The Commonwealth of Australia*, High Court of Australia, <http://www.hcourt.gov.au/cases/case-s389/2011> (visited 6 Nov 2015).
- 47 See *infra* notes 57–64 and accompanying text; see also Pauwelyn, ‘The Rule of Law’, *supra* note 13 (investment arbitration ill suited to address regulatory challenges, particularly given the composition of investment arbitral panels and the nature of the investment arbitration community itself, and how they differ in key respects from the composition of trade panels and the trade dispute panelist community).
- 48 See Zeng Huaqun, ‘Balance, Sustainable Development and Integration: Innovative Path for BIT Practice’, 17 *Journal of International Economic Law* 299 (2014), at 308–22 (surveying range of unbalanced BIT doctrines and provisions); but see Pauwelyn, ‘At the Edge of Chaos’, *supra* note 14 at 403 (challenging asymmetry narrative on the grounds that in entering into BITs home states sacrifice important prerogatives such as diplomatic protection, rendering the *quid pro quo* more balanced).

(diplomatic protection under weak customary international law norms, in the face of strong host state domestic law), that favored host states over investors. Capital-exporting states, which until recently were the Western states and former colonial powers, needed a measure of protection for their nationals which went beyond that provided by the domestic laws of the capital-importing countries (i.e. something more protective than national treatment).⁴⁹ It was this initial asymmetry that the resulting BIT framework sought to balance. However, instead of equalizing the position of the investor against the host state, the recent trend of awards suggests to many that BITs have over-compensated, empowering investors to effectively override legitimate state concerns and resulting in a second asymmetry favoring investors over host states.

The majority of obligations established by a BIT are obligations on the state to protect the investor and investment, mandating a range of specific duties and standards.⁵⁰ Many of these are justifiable in themselves due to the clear risks that foreign investments and investors face, yet they are by nature unbalanced. Moreover, although the primary law governing foreign investments remains the law of the host state, which should therefore give the host state ample leverage, a further asymmetry arises between the investor and the state when a dispute enters third-party arbitration. As an initial matter, the state has no bargaining power in the face of arbitration, as states cannot generally bring their own claims in this forum due to the one-sided norms of the BIT. Moreover, where there are provisions of importance to the state such as public policy exceptions, they are often ill defined (when they are included at all), and have been interpreted strictly (and tersely) to erode state regulatory power and give little guidance as to how to successfully protect public policy. Finally, the shift to ISDS, understandable in view of the persistent risk of judicial nationalism,⁵¹ brings new constraints into investment dispute settlement, particularly when disputes touching key social issues and rights are before an arbitral tribunal rather than a court.⁵²

This normative asymmetry is also in part the result of the historically asymmetric nature of investment treaty negotiations, in which many host states lack the economic power to negotiate different outcomes.⁵³ Although the face of investment arbitration has been changing with numerous south-south agreements, the premise

49 See Di Mascio and Pauwelyn, *supra* note 14, at 52; Moshe Hirsch, *supra* note 16 (explaining both investment and human rights law evolved to cope with the asymmetric relations between sovereign states and private individuals or corporations, with legal rules developing to compensate the inferior position of individuals and investors under domestic law by enhancing their legal protection at the international level).

50 Echandi and Newson suggest, following the work of Dunning, that this may be due to the development of early BIT models during the resource extraction phase of investment history, thus accounting for the preoccupation with protecting investors from nationalist post-colonial tensions around this model. Echandi and Newson, *supra* note 13, at 858. However, in their view this is not an apology for this model as much as it is part of their historically based argument that the current global trade and investment environment cannot be managed through such outdated models. *Ibid.*

51 See Echandi and Newson, *supra* note 13, at 857 (ISDS also has its roots in the fraught resource extraction period in BIT history).

52 See Pauwelyn, 'At the Edge of Chaos', *supra* note 14 at 408 (acknowledging that private commercial arbitration-style dispute resolution is inappropriate for regulatory challenges increasingly found on the ISDS 'docket').

53 Frank J. Garcia, *Global Justice and International Economic Law: Three Takes* (New York: Cambridge University Press, 2014) 240–51 [hereinafter 'Three Takes'] (on the negotiation dynamics in asymmetric trade agreements).

and balance of power in BITs remains the same. Bilateral negotiations maximize leverage on the part of the more powerful partner, resulting in agreements that are unbalanced in terms of the ultimate negotiated concessions.⁵⁴ Investors have this leverage because capital is in demand and highly fluid, and individual host states face serious collective action problems in presenting a united front in terms of negotiation positions and investment policy frameworks.⁵⁵

3. Rule of law deficits: transparency, coherence, and the progressive evolution of the law

Whatever their view of the merits of the BIT system and its current normative structure, commentators from all points on the spectrum note serious shortcomings in the investment regime from a rule of law perspective. While some prominent advocates of the ISDS system maintain that investment tribunals *enhance* the rule of law in investment protection where it did not exist before, namely in partisan domestic courts,⁵⁶ even this group will acknowledge shortcomings in the coherence and predictability of arbitral outcomes, two key rules of law desiderata.⁵⁷ Moreover, even if ISDS strengthens the rule of law for one class of stakeholders (investors), this is no substitute for the larger systemic evaluation of ISDS in terms of the rule of law for *all* stakeholders, not just favored investors.⁵⁸

Transparency. The grafting of a private arbitral dispute settlement model into the international law of investment⁵⁹ has resulted in a less than transparent system of dispute settlement, in which it is hard to determine basic information such as the number of disputes initiated and their outcomes.⁶⁰ These transparency issues reflect

54 See Zeng, *supra* note 48, at 302–4 (discussing factors making true negotiation by developing country capital importing states difficult if not impossible).

55 See Andrew Guzman, 'Global Governance and the WTO', 45 *Harvard International Law Journal* 303 (2004) (impact of trade law on non-trade areas has led to critical challenges).

56 See Thomas W. Wälde, 'The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research' in Philippe Kahn and T.W. Wälde (eds), *New Aspects of International Investment Law* (2007) 63, 95; J Paulsson, *Denial of Justice in International Law* (New York: Cambridge University Press, 2005) 265. One tribunal went so far as to say that a state's right to regulate is limited by 'the rule of law', i.e. the BIT itself. *ADC v Hungary*, cited with approval in Dolzer, FET 29. See also Charles N. Brower and Lee A. Steven, 'Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11', 2 *Chicago Journal of International Law* 193 (2001); C. N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law', 9 *Chicago Journal of International Law* 471 (2009); Stephan W. Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law', Institute for International Law and Justice Working Paper 2006/6 (Global Administrative Law Series) 4, 31, 36.

57 See e.g. Dolzer, *supra* note 38; see also, Schill, *supra* note 8, at 57; Brower and Schill, *supra* note 56, at 471.

58 See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press, 2008) (Investment arbitration undermines the rule of law because the fact that claims can be brought by only one class of parties provides arbitrators with an incentive to favor claimants, since arbitrators are appointed on a case-by-case basis).

59 Anthea Roberts has characterized ISDS as 'private' international law dispute resolution mechanisms 'grafted' onto public international law treaties. *Supra* note 12.

60 Like ICSID, UNCITRAL publishes arbitration results only with the consent of *both* parties, unless the newer more transparent 2010 rules apply to post-2014 BITs. UNCITRAL, UNCITRAL Arbitration Rules Article 32(5), (1976) available at www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-

the system's origins in private commercial dispute resolution, where there is perhaps more business justification for secrecy.⁶¹

The trade law system has also had its transparency problems, but for a different reason, namely its background in the private consultations of diplomacy and international relations. John Jackson was a leader in recognizing the problems this posed for contemporary international trade regulation, and played a key role in identifying and hastening the necessary shift towards a transparent rule-oriented system, as befitting the regulation of a global economy.⁶² None other than the former Director General of the WTO Mike Moore acknowledged at the 10th anniversary of the WTO that increased transparency and inclusiveness are key to the legitimacy of the WTO itself.⁶³

Coherence. Scholars from across the spectrum agree that the investment arbitration system's legitimacy crisis is fueled by the growing number of inconsistent tribunal decisions.⁶⁴ Even as staunch a defender of the system as Rudolf Dolzer concedes that 'as we all know, the current system of investment arbitration has not been designed in order to promote uniformity or consistency of either rule-making or interpretation, with the sprawling consequences we have seen . . .'.⁶⁵

The GATT system faced similar challenges before the creation of the WTO and its Appellate Body, dramatically illustrated in the landmark series of inconsistent environmental rulings growing out of the Tuna/Dolphin dispute and its progeny.⁶⁶

rules.pdf (visited 6 Nov 2015); on the 2013 transparency amendments to the 2010 rules, see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (visited 6 Nov 2015). The US model BIT (published 20 April 2012) also has enhanced transparency provisions, as well as provision requiring the parties not to derogate from domestic laws on labor and environment. Interestingly no mention is made of human rights. US Model BIT available at <http://m.state.gov/md188199.htm> (visited 21 April 2012). However, almost all US BITs do not have that provision (in fact they even lack the requirement of transparency in state measures affecting foreign investment).

61 Roberts, *supra* note 12; Maupin, *supra* note 8, at 369.

62 Ehandi and Newson, *supra* note 13, at 847 (on Jackson's role); see e.g. John H. Jackson, 'The Crumbling Institution of the Liberal Trade System', 12 *Journal of World Trade Law* 93, (1978), 98.

63 Moore, *supra* note 10, at 17–18.

64 Dolzer, *supra* note 38, at 15 (noting that design of ISDS system does not promote consistency or uniformity); Ehandi and Newson, *supra* note 13, at 848 (2014) (doctrinal incoherence is one characteristic of how investment law has evolved); Franck, *supra* note 8, at 1610 (blaming the application of abstract public international law for the inconsistency in arbitral rulings); David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes', 30 *Northwestern Journal of International Law & Business* 383 (2010) (attributing incoherence to the arbitrators' educational and professional backgrounds, individual attitudes, strategic choice, and the tribunals' institutional capacity as reasons for the different decisions on similar cases); Christopher M. Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' 29 *University of Pennsylvania Journal of International Law* 725 (2014) (inconsistency a function of tribunals' inability to simultaneously meet three needs: the demands of developing countries that seek to attract foreign direct investments with a sufficient space for public policy regulation, the aspirations of developed countries to globalize investor property rights and at the same time depoliticize investment disputes from the host countries, and the aims of foreign investors who seek mitigation of risks associated with their investments).

65 Dolzer, *supra* note 38, at 15.

66 See Thomas J. Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation', 91 *American Journal of International Law* 268 (Washington, DC: Institute for International Economics, 1997); Daniel C. Esty, *Greening the GATT: Trade,*

Similar shortcomings are being revealed through contemporary investment arbitration decisions on equally compelling social issues.⁶⁷

Progressive evolution. Related to the coherence problem, investment law lacks an organized structure to manage the progressive evolution of the law.⁶⁸ With no appellate mechanism and no official or unofficial system of precedent in international arbitration, it is harder for progressive trends in any substantive direction to crystallize into lines of authority that tribunals can predictably follow.

The work of the WTO Appellate Body demonstrates the importance of such a mechanism.⁶⁹ It was again the ‘trade and’ area—and again the environment—that contributed both the most visible signs of the need for reform, and the progressive evolution of case law to meet it, through the Appellate Body’s crafting of a line of authority in cases such as *Shrimp/Turtle*⁷⁰ and *Reformulated Gasoline*.⁷¹ This appellate mechanism was essential for the development of doctrine protecting both our need for trade liberalization and nondiscrimination in the application of national measures, and our collective need to protect vulnerable resources and the environment itself.⁷²

III. INVESTMENT LAW AS ECONOMIC GOVERNANCE: A NEW PARADIGM

A. Lessons from the trade law crisis

What do these sorts of conflicts and concerns collectively signify? In the trading system, conflicts between trade and social issues raised the profile of the GATT in the public eye and within civil society like no other category of trade dispute could, and together with other critical inputs dramatically signaled both the need for change and the broad contours of necessary institutional and doctrinal reform.⁷³ This

Environment, and the Future (1994); Steve Charnovitz, ‘Trade and the Environment in the WTO’, 10 *Journal of International Economic Law* 1 (2007).

67 See e.g. *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02.

68 See Pauwelyn, *supra* note 14, at 378. Pauwelyn argues that, in contrast to WTO law, which revolves around a central international organization, foreign investment law emerged as a highly decentralized system. FIL’s decentralized composition, according to Pauwelyn, includes bilateral, regional and multilateral treaties, customary international law, domestic law, contract and insurance schemes, and arbitral institutions and domestic courts lacking central authority.

69 See Raj Bhala, ‘The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)’, 14 *American University International Law Review* 845 (1999) (documenting need for orderly precedent-style evolution of trade law, and the role of the Appellate Body in developing such a system even in the absence of a formal stare decisis doctrine).

70 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DSS8/AB/R (12 October 1998).

71 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (20 May 1996).

72 Steve Charnovitz, ‘The WTO’s Environmental Progress’, in William J. Davey and John Jackson (eds), *The Future of IEL* (Oxford: Oxford University Press, 2008) 247 (evolution of environmental cases post-WTO creation).

73 See Guzman, *supra* note 55 (impact of trade law on non-trade areas has led to critical challenges).

challenge, coupled with the fact that enough stakeholders were dissatisfied with various institutional and doctrinal aspects of trade law as it then existed, meant that fundamental change was possible, both politically in the creation of the WTO system and jurisprudentially in the work of the Appellate Body.

Similarly in investment, the growing prominence of these issues reflects the tremendous importance of Foreign Direct Investment (FDI) in development and in the global economy as a whole. In that sense, it reflects the *success* of the international investment regime in mobilizing global investment capital on an unprecedented scale.⁷⁴ However, the salience of these issues equally demonstrates the growing recognition that managing a global investment system involves far more than technical issues such as umbrella clauses and national treatment standards. Investment touches so many core social issues and responsibilities of host states, that it simply cannot be managed from the perspective of capital alone. The international investment regime involves private actors but it is not solely about private actor rights—it is also about state responsibilities to the larger society.

Facing similar challenges in trade toward the end of the past century required nothing short of a major paradigm shift in how we understood international trade law, with significant institutional implications. In the 1980's, the dominant paradigm for trade was the Washington Consensus—specifically, the view that trade was about economic flows, and trade law was about liberalizing economic flows according to neoliberal principles of economics.⁷⁵ In our view, the single most important consequence of the trade-and problem and the resulting debates was to highlight the fact that this dominant paradigm was obsolete: trade and trade law were no longer simply about the liberalization of trade rules and technical trade law matters, if they ever truly were. The trading system had grown into an emerging system of global economic governance, subject to basic normative constraints, and suffering from serious structural defects as a system of governance.⁷⁶

The same is true of the international investment regime. The ferment around social issues and BITs is very publicly making the case that BITs are not simply a system of private ordering (with a background in commercial dispute resolution) but are part of a comprehensive governance system meant to ensure justice and the rule of law in one aspect of international economic relations, the allocation of investment capital.⁷⁷ International investment law is governance, because through it states use their sovereign powers to set the basic framework in public law for economic activity, in this case for the regulation of foreign investment capital within their jurisdictions.

74 See Echandi and Newson, *supra* note 13, at 862–3 (success of trade and investment model is driving current demand to develop more integrated, rule-based trade and investment regimes).

75 Jeffrey L. Dunoff, 'The Death of the Trade Regime', 10 *European Journal of International Law* 733 (1999).

76 See, e.g. Thomas Cottier, 'IEL in Transition from Trade Liberalization to Trade Regulation', 17 *Journal of International Economic Law* 671 (2014) (charting growth in trade law from obscure technical matters to institutions governing global markets); Garcia, *Three takes*, *supra* note 53.

77 Echandi and Newson, *supra* note 13, at 866 (the time has come to visualize the investment regime not simply as a tool for protecting investment but as a tool of international economic governance); but see Pauwelyn, 'At the Edge of Chaos', *supra* note 14 at 378–79 (arguing that foreign investment law should not be evaluated as an institutional system or governance system but as a collection of self-organizing components best understood through complexity theory).

This framework includes a legal mechanism for the settlement of resulting disputes that will also involve the state as a party, and that can effectively override host state regulatory decisions. In establishing and deploying this framework, states make a range of political and distributive decisions involving power, rights, and resources that are quite familiar to domestic law.⁷⁸

As a system of governance, the international investment law framework today is seriously deficient. The domestic political equivalent to the BIT system would be the reinstatement of property requirements as a condition of voting rights: only those with capital would have a voice. The asymmetry and collective action problems highlighted above mean that host states, which should be the chief spokespersons for countervailing voices, cannot effectively play that role and therefore large segments of the affected public in host states—meaning most of us—go unrepresented.⁷⁹

In normative terms, the fault lies in the dominant paradigm in investment law today, which insists on treating international investment treaties and dispute resolution as exclusively a private ordering system with roots in contract law and commercial arbitration, thereby ignoring the public nature of the rules and their allocative effects on legal rights and economic resources. Such effects would in the domestic sphere trigger essential civil and political values such as procedural fairness, equality before the law, the rule of law, and the right to political voice for all affected parties,⁸⁰ and would bring into play recognized principles of distributive justice.⁸¹ That this has not been the case in investment law unfortunately makes the international investment regime appear to have more in common with kleptocratic states—the use of public authority to allocate considerable wealth towards a select few with little regard for the public good—than with any other major social institution for allocating rights and resources today, such as the taxation system, the banking system, or indeed the WTO system.⁸²

78 In economic law there is a continuous dialogue concerning how much scope to leave for private actors to make their own arrangements (e.g. contract law) and where the state should regulate to set the limits of acceptable bargains (through, e.g. employment law, competition law, securities law, etc.). That same conversation is being played out in the international investment regime, and potential investment law reforms cannot plausibly be viewed simply as unwarranted incursions by the state into private ordering. See Thomas Franck, *Fairness in International Law and Institutions* (1998) 438–9 (reminding us that capital markets operate within political systems wherein the expectations of the capitalists are not usually the sole or last word) see also Pauwelyn, ‘Rule of Law’, *supra* note 13, at 7 (both trade and investment dispute settlement mechanisms are alike in that they “address politically sensitive, public disputes driven by private economic interests”).

79 We are not even including the problems associated with collusion between investors and government agents, capture, and other associated issues that are well-documented between post-colonial elites and multinational actors. See Joseph T. McLaughlin, ‘Arbitration and Developing Countries’, 13 *International Law* 211 (1979), at 212.

80 See generally Benedict Kingsbury and Stephen Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’, ILLJ Working Paper, Global Administrative Law Series (2009).

81 See Chi Carmody, Frank J. Garcia and John Linarelli, *Global Justice and International Economic Law: Opportunities and Prospects* (New York: Cambridge University Press, 2012).

82 Lest this comparison seem too far-fetched, see Mark Massoud’s fascinating study on a related point: ‘International Arbitration and Judicial Politics in Authoritarian States’, 39 *Law and Society Inquiry* 1 (2014) (highlighting how international arbitration enables kleptocratic regimes to pursue their aims without judicial and public scrutiny).

In our view, this failure to acknowledge investment law as governance and to recognize and justify investment treaty-based economic distributions according to principles of fairness are the main systemic contributors to the current legitimacy crisis in foreign investment. The key response in trade law to its own parallel crisis was for the system to accept the consequences of its success and embrace its role in exercising governance over the allocation of global economic resources.⁸³ As has been the case with trade, for investment this shift will have two key dimensions: a normative perspective (justice), and a set of institutional implications (governance).

B. Normative reform: justice and investment

In normative terms, responding to the investment legitimacy crisis requires us to understand international investment law as subject to the principles of distributive justice: principles of fairness that guide the allocation of rights, privileges, opportunities, and burdens by social institutions.⁸⁴

1. *Investment law as an allocative social institution*

Key to this paradigm shift is understanding investment law as an allocative social institution. It is a social institution in that, as discussed above, it is a rule-based system grounded in the exercise of public authority.⁸⁵ It is an allocative institution, in that as a social institution, investment law allocates social resources. It does so in at least three ways:

1. Investment treaties allocate rights, privileges, and burdens between investors and host states. Such rights and privileges are a valuable and socially produced resource. In Rawlsian terms, they are a social primary good—valuable in their own right and for a range of uses.⁸⁶
2. Investment treaties themselves impact the *domestic* rights, privileges and burdens of a range of stakeholders. They affect the regulatory, economic, and social balance among government, domestic capital, foreign capital,

83 As with so many aspects of international economic law, John Jackson played a key role in helping the trade regime in this evolution as well, towards a stable, progressive system based on general rules as befitting an interdependent world economy. Ehandi and Newson, *supra* note 13, at 848, (citing his influence). See generally Symposium, *in Honor of John H. Jackson*, 17 *Journal of International Economic Law* 601 (2014) (considering 'the state and future of international economic law as a system of rules and institutions regulating key interactions in the global economy' and Jackson's role in shaping this architecture).

84 See Franck, *supra* note 78, at 438–73 (1998) (exploring role of fairness in late 20th century investment law); Ernst-Ulrich Petersmann, 'International Rule of Law and Constitutional Justice in International Investment Law and Arbitration' 16 *Indiana Journal of Global Legal Studies* (2009); see generally Carmody, Garcia and Linarelli, *supra* note 81; Frank J. Garcia and Lindita Ciko, 'Theories of Justice and International Economic Law', in John Linarelli and Edward Elgar (eds), *Research Handbook on Global Justice and International Economic Law* (Cheltenham, UK: Edward Elgar, 2012).

85 See Maupin, *supra* note 8 (investment law as a system); on the nature of social institutions generally, see 'Social Institutions', *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/social-institutions/>. (visited 6 November 2015).

86 On social primary goods in international economic law, see, e.g. Frank J. Garcia, *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade* (2003); Jonathan Trejo-Mathys, 'Towards a Critical Theory of the WTO: Thinking with Rawls Beyond Rawls', 20 *Constellations: An International Journal of Critical and Democratic Theory* 459 (Ardsley, NY: Transnational Publishers, 2013).

producers, consumers, and citizens needing economic rights, social welfare, environmental protection, and other public goods.⁸⁷

3. By collectively setting the terms under which investment capital is regulated, investment law as a whole influences the allocation of investment capital itself, and capital is a socially produced resource.⁸⁸ BITS, and investment treaties generally, influence which states get capital, how much, and with what consequences to the host society.⁸⁹

Insofar as international investment law allocates basic social resources in these and doubtless other ways, it is therefore a matter of justice, since justice applies wherever social institutions make decisions with distributive effects. By justice, we mean justice for all affected stakeholders, i.e. justice as we understand it in the liberal western tradition, not justice in the eyes of investors alone.⁹⁰

The implications of this are profound. Essentially, it means we have to examine the investment law regime in terms of the same norms of basic fairness we would apply to any legal system allocating economic rights and resources. Profound, and yet simple: we already do this for any body of law, such as tax law, health care law, or banking law, that has a distributive impact. Most importantly, this analysis makes clear that investment law does not operate outside the realm of justice. One cannot plausibly maintain that justice is ‘external’ to the investment law system—it is *inherent* in the system.

87 See, e.g. Frank J. Garcia, ‘Justice, the Bretton Woods Institutions and the Problem of Inequality’ in Chantal Thomas et al. (eds), *Developing Countries in the WTO Legal System* (New York: Oxford University Press, 2009) 504–10 (discussing domestic impact of IMF policies as an international distributive justice problem); Kok-Chor Tan, ‘Boundary Making and Equal Concern’, in Christian Barry & Thomas W. Pogge (eds), *Global Institutions and Responsibilities* (Malden, MA: Blackwell Publishing, 2005) 48 (harmonizing apparent tensions between domestic distributive issues and global justice).

88 See Garcia, *ibid.*, at 488 (discussing capital as a socially produced resource).

89 The impact of BITs on actual investment flows has been difficult to unequivocally demonstrate in quantitative terms. See UNCTAD, ‘The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries,’ UNCTAD Series on International Investment Policies for Development (2009) (BITs have demonstrable impact on FDI as one of several key policy elements); but see Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: Oxford University Press, 2009) (questioning whether BITs have any demonstrable effect on capital flows). Independent of the empirical question, however, it is the terms of the economic relationship that matter from a normative perspective, not necessarily the effects, which are subject to many other variables as well, as has been well-settled in the trade area. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 September 1997) (citing with approval 1987 US Superfund GATT case holding that key to trade remedies was a change in the terms of the competitive relationship, not any impact on economic flows).

90 See, e.g. Tan, *supra* note 72. Dolzer, although he speaks of the BIT system in terms of justice, confines this to ‘outcomes generally considered by the investment community to be just . . .’ *supra* note 38, at 33. This may well be a plausible internal account of justice as understood within the four corners of most investment treaties as they exist today (see *infra* notes 95 and 100–101 and accompanying text), but it is deeply inadequate as an account of justice in the larger sense, which the current legitimacy crisis makes acutely relevant. To overstate the case, it is defending the justice of slavery from the vantage point of the slave owners. Perhaps more fairly, it is defending the justice of 19th century employment and workplace safety conditions from the perspective of the business owners alone.

We want to emphasize that by saying this, we are not advocating that the investment regime be about something *other* than capital and returns on investment. Perhaps the most important conclusion arising from our research is that managing capital for the good of capital owners and the larger society is *inherently* about justice and governance. ‘Ensuring a secure and adequate return on investment is fair, but does not exhaust what fairness means or requires of investment law’.⁹¹ Those who think it does must offer normative arguments in terms of justice, and not obscure this point behind functionalist or positivist legal arguments.

2. *Investigating the justice of investment agreements*

If investment law is indeed an allocative social institution, then the next step is an investigation into what norms of justice apply to its activities. This is a large project worthy of an inquiry unto itself, but we can at least sketch the contours here.

Justice can be understood from either an external or internal point of view.⁹² The difference lies in the source of the norms of justice that are then applied to the distributive subject at hand. In an external approach, norms of justice are developed out of political or moral theory and then applied to international economic law, much as they would be to any domestic legal or other socioeconomic institution.⁹³ An internal approach, in contrast, aims to begin from the underlying social practices or the inherent normative structure of the particular international law subject (be it international trade and trade law treaties, for example, or investment and investment law treaties, as in the case at hand).⁹⁴ An advantage of the internal approach is that the resulting norms of fairness are perhaps less controversial and one hopes more readily integrated into the practice or treaty system from which they grew, since that is their origin. However, internal approaches may not reach all of the dimensions and implications of fairness (Rawls’ Difference Principle, for example) that our intuitions may tell us are immanent in the social practices we have constructed.⁹⁵

External Approaches to Investment Justice. Perhaps the most influential contemporary external approach to justice is Rawls’ Justice as Fairness. This is not the place in which to derive a fully developed Rawlsian theory of justice in international investment law, but the basic dimensions can be usefully suggested.⁹⁶ The core of any Rawlsian account of distributive justice is his celebrated Difference Principle, which can be paraphrased as follows: ‘Inequalities in the distribution of social primary goods are justifiable if they benefit the least advantaged.’ Within the Rawls ‘camp’ there is a basic divergence between those who follow him and limit the Difference

91 Dolzer himself notes that the doctrine of fair and equitable treatment itself is rooted in basic concept of fairness and anchored in a universally accepted sense of justice—in our view, one need only tease out the deeper implications of what he has acknowledged. *Supra* note 38, at 7.

92 What follows relies on Garcia and Ciko, *supra* note 84.

93 See *ibid.*, at 61–71 and sources cited therein.

94 See *ibid.*, at 71–81 and sources cited therein.

95 A good case in point is the earlier reference to Dolzer’s own account of fairness within BITs as fairness for investors—a plausible internal account of justice in an unbalanced treaty, but not an adequate response to external critiques or those actors left out by the asymmetry. Dolzer, *supra* note 38.

96 See e.g. Garcia, *Three Takes*, *supra* note 53 (outlining an external Rawlsian approach to justice and the Bretton Woods Institutions); Trejo-Mathys, *supra* note 86.

Principle to domestic institutions, advocating a more limited duty of assistance for international relations based in his Law of Peoples;⁹⁷ and those who advocate an internationalized Difference Principle that applies equally to domestic and international social institutions.⁹⁸ We follow the latter group, and therefore suggest that when it comes to international investment, the core of this kind of Rawlsian account would be something like this standard: ‘Inequalities in the distribution of investment capital and in the terms under which capital is allocated, are justifiable only if they benefit the least advantaged.’⁹⁹

It is important to note at the outset that one must not assume that outright welfare payments or direct redistributions of capital are what will benefit the least advantaged in a Rawlsian sense—the theory is sophisticated and nuanced enough to embrace inequalities in wealth, resources, wages, social benefits, etc., provided that such inequalities can be shown to benefit the least advantaged. Thus in principle there is room for an investment system which protects capital (perhaps even disproportionately) and ensures an adequate rate of return, provided it can be shown that such asymmetry benefits the least advantaged. However, it must be shown that it does, or it is not justifiable and hence not just. Developing such an account is an immense and complex challenge blending normative and empirical work, but it simply cannot be avoided on that ground alone—justice and legitimacy require it of us and of investment law.

Internal Approaches to Investment Justice. An internal approach to justice, in contrast, would begin with the social practices underlying foreign investment transactions, and/or the normative structure of investment treaties, and derive from these sources an account of what fairness would mean in this context. Given the asymmetric and troubled nature of investment treaties as we find them today, we opt for the former approach,¹⁰⁰ and will attempt, in this short space, to sketch out what an internal approach to just investment could look like based on consent and the social practice of investment itself.¹⁰¹

The basis of a consent approach to trade and trade law is the nature of trade as a freely bargained and mutually beneficial exchange of value—trade agreements must themselves both promote and protect such exchanges, and be the result of a similarly consensual treaty negotiation, or something other than trade results: predation,

97 John Rawls, ‘The Law of Peoples’, 20 *Critical Inquiry* 36 (1993); see, e.g. Leif Wenar, ‘Why Rawls is not a Cosmopolitan Egalitarian’, in Rex Martin and David A. Reidy (eds), *Rawls’ Law of Peoples: A Realistic Utopia?* (Malden, MA: Blackwell Publishing, 2006) 95.

98 See Thomas Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989); see generally Garcia, *Three Takes*, supra note 53.

99 We note but leave for another day the complex issue of whether we should focus on the least advantaged states, or least advantaged individuals within states, or both. See Andrew Kuper, ‘Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons’, 28 *Political Theory* (2000); Garcia, *Three Takes*, supra note 53.

100 Dolzer is a good example of the latter, i.e. an internal account of investment justice based on the treaty structure itself, with the disturbing implications one would expect. See supra note 38.

101 The account that follows draws upon Garcia, *Three Takes*, supra note 53, at 205–72 (an internal approach to trade through the phenomenon of consensual exchange).

coercion, or exploitation.¹⁰² As a starting point, we can evaluate whether foreign investment transactions, and investment agreements viewed as transactions, are similarly rooted. It would seem that the structure of the phenomenon is similar: parties to an investment transaction negotiate the terms of an exchange of value: capital on the one hand and labor, natural resources, markets, or knowledge capital on the other, together with legal rights.¹⁰³ The key is whether or not each party consents to the terms of the exchange – in the trade context, this is what distinguishes trade from coercion, predation, or exploitation. This raises challenging issues of interpretation and matters of degree: how ‘free’ is a state’s consent to a particular trade treaty, or an economic actor to any particular economic exchange? Nevertheless, the normative valence is clear: the more consensual the transaction, the more likely it is to be ‘fair’, and the less consensual, the less ‘fair’.

In an investment context, the element of consent is, if possible, even more nuanced. Successfully deploying investment capital abroad generally depends on a whole range of volitional acts by private and public actors: incorporation; licensing and permitting; the hiring of employees; extracting and perhaps processing resources; ensuring full protection and security, shipping the output; and so forth. One could easily conclude that investment transactions must be basically consensual or else they simply wouldn’t work. However, the entire history of critical study and social conflict around investment suggests the opposite, insofar as social conflict is often one manifestation of the resentment and anger that come from unfair transactions.¹⁰⁴ This obviously requires much careful investigation, but the reality of conflict and indeed some of the very risks investment law is designed to address (through expropriation law, or the full protection and security standard, for example), suggest that investment treaties and transactions cannot be assumed to be fully consensual, even if their deployment depends on a consistent pattern of volitional acts over time.¹⁰⁵

Much work remains to be done to develop such an account, but it can be seen that a consent approach to investment would direct our attention to the degree and nature of consent underlying the investment treaties and investment transactions in question, in order to determine whether we are indeed facilitating investment, or the investment equivalent of coercion, predation, or exploitation.

To summarize, whatever one thinks of specific theories of justice or specific deficits of the investment law regime, the core insight here is a conceptual one: understanding the investment regime as an institution that allocates rights, privileges, and burdens with respect to investment capital, and hence is subject to principles of justice. It is in this sense, investment law is already a matter of governance and justice—

102 Ibid.

103 I am relying here on the typology of investment ‘desiderata’ sought by capital, as developed by Echandi and Newson, *supra* note 13, at 856–65.

104 See Frank Garcia, ‘Trade, Justice and Security’, in Padideh Alai, Tomer Broude and Colin Picker (eds), *Trade as Guarantor of Peace, Liberty and Security?* (Washington, DC: American Society of International Law, 2006) (citing social psychology of justice and social conflict). Resentment and conflict can obviously arise for many reasons including nationalism and pathologies of governance, so it would be unfair to attribute all of the social conflict around investment to injustice. However, some basic connection seems clear.

105 I am indebted to Federico Ortino for the conversations underlying these reflections.

the problem has been that it has simply not seen itself or been seen that way, and has not therefore operated that way.

If this is right, what does it matter for the nature of investment law itself? If in fact investment law is a system of governance involving the fair allocation of investment capital, this has a number of significant implications for the structure and doctrine of the investment treaty system, and for the current debate about investment law and policy.¹⁰⁶ We highlight some of these implications below.

C. Governance reform: institutions and doctrine

The trading system did not simply undergo a paradigm shift in terms of the nature of its role in global governance—it went through an associated process of profound institutional reform and innovation.¹⁰⁷ Similarly, insofar as the investment regime is also system of governance involving the allocation of economic resources, a number of changes to the structure and doctrine of investment law should be effected, if investment law is to become the fair, integrated, and rule-oriented system that we need.¹⁰⁸

1. Multilateralism

The first step is to find a way out of the impasse created by a dense web of asymmetrical bilateral treaties, toward more comprehensive and inclusive sets of rules. More effective multilateralism has been key to the success of the WTO,¹⁰⁹ and Hufbauer cites this fragmentation as the ‘main defect’ of the investment system.¹¹⁰ Addressing this defect means looking again at the creation of a true multilateral investment system.

Reviving Multilateral Efforts. One of the obvious questions raised by the trade law experience is whether we need a Uruguay Round for investment law.¹¹¹ Recall that heading into the Uruguay Round, many parties held a diverse range of frustrations and perspectives about the GATT system, but they all agreed the GATT system needed improvement. The creation of the WTO was a watershed for international trade regulation on a structural and doctrinal level, yet the emergence of the WTO out of the Uruguay round surprised everyone, including the participants.¹¹² It came about because there was a basis among the key stakeholders for negotiated

106 We can already see traces of this intuition in the current debate. See Zeng, supra note 48, at 329 (suggesting that concepts such as balance, sustainable development and integration which should guide BIT reform are rooted in basic notions of equity and equality).

107 See, e.g. Sylvia Ostry, ‘WTO: Institutional Design for Better Governance’, in Roger B. Porter et al. (eds), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Center Business and Government Harvard University and Brookings Institution Press, 2001) 361, 363–64.

108 Ehandi and Newson, supra note 13, at 866.

109 See, e.g. Moore, supra note 10, at 19 (multilateralism protects smallest and poorest states).

110 Hufbauer, supra note 12, at 833, 845 (WTO-supervised multilateral investment rules would address the ‘patchwork’ of investment rules).

111 Hufbauer, *ibid.*, at 837 (would seem an obvious move); but see Pauwelyn, ‘At the Edge of Chaos’, supra note 14 at 417 (questioning whether multilateralism is even realistic, let alone desired, given investment law’s path-dependent reliance on bilateral treaties).

112 For background on Uruguay Round negotiations and the late proposal of the WTO, see generally *The Uruguay Round*, Understanding the WTO: Basics, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm. (visited 6 November 2015).

institutional innovation, and that opportunity was seized: Organisation for Economic Co-operation and Development (OECD) states got the single undertaking approach and rules on Intellectual Property (IP) and services, while developing countries got the DSU and some special and differential treatment (S&D).¹¹³

In 1995, the OECD attempted to sponsor a similar multilateral approach for investment—the Multilateral Agreement on Investment (MAI).¹¹⁴ Yet the MAI process was criticized as insufficiently multilateral in nature, drafted largely without developing country input, and the resulting draft did not receive much support from developing countries or civil society groups, who were afraid that the agreement would make it difficult to regulate investors.¹¹⁵ Eventually, with protests against this agreement occurring within both capital-importing and capital-exporting states, the idea of a multilateral investment agreement was abandoned.

Given the ferment in investment law today and the widespread dissatisfaction with current rules, the time may be right for a fresh approach to multilateral regulation. To an observer it might look like capital is getting everything it wants from the current system, so the political basis for change is absent. However, if more states follow Australia's lead and suspend binding ISDS due to the public policy problem, and the variability of panel outcomes continues to frustrate investors and states alike, this might lead to the basis to broker a deal. Moreover, the shift in development models and the emergence of an integrated global economy has blurred the lines between capital importing and capital exporting countries, with developed and developing countries alike finding themselves simultaneously on both sides of the table, dramatically shifting their overall investment policy priorities.¹¹⁶ It may well be that the politics of reform are becoming more manageable, at least on certain issues.

If so, then there are promising resources and models to be considered, such as UNCTAD's Investment Policy Framework (IPF)¹¹⁷ and the International Institute for Sustainable Development's 2005 Model International Agreement on Investment for Sustainable Development (hereinafter Model IIA).¹¹⁸ These and other resources are already part of the debate, but we are suggesting a shift in the

113 Doha round of course is highlighting the imperfections of the outcome, but that is for another day.

114 See generally *Multilateral Agreement on Investment*, OECD, <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>. (visited 6 November 2015).

115 See Rainer Geiger, 'Multilateral Approaches to Investment: The Way Forward', in José E. Alvarez and Gabriela P. Vizcaino (eds), *The Evolving Int'l Investment Regime* (New York: Oxford University Press, 2011) 153, 157.

116 Ehandi and Newson, *supra* note 13, at 865. The USA, for example, has already shifted its model BIT program towards clearer policy space for social legislation that does not necessarily trigger investment protections. See José E. Alvarez, 'Why Are We "Re-Calibrating Our Investment Treaties"', 4 *World Arbitration & Mediation Review* 143 (2010).

117 See *Investment Policy Framework for Sustainable Development*, UNCTAD (2013), available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx). (visited 6 November 2015). In fact, many of the reforms advocated in the IPF as a whole could be understood as S&D if they were implemented at a broad multilateral and structural level.

118 Model International Agreement on Investment for Sustainable Development, International Institute for Sustainable Development, 2005, available at http://wgbis.ces.iisc.ernet.in/biodiversity/sdev/investment_model_int_handbook.pdf. (visited 6 November 2015). Unlike the primary focus of most BITs on protection of the private investor, the IISD Model IIA seeks an 'overall balance of rights and obligations in international investment between investors, host countries, and home countries'. For example, IISD Model IIA reverses the asymmetric power relationship between investors and host states by

frame. If investment law is understood as a matter of justice, then negotiating substantive treaty provisions is no longer simply a matter of economic and political power-based negotiations coupled with hortatory exhortations to create more policy space. If IPF and Model IIA-style provisions are reframed as what *fairness* requires *whenever* investment treaties involve unequal partners, it starts to look anomalous or opportunistic for capital exporting countries to negotiate more unbalanced agreements. The rhetorical power of justice discourse would thus support an emerging consensus on not just what a *model* BIT or MAI might look like, but what a *just* investment agreement might look like, and what an *unjust* investment agreement might look like.¹¹⁹

Regional Alternatives for Investment Reform. The Transatlantic Trade and Investment Partnership (TTIP) and Trans Pacific Partnership (TPP) currently under negotiation raise the interesting question of how regional alternatives can play a useful role in developing more coherent and integrated norms.¹²⁰ The TPP, a joint project of 12 Pacific Rim countries,¹²¹ aims to comprehensively liberalize both goods and services, and with more than \$2 trillion in goods traded among TPP partners in 2012, could significantly impact the dynamics of global trade should it come into force.¹²² Through the TTIP, the EU and the US¹²³ seek to create a comprehensive transatlantic agreement expanding both trade and investment, which could yield significant economic benefits to both economies.¹²⁴

Both the TPP and TTIP are already seen to ‘represent an alternative track for the development of the governance framework for international trade, one in which

including entire sections on Corporate Social Responsibility (Article 16), Investor Liability (Article 17), and the effects of the investor misconduct on the dispute settlement process (Article 18).

- 119 See Garcia and Ciko, *supra* note 84 (rhetorical power of justice language a key role for justice theory to play in international economic law).
- 120 See Puig, *supra* note 13, at 58–9 (discussing how convergence and unilateralism (as exemplified by the TTIP and TPP negotiations) have resulted in the merging of international trade and investment law and arguing that this merger provides policy makers with the opportunity to ‘consider not only clarifying rules and jurisdictional mandates, but also instituting mechanisms that can work to accomplish coordination and collaboration among different bodies by institutionalizing participation and collaborative communication’).
- 121 In 2006, the countries of Brunei, Chile, New Zealand, and Singapore sought to create a four-way FTA. Today that original initiative has expanded to include eight more countries including the USA, Australia, Canada, Japan, Malaysia, Mexico, Peru, and Vietnam, collectively forming the TPP.
- 122 Peter Draper and Ricardo Meléndez-Ortiz, ‘The Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) – Key Issues on Potential Impact on Members’, in *World Economic Forum, Mega-Regional Trade Agreements: Game Changers Or Costly Distractions For The World Trading System?* (2014) 14, 14–15.
- 123 In June 2013, the United States Trade Representative (USTR) and the European Commission formally launched TTIP negotiations.
- 124 Office of the United States Trade Representative, *U.S. Objectives, U.S. Benefits In the Transatlantic Trade and Investment Partnership: A Detailed View* (2014), available at <http://www.ustr.gov/about-us/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>. (visited 6 November 2015). A study by the Centre for Economic Policy Research projected that TTIP could potentially increase the size of the EU economy by €120 billion (or 0.5% of GDP) and the US economy by €95 billion (or 0.4% of GDP). European Commission, ‘Transatlantic Trade and Investment Partnership, The Economic Analysis’ (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf. (visited 6 November 2015).

smaller groups of individual states combine to forge common language that include harmonized general principles along with the specific provisions to reflect the priorities of the member states'.¹²⁵ Similarly, both TTIP and TPP may in fact serve as a necessary stepping-stone towards multilateral reforms of the international investment regime as well.¹²⁶ TTIP and TPP may offer a template for creating uniform rules in international investment, allowing reforms to be 'tested' at the regional level before being implemented at the multilateral level.¹²⁷

While these regional agreements are likely to make a significant impact on a wide range of investment agreement provisions, the most vital breakthrough may well be in the area of ISDS. At first glance, it may appear that ISDS provision have little chance of undergoing reform through TPP negotiations. A recently leaked draft of the agreement reveals that the ISDS is being included in the agreement despite opposition from Australia in light of the Philip Morris arbitration.¹²⁸ However, a closer look at the footnotes of the agreement reveals that Australia may in fact exempt itself from ISDS under the TPP.¹²⁹ This footnote creates the possibility that carve-outs in a bilateral context may also apply in a plurilateral context under the TPP.¹³⁰ If such a carve-out is included in the final text of the TPP, it could allow for other countries to follow suit and carve out the ISDS provision as well.¹³¹ In this way, the TPP has opened the door for Australia and other countries to pass legislation in the public interest without the fear of repercussions under ISDS.

While the TPP could result in carve outs, current negotiations between the United States Trade Representative (USTR) and EU Commission suggest that TTIP could result in fundamental reform of ISDS altogether.¹³² While the USA believes it has created ISDS provisions that protect the ability of governments to

125 Larry Cata Backer, 'The Trans-Pacific Partnership: Japan, China, The U.S., and the Emerging Shape of a New World Trade Regulatory Order', 13 *Washington University Global Studies Law Review* 49 (2014), at 59.

126 It has been said of regional partnerships more broadly that '[t]he shift to regionalism can bring about the consolidation and harmonization of investment rules and represent a step toward multilateralism . . . [c]urrent regional IIA negotiations present a window of opportunity to consolidate that existing network of BITs'. *Towards a New Generation of International Investment Policies*, supra note 6, at 5.

127 Geiger, supra note 115, at 161.

128 See Sappideen and He, supra note 45, at 226.

129 The footnote reads: 'Section B does not apply to Australia or an investor of Australia. Notwithstanding any provision of this Agreement, Australia does not consent to the submission of a claim to arbitration under this Section.' See *ibid.*, at 223–6.

130 See Tsai-Yu Lin, 'Preventing Tobacco Companies' Interference with Tobacco Control Through Investor-State Dispute Settlement under the TPP', 8 *Asian Journal of WTO and International Health Law and Policy* 565 (2013), at 577. Such a carve out would mean that investment claims against Australia would have to be resolved by local court or tribunals or else under an alternative form of dispute resolution.

131 Deborah Kay Elms, 'The Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch', 8 *Asian Journal of WTO and International Health Law and Policy* 379 (2013), at 390. As has been described, ' . . . if Australia opts out of the investor-state arbitration in the TPP negotiation, it is very likely that other countries will respond likewise'. Sappideen and He, supra note 45, at 225. New Zealand has been identified as the country most likely to follow in the footsteps of Australia and seek such a carve out. *Ibid.*, at 224.

132 As Reinhard Quick has observed, the TTIP provides a 'unique opportunity to introduce procedural and substantive reforms for investor-state dispute settlement'. Quick, supra note 4. Reinhard Quick, *Why TTIP Should Have an Investment Chapter Including ISDS*, 49:2 *J. WORLD TRADE* (forthcoming 2015)

regulate, to discourage non-meritorious claims, and to ensure a high level of transparency, the EU has been more reluctant to adopt ISDS without some reforms to the proposed mechanism.¹³³

Although the EU Commission has been given a mandate to include ISDS in its agreement with the USA, it appears that the Commission is also taking cues from the public and civil society organizations in the EU. From 27 March through 13 July 2014, the Commission administered a consultation to gain public feedback on the Commission's position on 12 key issues of interest surrounding the TTIP, including the right to regulate, fair and equitable treatment for investors, and transparency of the ISDS system.¹³⁴ With nearly 150,000 replies, the majority of respondents voiced their opposition and concern on various aspects of the proposed TTIP agreement, particularly the role of ISDS.¹³⁵ The results of the consultation, released in January 2015, reveal four main areas in which further improvements will be explored: (i) the protection of the right to regulate; (ii) the supervision and functioning of arbitral tribunals; (iii) the relationship between ISDS and domestic remedies; and (iv) the review of ISDS decisions through an appellate mechanism.¹³⁶ The next steps in the process include further consultation with EU stakeholders, EU Member States, and the European Parliament on these core issues as a means of 'developing concrete proposals for the TTIP negotiations'.¹³⁷ Should this result in substantive and viable proposals, TTIP could significantly reform the current model of ISDS as we know it.¹³⁸

2. Key structural reforms

Whether or not the international community proceeds through multilateral or regional reform, or is constrained to incremental reform through existing BITs and arbitral rule systems such as UNCITRAL, the experience of the trade regime highlights several of the key structural issues that need attention, and which follow from a shift in understanding the nature of the investment regime. These reforms are intended to improve the investment law system in terms of basic rule of law requirements, and

133 *The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors*, Office of the United States Trade Representative (March 2014), available at <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>. (visited 6 November 2015).

134 *Report on the online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership agreement*, European Commission (13 January 2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153045.pdf. (visited 6 November 2015).

135 See *ibid.*

136 See *ibid.*

137 See *ibid.*

138 As Reinhard Quick offers, the 'TTIP could provide for reform to overcome the alleged democratic deficits of ISDS both substantially and procedurally. TTIP could thus strike a balance between the "right to regulate" and the protection of the foreign investor, clarify and specify the principles of investment protection in such a way as to give guidance to the international tribunal, establish such a tribunal with transparent proceedings and composed of impartial arbitrators... Given the sensitive political issues which the future TTIP ISDS will be dealing with it is strongly advisable to create an appellate instance whose role should be to decide on appeal whether the legal findings of the tribunal in a specific case are consistent with the provisions of TTIP. Such a two-step process would render arbitration awards less efficient but politically more acceptable'. Quick, *supra* note 132.

reflect (in our view) the broadest consensus about investment law reform: strengthening the coherence, transparency, and progressive development of the law.

Appellate Mechanism. The first of these is the need for an integrated comprehensive appellate mechanism. It is widely recognized that the creation of the Appellate Body has been critical to the success of the WTO, since it has the authority to clarify and interpret the law, improve legal outcomes, and progressively develop the treaty system within the limits of the law, politics and culture of the WTO.¹³⁹

In the same way, the investment regime needs a mechanism for unified doctrinal interpretation and innovation.¹⁴⁰ The idea is not new, having been part of ICSID reform discussions at least for the past ten years, and part of the US model BIT program since 2004.¹⁴¹ Reform proposals range from granting the current academic literature quasi-precedential status,¹⁴² voluntary or multilateral reform of arbitral association rules,¹⁴³ and creation of an investment arbitration appellate court;¹⁴⁴ to more ambitious upstream reforms including replacing ad hoc arbitration outright and creating an international investment court.¹⁴⁵ There have even been calls for an investment agreement within the WTO framework, which would have the added benefit of bringing investment disputes under the auspices of the Appellate Body itself.¹⁴⁶ There is even a proposal for a kind of supra-national quasi-constitutional law of investment to reform and discipline outcomes through normative supremacy.¹⁴⁷

139 See Hufbauer, *supra* note 12, at 835 (DSB critical to trade's success); see also Andreas R. Ziegler, 'Scope and Function of the WTO Appellate System: What Future after the Millennium Round?', 3 Max Plank UNYB 439 (1999); see generally Pauwelyn, *supra* note 13 (contrasting acclaim for WTO DSU with criticism for ISDS).

140 See, e.g. Anna Joubin-Bret, 'Why we need a Global Appellate Mechanism for International Investment Law', Columbia FDI Perspectives No. 146 1, 1 (27 April 2015); *Reform on Investor-State Dispute Settlement: In Search of a Roadmap*, UNCTAD IIA Issues Notes (June 2013), http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. (visited 6 November 2015). (outlining the introduction of an appellate facility as one of the five main reform paths).

141 See *ibid.*

142 Franck, *supra* note 8 (Develop an academic literature having precedent-setting status that could be relied on and decrease the risk of inconsistent decisions). I will discuss this further below.

143 Nathalie Bernasconi-Osterwalder and Diana Rosert, 'Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes', International Institute for Sustainable Development (2014), http://www.iisd.org/pdf/2014/investment_treaty_arbitration.pdf. (visited 6 November 2015); Revising the UNCITRAL Arbitration Rules to Address State Arbitrations, CIEL & IISD (February 2007), http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf. (visited 6 November 2015); Bret, *supra* note 140.

144 Susan Franck. *Ibid.* (Establishing an Investment Arbitration Appellate Court to prevent the consideration of Treaties in isolation).

145 *Brussels considers replacing ISDS with a public court*, EurActiv, 26 March 2013, <http://www.euractiv.com/sections/trade-society/eu-considers-replacing-isds-public-court-313079>. Gus van Harten, 'A Case for an International Investment Court', Society of International Economic Law (SIEL) Inaugural Conference 2008, Paper No. 22/08, available at <http://ssrn.com/abstract=1153424>.

146 Hufbauer, *supra* note 12, at 833, 838 (an investment chapter in WTO would bring significant structural benefits if ICSID could be incorporated and the AB set over the system).

147 Santiago Montt, 'State Liability in Investment Treaty Arbitration', calls for creating a kind of 'higher law-making' that acts as precedential jurisprudence for international investment law systems.

Whatever the mechanism, and whether it is pioneered at the superregional level through TTIP, the arbitral association level, or as the basis for a true multilateral reform, developing an appellate mechanism beyond the current ICSID annulment committee process would seem both appropriate and attainable. Scholars agree that the systemic and social benefits would be profound and wide-ranging, with one scholar saying such a mechanism “offers the best hope for enhancing consistency and coherence.”¹⁴⁸ Certainly the WTO’s twenty years of experience with the Appellate Body would bear this out.¹⁴⁹

Amicus Brief Mechanism. A second key set of reforms involves a stronger and more systematic approach to amicus participation. The legitimacy of the system and basic rule of law norms require a way to increase inputs from civil society and other affected parties where economic and political decisions of such import are being made. Amicus brief submissions are a way to bring arbitration, a relatively secret proceeding, into the public light by making the particular submission and the human rights and social welfare implications known to the wider community.¹⁵⁰ In doing so, tribunals and investors may become more accountable to international pressures.

For similar reasons, the WTO Appellate Body has been walking a very careful (and often confusing) line on this issue since it was disciplined by the WTO General Council for using its procedural authority to create an amicus process during the *EC-Asbestos* case.¹⁵¹ The current WTO practice is that amicus briefs can be accepted on a case by case basis, but they will not be directly addressed by the Appellate Body in its ruling, and have never been clearly relied on.¹⁵² However, there is at least a way in for a broader range of voices including civil society concerns, and what is read can of course be influential regardless of whether it is formally addressed.

The investment regime has also been moving ahead, albeit episodically and in small steps, within the ICSID and UNCITRAL systems, culminating in a legal framework for accepting amicus curiae briefs.¹⁵³ Contemporary BITs have also begun incorporating amicus brief mechanisms into their procedural rules.¹⁵⁴ In some respects, therefore, the investment regime is therefore in the lead with respect to this

148 Joubin-Bret, supra note 140, at 2.

149 Ibid, at 1 (twenty years of positive feedback from WTO members about the AB would support such investment law innovation).

150 See L. Butler, ‘Effects and Outcomes of *Amicus Curiae* Briefs at the WTO: An Assessment of NGO Experiences’, available at <<http://socrates.berkeley.edu/~es196/projects/2006final/butler.pdf>>, (visited 10 September 2008) 13; Pauwelyn, ‘At the Edge of Chaos’, supra note 14 at 406 (amicus brief procedures an important curative to costs of pursuing regulatory review actions through commercial arbitration-style proceedings).

151 See General Council, Minutes of the Meeting of 22 November 2000, WT/GC/M/60 (concerning *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*); Mary E. Footer, *Analysis of the World Trade Organization* (2006) 300.

152 Chapter 9.3, *Amicus Curiae Submissions*, Dispute Settlement System Training Module, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm#fnt7. (visited 6 November 2015).

153 UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/60/1 (2010); Rule 37 of the ICSID Convention, Regulations, and Rules (2006).

154 United States’ Model BIT, Articles 28 and 29; Canadian Model BIT, Articles 34, 35, 38, and 39; Norway MODEL BIT, Articles 18 and 22.

issue. However, arbitral decisions using current mechanisms have also shed light on important procedural shortcomings regarding amicus brief submissions.¹⁵⁵ In the *Suez/Vivendi* decision, for example, the tribunal stated that non-disputing parties do not require access to the record in order to submit meaningful and informed briefs, potentially limiting the effectiveness of their submissions.¹⁵⁶ Thus while an increased use of amicus briefs to bring human rights and other social perspectives to an investment dispute may be promising, it remains to be seen how far the mechanism as currently constituted can play a pivotal role in the shaping of the arbitral decision.¹⁵⁷ Strengthening the legitimacy of ISDS as part of governance means strengthening the amicus mechanism.¹⁵⁸

Of course, the deepest structural reform is not enough if it does not include or incorporate the necessary substantive law reforms. We now turn to some of the key doctrinal reforms needed, regardless of the setting in which they take place.

3. *Doctrinal reform: protecting space for competing social values*

In view of the trade experience, a key reform to bolster legitimacy is to improve the space in BITs for responsible public policy exceptions. When it came to social issues, the most vocal public criticism concerning the GATT came from environmentalists concerned with the GATT's effect on domestic environmental legislation.¹⁵⁹ Developing more progressive interpretations of Article XX¹⁶⁰ and related provisions through the WTO structure was critical to the WTO's enhanced legitimacy.¹⁶¹

However, the GATT at least *had* an Article XX so that there might be some basis for doctrinal evolution when the Appellate Body was created, which brings us back to the uneven nature of the investment regime: you must first *have* a public policy exception to be able to develop it horizontally or through any appellate mechanism.

Public Policy Exceptions in Investment Law. International law provides several avenues through which host states may argue for policy space and the effective right to regulate in the face of critical social challenges. While only some BITs have well-developed public policy exceptions in the text, many have at a minimum a provision ensuring the state's right to enact non-precluded measures (NPMs) in appropriately

155 J. Harrison, 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?' in *Human Rights in International Investment Law and Arbitration* (2009).

156 *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 19 May 2005; *but see Piero Foresti v South Africa*, in which the tribunal ordered the parties to disclose their briefs to the amicus interveners).

157 See Sarah Schadendorf, 'Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations', 10(1) *Transnational Dispute Management* (1 October 2013).

158 See Pauwelyn, 'The Rule of Law', *supra* note 13 at 4 (as ISDS increasingly involves regulatory challenges against states with highly developed rule of law systems, it becomes increasingly important to strengthen traditional democratic and rule of law desiderata such as participation, transparency and inclusiveness in investment dispute resolution).

159 See e.g. *supra* note 52 at 268; Esty, *supra* note 66.

160 Article XX General Exceptions, https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm. (visited 6 November 2015).

161 See Charnovitz, *supra* note 72 at 247 (tracing the recent history of Appellate Body doctrinal reform in this critical area and its role in the larger story of WTO evolution and global economic governance).

urgent circumstances.¹⁶² Early public policy exceptions to investment obligations included regulation to protect a country's essential security interests or maintain public order.¹⁶³ States can also justify such regulations by asserting their inherent police power to act for legitimate public concerns, as recognized in the customary international law of necessity. However, while host states are legally able to raise a range of defenses for measures having adverse effects on investors, arbitral tribunals have routinely downplayed the host state's concerns, set strict standards for proportionality, and questioned the host state's arguments that human rights and investor protection interests are in collision.¹⁶⁴

The incorporation of more explicit public policy exceptions within international investment agreements has occurred in part due to such ambiguities. New generation BITs have increased the number of public policy exceptions to include, for example, measures necessary to protect health, safety or the environment, to regulate financial services, or to preserve cultural patrimony, industries or diversity. While there has been some movement on the incorporation of comprehensive public policy exceptions into BITs, the vast majority of BITs do not have such clauses or have only limited clauses.¹⁶⁵ This makes interpretive solutions based on existing provisions a key to reform in this area, and here we confront again the structural and rule of law deficits of the investment regime.

Interpretive Reform. The WTO Appellate Body faced a similar textual challenge with respect to 'trade and' issues, matters covered (albeit imperfectly) by GATT Article XX. It was considered politically impossible to amend the GATT, hence there was no opportunity to create a new provision more attuned to contemporary socio-legal realities. The only remaining strategy, therefore, was to interpret the problem down to a manageable level.

