Note

Still the Law of Nations: Legitimate Expectations and the Sovereignist Turn in International Investment Law

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INTRODUCTION

In the late twentieth century, States around the world struck a Faustian bargain. They concluded thousands of treaties among themselves, empowering private arbitrators to hear disputes between States and foreign investors. States surrendered some measure of sovereignty in order to assure investors that their governments would not have the last word regarding the treatment of foreign investments. Disputes that were once waged among States are now routinely brought before investor-State arbitral tribunals. Chief Justice John Roberts of the United States Supreme Court observed that in consenting to investor-State dispute settlement (ISDS), a State “grants to private adjudicators not necessarily of its own choosing... a power it typically reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts.”

The work of investment tribunals is sometimes compared to judicial review; both require decision-makers to adjudicate the lawfulness of government measures that affect the rights of private actors. However, ISDS finds private persons in a fundamentally different place than does judicial review: investors are not tied to a legal community in the same way that citizens are. The investor’s decision to invest is typically a sophisticated business decision that turns on the host State’s credible commitment. Investors are therefore not as reliant upon the protective sheath of a judicial review-like process for their rights, particularly if they have a credible threat of exit. For this reason, investment treaties are neither bills of rights nor insurance policies.

Yet, tribunals persistently draw upon the disciplinary, value-neutral register of pacta sunt servanda and economic stability when they protect investors’ expectations of regulatory stability. Certainty about the content of treatment obligations contributes to inflows of capital and promotes economic development. Or so the theory goes. Nevertheless, there remains the widespread belief that ISDS has an investor-friendly valence and that arbitrators consistently resolve interpretive ambiguities against the interests of the very States that confer authority upon them.

This Note heralds a sovereigntist turn in international investment law. Its point of departure is the “fair and equitable treatment” (FET) standard and the controversial gloss that has been applied upon it by the doctrine of legitimate expectations, which supposedly protects an investor’s expectations against the host State’s infelicities. States are understandably discontented with the excesses of the legitimate expectations doctrine. Their efforts to take back the reins by rewriting the “legislation” of the international investment regime reflect a struggle over the telos of ISDS and the role of States within it. The present reform

3. Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000).
moment seeks a return to the sovereigntist roots of investment law. To hasten that return, this Note looks to a method already familiar to international law: binding joint interpretations. It argues that, in comparison to approaches such as volitional self-restraint by arbitrators and treaty redesign, binding joint interpretations are a way for States parties to collectively control the interpretation of their treaties at all times, not just at times of treaty formation or formal amendment.

Part I describes the origin and legal architecture of ISDS. In particular, it examines the legal status of investors as rights-holders in international law and disambiguates the so-called “right to regulate,” a concept cloaked in mystery. Part II ventures into the interpretive morass surrounding the legitimate expectations doctrine and casts light upon its excesses. Part III evaluates current efforts to respond to the legitimate expectations doctrine. Arbitrators have sought to discipline their interpretations using public law standards of review. Several discontented States have exited the ISDS system altogether. Other States, meanwhile, have made quasi-legislative reforms to their investment treaties. Part IV develops this Note’s “sovereigntist fix” to reclaim a proper role for States in the balance of interpretive authority. It shows that there is tried-and-tested potential in binding joint interpretations established among States parties to limit discretion available to arbitral tribunals.

I. THE ORIGINS AND ENDS OF INVESTOR-STATE DISPUTE SETTLEMENT

A. Why Did States Sign Investment Treaties?

The story of ISDS must begin by explaining the following counterintuitive trend: why did so many States sign investment treaties with ISDS provisions in the late twentieth century, constraining their own sovereignty by delegating authority to arbitral tribunals?

The rational choice explanation characterizes self-constraint as a solution to a time-inconsistency problem. After foreign investors make sticky, capital-intensive investment arrangements, host States subsequently have limited self-disciplinary incentives without the credible threat of externally-imposed punishment. ISDS creates a credible threat by providing a means of recourse to foreign investors for pursuing substantive and procedural causes of action against host States. In this account, self-constraint by delegation of dispute resolution authority to third-party arbitrators serves as a rational response, a means of signaling credible commitment to attract potential foreign investors.

As always, a historically sensitive explanation grounded in political economy adds much-needed texture to the ahistorical rational choice story. There is considerable evidence that investment treaties were signed by many developing countries without a clear-eyed appreciation of consequences for their regulatory autonomy and exposure to potential future liability. Lauge Poulsen explains this phenomenon using a model of “bounded rationality” that led States to underestimate the risk of liability for breaching investment treaty provisions.5

5. LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY:
The proliferation of investment treaties also coincided with efforts by capital-exporting States to encourage their capitalists to invest abroad by insuring them against risks of adverse treatment. Treatment guarantees such as FET were thought to be instrumental in securing the buy-in of potential foreign investors. Following on the heels of early German bilateral investment treaties (BITs) signed starting in 1959, many other capital-exporting States began their own BIT programs in the 1960s and 1970s. Between then and the close of the twentieth century, spurred on by the orthodoxy of capital and current account liberalization, thousands of BITs were concluded with hasty deliberations and almost identically-worded treaty provisions (at a rate of almost three new treaties per week in the 1990s).6 These treaties were practically facsimiles of each other, containing broad, unqualified substantive protections for investors. Most treaties presently in force were concluded during this wave.

These two explanations have one very important characteristic in common: they both acknowledge the fundamentally sovereigntist character of ISDS. The regime was never founded with the intention of creating a general charter of investors’ rights. Yet, reading between the lines of today’s arbitral jurisprudence, one gets the distinct sense that the rights of host States and investors are counterpoised in some imagined symmetrical relationship. