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The Private Law Critique of International Investment Law

Julian Arato

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The Private Law Critique of International Investment Law

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Abstract: International investment law goes further in disciplining states' internal policy space than is commonly understood. This Article argues that investment treaties subtly constrain how nations organize their internal systems of private law – including laws of property, contracts, corporations, and IP. Problematically, they do so on a one-size-fits-all model, disregarding the wide variation in values reflected in these discrete legal institutions. Moreover, investor-state dispute settlement exacerbates these constraints, further distorting national private law arrangements. This hidden aspect of the system produces distinct problems of inefficiency, unfairness, and inequitable distribution that have eluded the regime's critics and apologists alike.

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INTRODUCTION

International investment law (**IIL**) goes further in disciplining states' internal policy space than is commonly realized. The point has been made time and again that IIL restricts the state's capacity to regulate in the public interest. While this critique is sometimes overstated, it is clear that investment treaties constrain states' regulatory autonomy as regards foreign property, at least to a degree. But what is generally missed is an altogether different, implicit way in which IIL disciplines the state's internal legal architecture. I argue that investment treaties subtly, but significantly, constrain how nations organize and balance their internal systems of private law vis-à-vis foreigners – not limited to property rights, but also extending to the law of contracts, intellectual property (**IP**), and corporations. Problematically, however, they tend to do so on a rigid, one-size-fits-all model – without regard to the wide variation in values undergirding these discrete private law institutions. Moreover, these constraints have been inflated, irregularly and inconsistently, through interpretation in investor-state dispute settlement (**ISDS**) case-law. Put another way, IIL and ISDS together haphazardly discipline domestic private law policy space, with overlooked consequences for both private and public interests. This hidden aspect of the system produces discrete doctrinal, conceptual, and distributional problems, which are insufficiently understood – by both its critics and apologists.

I draw out the private dimension of IIL, as a new frame for understanding the system's promise and pitfalls. The debate has focused too much on balancing private rights and public values in general, without adequately analyzing what kinds of private legal relations investment treaties impose. I argue that IIL has effectively, if unintentionally, created broad swathes of international private law[1] across diverse fields – through a dynamic combination of treaty-making and arbitral interpretation. Not only does IIL effectively displace particular rules of national private law; much more seriously, it distorts the logic and functions of core private law institutions (e.g. by undermining party choice in contracts, and the separate legal personality of corporations).

I make two main claims: one conceptual and one critical. *First*, I argue that the emergence of IIL as a broad, amorphous field of international private law has turned on a doctrinal anomaly –

[1] I avoid the term "private international law" – a term of art covering mostly rules regulating conflicts of law and jurisdiction. While not technically inapposite, the term is not usually used to cover substantive private law (which is largely left to domestic law). To avoid confusion, I use the anodyne expression "*international private law*" to connote those international legal rules imposing primary substantive and procedural rules of private law on States (and others) – on the scope of property rights, the disposition of contracts or IP, corporate governance, etc. This Article takes no hard, formal stance on whether this is better understood as "private international law" or "public international law."

grounded in a common, but subtle problem in treaty drafting. Investment treaties typically lay out exceptionally broad definitions of investment, covering not only standard forms of property, but also "*assets of any kind*." By extending their protections to property, contracts, IP, enterprises, and stocks and shares, investment treaties materially create international private law in relation to each – incompletely, to be sure, but meaningfully disciplining national private law nevertheless. Yet these treaties rarely differentiate as to how their substantive and procedural protections apply to the varied assets they cover. ISDS tribunals have been left to determine the scope of international property, contract, IP, and corporate law that investment treaties impose – and thus how far IIL displaces domestic private law institutions and values. This they have done expansively, though mostly implicitly, based on questionable interpretive assumptions. *Second*, I argue that in key cases the patterns of interpretation have distorted foundational principles of national private law – producing looming inefficiency and unfairness for investors, host states, and home states alike.

The transformation of IIL into a broad regime of international private law has been a quiet metamorphosis. Prior to the 1970's, foreign investment was largely regulated by a thin regime of customary international law, which imposed duties of non-discrimination, and arguably disciplines concerning expropriation and due process (denial of justice).[2] These rules were understood to apply to real and personal property, classically understood, and only in very limited form to contracts.[3] However, in the 1980s and 1990s, states largely supplanted this customary regime with a network of thousands of bilateral investment treaties (***BITs***). As is well known, these treaties codified and expanded international standards of treatment due to foreign investors, and empowered investors to directly sue host states via ISDS. Less understood is that investment treaties almost invariably (1) extend their substantive protections to assets of any kind, *without* (2) drawing any distinctions as to how their provisions relate to such varied commercial legal relationships. The harm in this under-specification would only emerge in the 2000s, as ISDS exploded in popularity among investors. Concrete cases forced tribunals to rule on the relationship between substantive and procedural treaty standards and the broad array of covered investments. But the case-law has tended to skate over the issue uncritically, without sensitivity to the wide variety of interests and values at stake. Taken together, through meandering waves of treaty making and interpretation over fifty years, IIL has established an

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[2] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW (8th edn, 2012).
[3] *See* GA Res. 1803 (XVII) "Permanent Sovereignty Over Natural Resources" Art. 8 (14 Dec., 1962) ("Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith.").

invasive field of international private law *sub rosa* – one whose contours remain fuzzy and unpredictable, often frustrating the very values investment treaties are designed to promote.

The lion's share of this Article reassesses the jurisprudence from a private law analytic. For the most part, tribunals have construed the implications of IIL for all forms of private legal assets broadly and homogenously. As a result, ISDS has effectively expanded the scope of IIL as a system of private law, imposing obligations on states regarding the disposition of property, contracts, IP, and stocks and shares, with very little differentiation. Moreover, tribunals rarely consider these matters head on, tending rather to base their reasoning on implicit property-oriented assumptions (or, more recently, assumptions about the level of deference due to states' public regulatory decisions). The effect is not only to displace particular private law rules, but to distort the varied functions of whole fields of national private law in relations between states and foreign investors.

Investment treaties evidently create international property law, affording foreign-owned real and personal property with protections from uncompensated takings, discrimination, and unfair treatment more generally. For the most part, IIL reflects the basic structure of property protection found in domestic law – at least in market economies. True, ISDS tends toward an absolutist "Blackstonian" conception of property, while domestic jurisdictions tend to exhibit more flexibility (treating property rights as variable "bundles of sticks").[4] Property rights need not be absolute, nor even equivalent from category to category – let alone country to country, which prioritize widely different values in their property institutions. But to the extent IIL affects these important matters, the concern usually relates more to values than concepts. ISDS does not generally distort the animating functions or logic of property law in significant ways.

The deeper category problems emerge where tribunals consider non-property assets. ISDS tends to resolve such cases in much the same way as property disputes, and with much the same vocabulary. Though subtle, this tendency produces serious normative problems, and it is here that the private law framework I advance has its greatest critical payoff.

Contracts provide the most vivid case. The essence of contract is choice – a logic of customization, by contrast to property's logic of standardization. However, ISDS tribunals implicitly, but routinely, interpret investment treaties as generating a wide set of rigid implied terms applicable to contracts between foreign investors and host-states (and state-owned entities). Tribunals almost always cast treaty rights as hard property-style rules, with the effect of precluding a wide range of

[4] Julian Arato, *Corporations as Lawmakers*, 56 HARV. J. INT'L L. 229, 260 (2015).

contractual choices – imposing terms ranging from substantive duties to the measurement of damages, forum selection, and excuse. In contract terminology, tribunals tend to effectively apply treaty rules on all these matters as mandatory terms – or very sticky defaults – constraining states' and investors' capacity to efficiently allocate risk *ex ante*.[5] ISDS has also distorted the regulatory functions of contract law in other ways. For example, some tribunals have interpreted IIL as dictating rules on the valid modes of contract formation, thereby requiring states to enforce contracts which would have been invalid under the law of the contract for reasons of public policy.[6] By uncritically and rigidly extending treaty protections to contracts, ISDS tribunals have tended to distort the basic logic of contract in domestic law, with unfortunate policy side effects for the very investment-promotion goals that IIL seeks to achieve.

A similar dynamic plays out in the extension of IIL to corporate law. Treaty coverage of both "enterprises" and "stocks and shares" creates jarring ambiguities from a corporate law perspective. For example, BITs generally leave unclear what kinds of claims an investor-shareholder may bring. Tribunals typically assume that they allow investors to bring shareholder claims for losses suffered by the corporation, to vindicate their stocks and shares as covered "assets."[7] This deceptively mundane interpretive decision erects a rule of international corporate law that cuts against the universal national presumption that shareholders may not bring claims for indirect diminution in share value caused by third-party harm to the firm (except via shareholder derivative suits). Yet tribunals have generally interpreted IIL as displacing this foundational national rule uncritically, without any consideration of the strong policies behind the domestic approach, which carefully balances the interests and expectations of the firm, corporate insiders (shareholders and management), and outsiders (creditors and the general public).[8] The ISDS approach has perverse effects for all concerned, simultaneously: subjecting states to multiple claims by the firm, its shareholders and even indirect owners; and allowing some shareholders to subordinate the rights and interests of creditors, management, and other owners. Elsewhere, tribunals have muddied foundational questions of corporate agency and authority. For example, in *Getma v. Guinea,* the Tribunal substituted its own *ex post* assessment of apparent authority

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[5] *See* Julian Arato, *The Logic of Contract in the World of Investment Treaties*, 58 WM. & MARY L. REV 35 (2016).
[6] *See, e.g.*, *Bankswitch v. Ghana*, UNCITRAL Award (except for costs) (2014) [hereinafter *Bankswitch*].
[7] *See, e.g. CMS Gas v. Argentine Republic*, ICSID Case No. ARB/01/8, Jurisdiction, ¶ 65 (July 17, 2003).
[8] *See* David Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law", OECD Working Papers on International Investment, 2014/02, OECD Publishing (2014), *available at* http://dx.doi.org/10.1787/5jz0xvgngmr3-en; Vera Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. PENN. J. INT'L L. (forthcoming 2018).

for any analysis of the applicable law – an approach which would, *ex ante*, destabilize the rules of engagement with firms and their agents in the context of FDI.[9] In all these cases, ISDS and IIL have displaced key features of domestic corporate law, though only implicitly and without due analysis of the tradeoffs – unjustifiably and inefficiently distorting core functions of the corporate form, from separate legal personality to delegated management.

By contrast, tribunals have tended to fare better in the few cases involving IP claims thus far. Unlike property, contracts, and corporate law, there is an independent and robust field of international IP law and institutions. As the breadth of IIL and ISDS came into focus, international IP scholars raised alarms that ISDS could be used to subvert both national and international IP arrangements.[10] However, in the few IP cases that have arisen – all very recent – tribunals have proven more sensitive to the particular nuances of patent and trademark, as distinct from real property and other assets. For example, in *Philip Morris v. Uruguay* the Tribunal resisted efforts to cast trademarks in Blackstonian property terms, finding that unlike with real and personal property, the applicable national and international IP arrangements endow trademarks with only a right of exclusion, not use-rights. In other words, a trademark holder may prevent another from using her mark, but has no separate right to actually use the mark herself – if, for example, the state seeks to limit advertising on tobacco products. Though the IP cases remain few, they help blaze a better path toward grappling with the private dimensions of IIL.

In each field, IIL creates international private law. The seed lies in the under-specified drafting of investment treaties, which extend broad substantive and procedural protections to a wide range of assets – without explaining how these obligations relate to the range of covered investments. Forced to grapple with the issue, ISDS tribunals have tended to assume that treaty norms apply to all covered assets in much the same way. In so doing, they functionally transform IIL into a broad regime of international private law, constraining states' flexibility in articulating their internal private law systems – both with respect to choosing which values to enshrine, and how to balance the relevant tradeoffs. In other words, IIL and ISDS do not only discipline states' public regulatory policy space. Investment

[9] *See Getma v. Guinea*, ICSID Case No. ARB/11/29, *Decision sur la Compétence*, ¶ 17 (29 Dec., 2012) (Fr.) [hereinafter *Getma*].
[10] Dreyfuss & Frankel, *From Incentive to Commodity to Asset: How International Law is Reconceptualizing Intellectual Property*, 36 MICH. J. INT'L L. 557 (2015); Gathii & Ho, *Regime Shift of IP Law Making and Enforcement from the WTO to the International Investment Regime*, 18 MINN. J. L. SCI. & TECH. 427 (2017); Liddell & Waibel, *Fair and Equitable Treatment and Judicial Patent Decisions*, 19 J. INT'L ECON. L. 145 (2016).

law also constrains (and distorts) how states design their private law institutions – with distinct distributional consequences and implications for social values not captured by the "public law" frame.

Given these problems, the major outstanding questions are why all this has gone mostly unnoticed, and to what extent states' ongoing reform efforts might nevertheless address these private law concerns. Though not encouraging, the answers turn out to be related. The rising skepticism of IIL must be understood in light of broader trends in economic globalization. As Poulsen explains, developed states were only able to get BIT programs off the ground in the 1980s and 1990s, as neo-liberalism ascended in international economic law and policy more generally.[11] Thus the transformative deepening of IIL occurred alongside a more general turn to deep integration strategies among developed and developing states alike, in trade, finance, and development policy, all against the backdrop of Washington Consensus ideas.[12] The backlash against IIL and ISDS in the late 2000s should also be understood in connection with a broader waning of neo-liberal ideology – even in mainstream economics.[13] Here, the particular spark was a series of vivid awards against Argentina arising out of measures taken by that state to weather its financial crisis of 2001-2002. From the beginning, the backlash against IIL and ISDS was overwhelmingly influenced by an important, but contingent, intuition that investment treaties unduly constrain the state's regulatory autonomy – with the dominant scholarly critique oriented around reconceiving IIL in public law terms.[14] Though highly successful, this line of attack has been overly focused on the *general* balance between regulatory sovereignty and investor protection.[15] The outsized influence of these concerns has tended to obscure pathologies in how IIL and ISDS regulate private law – both at the treaty level, and within the

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[11] LAUGE POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES, ch. 2 (2016).

[12] DANI RODRIK, STRAIGHT TALK ON TRADE (2017). A parallel, though less thoroughgoing, development has occurred in human rights law with respect to the right to property. *See* José Alvarez, *The Human Right of Property*, 72 MIAMI L. REV. (2018); Arato, *supra* note 4.

[13] *See e.g.*, THOMAS PICKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer, trans., 2017); DANI RODRIK, THE GLOBALIZATION PARADOX (2012); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS REVISITED (2017); *See also* Robert Howse, *Economics for Progressive International Lawyers*, 5 LONDON REV. INT'L L. (2017).

[14] *See, e.g.* Benedict Kingsbury & Stephan Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest: The Concept of Proportionality*, *in* SCHILL, ED., INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standards of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283 (2010); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007); *but see* José Alvarez, *Is Investor-State Arbitration Public?*, 7 J. INT'L DISP. SETTLEMENT 534 (2016).

[15] Not all proponents of the "public law school" of thought deploy the frame in such a totalizing manner. See, for example, the more even-handed work of Stephan Schill and Robert Howse.

jurisprudence. Moreover, this dynamic helps to explain why recent treaty reform projects have been practically blind to the private dimensions of IIL.

Based, in large part, on perceived imbalances between investor protections and regulatory autonomy, developed and developing states alike have embarked on a range of efforts toward reforming their investment treaties – both substantively[16] and institutionally.[17] Laudable as these reforms may be, the overemphasis on the public law frame has allowed a wide range of "merely" private law problems to continue unmitigated. Differently designed, IIL could serve as a compliment to national private law – one that respects the logic of its various fields, as well as the varied policy choices nations make in constructing their discrete private law regimes. But this requires a substantial shift in how we think about IIL – not only at the interpretive stage, but, most importantly, vis-à-vis treaty design.

Part I lays out the private law theory of IIL in broad conceptual terms, and situates it alongside the public law approach. Part II then advances a critique of the jurisprudence from a private law perspective. I close by laying the groundwork for a more satisfying path to reform, oriented primarily toward treaty design.

I. THE PRIVATE LAW THEORY OF IIL

The international law of foreign direct investment regulates state conduct behind the border, by affording special protections to foreign private investors. Investment treaties typically have two linked goals: to *protect* foreign investors from certain forms of state action *ex post*, in order to *promote* foreign direct investment *ex ante*.[18] The evident trade-off is that such commitments serve to legally discipline future state action, restricting the state's freedom of action within its own internal domain. Ideally, IIL would be calibrated to encourage maximally efficient investment, while disciplining the state to the minimal extent possible. Of course, such commitments will always prove messy and uncertain in practice. What is important to see, at the outset, is that trading-off discipline and freedom is a central

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[16] E.g. clarifying and/or limiting the scope of treaty protections, or incorporating general exceptions provisions.

[17] E.g. via mechanisms for greater control over interpretation, or reworking ISDS. *See* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AJIL 361 (2018); Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AJIL 410 (2018); Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework*, in INTERNATIONAL LAW AND LITIGATION (H.R. Fabri, ed., 2017).

[18] *See* Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. INT'L ECON. L. 507 (2009); JONATHAN BONNITCHA, LAUGE POULSEN, & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INTERNATIONAL INVESTMENT REGIME (2017).

function of IIL. The real questions are what kinds of disciplines it sets up, what it constrains, and what incentives it produces.

The prevailing view in scholarly and policy circles is that the balance in IIL is off, with the costs of its disciplines vastly outstripping any potential gains in encouraging FDI.[19] From a national regulatory perspective, IIL has come under fire for undercutting the state's internal sovereign prerogatives, democratic choice and self-determination. The concern is that the regime has empowered private investors to collaterally attack sovereign regulatory measures of all stripes, through compulsory, binding, and highly enforceable ISDS arbitration. Further, the sheer volume of investment treaties and arbitral awards has contributed to legal fragmentation and uncertainty. *Ad hoc* ISDS awards have created significant interpretive inconsistencies, without any institutional mechanism for appeal, review, or harmonization.[20] These are real concerns, even if occasionally overblown. Even in its best light, this troublingly incoherent regime at least threatens national regulatory autonomy.

The investment treaty regime is at an inflection point. While very few states have moved toward total exit, very few accept the status quo.[21] States of all stripes have embarked on significant projects of reform – unilaterally,[22] bilaterally,[23] and multilaterally.[24]

The tenor of intellectual commentary on IIL and ISDS has also become overwhelmingly critical. The emerging conventional wisdom among reformers holds that IIL must be recast as a system

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[19] *See, e.g.,* MICHAEL WAIBEL ET. AL, THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (2010); BONNITCHA ET. AL, *supra* note 18; UNCITRAL, Report of Working Group III (Reform of Investor-State Dispute Settlement), 35th Sess., U.N. Doc A/CN.9/935 (23-27 April, 2018) [*hereinafter* UNCITRAL WGIII Report, 35th Sess.] (compiling government concerns about procedural and structural problems with ISDS).

[20] UNCITRAL WGIII Report, 35th Sess., *supra* note 19.

[21] Puig & Shaffer, *supra* note 17, at n. 31 (discussing withdrawals from ICSID by Bolivia, Ecuador, and Venezuela, and attempts by the latter two to exit numerous BITs). South Africa has also suspended negotiation of new investment treaties. *See, e.g.*, Republic of South Africa, Bilateral Investment Treaty Policy Framework Review: Government Position Paper 12, 12 (2009), available at http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf.

[22] *See, e.g.*, 2016 Indian Model BIT, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560; 2018 Netherlands Draft Model BIT, available at https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf; 2012 U.S. Model BIT, available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[23] *See, e.g.*, EU-Canada Comprehensive and Economic Trade Agreement (***CETA***), available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (***CPTPP***), available at http://www.trungtamwto.vn/sites/default/files/comprehensive-and-progressiveagreement-for-trans-pacific-partnership-cptpp-english.pdf.

[24] UNCITRAL WGIII Report, 35th Sess., *supra* note 19 (on reforming ISDS multilaterally).

of public law – to better capture its pressure on national regulatory policy. Those writing in this vein view the "public law frame" as key to securing national sovereignty and democratic choice, supposing that the language, doctrines and institutions of public law will be more sensitive to cherished public values.[25] This turn to public law has not been free of controversy, and important voices remain unconvinced.[26] But it has clearly reshaped the debate, with states adopting the rhetoric of public law in advocating for reform.[27]

Yet for all this productivity, the meaning and consequences of IIL remain poorly understood. Its doctrinal workings are, of course, expounded in countless treatises, monographs and articles.[28] And the basic tension between investor protection and regulatory values is now well understood – thanks largely to the important contributions of the "public law school" of thought. But for all the pages written on BITs and ISDS, there has been very little theoretical attention to the core private dimensions of a regime established for the protection of foreign property. As a result, major problems of fairness, efficiency, and equitable distribution have been missed. The private law account advocated here seeks to address this lacuna.

For all its very real and significant implications for domestic public law and public values, IIL is at heart about regulating *investments* – which means property (real, personal, and intellectual), contracts, going concerns, and all sorts of equity interests in local enterprises. The main thing that investment treaties do is establish international law and institutions to govern these private rights and interests. In so doing, they discipline how the private rights and interests of foreigners are governed at the national level. In other words, IIL regulates domestic private law. The goal, here, is to re-examine IIL and ISDS from a private law perspective – both on its own terms, and in how it interacts with private law at the national level.

A. IIL AS INTERNATIONAL PRIVATE LAW

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25 *See, e.g.* Van Harten, *supra* note 14; Burke-White & von Staden, *supra* note 14; Kingsbury & Schill *supra* note 14; Howse, *supra* note 17.

26 Alvarez, *supra* note 14.

27 *See, e.g.*, UNCITRAL, Possible Reform of ISDS, Submission from the EU, at 2–3, U.N. Doc. A/CN.9/WG.III/WP.145 (Dec. 12, 2017), available at https://documents-ddsny.un.org/doc/UNDOC/LTD/V17/088/32/PDF/V1708832.pdf?OpenElement.

28 *See, e.g.,* RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed., 2012); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009).

As categories, public and private law should not be segregated too neatly. The classical division understands public law as the law regulating interactions between individuals and the state (or other public authorities), and private law as that regulating relationships between private individuals. As has long been clear, however, these categories cannot really connote entirely distinct fields of law.[29] Wide areas of so-called private law wind up regulating interactions between individuals and the state, such as takings law, the law of public contracts, and the regulation of corporations (such as capitalization requirements or mandatory disclosures to regulators). Indeed, entire fields of law arguably live in the boundary, such as the law of patents.[30] Moreover, the state often acts as a commercial party in all kinds of private legal arrangements, from buying and selling property, to contracting with citizens and foreigners, to investing in private business organizations, joint ventures, and state owned enterprises. IIL disciplines state action in exactly this border zone.[31] As such, it can be usefully and differently understood through both public and private law frames – both in terms of how far it accomplishes its goals of investment protection and promotion, and in terms of how it affects domestic legal institutions.

The claim, then, is that, whatever else it does, IIL creates surprisingly broad swathes of international private law. In extending their broad, open textured standards of treatment to "assets of any kind," investment treaties effectively set out international legal rules to govern property, contracts, corporate law, IP, and many other private legal rights and interests. Their breadth has been further expanded and hardened through ISDS case-law: touching on matters from the scope and content of property forms; to the making, breaking, and content of contracts; to the contours of the corporate form. These rules materially affect the meaning of such covered private rights and interests, even if the latter originate in the national legal order. Private investors and states should factor them in *ex ante* in constructing their commercial relationships, and they will have strong bearing on how alleged harms are compensated *ex post*. As a consequence, IIL also strongly affects the range of choices available to the state in how it regulates through internal private law.

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[29] MAX WEBER, ECONOMY AND SOCIETY, Vol II, 641 (Guenther Roth & Claus Wittich, eds., 1968).

[30] *See, e.g.*, Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor after Eldred*, 19 BERKELEY TECH. L.J. 1315 (2004).

[31] A few scholars have similarly characterized the regime as a hybrid between public and private law. *See* Alvarez, *supra* note 14; Anthea Roberts, *Clash of the Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AJIL 45, 45 (2013).

To be clear, I do not seek to replace a reified public law theory with an equally doctrinaire private one.[32] As a semantic matter, it is not especially important that IIL is described as either public law or private law, or as some kind of hybrid. What matters is the level of nuance with which we evaluate the regime. I deploy the concepts of public and private law here as ideal types – as analytical categories, the purpose of which is not classification in and of itself, but rather achieving a better understanding of the pressures and values implicated by regulating commercial interactions between private individuals and the state.[33] Public law and private law are just analytical categories. Each type may have some elective affinity toward certain legal doctrines or institutions, but merely affixing one label or the other to a borderline case should not lead mechanically to conclusions about how that case should be resolved.[34] Calling the law of government contracts "public law" does not automatically imply that the state should be entitled to deference in case of regulatory breach, any more than would labeling it "private law" logically imply that the state should be construed as a private commercial actor like any other, subject to strict liability and expectation damages. National legal systems resolve these questions differently, in pursuit of different mixes of values, and such choices are not determined by mere moniker. The same holds for IIL. The trade-offs need to be addressed head on, not formalistically papered over. The labels only serve to draw attention to the different facets involved. Moreover, there can be value in overlap, where, the public and private law frames reveal discrete pathologies, and point to different pathways for reform.

Given its significant impact on domestic public life, it matters how we evaluate IIL's successes and diagnose its pathologies, and it matters how we think about reform. And herein lies the value in keeping sight of IIL's private dimension. The core tension of the regime lies in optimally balancing the state's regulatory capacity against providing investor protections to induce FDI. The private law perspective reveals pathologies on both sides of this trade-off. On the one hand, it illuminates how IIL constrains and distorts the state's regulatory choices across a wide, and underappreciated, range of private legal fields. On the other hand, IIL and ISDS appear to work *against* the predictability and stability central to IIL's investment promotion goals. Yet, none of this is necessarily implied by the treaties as drafted. A more theoretically satisfying private law approach opens the way to bettering

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32 *See, mutatis mutandis*, MAX WEBER, PROTESTANT ETHIC 125.
33 WEBER, *supra* note 29, at 3-24 (on ideal types) and 641–644 (on public and private law as ideal types).
34 As Dewey notes, abstract descriptions of what a legal entity *is* tells us nothing about how it *ought* to be regulated, and may indeed mask the key tradeoffs. John Dewey, The Historical Background of Corporate Legal Personality, 35 YALE L.J. 655, 670-673 (1926).

calibrated the wide range of relationships, interests, and values implicated by IIL and ISDS – with payoffs for interpreting extant treaties, and, more importantly, for future treaty design.

B. IIL AND NATIONAL PRIVATE LAW

The relationship between IIL and national private law has been mostly missed. Shifting focus, here, brings to light an underappreciated constriction of the state's regulatory policy space – one that has already proven more invasive than IIL's much feared strangulation of the state's ability to regulate health and environmental matters. Before turning to the jurisprudence, it is worth pausing to clarify terms. IIL relates to national law in three discrete, but partially overlapping ways. First, in a general sense, it *disciplines* the state, limiting its freedom as a matter of international law; Second, this can entail formally *displacing* national legal rules. Third, IIL can materially *distort* national law in a deeper functional sense – upsetting the logic of whole fields of private law.

IIL is clearly meant to *discipline* domestic law at the international level. Indeed, commitment is the investment treaty's stated function – a legal promise by the state to forbear from certain actions with respect to foreigners in the hopes of attracting FDI. Such promises invariably include forbearance from arbitrary and discriminatory action, and generally some broader protections against losses associated with regulation. And ISDS gives these commitments teeth. Thus discipline, here, connotes commitment at the international level in the most general sense – the state agrees to act (or not act) in certain ways, and can be held to account for failing to do so through compulsory arbitration and potentially large monetary awards.

But what happens where such disciplines prohibit acts authorized or required by national law – for example, by affording foreign investors more robust takings protections than would be available domestically? Certainly an applicable investment treaty norm purports to take priority over conflicting national law. But the relationship is only deceptively simple.

First, IIL formally *displaces* conflicting national legal rules in the context of ISDS. It is a basic principle of international law that a state's international legal obligation will prevail over conflicting national rules. Internal law cannot excuse the violation of an international legal obligation.[35] This does not mean that the latter *invalidates* the former. Absent a special relationship of direct effect, the national legal obligation will remain in place unless the state removes the conflict internally.[36] But the state will

[35] VCLT, Art. 27; ARSIWA, Art. 3.
[36] On "direct effect" in EU law, see J.H.H. WEILER, THE CONSTITUTION OF EUROPE 19 (1999).

be liable for any breach of the international obligation *as a matter of international law*. What makes the IIL special is that private individuals can enforce their international legal rights directly through ISDS, where IIL obligations take priority over conflicting national law. Taken together, IIL and ISDS thus meaningfully displace conflicting national legal rules at the international level. Furthermore, ISDS is highly enforceable, keying into multilateral treaties for enforcing arbitral awards across the globe.[37] Thus, *ex ante*, states and investors should understand IIL as creating justiciable and enforceable rules of substantive private law with priority over national law, and they should price its rules and institutions into any investments accordingly.

That international legal rules displace domestic law is not surprising in and of itself. This is what international law does. What comes as a surprise is the sheer breadth of private legal rules read into brief, laconic investment treaties in the cases. As explored in the next Part, in applying a handful of standards relating to expropriation and fair treatment to an expansive range of covered investments, ISDS tribunals have read investment treaties to displace a staggering range of national private law rules: from the scope of property rights; to the making, performance, and breaking of contracts; to the relations among corporate constituencies, including particularly the procedural rights of shareholders, and rules of agency and authority.

By *distort*, I mean something less formal, but more normatively charged. A rule of international law distorts national law when it interferes with the broader logic and functions of the domestic legal system. For example, a strong international expropriation standard will displace weaker domestic takings protections, without necessarily distorting national property law. But it is also possible that displacing certain keystone rules and principles can undercut the broader functions of whole fields of national private law – e.g. by blurring the *numerus clausus* principle in national property law.

To the extent that investment treaties apply substantive and procedural rules to real and personal property, contracts, IP, enterprises, stocks and shares, they create rules of international private law in each field. Naturally such rules would displace conflicting domestic rules,[38] though the scope and meaning of a conflict is often murky in private law.[39] More surprising are the range and scope of private law rules that tribunals have read into investment treaties, and thus the extent to which IIL implicitly invades domestic systems of private law. Most problematically,, in some instances

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[37] *See* ICSID Convention; New York Convention.
[38] *See* VCLT Art. 27; ARSIWA Art. 3.
[39] For example, express contract terms would not properly "conflict" with diverging defaults. *See* Richard Craswell, *Freedom of Contract* 1-2, Coase-Sandor Inst. for Law & Econ., Working Paper No. 33 (1995).

ISDS jurisprudence has gravitated toward (non-obvious) interpretations of IIL that effectively upend keystone private legal principles. In at least some cases it distorts whole fields of national private law – particularly vis-à-vis contracts and corporations. Such distortions undermine efficiency, fairness, equitable distribution, and other regulatory values – benefitting neither states nor investors as a class.

II. THE PRIVATE LAW CRITIQUE OF IIL AND ISDS

This Part turns to a critique of IIL and ISDS from the private law perspective. I reassess the case law in relation to four discrete private legal regimes. Property provides the baseline comparator – the case where IIL and ISDS work more or less as expected, even if not entirely comfortably (II.A.). By contrast, contract provides the archetypal case of distortion. Here, the investment treaty regime goes beyond merely displacing particular rules of national contract law, fundamentally distorting its logic and functions in the context of FDI (II.B.). Corporate Law provides a second case of significant distortion. This section thus serves to illustrate the robustness of the theory, which both helps to situate, elucidate and elaborate problems that have been thus far debated in isolation (e.g. shareholder suits for reflective loss), and to identify additional unnoticed distortions of corporate law (e.g. apparent authority) (II.C.). Lastly, IP provides a case for (very) cautious optimism, where the few cases decided thus far have proven sensitive to the special features and trade-offs of IP protection vis-à-vis other forms of property (II.D.).

Each of the following case-studies proceed in like fashion, moving from functional analysis to doctrinal critique. Each section begins by setting out the core logic and functions of the private law regime in question. Each then proceeds to examine how ISDS jurisprudence fares in relation to these functions, illustrating how the investment treaty regime has (or has not) distorted these discrete regimes of national private law in the context of FDI.

A. THE PROPERTY MODEL OF INVESTMENT

Investment treaties work reasonably well in relation to foreign property (in the strict sense). Treaty definitions of investment generally cover classical categories of real and personal property,[40] and their

[40] *See, e.g.* US—Turkey BIT, Art. 1(c)(i) ("tangible and intangible property, including rights, such as mortgages, liens, and pledges,"); UK—Argentina BIT, Art. 1(a)(i) ("movable and immovable property and any other property rights …").

substantive and procedural guarantees apply straightforwardly to such assets. While IIL and ISDS do displace particular property rules, they not appear to fundamentally distort the logic of property law. The major outstanding question – of only passing interest here – is to what *extent* IIL protects foreign property relative to national policy and democratic choice.[41]

As with all fields of private law, the law of property serves numerous functions. At the core are (1) an *empowering* function, providing for the creation and transfer of rights *in rem*; (2) a *delimiting* function, articulating the types and scope of property rights, against others and against the state; and, implicit in the latter, (3) a deep *regulatory* function, in enshrining and balancing national values in the design of particular property forms. A signal feature of property law in all jurisdictions, as opposed to contract, is that the law recognizes only a handful of property forms, each comprising a different bundle of rights (e.g. rights of use, or exclusion) in the service of some particular mix of interests and values.[42] This principle of *numerus clausus* ("the number is closed") pervades all aspects of property law, channeling transactions and interactions with property into relatively rigid lanes. Property law is everywhere marked by a logic of rigid standardization – in contrast to the logic of contract, which prioritizes choice and customization.[43]

Property theorists give varying compelling accounts of the *numerus clausus* (and thus property's logic of standardization). For law and economics scholars, the key lies in the fact that property rights are held *in rem* (inhering in the asset), as opposed to contract rights which are *in personam* (inhering in only those persons party to the contract). Materially, this means that, unlike contract rights, which are opposable only to contracting parties, property rights are good against the world.[44] Moreover, property rights "run with the asset."[45] These features mean that property rights create high information costs – not only for owners and potential buyers, but for third-parties more generally. As Merrill and Smith

[41] Of course, the degree to which the law protects property from state action is of prime interest to domestic property theory. Every society must draw this balance, and it touches upon the full range of societal values. *See* Joseph Singer, *Property as the Law of Democracy*, 61 DUKE L.J. 1287 (2014). Evidently BITs regulate the balance between property protection and regulatory autonomy. Yet the important question of the appropriate *level* can be settled in myriad ways without denaturing the logic and functions of property law.

[42] *See* Thomas Merrill and Henry Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus Principle, 110 YALE L.J. 1 (2000); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373 (2002); Nestor Davidson, *Standardization and Pluralism in Property Law*, 61 VANDERBILT L. REV 1597 (2008).

[43] Merrill & Smith, *supra* note 42, at 3; Davidson, *supra* note 42, at 1598; Robert Scott & Alan Schwartz, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); Arato, *supra* note 5, at 399.

[44] Merrill & Smith, *supra* note 42, at 8.

[45] Hansmann & Kraakman, *supra* note 42, at S374.

explain, "when property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them".[46] If present holders were free to carve up their holdings in any way, shape, or form, future buyers, as well as other market participants and third parties, would face inordinate diligence costs in apprising themselves of the contents of any parcel or asset with which they interact (in commercial transactions, or more casually).[47] The logic of standardization, then, is to reduce the measurement[48] and verification[49] costs inherent in property rights – by strictly limiting the available types of rights *in rem*. All property systems entail a relatively limited, manageable and knowable number of property forms, into which the law will funnel owners' attempts at customization.

Pluralists explain the logic of standardization differently, usefully highlighting important functions of property law beyond efficiency.[50] In explaining the pervasive logic of standardization, Davidson emphasizes the wide variation in the particular contents of the forms across different societies, and over time.[51] While acknowledging the efficiency functions of standardization *in general*, he argues that this cannot explain the diversity in which bundles of rights national systems sanctify as forms. This variation reveals a *regulatory* function of standardization – the content of the forms reflects regulatory choices, in the service of particular societal values, ranging from distribution and fairness to environmental concerns.[52]

The bottom line is that the logic of property is, everywhere, one of standardization. National laws recognize a limited number of property forms. Each form entails some bundle of exclusive rights, against other private actors (e.g. trespass or nuisance rules), and rights against the state (e.g. protections from expropriation or regulatory takings). And the precise mix reflects each society's regulatory and democratic choices.

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46 Merrill & Smith, *supra* note 42, at 8.
47 Excessive individual freedom to dissect and synthesize property forms can also create significant societal costs. *See* Michael Heller, *The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621-688 (1998).
48 Merrill & Smith, *supra* note 42, at 24.
49 Hansmann & Kraakman, *supra* note 42, at S374.
50 Davidson, *supra* note 42, at 1600–01.
51 *Id.*, 1600.
52 *Id.*, 1601 ("standardization is a near-universal feature of property systems because the phenomenon facilitates the use of property law to define, control, and regulate the public aspects of *private* legal relations with respect to things … any given form represents the resolution of the competition between the multiple and clashing ends that property serves"); HANOCH DAGAN, PROPERTY: INSTITUTIONS AND VALUES (2011). *See also* Singer, *supra* note 41, at 1303.

IIL does not substantially distort the logic of property. Investment treaties certainly do displace particular property rules vis-à-vis foreigners, and may strongly affect the relative values enshrined in national law – usually by requiring greater protection of foreign property, and leaving less room for state regulation. Thus they do augment national property forms. But IIL leaves the principle of standardization intact, and, generally, relies on national law to define the basic contours of the forms.[53]

In fact, the basic structure of investment treaties more or less mirrors how national law protects private property from state action in market economies – being largely modeled on how developed countries protect property rights. Naturally, as international legal rules, they do displace particular domestic property rules, vis-à-vis foreigners. For typical market-oriented states, investment treaties may well thus affect the *level* of property protection. But they will not drastically reshape the *nature* of property protection.[54] True, the same cannot necessarily be said for all non-market societies, whose internal law may be less sanguine about private property. In such cases, investment treaties may significantly transform property law vis-à-vis foreign investors. But here, at least, radical change in the protection of private property is largely the point.[55]

Take real property as an example. A foreign investor's ownership rights in land originate in the domestic law of the host state. IIL makes no claim to providing for the creation of property rights.[56] But the investment treaty will serve to supplement (or displace) the bundle of rights associated with an investor's parcel under domestic law – via specific protections against state action. Typical substantive guarantees include strong takings protection, fair and equitable treatment (***FET***), including some protection of investor expectations, and non-discrimination - all enforceable through ISDS. These guarantees are typically more robust than their domestic analogues, but still sit well with the deep logic and functions of national property law. Property is still created, registered, and transferred

[53] DOUGLAS, *supra* note 30, at 52.

[54] Arguably, however, the uncertainty inherent in IIL and ISDS does increase the cost of coordination and verification substantially for States in verifying whose property is entitled to international protection. Such concerns are likely to become significant in view of various methods of treaty shopping. *See,* Arato, *supra* note 4, at 275; Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization* 111 AJIL 873). I leave this potential distortion aside for closer study in a future paper.

[55] DOLZER & SCHREUER, *supra* note 28; CRAWFORD, *supra* note 2, at 614. *But see* POULSEN, *supra* note 11 (demonstrating that, in practice, officials responsible for executing BITs in developing countries often lack adequate information about these treaties' tradeoffs).

[56] *See, e.g.*, *Emmis v. Hungary*, Award, ¶ 162 ("Public international law does not create property rights. Rather it accords certain protections to property rights created according to municipal law"); DOUGLAS, *supra* note 30, at 52.

as before, and the nationally recognized forms of real property entail essentially the same bundle of rights – except that the bundle is supplemented, for covered foreign investors, with additional protections against state action.

The property right enshrined in IIL and ISDS is by no means beyond reproach. Every property regime, national or international, grapples with an intractable tension between private property and government regulation.[57] However, the extent of property protection required by investment treaties is left largely undecided by their text – leaving the scope of broad and open-textured guarantees like FET largely up to arbitral interpretation. Some argue that tribunals sometimes go too far and too fast toward property absolutism.[58] The objection, here, is that ISDS has tended to draw the balance too mightily in favor of investor property, at the expense of host state regulatory autonomy – though there are signs that the tide is turning.[59] The appropriate level of property protection in IIL is important, and highly debatable. But whether or not it proves too capital-friendly, IIL does not appear to distort the basic functions of domestic property law (at least as compared to the Western-style models on which it is based): providing for legal ownership through particular, verifiable bundles of rights *in rem*,[60] and regulating these bundles' number, content, and outer bounds.[61]

From a private law perspective, then, the criticism of how IIL relates to classical property forms is really about *values*, more than *categories*.[62] At the margins, it may be debatable whether IIL paves over conceptual nuance in displacing domestic property rules in particular jurisdictions – and thereby increases uncertainty and information costs regarding the full meaning and value of foreign-owned property rights. But most criticisms in this vein reduce to value-based concerns about how far investor property should be protected. It is certainly possible that ISDS could develop in ways that

57 Davidson, *supra* note 42, at 1601; Singer, *supra* note 41, at 1303.

58 Arato, *supra* note 4, at 260; Hanoch Dagan & Avihay Dorfmann, *The Human Right to Private Property*, 18 THEORETICAL INQUIRIES L. 391, 393 (2017); Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 363 (Zachary Douglas, Joost Pauwelyn, & Jorge E. Viñuales eds., 2014); *see also* Nicolás Perrone, *The Emerging Global Right to Investment*, 8 J. INT'L DISP. SETTLEMENT 673 (2017). *See generally* DAGAN, *supra* note 52.

59 *See, e.g.*, *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, ¶ 423 (July 8, 2016) [hereinafter *Philip Morris v. Uruguay*]; *Mesa Power Grp., LLC v. Gov't of Can.*, PCA Case No. 2012-17, Award, ¶ 502 (Mar. 24, 2016) (limiting the scope of "legitimate expectations" protection). Recent treaties and model BITs have set heavy presumptions against recovery for regulatory takings. *See* Howse, *supra* note 17.

60 Merrill & Smith, *supra* note 42, at 8.

61 DAGAN, *supra* note 52, at xvii-xviii.

62 *See, e.g.* Vicki Been & Joel Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine*, 78 N.Y.U. L. REV. 30, 63-64 (2003).

distort core principles in the future, for example by blurring *numerus clausus* (say by ignoring limitations inhering in particular national forms, or by drawing impermissible analogies across national systems about the balance of rights and values embedded in similar forms).[63] It also true that, pushed far enough, the expansion of the level of property protection may of itself erode the regulatory functions of national property law beyond recognition.[64] But for now such concerns remain speculative. IIL may impose overly strong property protections on states. But it does not seem to fundamentally denature the logic of property. By contrast, deeply distortive category problems arise where IIL and ISDS grapple with other types of investment – and other fields of private law.

B. CONTRACTS AS INVESTMENTS

Investment treaties typically cover contracts within the definition of investment.[65] As with property, in extending their substantive standards to contracts these treaties effectively generate rules of international contract law. Certainly *ex ante*, both contracting states and investors should view any applicable investment treaty norms as part of the package of background legal rules framing all contractual negotiations. Here, however, IIL and ISDS do not just supplement, or displace, particular domestic rules. Investment law further distorts the basic logic of contract, undermining key functions of national contract law.

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[63] *See* Merrill & Smith, *supra* note 42; Hansmann & Kraakman, *supra* note 42.

[64] For example, Hale notes that American law protects a property holder's vested rights and legitimate expectations "from some vicissitudes" but "leaves them exposed to many others—such as competition, the constitutional exercise of the police power, the increase in the cost of operation" and so on. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLITICAL SCIENCE QUARTERLY 470, 489 (1923). National systems vary widely on how far such protection goes. Evidently one purpose of investment treaties is to set certain minimums, and this is not necessarily distortive. But a difference of degree here would eventually become a difference in kind. Pushed far enough, an absolutist approach to protecting expectations would arguably erode the nature of property law – say by insuring foreign property against any and all diminution of value caused by regulatory change. *See* Been & Beauvais, *supra* note 62. Still, with the arguable exception of a handful of early awards (like *Metalclad v. Mexico*), ISDS rarely goes so far – and indeed seems to be going in the opposite direction.

[65] *See, e.g.* Japan—Israel BIT, Art. 1(a) ("the term 'investment' means every kind of asset … including (v) rights under contracts, including turnkey, construction, management, production, or revenue-sharing contracts; (vi) claims to money and to any performance under contract having a financial value."); US—Turkey BIT, Art. 1(c) ("every kind of investment … [including] service and investment contracts … (iii) a claim to money or a claim to performance having economic value, and associated with an investment … [and] (v) any right conferred by law or contract").

By contrast to property, the logic of contract law everywhere is one of choice – flexibility and customization instead of rigid standardization.[66] Contract law does standardize – national laws of contract always provide an edifice of background terms which augment party choices. But a key difference between property and contract is that, with the latter, the background rules are mostly optional. While property law is typically mandatory, the law of contracts is mostly comprised of mere default rules. National laws of contracts often impose some rigid rules.[67] But in general, contract law prioritizes the choices of private persons, while property law prioritizes the choices of the state.

Here, again, it helps to start from a functional view. Contract law has at least four key functions: (1) *empowering* private parties to create legally enforceable agreements on the terms they prefer; (2) setting rules for *interpreting* contracts; (3) *filling gaps* in incomplete contracts; and (4) *regulating* the outer bounds of acceptable bargaining behavior and outcomes.[68] The notion of party choice pervades these functions, but not blindly. Contracting parties' chosen terms are generally given priority, but where parties have not chosen, or their choices are unclear, the state provides terms that it deems appropriate – either in the hopes of capturing what most parties would have wanted (majoritarian defaults),[69] or in the service of other values (e.g. penalty defaults).[70] Rarely, the state will intervene even where the parties have chosen – regulating choice via sticky defaults and mandatory rules and, at the limit, through rules on contract formation and validity. IIL and ISDS distort the logic and functions of contract law from both sides – by constraining parties' ability to choose, and by constraining the state's capacity to regulate choice.

Section 1 examines how IIL and ISDS undercut contract's basic logic of customization, distorting both the empowering and gap-filling functions of contract law with costs for efficiency and autonomy. Section 2 examines the mirror-image problem, wherein ISDS tribunals water down national mandatory rules that serve values *outside* of contractual efficiency – such as contract formation

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[66] DAGAN & HELLER, THE CHOICE THEORY OF CONTRACTS (2017); Scott & Schwartz, *supra* note 43; Merrill & Smith, *supra* note 42, at 8.
[67] DAGAN & HELLER *supra* note 66, at 109; Mariana Pargendler, *The Role of the State in Contract Law: The Common-Civil Law Divide*, 43 YALE J. INT'L L. 143, 146 (2018).
[68] ROBERT SCOTT & JODY KRAUS, CONTRACT LAW AND THEORY 2-4 (2013); Robin Bradley Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759 (2016).
[69] Charles Goetz & Robert Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971.
[70] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91(1989).

rules meant to preserve government transparency and anti-corruption norms. In so doing, they further distort the regulatory functions of contract law.

1. Implied Terms and the Logic of Choice

No legal system expects parties to negotiate every aspect of a contract. All laws of contracts provide ready-made "implied terms," which supplement contracts – ranging from technical matters which parties often do not discuss, like damages, defenses, and forum selection, to bases of substantive obligation (e.g. warranties),[71] and even price.[72] Parties can and do expressly negotiate such terms – all of which affect price and risk allocation. But parties need not negotiate everything, every time. All laws of contract provide off-the-rack background rules that allow parties to avoid reinventing the wheel from deal to deal. Usually these implied terms are *optional* – mere defaults, around which parties may contract to pursue their joint goals as they see fit. Prioritizing party choice serves a wide range of values, from autonomy, to efficiency to community.[73]

Implied terms differ dramatically across national systems. As with the property forms, their content is fundamentally a regulatory question, about which values to prioritize and how much to prioritize them. US contract law, for example, typically sets defaults on a majoritarian basis – reflecting the courts' (or legislatures') best guess at what contracting parties would have wanted, *ex ante*, had they considered the issue.[74] But needless to say, myriad other approaches are possible.[75] What is common, everywhere, is that parties may generally bargain around these rules, to secure the mix of goods, incentives, and values they see fit.

This is not to say that national laws of contract are only comprised of default rules – or that contracts are *completely* customizable. The flexibility of any particular background rule is itself an important regulatory choice, and nations vary widely in exactly where and why they introduce rigidity into the law of contracts.[76] Like content, rigidity reflects its own axis of regulatory values – such as

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[71] Goetz & Scott, *supra* note 69, at 971.
[72] *See, e.g.* UCC 2-305.
[73] Arato, *supra* note 5, at 400-401. *See* DAGAN & HELLER *supra* note 66, at 5, 49-65; Scott & Schwartz, *supra* note 43; Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 490 (1989).
[74] Goetz & Scott, *supra* note 69, at 569.
[75] *See* Ayres & Gertner, *supra* note 70, at 91.
[76] For example, U.S. jurisdictions prefer defaults, while European jurisdictions make broader use of mandatory rules, reflecting different mixes of social values and priorities. *See* Aditi Bagchi, *The Political Economy of Regulating*

how much faith to place in markets, how much to prioritize individual choice, and the proper role of the state in creating the conditions for relational equality in the world of private legal transactions.[77] Still, for the most part, contract law everywhere seeks to empower parties to commit to one another on terms that *they* deem appropriate.[78] IIL and ISDS turn this logic on its head.

To capture the problem, it is important to first see clearly how and why national contract law limits choice at the margins. Choice can be limited completely, through mandatory rules which preclude certain choices. But choice can also constrained more provisionally through "sticky defaults" – rules which parties may contract around, but only through observing certain formalities (e.g. through heightened clear statement requirements, or *via* requiring special contractual language or a separately signed writing).[79] Both kinds of constraints can be grounded in values internal to the logic of contract, or on the basis of external values. The first type of justification considers sticky defaults and mandatory rules appropriate where they serve to *enhance* choice, by putting the parties on equal footing or by correcting for market failures.[80] These kinds of constraints serve to ensure the rules of the game, protect basic fairness among contracting parties, and the like. For example, some sticky defaults correct information asymmetries, by requiring that opt-out employ special language that forces better informed parties to reveal potentially hidden information to less well-informed parties – e.g. about the scope of their default rights.[81] A second type of justification for constraining choice relies on extrinsic values, as with mandatory rules precluding contracts of enslavement and contracts to commit a crime, mandatory and/or sticky protects for workers, or, in the context of state contracts, limitations on a government's ability to tie the hands of a future government.

Contract law thus involves two broad, and conceptually discrete, regulatory questions: (a) how to set the content of the background rules? And (b) how flexible or rigid to make them? National laws vary widely on both, reflecting different priorities and values. But, on the second at least, the general spirit is always similar. The prime logic of contract everywhere lies in prioritizing choice – the choices

Contract, 62 AM. J. COMP. L. 687 (2014); Pargendler, *supra* note 67, at 155 (In civil law countries, "the State … goes further in providing and policing the substantive terms of the agreement to ensure compliance with broader social values and objectives.").
77 *Id.*
78 *Id.*, at 155; Scott & Schwartz, *supra* note 43, at 569.
79 Pargendler, *supra* note 67, at 154–155; Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2045.
80 *See, e.g.* DAGAN & HELLER, *supra* note 66 at 4, 111-113; Ayres, *supra* note 79, 2045, 2095-96.
81 *See* Ayres, *supra* note 79, at 2098.

of particular contracting parties, rather than the general default choices erected by the state. IIL and ISDS muddy the waters for both questions.

Obviously, in extending to contracts, IIL will affect domestic contract rules. If contracts are covered as investments, then the substantive and procedural treaty guarantees will presumably apply in some way. But, unlike with property, it is not at all obvious what kind of effect investment treaties ought to have on a covered contractual investment. Investment treaties leave unclear both: (a) the scope and content of treaty rules applicable to contracts, and, crucially, (b) the way in which such rules interact with contracts (as defaults, mandatory rules, or something in between).

ISDS has consistently read investment treaties as covering a surprisingly broad scope of contractual matters – ranging from substantive obligations, to defenses, damages, and forum selection terms. All tribunals assume, sensibly, that, whatever their scope, investment treaties displace conflicting background rules in the law of the contract. However, ISDS has been all over the map on the core question of choice – with some tribunals viewing treaty rules as mandatory, others viewing the same rules as sticky defaults, and still others viewing them as fully customizable. Such uncertainty is itself a serious problem for all contracting parties *ex ante*. Moreover, the jurisprudence reflects has tended to drift in the wrong direction – prioritizing treaty over contract, and conflating the logic of contract with that of property. Examples from the cases on three kinds of treaty terms suffice to illustrate the problem: (a) FET; (b) damages; and (c) forum selection.[82]

a. FET: Stabilization and Expectations

FET is one of the most common investment treaty standards, and among the most controversial. It is also the standard most commonly invoked by investors, and often proves outcome determinative.[83] In most treaties the standard is stated laconically. The thorniest point of contention is whether FET imposes an obligation to protect an investor's "legitimate expectations," and to what extent that entails compensation for losses arising out of regulatory change – i.e. an implied "stabilization" clause, in contracts terminology.[84] Without passing on its proper content, suffice it to say that most tribunals

[82] Arato, *supra* note 5, at 372-392.
[83] CAMPBELL MCLACHLAN, LAURENCE SHORE, MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 7.04 (2d ed., OUP 2017).
[84] *Compare Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 260-261 (May 22, 2007) [hereinafter *Enron* Award] (FET entails a strong obligation of legal stabilization), with *Philip Morris v. Uruguay*, ¶ 423 (FET entails only a weak stabilization protection against general legislation), and *Mesa Power v. Canada*, Award, ¶ 502 ("failure to respect an investor's legitimate expectations in and of itself does not constitute a

agree that FET protects investor expectations to *some* degree.[85] Of interest, here, is a second order question: whether (and how) states and investors can contract around the treaty rule. This question arises in every ISDS case involving contracts. However the cases rarely examine it explicitly, necessitating some reading between the lines.

The *Argentine Gas Cases* provide the archetypal mandatory approach, resolving the issue implicitly and formalistically.[86] In *Sempra*, *Enron*, and *CMS*, the Tribunals each read FET as entailing broad stabilization requirements, which applied to investments arising out of contracts as they would to any other investment.[87] Each assumed that treaty claims are completely independent from contract claims, and found that its jurisdiction was limited to the former.[88] On this formalistic view, it does not matter if the investment triggering treaty protection is property, contract, or anything else – once triggered, FET always demands the same level of treatment. The scope and meaning of treaty rights turn not at all on the content of the underlying contract, and are unaffected by anything the contract says about the scope of stabilization, or even waiver of treaty rights.

From the perspective of contract law and theory, the reasoning of the *Argentine Gas Cases* is misleading. The formalistic separation of treaty and contract only serves to mask what it implies – that, far from being independent, any immutable investment treaty provision triggered by a contract-based-investment will simply to rewrite the deal struck in the contract as an effectively mandatory term.[89] On this view, the investment treaty effectively displaces any conflicting rules of national contract law and provides rigid standards in their stead. If an investment contract will always trigger immutable treaty protections then, *ex ante*, states and investors must assume that IIL will apply whatever they choose to put in the contract – and they must price it in accordingly, whether or not it

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breach of [FET under the NAFTA], but is an element to take into account when assessing whether other components of the standard are breached"). *See also* DOLZER & SCHREUER, *supra* note 28, at 82–85.

85 *See* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 25-26 (2013); Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Law*, 12 J. WORLD INV. & TRADE 783, 805-06 (2011).

86 *Sempra Energy v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) [hereinafter *Sempra* Award]; *Enron* Award (May 22, 2007); *CMS Gas v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) [hereinafter *CMS Gas* Award]. *See generally* José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* YBK INT'L INVESTMENT L. & POLICY 2008/2009, at 379 (Karl P. Sauvant ed., 2009).

87 Each tribunal noted that the State might not be under a total stabilization requirement, but none clarified how far the requirement goes. See *CMS Gas* Award, ¶ 277; *Sempra* Award, ¶ 300; *Enron* Award, ¶ 261.

88 *See Sempra* Award, ¶ 310.

89 Arato, *supra* note 5, at 383–384, 394; James Crawford, *Treaty and Contract in Investment Treaty Arbitration*, 24 ARB. INT'L 351, 373 (2008) ("treaties and contracts are different things. But they are not clean different things.").

is efficient. Thus, on these Tribunals' interpretation of FET, states and investors would always be stuck with an implied stabilization clause, however extremely that affects price – or even the parties' willingness to contract – and whether or not such a provision is even important to the investor.[90]

Though most tribunals follow the *Argentine Gas Cases* in assuming the rigidity of substantive treaty standards, a handful of cases have hinted at more flexible approaches. In *Parkerings v. Lithuania*, the Tribunal implicitly viewed FET as a mere default. First, it viewed FET more minimally than the *Argentine Gas Cases*.[91] However, it considered that states and investors are free to ratchet up the level of protection that FET would entail by negotiating for a stabilization clause *in the contract*.[92] In other words, treaty and contract cannot be neatly separated, and the parties can control the scope of FET by contract. *Parkerings* and cases like it differ markedly from the *Argentine Gas Cases* in treating FET as a mere default whose scope can be enlarged (and, arguably, reduced or waived) by agreement.[93]

MNSS v. Montenegro provides yet a third option – that FET (and other treaty standards) are defaults, but only very sticky ones.[94] To contract around them, states and investors must use exceptionally clear language. The Privatization Agreement in *MNSS* included a clause waiving BIT and other international legal rights by name – though it was somewhat murky about how far it disclaimed them.[95] In principle, the Tribunal found that states and investors could contract around FET, stating that "investors may waive the rights conferred to them by treaty provided [the] waivers are explicit and freely entered into…."[96] For the Tribunal, the contract's express disclaimer of BITs and international law sufficed to demonstrate a mutual intention to contract around the treaty. The Tribunal gave the disclaimer effect, but read it narrowly, apparently operating under an unstated presumption against waiver.[97] Moreover, the Tribunal suggested that the treaty might not be entirely

[90] Arato, *supra* note 5, at 394; Crawford, *supra* note 89, at 373 ("The relevance of legitimate expectations is not a license to arbitral tribunals to rewrite the freely negotiated terms of investment contracts.").
[91] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sept. 11, 2007) (finding that FET does not impose broad stabilization requirements, but merely amorphously obliges the State to not use its legislative power "unfairly, unreasonably, or inequitably").
[92] *Id.*
[93] *Parkerings* leaves unsaid whether FET can be ratcheted down. *See also EDF Servs. Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, ¶ 217 (Oct. 8, 2009); *Philip Morris v. Uruguay*, ¶ 423.
[94] *MNSS v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (2016).
[95] *Id.*, ¶ 149
[96] *Id.*, ¶ 163.
[97] *Id.*, ¶ 159 (accepting waiver of FET claims over matters covered by the contract, but not FET claims over interference with the investment not envisioned by the contract).

waivable – indicating opaquely that it might not have given effect to a waiver that contravened the "public interests" achieved by the BIT.[98]

b. Forum Selection

Most modern investment treaties empower investors to compel host states into ISDS. But BITs and FTAs generally do not elaborate on whether their procedural rights turn on the type of investment at issue. Thus, in relation to contracts, any applicable investment treaty will provide a clear background term on forum selection. Left completely unclear is what happens if the contract waives such rights *via* an exclusive forum selection clause (opting for domestic courts, or another arbitral mechanism).

Conflicts between treaty fora and contractual forum selection clauses occur frequently in ISDS. Here too, Tribunals have gone in every possible direction, though on a more even split. For some, ISDS is a mandatory procedural right, while for others it is just another default (of varying levels of stickiness).

SGS v. Paraguay captures the mandatory view.[99] Like the *Argentine Gas Cases*, the Tribunal accepted the notion that investment treaty claims and contract claims must be cleanly separated.[100] The BIT here included an umbrella clause, purporting to convert breach of an investment contract into a breach of treaty. In the Tribunal's view, a contract covered by such a clause would create two separate tracks of rights – a set of purely contractual rights, and a distinct set of treaty rights. The parties can disclaim ISDS for the former by exclusively selecting domestic courts in the contract; but they cannot waive ISDS for breach of treaty rights, even if those were generated by the same contract *via* the umbrella clause. Other tribunals have similarly dismissed contractual exclusive forum selection clauses in FET and expropriation cases.[101]

Yet several tribunals have gone the other way – viewing ISDS as a waivable default. In umbrella clause cases markedly similar to *SGS v. Paraguay*, the Tribunals in *SGS v. Philippines* and *BIVAC v. Paraguay* found that treaty and contract could not be neatly separated.[102] These Tribunals held that the treaty cannot alter the bargain stuck between the contracting parties. An exclusive forum

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[98] *Id.*, ¶ 164.
[99] See *SGS v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶¶ 131, 138-142 (Feb. 12, 2010);
[100] *SGS v. Paraguay*, Jurisdiction, ¶¶ 177-184.
[101] *See, e.g.*, *Vivendi I*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶¶ 101-103 (2002).
[102] *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 92 (Jan. 29, 2004) [hereinafter *SGS v. Philippines*]; BIVAC v. Paraguay, ICSID Case No. ARB/07/9, Jurisdiction, ¶ 142 (May 29, 2009).

selection clause opting to resolve all disputes in local courts is obviously part of that deal, presumably bought and paid for *ex ante*. Each Tribunal thus held that breach could only be authoritatively determined by the contractually chosen forum, and thus any umbrella clause claims would be inadmissible prior to an authoritative finding of breach in local court.[103] As above, other Tribunals have followed this default-approach outside of the umbrella clause context.[104]

Still other cases have viewed ISDS as a sticky default, which states and investors may waive by contract, but only by observing certain formalities – such as by clear statement, or use of magic words. In *Aguas del Tunari*, the Tribunal refused to "read an ambiguous clause as an implicit waiver of ICSID jurisdiction," adding that "silence as to that question is not sufficient."[105] The Tribunal in *Crystallex* went further, finding that "any such waiver would have to be formulated in clear and specific terms,"[106] and that waiver "is never to be lightly admitted as it requires knowledge and intent of forgoing a right, a conduct rather unusual in economic transactions."[107] Here the Tribunal rejected an exclusive forum selection clause "merely" requiring that all disputes be resolved in Venezuelan Court.[108] Though this clause surely indicates that the contracting parties were aware of the scope of their procedural rights under the contract, it might not indicate that the investor was aware of the treaty right to ISDS that it was allegedly giving up. Without elaboration, the Tribunal suggested that an effective waiver would need to mention the BIT or ISDS by name.[109] But reading between the lines, requiring such specificity might make sense on an information-forcing rationale, to protect investors who might not be aware of their rights (and leverage) under an investment treaty *ex ante*.[110]

c. Damages

All laws of contract include implied damages rules – standards of recovery, like expectancy, reliance, and restitution, as well as myriad corollary technical rules for valuation. National damages rules are typically defaults, enabling parties negotiate the scope of future recovery as they see fit. The idea is

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103 *Id.*

104 *Oxus Gold v. Uzbekistan,* UNCITRAL, Final Award ¶ 958(ii) (2015) (recognizing contractual waiver of ISDS jurisdiction over counter-claims); *Getma*, ¶ 17 (permitting waiver of ISDS in an expropriation case under the Guinean investment law, which incorporated IIL by reference).

105 *Aguas del Tunari*, Jurisdiction, ¶¶ 119, 122; *see also Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶¶ 71-74 (2008).

106 *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, ¶ 481 (2016) [hereinafter *Crystallex*].

107 *Id.* (The Tribunal does not explain why it considers the quite ordinary practice of opt-out to be "unusual in economic transactions.").

108 *Id.*, ¶ 482.

109 *Id.*

110 *See* Arato, *supra* note 5, at 377–378; Ayres & Gertner, *supra* note 70, at 91.

that parties are themselves typically best equipped to allocate risk and price efficiently, and that the law should not stand in their way. Contract law may impose limits, especially to police clauses imposing disproportionate, punitive, or otherwise unconscionable damages. But parties retain wide latitude to negotiate over future recovery, through liquidated damages provisions, damages caps, and so on. The same is true of government contracts, though here national law often provides for weaker damages provisions by default,[111] and may make contracting around such defaults more difficult.[112] The rationale is typically an entrenchment concern about regulatory autonomy and chill – a worry that one government might tie the hands of future governments through privatization.[113]

Investment treaties say very little about damages. Typically they provide no express general damages rule across all standards of treatment.[114] Much less do they differentiate among investments for purposes of measuring treaty damages. ISDS tribunals thus typically draw on general international law damages principles, and apply them to all types of investments. The usual measure of damages in international investment law is fair market value (***FMV***).[115] This entails measuring the present value of the asset, taking into account its capacity to generate income over time.[116] For contracts, FMV is typically taken to entail expectation damages.[117] Tribunals implicitly invoke FMV as a "double default" – an implied expectation damages rule in general international law, to be read into the "incomplete" investment treaty absent any special provision on damages, and thereby read into any investment contract to which the treaty applies.[118] The question, as above, is whether FMV is negotiable or mandatory.

Here again, the case law varies. Several tribunals have simply assumed that international law damages cannot be abrogated by contract, such as the *Argentine Gas Cases*[119] and the more recent award

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[111] *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 916 (2011); Daniel Fischel & Alan Sykes, *Government Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 316 (1999).
[112] *See* DAGAN & HELLER *supra* note 66, at 100.
[113] *See* Serkin, *supra* note 111, at 894-96; Arato, *supra* note 5, at 388.
[114] *See* Pierre-Yves Tschanz & Jorge Viñuales, *Compensation for Non-Expropriatory Breaches of International Investment Law: The Contribution of the Argentine Awards*, 26 J. INT'L ARB. 729, 729-30 (2009). Expropriation provisions often provide for fair market value compensation, but FET and other provisions typically say nothing about damages one way or another. *See* SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 78-79 (2008).
[115] *See Factory at Chorzów* (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept.13).
[116] *Id.*
[117] Arato, *supra* note 5, at 388.
[118] I owe this neat phrase to a helpful discussion with Gregory Klass.
[119] *Venezuela Holdings v. Venezuela*, ICSID Case No. ARB/07/27, Award (2014). [hereinafter *ExxonMobil* Award].

in *ExxonMobil v. Venezuela*.[120] For the former, the assumption followed from the strict separation of treaty and contract, discussed above. The latter relied on a different, but equally inapposite formalism, finding that treaty rigidity followed from the principle that internal law cannot excuse a violation of international law.[121] As a result, the Tribunal held that it could not give effect to potentially limiting compensation provisions in the underlying concession contract. This reasoning is both legally and economically flawed. First, as a technical matter, a contractual limitation on damages reflects the parties' choice to limit the scope of their mutual obligations *ex ante* – not an excuse for breach *ex post*. There is no reason that international law cannot provide private parties with negotiable default terms – as does the Convention on the International Sale of Goods (***CISG***).[122] Second, even under FMV analysis, any compensation clause in the contract would clearly affect the market value of the investment, and cannot be ignored. As Abi-Saab asks rhetorically, in the related (ongoing) *ConocoPhillips* case: "how can any *homo economicus* exercising rational choice as a 'willing buyer' … calculate the price he would be willing to pay, without factoring in … the terms of the compensation clauses of the Agreements?"[123] To ignore contractual limitations on damages effectively implies that FMV imposes a mandatory rule, providing for full expectation damages, whatever the parties have agreed as between themselves. This approach inexplicably constrains parties' ability to bargain over damages in allocating risk in their contracts *ex ante*.

Other tribunals have understood treaty damages as defaults of varying flexibility. Most spectacularly, Venezuela succeeded in having the *ExxonMobil* Award annulled on precisely this point (for failure to state reasons). The *ad hoc* Committee rightly dismissed the as a straw man the Tribunal's incantation that internal law cannot excuse a breach of international law,[124] and found that the Tribunal failed to otherwise explain ignoring the contractual compensation clause.[125] The Committee stressed that the unjustified implication of the Tribunal's approach was to boot-strap FMV, an international

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120 *See also Argentine Gas Cases*, discussed *infra*; Arato, *supra* note 5, at 389–90.
121 *ExxonMobil* Award, ¶ 225.
122 *See* CISG, Art. 6. (private parties to a covered sales contract "may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.").
123 *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Dissenting Opinion of Georges Abi-Saab to Decision on Jurisdiction and Merits ¶¶ 34–37 (Feb. 19, 2015) (concerning similar compensation clauses in a related concession).
124 *Venezuela Holdings v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, ¶¶ 181–183 (2017) [hereinafter *ExxonMobil* Annulment].
125 *ExxonMobil* Annulment, ¶ 184 ("at no stage does the Tribunal give any consideration to what relevance the limitations on the investors' rights embodied in the Price Cap might actually have to the application of the mandatory criteria laid down in the BIT for compensation").

law standard not found in the BIT, into an effectively mandatory rule for all contracts covered by the Treaty.[126] The Committee strongly questioned whether the treaty could reasonably be interpreted to prevent parties from contracting around treaty damages, but, given its limited mandate, stopped short of expounding the precise relationship between treaty and contract. With less fanfare, the Tribunal in *Siag* also appeared to view FMV as a mere default, simply taking contractual compensation clauses into account in assessing damages.[127] Others still, like *Kardassopoulos*, have understood FMV as a sticky default, with a strong presumption against opt-out, similar to *MNSS* and *Crystallex*.[128]

d. Distorting the Logic of Choice

In applying their standards to investment contracts, investment treaties establish rules of international contract law. However, the treaties are invariably silent about how their standards relate to contractual choice. This second order question arises in every ISDS case involving contracts. Yet the cases rarely engage with this issue directly, let alone with the policy matters at stake, generally proceeding on the basis of mere assumptions.[129] Moreover, tribunals have resolved the treaty/contract relationship in all possible ways. Most tend to assume that investment treaty rules are effectively mandatory, or at least as very sticky defaults. Only a few have viewed IIL as presumptively optional – though this is the norm with background rules at national law, and would generally be the better rule here.

In the case of contracts, then, IIL displaces domestic law in two different ways. First, investment treaties clearly displace conflicting national background rules, supplanting domestic implied terms with international ones. This form of displacement is not especially problematic, although it is perhaps startling how broad a range of implied terms have been read into investment

126 *ExxonMobil* Annulment, ¶ 187.

127 *See Siag v. Egypt*, ICSID Case No. ARB/05/15, Award ¶¶ 577-584 (2009).

128 *Kardassopoulos v. Georgia,* ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, ¶¶ 480-481 (2010).

129 *But see SGS v. Philippines*; *ExxonMobil*, annulment; *ConocoPhillips*, Dissenting Opinion of Georges Abi-Saab. Some scholars have suggested that the matter turns on the broader debate on whether investment treaties are better understood as conferring direct rights or derivative rights on foreign investors. *See* DOUGLAS, *supra* note 30, at 17–19; Bart Smit Duijzentkunst, *Treaty Rights as Tradeable Assets: Can Investors Waive Investment Treaty Protection?*, 25 ICSID REVIEW 409 (2010); *see also* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights,* 56 HARV. INT'L L. J. 353, 355 (2015); Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 BRIT. Y.B. INT'L L 264 (2008). However the question of opt-out cannot be neatly settled by appeal to first principles in this way. Either direct or derivative rights could be structured in default or mandatory form – to allow, encourage, or bar opt-out by investors and States. The fact is, the treaties are simply silent on this matter, and the cases are highly ambivalent. The point here is to draw out the distortive consequences of this ambiguity for the logic and functions of national contract law – and to clear the ground for treaty reform.

treaties. However, under the approach of most tribunals, investment treaties displace national law in another, more troubling way – by supplanting the express choices of the parties to particular contracts, either through mandatory terms or very sticky defaults. This turns the logic of contract on its head.

IIL and ISDS thus create two discrete distortions of national contract law. First, absent any mechanism for systematizing the jurisprudence, the sheer variation in approaches creates acute uncertainty. This is a second-order problem, sharper than the typical critique of ISDS inconsistency. As is often noted, states and investors always grapple with potentially inconsistent arbitral interpretations of substantive standards of treatment[130] – a real problem, but not one altogether avoidable in any legal system. However, one might imagine that states and investors could respond to such uncertainty *ex ante*, by contracting for what they consider really important. Uncertainty cannot be completely avoided, but it can be mitigated through contract. Here, however, the second-order uncertainty problem exerts its sting. Given the treaty/contract jurisprudence, states and investors cannot know whether their *ex ante* attempts to define the scope of their obligations through contract will be given effect at ISDS *ex post*. This leaves the meaning of contracts between foreign investors and states and/or state-owned enterprises in substantial doubt. All parties will have to take risks associated with such uncertainty into account *ex ante*, affecting price and potentially dampening the parties' incentives to contract – precisely the opposite of what investment treaties set out to achieve.

Second, the ISDS jurisprudence tends to gravitate in the wrong direction, toward making treaty rules mandatory for covered contracts. Quite apart from the uncertainty problem, this is a bad rule, needlessly inefficient and likely unjust – even assuming perfect rationality of states and investors *ex ante*. In law and economics (or Coasean) terms, under ideal market conditions (perfect rationality and low transaction costs), the *content* of investment treaty rules should not matter, because states and investors would bargain in their shadow to achieve an efficient result.[131] The idea is that the market would push them to allocate resources efficiently. But, even in ideal theory, this proposition only holds if the parties are free to negotiate around the law – i.e. if the background rules are mere defaults. If the parties are stuck with the background rules, then their content matters a great deal, and will likely prove highly inefficient across myriad different constellations of facts and conditions. In other words, it is much more likely that the parties to an investment contract will be able to bargain to an efficient result, given their own needs, than it is that the states parties to an investment treaty will be able to

[130] UNCITRAL WGIII Report, 35th Sess., *supra* note 19; Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).
[131] Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

predict the most efficient contract terms, across a range of issues, for all contracts to which the treaty applies.

And, of course, there is little reason to assume perfect rationality in the practice of transnational government contracting. In reality, the mandatory approach is likely to prove not only inefficient, but quite unjust. It is a stretch to assume that state officials or agents of state owned entities charged with negotiating contracts will be aware that anything other than the agreed law of the contract will govern whether their chosen contractual terms are effective. It strains credulity to imagine that such officials or agents would be aware of the contents of IIL and ISDS jurisprudence, in relation to such contracts. This is especially so for developing countries, with smaller legal staffs and less resources to dedicate to such excessive due diligence.[132] Given that investment treaty standards will be typically more favorable to investors than the domestic contract rules they displace, states will likely find themselves on the wrong end of surprise claims arising out of investment contracts, with unexpected legal exposure measured in millions or even billions of dollars. This is not to say that ignorance of the law should be an excuse, but rather to suggest a rigid approach to the treaty/contract problem will be more likely to lead to perverse outcomes – and this should be taken into account in thinking through treaty interpretation and design.

The optimal approach is usually to privilege contractual arrangements over background treaty rules.[133] It may be that there is good reason to make specific rules stickier.[134] But given the costs, this should be justified on a case-by-case basis, in terms of the values, incentives and risks implicated by the particular treaty rule in question – not on the basis of broad formalisms about the relationship between treaty and contract, or international law and domestic law.[135] Suffice it to say, here, that, in general, the treaty/contract problem is not zero-sum. Although states and investors have different interests and values at stake, both sides usually stand to benefit from the freedom to negotiate around treaty rules. Prioritizing party choice is not only optimal from the economic standpoint – it also

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132 Though the empirical work remains to be done, one can cautiously extrapolate from Poulsen's study of treaty negotiation by developing countries that similar problems of bounded rationality are likely to arise in the context of government contracting. *See* POULSEN, *supra* note 11.

133 *See* Arato, *supra* note 5, at 397.

134 *Id.*

135 Sticky defaults may also be ineffective in IIL and ISDS, under current institutional arrangements, because they require jurisprudential coherence. It is easy enough for a tribunal to declare *ex post* that, were the parties serious about opt-out, they would have used special words to indicate their intent. But parties must have some way of knowing the magic words *ex ante*. Absent a system of precedent, or clear (and excessively intricate) treaty drafting, it will be difficult for States and investors to predict which words and phrases will make opt-out effective.

empowers states to secure their future regulatory autonomy, by controlling for risk through limitations on damages, *force majeure* clauses, and so on. Though investment treaties apply to contracts in order to protect foreign investors' contract rights, it makes little sense to bar states and investors from contracting around treaty terms at arms-length. To put it in crude terms, a contract represents a bargain struck by the parties, here foreign investor and state or state-owned enterprise. If the goal of the treaty is to protect the bargain as struck *ex ante*, then it should not be taken as license to rewrite it *ex post*.

2. Contract Formation and Regulation

Not everything in contract law is about facilitating choice. All laws of contract limit party autonomy in order to make choice itself more meaningful – through laying out rules of the game (basic formalities for formation), policing the bargaining process (e.g. mandatory fraud and duress doctrines), pushing parties to share certain kind of information, and so on.[136] National contract law also limits choice in the service of extrinsic values, at the margins, typically through mandatory rules – for example by protecting distribution and abuse at the margins through unconscionability and good faith doctrines, invalidating contracts to commit a crime, and limitations on government contracting designed to safeguard public administration and democratic choice.[137] All this comprises a core regulatory function of contract law – the state must address these matters if it is to make contract law effective, and if it is to safeguard other national values from the market. Here, investment treaties distort national contract law from the other direction. Not only do IIL and ISDS inefficiently limit party choice (without good reason); they also constrain how the state uses contract law to limit choice in the service of national values.

The recent Award in *Bankswitch v. Ghana* amply demonstrates how IIL and ISDS can distort the regulatory functions of contract law in the context of anti-corruption norms. The Ghanaian Constitution provides that all "international economic transactions," including contracts between the government and foreign investors, can only come into effect after Parliamentary approval.[138] The Constitution limits the executive's ability to unilaterally contract with foreigners in order to bolster transparency and accountability in a context where corruption is rife and effects on the public purse

[136] DAGAN & HELLER *supra* note 66, at 110; Ayres, *supra* note 79, at 2098.
[137] Nations vary widely in how far they interfere with choice in in this respect. Pargendler, *supra* note 67, at 155.
[138] GHANA CONST, Art. 181(5).

can be dramatic. The rule manages agency costs in government (i.e. the risk of executive self-dealing) by putting *both* Ghanaian officials and foreign investors on notice that government contracts require legislative approval. In *Bankswitch*, the investor contracted with the government to develop software for Ghanaian customs authorities, and invested heavily in the project over three years – relying on assurances that the contract was valid by various government officials (including the Attorney General), even absent Parliamentary approval.[139] The Tribunal agreed with Ghana that the alleged contract was subject to the constitutional formation requirements, which all agreed were not satisfied. Nevertheless, the Tribunal found the contract valid under a lenient promissory estoppel rule, (supposedly) grounded in customary international law (**CIL**)[140] – displacing the mandatory Ghanaian formation rule, and distorting the state's ability to regulate government corruption.

Bankswitch did not involve an investment treaty. Rather, it arose out of an investment contract between Bankswitch and Ghana, under Ghanaian law, providing for ISDS through UNCITRAL arbitration.[141] However the Tribunal determined that general international law applied to the contract, including aspects of IIL, and that it could rely on ISDS case law in fleshing out both the contract's terms and the conditions for valid contract formation. First, the Tribunal implied that CIL might apply to the contract simply in light of its international nature.[142] But in any case, it held that CIL would enter the picture as a convoluted triple-default. The contract was governed only by Ghanaian law, and did not expressly incorporate international law. Ghanaian law nowhere expressly incorporates international law. However, amazingly, the Tribunal found that "Ghana, as a former British Colony, is a common law country, and principles of English common law are generally applied in Ghana as highly persuasive (if not binding) authority," and that it could apply such English common law principles as were not expressly displaced by Ghanaian statute or binding case law.[143] Since English common law directly incorporates CIL into domestic law, and since Ghanaian law says nothing on the subject, the Tribunal found the English "doctrine of incorporation" implicitly applicable in Ghana. Finally, feeling thus emboldened to look to international law, the Tribunal drew on CIL and ISDS case law to read an implied doctrine of promissory estoppel into Ghanaian law.[144] Thus, in the Tribunal's view, an international contract governed by Ghanaian law, but invalid under that law, could

139 *Banskwitch*, ¶ 11.83.
140 *Id.*, ¶¶ 11.73-11.75.
141 *Id.*, ¶¶ 2.2–2.3.
142 *Id.*, ¶¶ 11.62–11.64.
143 *Id.*, n. 346.
144 *Id.*, ¶ 11.78.

be given effect under a theory of contract formation by estoppel derived from international law – even if it flatly contradicts constitutional requirements.[145]

The Tribunal found that the conditions for promissory estoppel were satisfied here.[146] Though the contract failed to satisfy constitutional requirements under the governing law, Bankswitch was entitled to rely on assurances by Ghanaian officials, and did in fact so rely. The Tribunal emphasized that "the Government was in a better position to understand the constitutional requirements that would possibly apply to the Agreement and Bankswitch was reasonable in relying on that knowledge."[147] The Tribunal thus enforced the contract, and ultimately found Ghana in breach. The problem is that this entirely upends the constitutional anti-corruption provision. The Tribunal misses the point that Article 181(5) is meant to check *government* action – to mitigate agency costs associated with corruption in the executive branch, by precluding officials from executing large scale international contracts without Parliamentary oversight. Allowing these same officials to vitiate the constraints on their action merely by making representations to the investor makes the intended constitutional constraint effectively optional. The tribunal's approach not only displaces national constraints on contract formation, but further distorts the state's capacity to regulate government corruption at the constitutional level.

Bankswitch was a hard case. Both parties had real grievances. Bankswitch *was* induced, and given assurances that its contract was valid without Parliamentary approval by the highest officials of the government. But it turned out that this was bad advice, given by those exact officials Article 181(5) was meant to constrain. Still, there was no evidence (or claim) of any actual corruption in this case, and indeed it was the executive branch that both induced the contract, assured its validity, and ultimately insisted on its invalidity for lack of Parliamentary approval after coming to regret the arrangement. Enforcing the constitutional provision strictly would thus not feel entirely fair to Bankswitch, *ex post*. But at the same time, enforcing the contract would mean vitiating the constitutional provision. Moreover, the Tribunal strains credulity in suggesting that it would be overly burdensome to expect foreign investors to review express *constitutional* requirements for contracts as *ex ante* due diligence. Ultimately *Bankswitch* aptly demonstrates Holmes' adage: that "hard cases make

145 *Id.*, ¶¶ 11.59, 11.70.
146 *Id.*, ¶ 11.81.
147 *Id.*, ¶ 11.88.

bad law."[148] The Tribunal sided with the company, defanging Article 181(5) and distorting the nation's capacity to regulate government corruption through constraints on forming public contracts.

3. Distorting the Logic of Contract

Including contracts in the definition of investment effectively transforms IIL into a rudimentary, yet broad, law of contracts – governing agreements between states and foreign investors on pivotal issues, from implied terms to rules on formation. However, this emerging international law of contracts has developed sporadically, irregularly, and inconsistently through ISDS, due in part to a tendency among tribunals to confuse the logics of contract and property.

As a result, it remains undecided whether contracting parties should understand background treaty norms as defaults, sticky defaults, or mandatory terms – leaving the meaning of their contracts under a cloud of doubt. Such uncertainty is, already, highly inefficient *ex ante*, and unfair insofar as it leads to undue (and costly) surprise *ex post*. Further, to the extent tribunals tend toward viewing treaty provisions as mandatory, the jurisprudence has the further effect of undercutting states and investors' capacity to bargain over the terms of their investment contracts. IIL and ISDS thus distort the empowering and gap-filling functions of national contract law for no good reason. At the same time, the *Bankswitch* case serves to show how IIL and ISDS can further distort the regulatory function of national contract law, by providing an end run around domestic constraints on bargaining – in that case vitiating constitutional anti-corruption norms.

Thus the investment treaty regime distorts national contract law from both ends. On the one hand, it distorts the general logic of customization in contract law by imposing rigid terms on states and investors – limiting their ability to bargain to efficient outcomes *ex ante*, and, in so doing, limiting the state's ability to control the scope of its liability. On the other hand, ISDS also stands in the way of the state's own attempts to constrain contracts in the service of extrinsic regulatory values.

C. Corporate Law and The Corporate Form in ISDS

[148] *Northern Securities Co v. United States*, 193 US 197, 400 (1904) (Holmes dissenting).

The dynamic between investment law and corporate law should, by now, be familiar. As with contracts, IIL and ISDS erect rules of international corporate law, with a surprising and textually non-obvious scope. In certain key instances, they subvert displace keystone principles of national corporate law, and thereby distort central functions of the corporate form. These distortions undercut efficiency, fairness, and equitable distribution, affecting not only host states, but also all corporate constituencies – including insiders (shareholders and management) and outsiders (creditors and third-parties), wherever they reside.

Here again the problem starts with the definition of investment. Investment treaties expressly protect both natural and legal persons. Corporations thus enjoy investment treaty protection as investors in their own right, where their assets qualify as covered investments. But the definition of investment in most BITs and FTAs also includes stocks and shares, meaning that shareholders in a locally incorporated company also qualify as covered investors. This extends beyond controlling stakes, to minority shares and even indirect equity – meaning shares in an enterprise held through intermediary companies.[149] The rationale seems to be that host states often require (or encourage) foreigners to invest through a local entity, in hopes of generating benefits for local development (jobs, transfer of know-how, etc.). As a national of the host state, that company would not be covered by the typical investment treaty. But by including stocks and shares, the treaties cover foreigners investing in the local entity.[150] The problem, here, is similar to the problem with how BITs apply to contracts: investment treaties tend not to specify how their provisions apply to shareholders, leaving unanswered substantial questions about differentiation and fit. Left to interpret these matters, ISDS tribunals have tended toward positions which distort important principles and functions of domestic corporate law – in both host and home states.[151]

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[149] *See, e.g.* Japan—Israel BIT, Art. 1(a) ("the term 'investment' means every kind of asset … owned or controlled, directly or indirectly, by an investor, including: (i) an enterprise and a branch of an enterprise; (ii) shares, stocks, and other forms of equity participation in an investment …"); US—Turkey BIT, Art. 1(c) ("'investment' means every kind of investment owned or controlled directly or indirectly, including equity, debt … (ii) a company or shares, stock or other interests in a company or interests in the assets thereof"). Because most treaties cover indirect shares, their coverage potentially extends to long parent-subsidiary chains.

[150] Where the firm is foreign, both it and its shareholders arguably enjoy separate treaty coverage. *See infra*, II.C.1.

[151] For brevity, I limit the discussion to corporations – but analogous problems arise for other organizational forms.

The business corporation (or company) is the most common vehicle for the large scale investment projects at issue in ISDS.[152] Across all legal systems, the corporate form exhibits the same core characteristics: (1) separate legal personality; (2) limited shareholder liability; (3) transferable shares; (4) centralized management; and (5) shared investor ownership.[153] Together, these interrelated features provide a streamlined and efficient vehicle for mobilizing capital at scale, "uniquely effective at minimizing coordination costs."[154] The prime function of corporate law everywhere is thus to *empower* private parties to organize their business through this uniquely efficient legal form, bearing these five core attributes.[155] Selection of the corporate form, in turn, imparts substantial expectations – among corporate insiders (shareholders and management), and outside constituencies (creditors, governments, and publics) – signaling to all the applicability of well-known basic rules.[156]

The second key function of corporate law is *regulatory*. Despite its merits, the corporate form tends to create serious agency problems, or conflicts of interest: between shareholders and managers; between controlling and minority shareholders; and between shareholders and outside constituencies (especially creditors).[157] These problems largely arise out of the same features which give the corporate form its distinct value. The bulk of corporate law in all jurisdictions is thus dedicated to mitigating these conflicts, to reduce the "ongoing costs of organizing business through the corporate form."[158] Importantly, however, there is no single blueprint. As with all private legal fields, national systems of corporate law differ substantially in which legal strategies they adopt to manage the relevant trade-offs, reflecting substantial differences in values and priorities.[159]

IIL and ISDS tend to upset both the empowering and regulatory functions of corporate law, by distorting national legal arrangements in important, and underappreciated ways. To illustrate this

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152 Gaukrodger*, supra* note 8. *See generally* John Armour, Henry Hansmann, Reinier Kraakman, and Mariana Pargendler, *What Is Corporate Law?*, *in* JOHN ARMOUR, ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 1 (3d ed., 2017).
153 Armour et al., *supra* note 152, at 5.
154 *Id.*, at 1–2.
155 *Id.*, at 1.
156 Gaukrodger*, supra* note 8, at 10.
157 Armour et al., *supra* note 152, at 2.
158 *Id.*
159 National corporate laws vary substantially in how far they enshrine values external to firm efficiency, "such as reducing systemic risk, mitigating gender inequity, or protecting the environment." Armour, et. al, *supra* note 152, at 24. *See also* AARON DIHR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY chs. 4-5 (2015).

problem, I focus on just one of the corporation's hallmark features: separate legal personality. However, it will be clear that IIL affects its other characteristics as well.

Separate legal personality is a *sine qua non* of the corporate form. It allows the "firm to serve [a] coordinating role by operating as a single contracting party that is distinct from the various individuals who own or manage the firm."[160] Personality entails three core capacities: (a) separate ownership; (b) the firm's capacity to contract in its own name; and (c) capacity to sue and be sued in its own name.[161] Each component requires background legal rules to sustain,[162] which, in each case, turn out to be undermined by IIL and ISDS. Some further specificity helps show why.

Separate ownership (or "*separate patrimony*" in civil law) is the most technical aspect of personality. The basic idea is that the corporation can own assets in its own right, hived off from its shareholders. Such patrimony includes "rights to use the assets, to sell them, and – of particular importance – to make them available for attachment by its creditors."[163] Conversely, the firm's assets are unavailable for attachment by shareholders' personal creditors. Emphasizing function over form, law and economics literature refers to this aspect as "*entity shielding*."[164] Separate patrimony, or entity shielding, is produced by two distinct background rules of law: a rule of *creditor priority*, granting the firm's creditors a claim on corporate assets prior to any claims by shareholders or their personal creditors; and a rule of *liquidation protection*, barring shareholders from withdrawing their share of corporate assets at will.[165] Together, these rules "protect the going concern value of the firm against destruction by individual shareholders or their creditors."[166] Entity shielding is what allows a firm to assure outsiders (e.g. creditors) that it will be able to perform its contracts. It facilitates negotiating contracts *ex ante*, and, ultimately, shareholder liquidity.[167]

The other two capacities of separate legal personality similarly require dedicated legal rules to make fully viable. The capacity of a corporation to contract in its own name requires clear rules about who acts for the corporation – who may buy and sell in its name, or otherwise commit its resources. Some can be defaults – corporations are generally free to decide how actual authority is delegated.

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160 Armour et al., *supra* note 152, at 5.
161 *Id.*, at 5-7; *see also* Gaukrodger*, supra* note 8, at 14
162 *See* Armour, et. al, *supra* note 152, at 8.
163 *Id.*, at 5-6.
164 *See* Henry Hansmann, Reinier Kraakman, and Richard Squire, *Law and the Rise of the Firm*, 119 HARVARD LAW REVIEW 1333 (2006).
165 Exit must rather be accomplished by sale of shares. *See* Armour, et. al, *supra* note 152, at 6.
166 *Id.*, at 6.
167 *Id.*, at 7.

However, the law must at minimum provide rigid rules on apparent authority to protect third-parties.[168] Similarly, the capacity to sue and be sued requires background legal procedures specifying how the firm can initiate, or be subjected to, litigation. For example, most jurisdictions provide that *in general* management makes litigation decisions on behalf of the corporation (not shareholders), and all recovery is due to, or from, the firm (not its owners).[169]

As a whole, separate legal personality facilitates efficient contracting, reduces conflicts of interest and associated agency costs, and, *ex ante*, serves to reduce the costs of capital. However, "[t]he outcomes achieved by each of these three types of rules—entity shielding, authority, and procedure—require dedicated legal doctrines to be effective" – rules which, empirically, all national legal systems provide (without major differences).[170] It is therefore striking that IIL and ISDS have managed to subvert each component of separate legal personality, in sometimes serious ways, without much in the way of policy justification for doing so. I illustrate such distortions in two contexts below: (1) shareholder suits for reflective loss; and (2) apparent authority.

1. Shareholder Claims for Reflective Loss

If the problem with how investment law grapples with contracts stems from the underspecified relationship between contracts-as-investments and substantive treaty protections, the problem with stocks and shares relates more to the procedural right of access to ISDS. While it is clear that stocks and shares are covered investments,[171] BITs tend to say very little about just how shareholder-investors may bring suit, and whether such procedural rights might differ from rights of suit relating to property, contract or IP. Though counterintuitive at first blush, there is no reason to assume that each type of investment is meant to, or should, involve the same kind of access to arbitration. To the contrary, the assumption that investors in stocks or shares possess unqualified access to ISDS substantially distorts national corporate law, upsetting the careful tradeoffs of interests and values established by both home and host state jurisdictions, with perverse consequences for corporate constituencies wherever they reside.

168 *Id.*
169 Gaukrodger*, supra* note 8, at 23.
170 Armour, et. al, *supra* note 152, at 7-8.
171 Only a very small handful of treaties limit coverage for shareholdings. *See, e.g.* Turkey—Azerbaijan BIT, Art. 1 (2011) (excluding shareholdings below 10%).

Investment treaties typically say very little about shareholder standing. The 2017 Japan—Israel BIT is typical. Article 1 provides:

> (a) the term 'investment' means *every kind of asset* … owned or controlled, directly or indirectly, by an investor, including … (ii) shares, stocks or other forms of equity participation in an enterprise."

Beyond that, Article 24(2) provides very generally that an investor:

> … may submit to arbitration under this Article a claim: (a) that the respondent [state] has breached an obligation under Section I …; and (b) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.

The connection between these provisions seems facially straightforward: shareholders-*qua*-investors appear empowered to sue the state directly for treaty breaches causing diminution in share value. From a corporate law perspective, however, things become immediately murky.

With real property, the relationship between the investment and the right to invoke ISDS is perfectly clear. In case of a dispute, the investor-in-property may compel the host state into arbitration. If she wins, she is clearly entitled to the winnings. She is thereby made whole. The same holds for investors with covered contract or IP rights. By contrast, where the investment in question is a pool of stock or shares in a corporation, drawing such a straight line between investment and ISDS proves quite problematic. At least from the perspective of corporate law, sizeable basic questions about just what kind of suit our investor-shareholder is entitled to bring are left totally unaddressed. Evidently, she is entitled to some kind of access to ISDS. But what kind of claim(s) can she bring? Can she bring suit *on her own behalf*, for injuries to the company diminishing the value of her shares? Or may she only bring suit *on the company's behalf*? And who is entitled to recover damages – the shareholder or the firm? Separate personality turns on these questions, making them fundamental to any system of corporate law. Yet they are rarely addressed directly in treaty text, leaving their resolution to arbitral interpretation. What is striking is that advanced national legal systems near always answer these questions in one way, for clear policy reasons, while ISDS tribunals invariably go in the opposite direction – with little policy justification.

Because shareholder standing cuts to the core of separate legal personality, corporate law everywhere sharply distinguishes two kinds of shareholder claims. On the one hand, shareholders may bring "direct claims," for direct injury to their shares (if, say, the government improperly forces a particular investor to sell his shares in a company). On the other hand, shareholders are typically not permitted to bring claims for "shareholder reflective loss" (***SRL***), meaning claims based on injury to the corporation causing incidental diminution in share value.[172] In general, all claims arising out of injury to the corporation must be vindicated by the corporation itself (in management's discretion). The only significant exception is the shareholder derivative suit, where shareholders can sometimes bring claims on behalf of the corporation against management's wishes (typically requiring managerial conflict of interest) – with any recovery going to the firm.[173]

All advanced domestic systems of corporate law categorically reject shareholder suits based on SRL,[174] as do most international jurisdictions, including the ICJ[175] and ECtHR.[176] However, as Gaukrodger explains, the restriction of SRL claims is rarely codified in statute or treaty.[177] The doctrine is instead usually judge-made, even in civil law countries. The main policy concerns driving this common judicial practice is that allowing direct shareholder recovery for SRL claims undermines entity shielding, and thus separate legal personality. SRL enables shareholders to siphon off recovery rightly belonging to the injured company (*pace* liquidation protection), and thereby jump the line ahead of creditors and other shareholders (*pace* creditor priority). It also enables shareholders to undermine centralized managerial decision-making about litigation and/or settlement, and creates unfair risks of multiple claims and double recovery.[178]

ISDS tribunals, by contrast, invariably interpret investment treaties as permitting SRL claims, with little explanation or analysis of why this follows from the underlying treaties.[179] They instead tend to assume that vague treaty text speaks for itself. In *Impregilo*, for example, the Italian Claimant-shareholder complained of Argentina's actions toward a local entity in which it had a controlling

[172] Gaukrodger*, supra* note 8, at 7.
[173] David Gaukrodger, "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency, 2013/03, OECD Publishing 19-20 (2013), *available at* http://www.oecd.org/investment/investment-policy/WP-2013_3.pdf.
[174] *Id.*, 14-17 (finding that U.S., U.K., Australian, German, French, and Japanese corporate laws all bar SRL claims)
[175] *See Barcelona Traction*, ICJ, ¶¶ 38, 44 (1970). (finding that diplomatic protection does not generally extend to claims for SRL, though remaining open to equitable exceptions, or exceptions in *lex specialis*); *but see ELSI* (allowing diplomatic protection on the basis of shareholder nationality where the corporation's state of nationality was the alleged wrongdoer).
[176] *See, e.g. Olczak v. Poland*, ECtHR App. No. 30417/96 ¶¶ 57-58 (2002).
[177] Gaukrodger*, supra* note 173, at 24.
[178] *Id.*, at 33.
[179] *See, e.g.*, *CMS Gas*, Jurisdiction, ¶ 65; *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 49 (Jan. 14, 2014); Christoph Schreuer, *Shareholder Protection in International Investment* Law, 3 TRANSNAT'L DISP. MGMT. 2005, 4; DOUGLAS, *supra* note 30, at 455.

interest (AGBA). For the Tribunal, it was enough that the definition of investment in the Argentina—Italy BIT included stocks and shares.