Three key sites for interpretive reform were the chapeau of Article XX, in which the Appellate Body developed its evenhandedness approach to the application of trade restrictive measures; the Article XX(g) exception, where the Appellate Body used an 'evolutionary' approach to the meaning of 'exhaustible natural resources', among other techniques, to chart a course towards a successful rapprochement with environmental values; and the Article XX(b) necessity test, in which the Appellate Body oversaw a judicial evolution of the 'less trade restrictive alternative' (LTRA) test to progressively incorporate fuller consideration of public policy implications before invalidating a state's chosen measure on the grounds of an alleged 'less trade restrictive alternative' measure.¹⁶⁶ Currently, we are seeing similar

162 Burke-White, *supra* note 7, at 207 (relatively widespread).

163 See Katia Yannaca-Small, 'Essential Security Interests under International Investment Law', OECD, *International Investment Perspective: Freedom of Investment in a Changing World* 93 (2007).

164 See, e.g. Burke-White, *supra* note 7.

165 Public policy exceptions are not very prominent in classical 1990s BITs. Out of 880 BITs from the 1990–2014 era analyzed by UNCTAD, only 90 include a public health and environmental protection exception, while 69 include a public order or a cultural exception provision (37 out of 128 BITs included both types of exceptions). However, recent treaties have started to include them on a more consistent and frequent basis, such as Egypt's Model BIT, the Korea-EFTA and the influential US Model BIT. See UNCTAD, *World Investment Report 2012–15* Chapter III.

166 See, e.g. Charnovitz, *supra* note 66 at 247.

evolution of the Article XX(a) public morals exception through cases like *Seals and Gambling*.¹⁶⁷

Similarly, two key sites for interpretive reform of investment law are the treaty-based provisions on public policy exceptions and NPMs; and the customary international law defense of necessity.¹⁶⁸ NPM provisions contain a nexus requirement, that the measures taken be sufficiently related ('necessary') to the objectives stated in the relevant clause.¹⁶⁹ Whether or not a BIT contains an NPM clause, host states can invoke the customary international law defense of necessity, limited to situations in which the action taken is the 'only' way for the state to safeguard this essential interest, and provided the state has not contributed to the situation of necessity.¹⁷⁰ In both situations, the challenge is essentially the same: to ensure that in the interpretation and application of a public policy exception or NPM clause, or the necessity defense, the appropriate balance is struck between investment restrictive effect and the achievement of the state's legitimate regulatory aim. In such cases, the approaches taken within the trade law system can be instructive.¹⁷¹

The key question in either situation is what it takes for a hypothetical measure to disqualify a state's chosen measure. Whether under an NPM clause or the necessity defense, the key issue will be the identification and characterization of a 'less investment restrictive alternative' (LIRA). This is very familiar from the trade context, where the law has evolved to focus on whether the 'LTRA' test is in fact ensuring balanced consideration of regulatory purpose and effectiveness, and not just the automatic disqualification of the state's chosen measure on the allegation of another allegedly available one.¹⁷² By comparison, the current mechanistic LIRA approach fails to take into account whether the alternative course is reasonably available under the circumstances and equally effective, and is therefore in substance and effect just like the old LTRA doctrine in trade law.¹⁷³ The question is most pointed in the

167 See Steve Charnovitz, 'The Moral Exception in Trade Policy', 38 *Virginia Journal of International Law* 689 (1998); Mark Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Note', 33 *Yale Journal of International Law* 215 (2008).

168 Of course, a key difference is that trading system has an appellate body, whereas investment law has no uniform appellate mechanism, as has been discussed above. However, the interpretive challenge remains.

169 Burke-White, *supra* note 7.

170 The necessity defense allows states to take action to 'safeguard an essential interest against a grave and imminent peril' without liability for resulting harm to investors. Article 25 ILC draft articles on state responsibility.

171 See Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law', 36 *University of Pennsylvania Journal of International Law* 1 (2015) (outlining potential cross-fertilization between trade and investment with respect to mechanisms to preserve regulatory space); Alford, *supra* note 13, at 40–44 (noting areas of convergence in trade and investment norms due to investment panels' recourse to WTO jurisprudence).

172 See Frank J. Garcia, 'The Salmon Case: Evolution of Balancing Mechanisms for Non-Trade Values in WTO', in George A. Bermann and Petros C. Mavroidis (eds), *Trade and Human Health and Safety* (2006) 133; see also Wu, *supra* note 167 at 215.

173 The *Sempra* and *Enron* panels give us two examples. In the *Sempra* case, the panel had ruled that even had there been a state of emergency, Argentina violated its FET obligations because it failed to choose the 'LIRA'—it could have taken measures that would restore order while still protecting investors. However, in *Enron* the award was annulled because panel failed to take into account the elements of the

context of the customary international law necessity defense: what does ‘only’ mean in Article 25 of the Draft Articles on State Responsibility?¹⁷⁴ Whether or not there is interpretive room in the Article 25 context to develop a more balanced test, it is important that tribunals at least interpret treaty-based NMP clauses as *lex specialis* on the necessity question, rather than incorporate the Article 25 analysis into treaty-based clauses as well.¹⁷⁵

The interpretation of ‘necessity’ thus represents an important area for progressive evolution and comparative analysis.¹⁷⁶ Even without a new mechanism for the coherent evolution of the law, NGOs and legal scholars can still play a critical role by offering reinterpretations of key BIT provisions to allow consideration of host country social issues, and influencing tribunals (and annulment committees) to adopt or enforce these approaches.¹⁷⁷

IV. CONCLUSION: LEGITIMACY CRISES AND THEIR RESOLUTION

The expansion of BITs and the increase in high-profile and controversial investment disputes have contributed to a significant, but potentially transformative, legitimacy crisis in the regulation of investment. When the trading system faced its own earlier legitimacy crisis, it was understood that preserving the viability of the trading system depended on a strong and visible response to that crisis.¹⁷⁸ Based on the trading system’s experience, the investment regime can emerge from its own crisis as a stronger system with enhanced legitimacy if it takes certain critical steps.

Most fundamentally, investment law has emerged as the kind of treaty-based economic law system that must be brought within the best practices of contemporary global governance norms. In so concluding, we recognize that we are arguing for a complete paradigm shift in the current understanding of international investment law, yet such a move is not without precedent as the trading system demonstrates. Moreover, the work of unearthing and critiquing paradigms in investment has already begun: Anthea Roberts has recently analyzed the legitimacy crisis through the various paradigms at work in our efforts to understand, characterize and reform (or not) the current investment system.¹⁷⁹ By articulating these paradigms and their assumptions, Roberts hopes to open space for two types of normative arguments to emerge with respect to investment law: meta-theories to explain how the current

necessity defense, in particular the legal implications for Argentina’s obligations if the measure taken was in fact the only one reasonably available, i.e. the only one adequate to achieve the regulatory purpose.

174 http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. (visited 6 November 2015).

175 Burke-White, *supra* note 7 at 212 (discussing the *Sempra* and *Enron* cases).

176 See Robert Sloane, ‘On the Use and Abuse of Necessity in the Law of State Responsibility’, 106 *American Journal of International Law* 447 (2012).

177 Franck, *supra* note 8.

178 The IMF and World Bank have also been undergoing similar challenges (as with trade and investment, a result of their success as global governance institutions as much as of their failures in terms of specific policy interventions), with varying degrees of progress, suggesting we are in an evolutionary period of institutional reform and innovation as international economic law becomes global economic governance.

179 Roberts, *supra* note 12.

investment system ought to be understood, and arguments for how the system should be reformed to become more like one paradigm than another.

In that spirit, we have offered the foundation for both types of arguments here, drawn from the trade experience. The paradigm shift we are advocating—recognizing that investment law is about governance and justice—simultaneously reveals key institutional and doctrinal deficiencies, and suggests key areas for reform, including comprehensive multilateral rules, a strengthened rule of law, and clear and balanced public policy exceptions that protect necessary policy space for the discharge of a sovereign's broader social responsibilities.

The investment community would be wise to recognize the similarity of the situation to trade, and (as was the case with trade) the compelling self-interest based reasons for reform. Thomas Piketty reminds us that the perceived fairness of globalization depends upon the perceived fairness of the global economic system and its distribution of benefits and burdens, and warns that no one, including capital owners, can afford to have more people grow disaffected with globalization itself.¹⁸⁰ In this regard, the investment regime is a key point of engagement between states (and their citizens) and the global economy, along with trade, global monetary policy and global fiscal policy, among others. How fair these points of engagement are, and are perceived to be, will be critical to the overall evaluation of the fairness of globalization, meaning the fairness of our evolving global society; and to our flourishing in this shared future.