> [If] AGBA was subjected to expropriation or unfair treatment with respect to its concession … such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT.[180]

Such focus on the definition of investment apparently leads tribunals to assume that shareholder claims are independent from the firm's claims. This leads to two further problematic corollaries. First, tribunals allow shareholders to recover directly in such suits, in proportion to their stake in the company. This effectively reverses the position across national jurisdictions that all recovery should go to the corporation itself. Second, this assumption of independence opens the door to multiple parallel and/or sequential claims – by the company, by controlling shareholders, and/or by various minority shareholders.[181] The effect is exponentially compounded where the treaty also covers indirect equity.[182]

ISDS case law is remarkably well settled on each of these points. Yet it is not clear that these conclusions necessarily follow from investment treaty drafting. Rather, ISDS openness to SRL reflects an interpretive choice. Certainly, BIT coverage of stocks and shares is meant to have *some* effect. But most investment treaties leave the scope of shareholder claims completely unaddressed.[183] That covering stocks and shares as investments, without more, implies allowing SRL claims is certainly one possibility. But other less distortive interpretations are also reasonable. One would require that such claims be brought *on behalf of* the firm, with any recovery going to company coffers. Another would be to limit shareholder claims to residual actions where the corporation itself is unable or unwilling to bring its own claim for some inequitable reason. While the pro-SRL rule may fit (relatively) neatly with investment treaty text, the text dos not unambiguously close off a more calibrated approach. Nor is text everything. Indeed, even as a matter of formal treaty interpretation, it is not clear why tribunals

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180 *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award (2011), ¶ 13; *See also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (1st ed., 2007) §§ 6.77, 6.79 ("Given the wide definition of investment … there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value.").
181 *See, e.g. Enron*, Jurisdiction ¶ 49.
182 *See Ampal-American Israel Corp. v. Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶ 343 (2016) [hereinafter *Ampal*] (refusing to "read into the Treaty restrictions … [on] 'passive, indirect and very small' holdings).
183 Gaukrodger*, supra* note 8, at 25.

have given such short shrift to the position in general international law,[184] or the uniformity across domestic jurisdictions.[185] As in domestic law, the scope and limits of shareholder suits reflect judicial choices – the difference is that, in ISDS, tribunals have placed little emphasis on policy, relying more on (assumed) textual mandate and arbitral precedent.

A small handful of treaties seem designed to limit shareholder claims, yet even here ISDS precedents on SRL exert apparent pull. The NAFTA, for example, includes stocks and shares within the definition of investment,[186] but distinguishes between two types of shareholder ISDS claims. Article 1116 covers claims by an investor "on its own behalf." Article 1117, by contrast, permits an investor to bring a claim "on behalf of" a locally incorporated enterprise that it "owns or controls, directly or indirectly" – essentially a form of derivative action, where recovery goes to the company.[187] Further, 1117(3) provides for presumptive joinder of 1116 and 1117 claims arising out of the same events. The NAFTA Parties have consistently argued that these provisions mirror the classic separation between direct and derivative claims in domestic corporate law, with the intent of precluding claims for SRL.[188] But these provisions are not paragons of clarity. While some tribunals

[184] VCLT 31(3)(c) requires tribunals to take into account "other relevant rules of international law applicable in the relations among the parties," which includes customary international law and general principles of law. *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005); Julian Arato, *Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 BROOK. J. INT'L L. 349 (2012). Where Tribunals have recognized that general international law bars SRL claims, they have insisted that BITs are *lex specialis*. *See CMS Gas*, Jurisdiction, ¶ 48; and *Enron*, Jurisdiction, ¶ 34. However, this argument still rests on an unstable assumption that BITs *clearly* authorize SRL as a matter of text, object and purpose, etc.

[185] Such uniformity arguably indicates a general principle of international law. *But see Teinver S.A. v. Argentine Republic,* ICSID Case No. ARB/09/1, Jurisdiction, ¶ 212 (Dec. 21, 2012) ("refus[ing] to take their cues from domestic corporate law").

[186] NAFTA Art. 1139.

[187] *See also* CPTPP, Arts. 9.19 (separating types of shareholder claims) and 9.28 (incorporating joinder procedures); and CETA, Art. 8.22 (extending waiver rules to cover both the foreign shareholder and a *locally* incorporated enterprise), and 8.43 (incorporating joinder procedures).

[188] The NAFTA Parties have argued that permitting minority shareholders to bring SRL claims under 1116 would render 1117 largely superfluous. *See Bilcon v. Canada*, Canadian Counter-Memorial on Damages ¶ 26 (9 June 2017) (Allowing SRL "undermines one of the most fundamental rules of corporate law in all three NAFTA Parties. … [This] will weaken the corporation's separate legal personality, create unpredictability for investors, creditors, banks, and others who participate in the foreign direct investment market, create unfair conditions of competition among these different sorts of investors, and hence, inevitably decrease the opportunities for investment in the NAFTA Parties."); *GAMI v. Mexico*, Submission of the United States, ¶ 17 (30 June 2003) and Escrito de Contestación of Mexico, ¶¶ 166-67 (24 Nov. 2003).

have viewed them as barring shareholder claims for SRL,[189] others have still permitted SRL claims under 1116.[190]

From his extensive review of the cases on SRL, Gaukrodger concludes that "Tribunals have apparently considered it unnecessary to consider policy consequences in any detail because they consider that the issue is resolved by the inclusion of shares in the investment definition… [and by force of] arbitral precedent" – though the precedents themselves "rarely if ever addressed the policy issues or consequences."[191] Yet it is worth considering whether there might nevertheless be some policy justification for allowing SRL in ISDS, which might be absent in domestic law. One seemingly compelling reason might be to protect foreigners who invest through local entities, discussed above. This does not, however, require anything so radical as reversing the national rule against SRL. Various treaties incorporate provisions that would solve this problem more directly, without contorting domestic corporate law. The NAFTA avoids this problem by providing for derivative suits.[192] And many US BITs resolve the issue by providing that a local company can invoke ISDS as a *constructive* foreign investor, if it would itself qualify as a covered investment under the treaty (by dint of foreign ownership).[193] These treaties still cover stocks and shares, and tribunals thus usually view them as permitting local company claims *in addition* to SRL.[194] But these alternatives would suffice, on their own, to protect investors operating through local companies, without sacrificing major features of corporate law – undercutting this possible rationale for SRL.

Though neither necessitated by text, nor supported by any clear policy justification, ISDS openness to SRL claims has a strong distortive effect on national private law. By allowing such shareholder claims, IIL here displaces a keystone presumption of corporate law wherever the relevant company is incorporated (home or host state), undermining foundational principles of the corporate form on which all constituencies rely. The ISDS approach further contorts domestic corporate law by allowing such shareholders to recover directly, bypassing the firm's coffers; and by allowing the firm

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189 *See, e.g. Mondev Int'l v. United States*, Award, ¶¶ 84–86 (2002) (highlighting the interests of creditors).
190 *GAMI v. Mexico*, Award, ¶¶120-121 (2004) (acknowledging the policy trade-offs); *Pope & Talbot v. Canada*, Award in Respect of Damages, ¶¶ 75—76 (31 May 2002).
191 Gaukrodger*, supra* note 173, at 30.
192 NAFTA, Art. 1117.
193 *See, e.g.* US—Argentina BIT, Art. VII(8); US—Turkey BIT, Art. VI(6). *See also* ECT, Art. 26(7) (taking a narrower approach, including only local companies *controlled* by nationals of another Party).
194 See *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5) (Mar. 20, 2017) (allowing both a local company claim (*Eskosol*), and a separate SRL claim (*Blusun v. Italy*)).

and its shareholders to bring multiple independent, and even sequential claims. Each of these moves reverses the position of the firm under the domestic law of incorporation. IIL thereby tends to upset how that state's national law calibrates the rights, interests and expectations of key corporate constituencies – shareholders and creditors in particular, but also management. Each of these distortions also strongly affect the expectations of the host state more generally, in its interactions with the firm – both adversarial (e.g. as a defendant) and cooperative (e.g. in trying to salvage an ongoing relationship, or settle a lawsuit).

The obvious surface problem with ISDS openness to SRL concerns the fairness of admitting multiple shareholder and/or corporate claims. Tribunals' tendency to view corporate claims and claims by discrete shareholders as completely independent raises two specters: double recovery and limitless bites at the apple. Tribunals have proven sensitive to the former, generally striving to limit shareholder recovery on a pro-rata basis if and when the arbitration reaches the damages phase. However, the latter concern has mostly fallen on deaf ears.[195] The problem is most vividly illustrated by the widely criticized awards in *CME* and *Lauder v. Czech Republic*. These cases involved separate claims arising out of the same injury to a local Czech company – by its 99% shareholder (CME) and by an indirect minority shareholder (Lauder, who controlled CME).[196] The two Tribunals famously disagreed on the merits of essentially identical disputes: Lauder lost, while CME won upwards of $270 million. But they substantially agreed on the admissibility of multiple separate shareholder suits. The Respondent argued that *Lauder* should be dismissed, because, to the extent that any damages are due, recovery by CME would make all of its shareholders whole *including* Mr. Lauder – while recovery by the latter would leave the other shareholders in CME empty-handed.[197] Both Tribunals disagreed, insisting that the claims were independent precisely because Lauder could not be completely identified with CME.[198]

The Tribunals' treatment of SRL in *CME* and *Lauder* is typical. This approach gives investors little reason to forego successive bites at the apple beyond (substantial) cost – especially in close cases. Beyond the manifest unfairness of allowing one party to "play 'till you win," the ISDS approach here also distorts incentives on all sides at the settlement stage, and facilitates opportunistic hold ups.

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195 *Enron*, Jurisdiction at ¶ 49; *Eskosol*, ¶ 170; *but see Orascom*, discussed below.
196 *CME v. Czech Republic*, UNCITRAL, Final Award, ¶ 436 (2003).
197 Though the cases are much vilified, it the Respondent notably refused the investor's request to join the proceedings – which both Tribunals held against it in allowing parallel claims. *Ronald Lauder v. Czech Republic*, UNCITRAL, Final Award, ¶ 178 [hereinafter *Lauder*]; *CME*, ¶ 428–29; *see similarly Ampal*, Jurisdiction ¶ 329.
198 *CME* ¶ 436; *Lauder* ¶ 172.

There have, however, been some recent signs that tribunals are becoming more sensitive to these concerns – at least on the surface. A few have recognized that, in principle, it would be abusive to allow an aggrieved investor to bring suit after failed suit, *ad infinitum*. A handful have drawn an outer limit based on *complete identity* of shares – baring separate claims by shareholders and their wholly-owned entities,[199] or separate indirect and direct shareholder claims over the exact same tranche of shares.[200] However, this rule is not difficult to work around *ex ante*, and does little to ward off opportunism. The very recent Award in *Orascom v. Algeria* goes further, explicitly questioning the continued relevance of *Lauder/CME*.[201] In *Orascom*, the ultimate controlling shareholder had both brought its own SRL claim, and caused several subsidiary entities in the chain to bring separate parallel claims under different BITs (including the local entity itself, the direct shareholder, and several other intermediaries). Uncomfortable with permitting the Claimant so many shots, the Tribunal invoked the equitable doctrine of "abuse of right" – holding that "an investor who *controls* several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain."[202] The investor may opt to take his bite through any affected vehicle he controls, but he may not take more than one.[203] Still, the Tribunal refused to foreclose the possibility of additional SRL claims by other *non-controlling* shareholders (direct or indirect), viewing these as essentially independent.[204] Thus, while *Orascom* is a step in the right direction, it addresses only the surface problems of multiple claims and double recovery, and these only partially.

The deeper structural harm in ISDS openness to SRL is that it hollows the core tenets of entity-shielding: creditor priority and liquidation protection. Where the corporation alone is entitled to bring suit to vindicate its interests, all recovery goes to the company – to be distributed according to normal priority rules, and without abnormal risk of liquidation by individual shareholders. But because ISDS entitles individual shareholders to sue host states for SRL, and recover directly, the

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199 *Grynberg et al. v. Grenada*, ICSID Case No. ARB/05/14, Award (13 March 2009) ¶ 7.1.6.
200 *Ampal*, Jurisdiction, ¶ 331, and *Ampal*, Liability, ¶¶ 11-12.
201 *Orascom TMT Investments. v. Algeria*, ICSID Case No. ARB/12/35, Award, ¶ 547 (31 May, 2017).
202 *Orascom*, ¶ 542 (my emphasis).
203 In the Tribunal's view, the first suit, by the direct shareholder in the local company, "crystalized" the dispute – blocking the controlling shareholder from making further claims. *Orascom*, ¶¶ 496, 523-524, 543. This "crystallization" theory is troubling, since, for reasons discussed below, the local entity's claim should be superior to that of its direct controlling shareholder's – irrespective of timing – especially given that the local entity enjoyed BIT protection in its own right.
204 *Orascom*, ¶ 543 n. 836.

covered shareholder-investor is empowered to jump the line (undermining priority rules), and to siphon off assets rightfully belonging to the corporation as a whole (undermining liquidation protection). This move distorts and undermines the signal feature of separate legal personality, with consequences *ex post* (e.g. for the insulation and/or equitable distribution of corporate assets) and *ex ante* (e.g. for the availability and price of credit).[205]

The extent to which ISDS distorts national law on entity shielding is most vivid where the firm is in distress – in the zone of bankruptcy, or in actual bankruptcy proceedings. As Gaukrodger puts it, usually "SRL intervenes at a moment when the company is already weakened. What is at issue is the company's capacity to reconstitute its assets and expectations about that capacity."[206]

Assume, for simplicity, that a foreign-owned firm's value as a going concern is destroyed – allegedly due to host state mistreatment. The business may need to be wound down, irrespective of any potential recovery from the state. In such circumstances, there may not be enough assets to go around to satisfy the firm's creditors and shareholders. National corporate law guarantees creditors priority on these assets. If the business gets wound down, all funds (including any recovery in pending litigation) get paid out to the firm's creditors first, and distributed pro rata among shareholders only thereafter.[207] Creditors depend on this priority rule, and it is a key factor in the availability (and price) of credit *ex ante*.[208] ISDS, however, allows particular (treaty-protected) shareholders to recover immediately, reducing the total asset pool available for distribution to all other corporate constituencies. Even if the tribunal reduces the investor's recovery in proportion to her shares, there may not be enough left to satisfy the firm's creditors (who normally expect priority), or appropriately compensate other shareholders (who expect parity). Moreover, allowing a shareholder to recover directly enables her to siphon value from the firm, potentially undercutting its capacity to reconstitute itself as a going concern. Thus, the ISDS rule distorts both aspects of entity shielding (creditor priority and liquidation protection), with the effect of subverting the normal expectations of creditors and shareholders (as a class) set by the domestic law of the corporation (be that host state law or home state law).

Though less glaring, the ISDS rule also undermines core features of the corporate form even for firms not in distress. It allows shareholders to second-guess fundamental managerial decisions on

[205] Gaukrodger*, supra* note 8, at 20.
[206] *Id.*; Korzun, *supra* note 8, at 6.
[207] Saul Levmore & Hideki Kanda, *Explaining Corporate Priorities*, 80 VA. L. REV. 2103, 2123.
[208] Armour et al., *supra* note 152.

whether to initiate litigation, how to pursue lawsuits, and/or whether to settle.[209] Investment disputes can (and often should) be resolved through consultation and compromise, rather than litigation. But the specter of separate shareholder claims substantially weakens the company's hand, and should diminish a rational state's confidence that any agreement with management will ultimately stick. All this further undermines the foundations of separate legal personality (weakening the firm's ability to serve as a single contracting party, and to sue in its own name), as well as the principle of delegated management.[210]

In perforating separate legal personality, ISDS creates substantial inefficiencies. *Ex post*, the rule creates incentives for covered shareholders to act opportunistically, especially where firms are in distress. This harms creditors, other shareholders, and the firm itself. Even among treaty-covered shareholders, it creates perverse first-mover incentives (with obvious harm for states stuck defending multiple claims). And it weakens the hand of management in its interaction with the state at critical moments. All these concerns are further likely to produce problems *ex ante*, over the long term. IIL, as interpreted, forces creditors to account for the dearth of typical priority and liquidation protections when considering whether to fund FDI projects – a problem drastically exacerbated by the possibility of SRL claims by indirect investors. By imposing additional risks and costs, this rule pushes creditors to either reduce the availability of credit, or increase its price – affecting the overall cost of capital either way.[211]

In sum, all that is clear is that investment treaties invariably cover stocks and shares as investments. They rarely clarify the scope of investor standing vis-à-vis such investments. Tribunals generally infer that shareholder-investors thus enjoy the same procedural rights as any other investors, allowing shareholder claims for reflective loss without much considering the vast policy considerations at stake.[212] This position deviates from, and displaces, the rule universally adopted by advanced national corporate laws, as well as general international law. But more fundamentally, IIL here affirmatively distorts the domestic corporate laws of all parties to the investment treaty, undermining key features of the corporate form for any firm involved in FDI – whether incorporated in the host or home state. These distortions have harmful spillover effects for the firm itself, as well as inside and

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[209] DOUGLAS, *supra* note 30, at 456.
[210] Gaukrodger, *supra* note 8, at 23-25.
[211] *Id.*, at 20; DOUGLAS, *supra* note 30, at 455.
[212] *Id.*

outside constituencies, both *ex post* (multiple bites at the apple and double recovery), and *ex ante* (relating to centralized management and the availability of credit).[213]

2. Agency and Apparent Authority

IIL and ISDS also distort the firm's capacity to contract as a single entity – another hallmark of separate legal personality – by creating unnecessary questions about apparent authority. This capacity turns on dedicated background rules articulating the authority of agents to tie the firm's hands. "Rules governing the allocation of authority are needed to establish common expectations as to who has authority to transfer rights relating to corporate assets *prior to* entering into a contract for their transfer."[214] For most matters, mere default rules suffice. Corporate law generally leaves firms significant leeway to decide internally how *actual* authority is delegated – in its articles of incorporation, or bylaws. However, the law must provide some firmer guidance regarding apparent authority, upon which third-parties can rely. Otherwise, parties wishing to deal with the firm would face oppressive and wasteful costs in striving to discover whether officers indeed possess the authority to transact in the firm's name.[215] This fact would, in turn, open the door to undue opportunism on the part of the firm and its agents. Corporate law everywhere thus provides minimal rules delineating apparent authority, or some functional equivalent, and generally makes them mandatory.[216]

ISDS muddies the apparent authority analysis.[217] Questions of authority come up frequently in ISDS – sometimes regarding agents of the host state[218] or state-owned entities, and sometimes regarding the investor's corporate agents.[219] Investment treaties generally say nothing on the subject, leaving it to tribunals to resolve such issues as they come up. Here, as elsewhere, the absence of clear

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213 *See Eskosol*, ¶ 170; *GAMI v. Mexico*, ¶¶ 120-121; *but see Mondev*, ¶¶ 84–86

214 Armour et al., *supra* note 152, 8.

215 *See* John Armour and Michael Whincop, *The Proprietary Foundations of Corporate* Law, 27 OXFORD J. LEGAL STUD. 429, 444-47 (2007) (arguing that authority rules necessarily trade off due diligence costs against preserving owners' flexibility to delineate authority as they see fit).

216 Armour et al., *supra* note 152, 8, 11; Otto Sandrock, *Arbitration Agreements and Groups of Companies*, *in* FESTSCHRIFT PIERRE LALIVE, 625, 640 et seq (1993).

217 *See* Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (distinguishing between crystalline and muddy rules –the former being bright, clear, and rigid, and the latter leaving judges substantial *ex post* discretion).

218 *See e.g., CCL v. Kazhakstan*, SCC Case 122/2001, Award (2004).

219 *Getma*, ¶ 17 (Fr.) (all translations my own); *Standard Charter Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award ¶¶ 92-96, 160-161 (2012) (examining whether the agents of a local power company – the investment – had proper authority to restructure its debt); *Philip Morris v. Uruguay*, ¶¶ 62-64, 92-95.

rules creates substantial uncertainty: is the question of authority governed by national law? If so, which national law? And, if not, on what basis will tribunals decide such questions? Given the strong policy rationale favoring clear rules of apparent authority (as rules of the game), one would expect a tribunal to simply rely on national law to resolve the issue, following conflicts of laws principles – or to at least articulate its own "crystalline" rules-based approach, upon which states and putative investors could theoretically rely, *ex ante*.[220] The case law on point is still sparse, so the analysis here must remain somewhat speculative. Yet at least one tribunal considering the issue eschewed a rules-based approach to apparent authority entirely, resolving the issue through muddy *ex post* equitable balancing – creating significant uncertainty on its own, and demonstrating another potential route through which ISDS can distort the corporate form.

In *Getma v. Guinea*, four Claimant companies brought an ICSID claim against the state over its termination of a concession contract to develop and operate a container terminal in the Port of Conkary.[221] The issue was whether the Claimants had waived ICSID jurisdiction. The concession agreement, formally executed between Getma International and Guinea, contained an arbitration clause, selecting the Common Court of Justice (***CCJA***) of the Organization for the Harmonization of Business Law in Africa (***OHADA***). In the Tribunal's view, this clause served to waive ICSID jurisdiction under the Guinean Investment Law (which provided standing consent to arbitrate at ICSID absent a "contrary agreement" to arbitrate elsewhere).[222] Since Getma International had actually signed the contract, its access to ICSID was foreclosed. The issue, for present purposes, was whether the other three claimants, not parties to the contract, were nevertheless constructively bound by the waiver.

The investment was structured through four French companies. NCT Necotrans, the parent, wholly owned the other three. Getma International was the concessionaire, and the other two subsidiaries were responsible for the construction and operation of the terminal.[223]

Formally, only Getma had signed the agreement waiving ICSID arbitration. However, Guinea claimed that the others should be constructively bound on a "group of companies" theory, allowing extending an arbitration agreement with a subsidiary to its non-signatory parent (and other related

[220] Rose, *supra* note 217, 578.
[221] *Getma*, at ¶ 17.
[222] *Id.*, ¶ 97.
[223] *Id.*, ¶ 26. NCT Necotrans was a French *société anonyme* (**SA)** (i.e. a corporation), while the other three were French *sociétés par actions simplifiée* (***SAS***) (i.e. simplified joint-stock companies, most similar to the American LLC). *Id.*, ¶¶ 1–4.

companies) under certain conditions.[224] Functionally, this doctrine should be understood under the rubric of apparent authority – as a means of protecting third-parties who believe they are negotiating with the broader group.[225] Guinea argued that this doctrine applied as a substantive principle of international arbitration, applicable in OHADA.[226] The Claimants denied that any such doctrine applied here, being neither clearly established in many domestic legal orders, nor in ICSID case law,[227] and in any event not apposite on the current set of facts.[228]

Given the parties' views on the matter, one might have expected the Tribunal to deal with three questions to determine the applicable rules of apparent authority here: (1) does the group of companies theory apply? If so, (2) does it bind the non-signatory claimants to Getma's contractual waiver of ICSID jurisdiction? And if not, whether (3) some other rules of apparent authority might bind the non-signatories thereto? Yet, with no explanation, the Tribunal skated past any rules-based analysis, opting instead to resolve the issue through impressionistic balancing.

The Tribunal first carefully examined whether Getma might have had actual authority to bind the other members of the group. The source of some confusion was that the same individuals who served as executives of the subsidiaries also served as executives (or board members) of the parent – meaning that the same individuals might have authority to speak for each entity.[229] The Tribunal rightly held that actual authority would turn on whether those officers were acting on behalf of Getma and/or

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224 The group of companies doctrine is not universally accepted. *See* Sandrock, *supra* note 216, at 629 (noting its acceptance in France and Germany, but not Switzerland or the U.K.). In its most famous formulation, in *Dow Chemical*, the theory turned on (1) a high degree of central control within the group (here absolute control by the parent), (2) the non-signatories playing some significant role "in the conclusion, performance, or termination of the contract," and (3) the "mutual intent of all parties." *Dow Chemical* ICC Award No. 4131, Interim Award of Sept. 23, 1982, YCA 1984, at 131, 136; confirmed by the Paris Court of Appeal in CA Paris, Oct. 21, 1983, *Société Isover-Saint-Gobain v Société Dow Chemical France et al* [1984] Rev. Arb. 98, at 100–101.

225 *See* Sandrock, *supra* note 216, at 639-645. Note that this doctrine is not always formally housed under the rubric of apparent authority, even if that is the best way to understand its function. Notably, U.S. doctrine deals with the problem of corporate groups under the rubric of *alter ego* or veil piercing, rather than apparent authority. *See Fisser v. Int'l Bank*, 282 F.2d 231, 235 (2d Cir. 1960).

226 *Id.*, ¶ 58. Selection of the CCJA means that OHADA law governs the arbitration agreement. OHADA is a West African international organization, which enacts supranational commercial law with direct effect in its seventeen member states. The CCJA is the system's apex court. *See generally* Claire Moore Dickinson, *The OHADA Common Court of Justice and Arbitration: Exogenous Forces Contributing to its Influence*, 79 L. & CONTEMP. PROBS. 63, 65 (2016). Thus, unlike most arbitral institutions, the CCJA is itself an arbitral seat, with its own system of substantive law, including rules on apparent authority.

227 *Getma*, ¶¶ 82-83, *citing CME* ¶ 436 ("a 'company group' theory is not generally accepted in international arbitration").

228 *Getma*, ¶ 82-83.

229 *Id.,* ¶ 154.

the other entities in negotiating and signing the concession agreement. And on close analysis, it was clear that they were only formally acting on behalf of Getma itself.[230]

The more difficult question was whether these companies may yet be bound to the concession under a theory of apparent authority. Obviously, the investors' group structure could create confusion in the negotiating process. So the question was whether some rule of apparent authority entitled Guinea to understand that it was negotiating with the corporate group as a whole. Here the Tribunal opted to resolve things on its own, through muddy *ex post* equitable review. It rejected Guinea's proposed theory of corporate groups out of hand, without reference to any particular applicable law or policy – finding simply that "it is not enough to note that the … applicants all belong to the same corporate group and have common management."[231] Instead, it declared that it would need to "examine their respective roles in the negotiation, conclusion and execution of the Concession Agreement."[232] In its view, "[t]hird parties are obliged to recognize the proper identity of each company, unless the companies themselves do not respect it and create confusion about the subject."[233] Thus, the Tribunal seemed to be looking for something closer to U.S.-style *alter ego*.

The Tribunal emphasized that these companies were not just part of a corporate group, but that each had a defined, constitutive role in the investment project, such that Guinea could have reasonably believed it was negotiating with them all as a group. In this light, it was especially important for the Tribunal that Getma was negotiating through individuals who also served as officers of the other companies – a fact from which claimants should have known that Guinea might derive assurances.[234] Thus it held that the non-signatories were bound by the concession agreement's arbitration clause, thereby waiving ICSID jurisdiction.[235]

Viewed in isolation, the Tribunal's analysis seems reasonable enough. It seemed to reject a broad group of companies doctrine, in favor of a more stringent theory of apparent authority, wherein one member of a corporate group might bind the others without actual authority where: the companies were all active participants in the investment; and their conduct was likely to create substantial confusion about the distinctions among them. This would be a perfectly reasonable approach, closer

[230] *Id.* ¶ 169.
[231] *Id.* ¶ 153.
[232] *Id.*
[233] *Id.* ¶ 159.
[234] *Id.* ¶ 174.
[235] *Id.* ¶ 177.

to the U.S. *alter ego* approach than the French doctrine of *groupes des sociétés*,[236] and this is not the place to debate which would be normatively preferable. The problem is rather that the Tribunal did not ground its approach in any legal rules at all, national or international, or even adequately specify the contours of its approach – in a context where crystalline clarity serves a crucial function of protecting third-parties. Therein lies the distortion.

What is important, with apparent authority, is having clear rules of the game. The corporate form necessitates *some* rules about apparent authority, and these need to be clear, and immutable. Their absence would engender broad perverse incentives for firms to behave opportunistically, and force third-parties to engage in excessive due-diligence. Even mere confusion about the rules drives up the cost of doing business – making crystalline rules far preferable to mud in this context. Though the *Getma* Tribunal came to a reasonable enough *ex post* result, its rough justice approach does little to foster confidence in the content of apparent authority *ex ante*. Under this muddy approach, ISDS thus displaces otherwise applicable national law solutions without offering a reasonably secure alternative. In so doing, the Tribunal's approach distorts the capacity of the firm to serve as a single contracting party, which depends on outsiders having confidence in the rules of engagement. What the Tribunal should have done instead – and future tribunals ought to do – is simply rely on national apparent authority rules, determined on the basis of conflicts of laws analysis.[237] Or, failing that, it should have at least articulated a rules-based approach, on which future tribunals might rely – even given the perennial institutional deficiencies of ISDS.

Getma is only one case, and cannot support firm doctrinal conclusions. Though questions of agency and authority arise in ISDS, and are likely to continue to come up, they have not been directly addressed with much frequency.[238] But even by itself, *Getma* reveals a substantial problem with how IIL and ISDS relate to national agency and authority law, and thereby produces *ex ante* uncertainty over the rules of engagement with firms and their agents in FDI.

3. Distorting the Corporate Form

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[236] *Compare Fisser* (2d cir.) with *Dow Chemicals* (Paris CA).

[237] Under typical conflicts rules, the relevant national law for determining apparent authority would generally be the law of the contract (or, if severable, the law of the arbitration agreement). DICEY & MORRIS; Sandrock *supra* note 216, at 633.

[238] *See also Standard Charter Bank v. Tanzania*, ¶¶ 92-96.

In extending their coverage to enterprises, as well stocks and shares, investment treaties materially create international corporate law. However, they do so only implicitly and vaguely. ISDS has tended to interpret the treaties in ways that displace keystone principles of domestic corporate law, and distort the corporate form. In particular, ISDS undercuts the corporation's separate legal personality, undermining each of its three core features. By upending the domestic bar on SRL suits, ISDS provides an end run around (1) *separate ownership* (by weakening entity shielding and liquidation protection). It further (2) allows shareholders to second guess managerial authority over litigation, watering down the firm's capacity to sue on its own behalf (not to mention delegated management) with efficiency costs for insiders and third-parties. And finally, (3) by muddying the waters on apparent authority, ISDS undercuts the firm's *capacity to contract in its own name*, creating unnecessary due diligence costs for all who engage with firms involved in FDI.

These problems should be taken as demonstrative of the distortive potential of ISDS vis-à-vis national corporate law – not as a comprehensive list. Indeed, examples abound. For just one further illustration, tribunals regularly have to decide under what circumstances it would be appropriate to "look through" a corporation ("veil piercing") – for such different questions as determining corporate nationality,[239] or attributing acts of a state-owned corporation to the host state. Here the reverse problem arises. Rather than ignoring domestic law, tribunals have typically over-emphasized domestic analogies – leaning on an inapposite presumption against veil piercing derived from the very different context of limited shareholder liability, without consideration of the different interests and values at stake across these varied situations.[240]

Lastly, it is worth noting that the distortions of contract and corporate law compound one another. One extreme result has been to render the terms of a bargained-for state contract effectively optional for a foreign investor operating through a business corporation.[241] This perverse result arises because IIL and ISDS simultaneously (1) make treaty rules mandatory, and (2) allow firms to shop for treaty protection *after* executing their contracts (by granting rights of standing to indirect shareholders, so long as they secured the requisite nationality before a dispute arises).[242] As a result, a firm can

239 Arato, *supra* note 4.
240 *Id.*, at 279–283 *See Tokios Tekeles v. Ukraine,* ICSID Case No. ARB/02/18, Dissenting Opinion of President Prosper Weil, ¶ 21 (Apr. 29, 2004) (challenging the majority's unexplained presumption against veil-piercing in the context of nationality shopping, which led the Tribunal to permit Ukrainian nationals to indirectly invoke ISDS against their own State of nationality under the Lithuania—Ukraine BIT, *via* a 99% owned Lithuanian holding company).
241 *Id.*
242 *See, e.g., Philip Morris v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (2015).

contract with a state in the absence of any investment treaty, and *unilaterally* alter the terms of the deal in its favor by restructuring for BIT protection *ex post*.[243] Needless to say this situation creates excessive due diligence costs for states party to even a single investment treaty, as well as significant risks of unfair, surprise constraints on their freedom of action.

At the same time, the mandatory approach to contracts might undercut potential private ordering solutions to ISDS' distortions of the corporate form. Korzun has suggested, for example, that firms might restrict shareholder access to ISDS in corporate charters or bylaws.[244] Firms should be able to do this. But the current *contracts* jurisprudence leaves open to serious doubt whether a Tribunal would give this innovative solution any effect.

D. INTELLECTUAL PROPERTY AS A LIMITED CASE FOR OPTIMISM

Tribunals have tended to fare better in the few cases involving IP claims thus far, with greater sensitivity to the nuances and functions of discrete IP forms. Intellectual property refers to a group of loosely related bundles of intangible rights, concerning ideas.[245] The major forms involve ownership rights over inventions (patent), expressions (copyright), and brand names or signs (trademark). This is not the place to delve deeply into these categories. Suffice it to say that each reflects a bargain between society and innovators: under certain circumstances, the state grants private actors protection for their ideas, with the broad goal of encouraging socially beneficial innovation. Such protections are always limited in scope, and often in duration. They are typically framed around exclusive rights – private monopolies over ideas, allowing owners to challenge other private actors' use of the same or similar ideas for infringement. IP rights typically involve only limited protection against the state as regulator.

Obviously the various IP categories each involve different tradeoffs and values, even in the abstract. For example, patent seeks to incentivize costly research and development by limiting third-party free-riding after the utility (and value) of an invention is established. One obvious trade-off is that such private monopolies may keep prices high for important consumer goods, like medicines. Trademark, by contrast, enables a business to reap and protect the goodwill it generates by preventing

243 *See Aguas del Tunari*, Jurisdiction; *ConocoPhilips*, Jurisdiction.
244 Korzun, *supra* note 8.
245 *See* Ghosh, *supra* note 30.

others from trading off its name – but might make it difficult for new, potentially innovative firms to dislodge established market players. This is not the place to lay out all the various tradeoffs exhaustively. What is important to see is that the IP categories pursue different interests and values, and that in no case is there a clear perfect balance among the relevant trade-offs. Nations unsurprisingly differ widely in what priorities they pursue within their IP regimes.

However, unlike with property and contract, there is a broad field of international IP law, comprised of major multilateral treaties and institutions,[246] and regional agreements. Indeed, most national legal systems have committed internationally to harmonize a common core of patent, copyright, and trademark rights. Still, countries exhibit a great deal of variation in how far they go beyond these minimums and how they interpret them. And some still refrain from signing on to particular IP conventions in the first place.[247]

The cases actually decided thus far have not tended to upend this ecology – neither distorting national nor international IP law, nor, mostly, the balance between them.[248] This does not mean that the investment treaty regime has had no distortive effects for national IP law. It is difficult to know how far the mere threat of ISDS has pushed states to informally distort the regulatory balance in favor of foreigner investors. It is at least clear that some large investors have pursued strategies of intense pressure under the shadow of litigation – sometimes successfully.[249] Still, from a private law perspective, at least those few IP cases that have been decided light the path toward a better approach.

1. The State of the Field: Trademark and Patent

246 Including the WTO-TRIPS, Paris, and Berne Conventions.
247 For example, Iran is not a party to the WTO, and thus not party to the TRIPS agreement.
248 One major exception is that BITs have allowed investors to bootstrap non-justiciable guarantees under various IP treaties into ISDS, as part of the expropriation and/or FET analysis. *See* Gathii & Ho, *supra* note 10; Henning Grosse Ruse-Khan, *Challenging Compliance with International Intellectual Property Norms in Investor-State Arbitration*, 19 J. INT'L ECON. L. 241 (2016).
249 For example, tobacco companies have deployed the threat of ISDS to pressure States to water down tobacco control regulations, often succeeding without the embarking on litigation. Sarah Boseley, *Threats, bullying, lawsuits: tobacco industry's dirty war for the African market*, THE GUARDIAN, July 12, 2017, https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market. As Puig notes, Big Tobacco's ability to wield IIL and ISDS in this way turns at least in part on ambiguity over how far ISDS will inflate (and distort) national IP protection. Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. J. INT'L L. 383, 412 (2016); *see generally* Marc Galanter *The Radiating Effects of Courts*, *in* Empirical Theories about Courts 117, 121 (Keith O. Boyum & Lynn Mater, eds., 1983); Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

Of the handful of ISDS merits-awards based on IP investments that have emerged thus far, the most prominent are *Philip Morris v. Uruguay* and *Eli Lilly v. Canada*.[250] In each case, the Tribunal proved sensitive to the particularities of the IP rights comprising the investment – trademarks and patents, respectively.[251] Rather than treat all covered investments as an undifferentiated pool, both Tribunals started from the sensible assumption that any expropriation or FET analysis would have to begin with an appreciation of the scope and meaning of those rights alleged to have been taken.

Philip Morris v. Uruguay involved a dispute over restrictions on cigarette packaging, which the investor alleged to have vitiated the value of several of its brands – in violation of treaty provisions on expropriation and FET (among others). The investor had registered several trademarks in Uruguay, grouped into several brands (e.g. *Marlboro*, *Casino*, and *Fiesta*), each including several "variants" (e.g. *Marlboro Red*, *Marlboro Gold*, and *Marlboro Fresh Mint*). The dispute arose out of two Uruguayan measures designed to limit tobacco consumption. One limited brand presentation to 20% of any cigarette package (***80/80 regulation***). The other barred companies from sub-dividing brands, to prevent misleading consumers into thinking that some variants posed lower health risks ("Single Presentation Regulation" or ***SPR***) – effectively forcing the investor to choose one variant, and refrain from marketing the others.[252] The clear goal of both measures was to mitigate consumer misinformation about the serious health risks associated with smoking. There was no dispute that trademarks were covered as investments under the BIT. The case turned on whether or not Uruguay had violated the treaty in regulating how the investor used its marks (80/80), and by completely restricting the use of several of its variant marks (SPR).

The Tribunal rightly began by asking exactly what sort of rights trademarks entailed under Uruguayan law. Acknowledging that the governing law of the dispute was the BIT (and other applicable international law), the Tribunal nevertheless explained that the treaty could not be applied in the abstract. Any expropriation or FET claim must start with that which was alleged to have been taken – an investment, the scope and contents of which are determined, in the first cut, by national

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[250] *Philip Morris v. Uruguay*, ¶ 423; *Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, Final Award (2017). A few other trademark claims have emerged thus far, without (yet) being resolved. *See Philip Morris v. Australia* (dismissed on jurisdiction); *Bridgestone v. Panama*, ICSID Case No. ARB/16/34, Request for Arbitration (2016) (claiming denial of justice and discrimination over a ruling by the Supreme Court of Panama, ordering Bridgestone to pay damages for allegedly "reckless" challenges to a locally registered trademark).

[251] The same can be said for other cases which have cursorily considered more tangential IP claims. *See, e.g.*, *AHS v. Niger*, ¶ 154 (Fr.) (dismissing an ancillary trademarks claim for lack of evidence of consumer confusion). *See generally* Ruse-Khan, *supra* note 248.

[252] *Philip Morris v. Uruguay*, ¶¶ 108-132.

law.[253] Thus, for the Tribunal, "[t]he central issue over the trademarks is what rights a registered trademark accords its owner under Uruguayan law."[254] Specifically, the case turned on whether Uruguayan trademarks entailed absolute use rights, or mere exclusive rights. The first would entail a right to use the trademarks in question in any way the investor wished, free from restriction by government or encroachment by others. The latter would entail more limited rights to exclude others from using the marks, or confusingly similar ones, without guaranteeing that the owner would be absolutely free to use the mark herself.

The Claimant attempted to muddy the waters, by arguing that trademarks are a form of property like any other, and that all property owners have the right to use their property under the Uruguayan Constitution.[255] However the Tribunal rightly agreed with the Respondent that Uruguayan law distinguishes between tangible and intellectual property, and that the scope of the investor's rights could only be determined in light of Uruguayan trademark law.[256] Reviewing Uruguay's IP statutes and international IP commitments, the Tribunal held that the trademarks entail no "absolute right to use that can be asserted against the state *qua* regulator."[257] In other words:

> … under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power.[258]

The question, then, was whether Uruguay's regulatory measures expropriated, or otherwise interfered with, the investor's exclusive rights. The Tribunal found that neither constituted an expropriation, which would require a substantial deprivation of the asset. The 80/80 measure did not deprive the investor of its marks at all (merely limiting their size). The SPR measure was more difficult, because it prevented Philip Morris from using some of its trademarks entirely (by forcing it to pick one variant per brand, and let any other trademarked variants lie fallow). However the Tribunal refused to take the trademarks one by one, instead finding that they comprised a single investment for

[253] *Id.*, ¶ 177.
[254] *Id.*, ¶ 255.
[255] *Id.*, ¶ 208.
[256] *Id.*, ¶ 266.
[257] *Id.*, ¶ 267.
[258] *Id.*, ¶ 271, and 256-266.

purposes of expropriation analysis, and that there had been no substantial deprivation of that investment taken as a whole.[259]

Moreover, the Tribunal found that there was no violation of FET. In its view, the state was entitled to "great deference" in FET claims where regulating matters like public health in good faith. Again emphasizing that the investors' rights were limited to exclusion, not use, it found that the measures were not sufficiently egregious as to breach the treaty:[260]

> Changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the [FET] standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change.[261]

In other words, the investor could not draw, from general Uruguayan trademark law, a legitimate expectation that its trademarks would not be subject to future regulation – though, notably, as in *Parkerings*, it could have ratcheted up the level of treaty protection by contract.[262]

From a private law view, then, *Philip Morris v. Uruguay* admirably keeps property, IP, and contract separate – despite their undifferentiated inclusion under the treaty definition of investment. For the Tribunal, the extension of treaty standards to IP rights turns on the content of those rights under national law, and must not be confused with other national property forms. And should an investor wish for heightened protections, she is free to bargain with the state, e.g. for a contractual stabilization clause.

From this perspective, the Award in *Eli Lilly v. Canada* is similarly encouraging. At issue here was the Canadian Courts' invalidation of two of the Claimant's patents for medications. The Courts voided the patents on the basis of a common law "promise utility doctrine."[263] Canadian patent law, like most laws of patent, requires that any patent be both novel and useful. The promise utility doctrine represented a relatively restrictive version of the latter prong, requiring that any invention actually turn out to have the utility that the filer claimed it would – foreclosing owners from developing post-filing

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[259] *Id.*, ¶¶ 280-284.
[260] *Id.*, ¶¶ 409-410.
[261] *Id.*, ¶ 423.
[262] *Id.*, ¶ 481.
[263] *Eli Lilly v. Canada*, ¶ 5.

evidence of utility, and/or finding new potential uses for the invention to justify the patent later on. The Claimant alleged that the promise utility doctrine was a new invention by the Courts, radically departing from the much more lenient regime in force when the patents were actually filed. Eli Lilly thus claimed that the retroactive application of this doctrine to invalidate its patents constituted an expropriation and a breach of legitimate expectations.[264]

The Tribunal sided with Canada on most fronts, mostly limiting its discussion to dismissing the "factual predicate" of the investor's case: that the promise utility doctrine really represented a radical transformation of Canadian common law.[265] Most importantly, for present purposes, the Tribunal focused on the meaning of the Claimant's rights under national law, and considered any expectations to which these patents might give rise only in the context of the IP regime under which they were actually granted. Noting that Canada is a common law system, the Tribunal emphasized that "evolution of the law through court decisions is natural, and departures from precedent are to be expected,"[266] and that "although the Claimant may not have been able to predict the precise trajectory of the law on utility, it should have, and could have, anticipated that the law would change over time as a function of judicial decision-making."[267] In any case, the Tribunal found that the promise utility doctrine emerged incrementally, with roots predating the Claimant's patents, thus upending the factual premise on which the Claimant hung its hat.[268]

Finally, timing aside, the Tribunal examined whether the Canadian patent doctrine could be described as arbitrary on its face. Stressing that the measures in question were judicial rulings, the Tribunal deferred mightily to both the Courts' interpretations of their own domestic law and their policy considerations, applying a highly deferential "rational connection" test.[269] It found that Canada had a "legitimate public policy justification" for the promise utility doctrine, in that it "helps ensure that 'the public receives its end of the patent bargain' … and that it 'encourages accuracy while discouraging overstatement in patent disclosures.'[270] The Tribunal found that it "need not opine on whether the promise doctrine is the only, or the best, means of achieving these objectives." In its view,

264 *Id.*
265 *Id.* ¶ 351.
266 *Id.* ¶ 310.
267 *Id.* ¶ 384.
268 *Id.* ¶ 386.
269 *Id.* ¶ 423.
270 *Id.* ¶ 423.

it sufficed that the "doctrine is rationally connected to these legitimate policy goals… [and] it is not the role of a NAFTA Chapter Eleven tribunal to question the policy choices of a NAFTA Party."[271]

In both of the major IP cases thus far, the Tribunals have proven uncommonly sensitive to domestic private law. From a private law perspective, these cases provide a model for engaging with the varied rights and assets covered by investment treaties. In both *Philip Morris* and *Eli Lilly*, the Tribunals' analyses started from an appreciation of the rights comprising the investment, in their proper national legal context. Both Tribunals proved highly sensitive to the discrete functions and logic of IP protection, as against other kinds of assets. And each proved admirably deferential to the states' own policy choices undergirding their IP regimes. In both instances, then, ISDS served as an additional procedural layer of protection for the investor's IP rights, without meaningfully distorting national (or international) IP law.

2. IP Is Not Special

There is nothing about IP law that insulates it from the distortive effects marking ISDS jurisprudence on contracts or corporate law. One can of course speculate about the greater sensitivity to national private law in *Philip Morris* and *Eli Lilly*. True, the situation of IP is different from that of property, contract, and corporations in international law. Arguably the existence of a robust field of international IP law played an important role, allowing the Tribunal to "check" domestic IP solutions against what might have appeared more neutral international comparators. It is certainly plausible that these Tribunals were more comfortable relying on domestic law to determine the scope of the rights involved where the domestic laws in question comport, more or less closely, with international standards. But just as plausibly, one might explain the cases by highlighting their recent vintage, their exceptionally high profile, or the particular arbitrators involved.[272] Also potentially relevant is the long-standing political salience of disputes over the scope of IP protection in international law and politics.[273] It may also be that tribunals are more comfortable with the rigid logic of standardization pervading IP, like classical property – by contrast to the contract and corporate law, which belong, to

[271] *Eli Lilly*, ¶¶ 423-426, and ¶ 425 ("All patent regimes must determine the line between speculation and invention … there is no perfect place to draw the line.").
[272] For example, the James Crawford, one of the very few nuanced voices on the treaty/contract problem, also served on the Tribunal in *Philip Morris*.
[273] *See, e.g.* STIGLITZ, *supra* note 13, 40-43.

varying degrees, to the world of choice. It must finally be noted that the parties to each of these disputes framed the cases around the contours of the domestic IP rights in question.

All this is of course speculative. What is important to see is that, whatever the explanation, the greater sensitivity of ISDS to the logic and functions of IP is highly contingent. The IP cases give some cause for cautious optimism. More importantly, they provide a roadmap for how tribunals ought to approach all kinds of private legal rights. But, given the diffuse nature of the ISDS regime, the structural risk of distortion remains – both in future cases, and informally, through investor pressure under the shadow of litigation.[274] Though a handful of cases have come out the right way, it behooves states to consider addressing the specificity of IP at the treaty level.

CONCLUSION: PRIVATE LAW AND REFORM

From a private law perspective, IIL and ISDS have become unjustifiable and unsustainable. I have argued that, from this point of view, investment treaties have quietly established broad fields of international private law – including discrete laws of property, contract, corporations, and IP. This metamorphosis has taken place through a troubling dynamic in the interpretation of thousands of similarly drafted BITs and FTA investment chapters. The treaties typically cover all kinds of private commercial rights as "assets," without differentiating as to how their substantive and procedural guarantees interact with such varied legal arrangements. Called to interpret the relationship between treaty rights and these myriad commercial assets, ISDS tribunals have mostly followed a one-size-fits-all model, reflecting an assumed real property logic – even though this logic makes little sense as applied to non-property assets. As a result, IIL and ISDS have together generated rudimentary, but surprisingly broad swathes of international private law – disciplining domestic policy space in underappreciated ways, and distorting the logic and functions of whole fields of domestic private law in relation to foreign investors. Not only do these distortions create unfair *ex post* constraints and surprise costs for states seeking to regulate in the public interest (the typical public law complaint); they also make investment more difficult, costly, and unappealing for all parties *ex ante*.

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[274] *See* Galanter, *supra* note 249, at 455 ("The principal contribution of courts to dispute resolution is the provision of a background of norms and procedures, against which negotiations and regulation in both private and governmental settings takes place … [including] communication to prospective litigants of what might transpire if one of them sought a judicial resolution"); Puig *supra* note 249, at 412 (hinting at how tobacco companies use ISDS in this way).

The most significant distortions have arisen thus far in the context of contracts and corporate law. ISDS tribunals have tended to blur the logics of contract and property, limiting states' and investors' capacity to bargain *ex ante* for terms they prefer – and instead mandating highly investor-friendly terms which are unlikely to prove efficient under all circumstances. At the same time, tribunals have prevented states from regulating choice where they deem it appropriate in the interest of extrinsic values (like policing public corruption). In so doing, ISDS has turned contract law on its head, undercutting its empowering, gap-filling, and regulatory functions. True, a few tribunals have exhibited a greater appreciation for the logic of contract. But given the institutional fragmentation of the investment treaty regime, even uncertainty over the prospective effects of contractual choices creates substantial inefficiencies for bargaining *ex ante*.

Similarly the case-law has tended to distort the logic and functions of corporate law. By permitting shareholders to directly sue host states for reflective loss, ISDS perforates the firm's separate legal personality, undercutting the expectations of all corporate constituencies (management, shareholders, creditors, and governments). All this affects the cost and availability of credit for FDI projects, and creates more long-term uncertainty than it cures. It further diminishes managerial authority over fundamental questions of litigation and settlement. IIL and ISDS have also proven capable of muddying rules of agency and authority, creating substantial uncertainty over who speaks for the firm in a cross-border context, and muddying the firm's ability to transact in its own name. This generates uncertainty for states contracting with foreign firms, as well as investors contracting with state-owned entities. All these distortions undercut core features of the corporate form, diminishing the corporation's signal value as an efficient vehicle for coordinating capital in the context of FDI. And similar concerns can arise for other forms of business organization.

Happily, the cases have not tended to distort real property and IP. Yet there is little reason to assume these regimes will remain insulated from the kinds of problems of differentiation and fit marking the jurisprudence on contracts and corporations. Particularly in the case of IP, there is reason to worry that the few landmark cases decided thus far may prove outliers, akin to the handful of better reasoned decisions grappling with contracts or corporations. And even now, investors can and do exploit the vagaries of the limited IP jurisprudence to informally inflate their IP rights beyond what is purportedly afforded in national law. The shadow of ISDS litigation is long indeed.

From a private law perspective, then, it appears that ISDS case-law has tended to undermine the very values of predictability, stability, and investment promotion that investment treaties are designed to secure – ballooning transaction costs for all parties *ex ante* for no good reason. Even on the most optimistic assumptions about market rationality and information available to states and investors, the trade-offs posed by prevailing interpretations of investment treaties produce perverse results. If adequately understood and priced in by all concerned parties, these distortions are likely to raise the cost of doing business for states and investors *ex ante* – particularly to the extent that they cannot be bargained around. And on more realistic assumptions about the (bounded) rationality of these actors, the regime is all the more problematic – likely to impose one-sided surprise costs on host states *ex post*.

The private law critique thus calls attention to myriad problems with the investment treaty regime that the public law approach has generally missed, and even tends to obscure. Moreover, this frame further shows that many of these problems are lose-lose – affecting not only host states (the primary locus of concern for the public lawyers), but also investors, home states, and third-parties (like corporate creditors, and non-litigious shareholders). From this vantage point, IIL and ISDS do not only undercut equitable distribution and fairness for states. Counterintuitively, they also undercut IIL's own prime values – legal predictability and stability, in the service of promoting efficient FDI.

Given all this, it remains to consider whether states are doing anything to reform the private dimensions of the regime, and, if not, to begin thinking about what might be done. As noted at the outset, IIL is at an inflection point, with states of all stripes invested in a wide range of reform projects. Yet, while important, the major ongoing projects of reform have mostly missed the kinds of private law pathologies identified here. For reasons of space, I defer systematically assessing the current reform efforts to a follow-on empirical work. Suffice it to note that, by hypothesis, a good part of the problem appears to be that the reform project is typically framed in public law terms, by both scholars and key reform-minded government actors[275] – a problem the present critique seeks to redress.

This one-sided public law approach is particularly evident in the unilateral and bilateral efforts toward reforming substantive investment treaty norms since 2010, where the focus has been on including general exceptions provisions or limiting the ambit of particular substantive treaty standards. Though such reforms can alleviate ISDS' sting, they do little to differentiate between the various species of covered rights and assets, or to cure IIL's distortion of national private law.

Still, there have been some small-scale signs for optimism in recent treaty practice, indicating that some states are beginning to recognize the private dimensions and pathologies of IIL – at least

[275] *See, e.g.* EU ISDS Proposal, *supra* note 27.

on a piecemeal basis. A few recent treaties have enacted differentiated rules for how substantive treaty standards apply to particular types of investment. For example, the Japanese and Canadian BITs generally set special rules for IP claims, clarifying, *inter alia*, that they do not expand substantive IP protection beyond the bargain reached in the WTO TRIPS.[276] Similarly, a handful of treaties incorporate special rules for some state contracts under the rubric of "investment agreements," adding greater clarity about the relationship between national and international law.[277] And a few recent treaties have hesitantly sought to limit the scope of indirect shareholder claims, by introducing minimal equity requirements.[278] Though these reforms rarely go far toward redressing the problems identified here, they at least hint at their growing salience.

States could go much further, through relatively simple treaty design solutions. For example, with respect to the logic of contract, states could explicitly indicate that investors and states are free to contract around substantive and/or procedural treaty terms. As noted above, the CISG does exactly this for sales contracts, with a single concise sentence.[279] States might also demarcate certain norms as expressly mandatory, or even as sticky defaults with specific rules on how to make opt-out effective. Any express language in this regard would be a substantial boon from the perspective of predictability and efficiency, for both states and investors. Similarly, states might include relatively simple provisions to eliminate or defang the perverse consequences of SRL claims – for example by requiring that all recovery go presumptively to the firm (not the shareholder). And with respect to IP and classical property, drafters might take a page from the IP cases to clarify that the scope of such rights turns, primarily, on national law. These examples are just illustrative of the range of drafting possibilities available.

Treaty reform of this sort is difficult to accomplish, due to the sheer number of treaties involved. But given the structural weakness of ISDS as a jurisprudential system, treaty design is likely

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276 *See, e.g.*, Japan—Kazakhstan Art. 21(1) ("Nothing in this Agreement shall be construed so as to derogate from the rights and obligations under multilateral agreements in respect of protection of intellectual property rights to which the Contracting Parties are parties"); Canada—China BIT, Art. 8(4) (2014), and Canada—Cote D'Ivoire BIT 16(5) (2015) (carving out MFN, NT, and Performance Requirement claims for actions permitted by the TRIPS or other international IP agreements).

277 Draft TPP Art. 9.25.2(b)(i) & fn. 35, *available at* http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng (providing that investment agreements are governed by the law of the contract, or, by default, the law of the Respondent, including in relation to damages, mitigation, interest, and estoppel (though supplemented by any applicable international law) (suspended by the supervening CPTPP).

278 *See, e.g.*, Turkey—Azerbaijan BIT, Art. 1 (2011) (excluding coverage for shareholdings under 10%).

279 *See* CISG, Art. 6.

to be a more fruitful and lasting strategy than waiting for tribunals to start getting it right. Given adequate substantive treaty reforms, IIL might serve as a complement to domestic private law, rather than a distortive interloper.

Though a heavier political lift, the broader multilateral efforts at reforming ISDS also give cause for optimism, and provide a rare window of opportunity. Here too, the efforts at UNCITRAL and elsewhere have tended to be cast in public law terms, with nary a mention of the trade-offs between ISDS and domestic private law. Yet some of these projects may nevertheless ameliorate the latter concerns. For example, a systematic multilateral investment court (or appellate mechanism) could mitigate the scourge of uncertainty over the treaty/contract relationship. Depending on design choices, it might also remove incentives for investors to bring parallel shareholder claims (through strong provisions on *res judicata*, *lis pendens*, and mandatory joinder).[280] In this sense, the investment court project might prove highly desirable from a private law perspective, even though it is rarely justified in those terms.[281] However, institutional reform is not a panacea, and could perversely lead to entrenching the distortions of the current jurisprudence instead of removing them – i.e. by endorsing an inefficiently rigid approach to the treaty/contract question, or endorsing SRL claims. Important as they are, institutional and procedural reforms must be accompanied by substantive treaty reform (bilateral or multilateral).

All this is to say that the private law frame reveals substantial pathologies in the investment treaty jurisprudence. IIL distorts domestic private law policy space, as much or more than it undercuts the state's general regulatory autonomy. These problems need to be addressed – not just by litigants and arbitrators, but, much more importantly, by states themselves in designing the next wave of investment treaties. This does not mean that the solutions are necessarily to be found in analogies to domestic private law *as opposed* to public law, as a magic key to unlocking IIL's optimal tradeoffs. The point is rather that these heuristics are most useful in what they reveal; not in what they prescribe. What is needed, then, is a project of treaty reform sensitive to the pathologies of IIL vis-à-vis both public and private law – a project for which this critique simply lays the groundwork.

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280 *See* Puig & Shaffer, *supra* note 17.
281 *See* Alvarez, *supra* note 14.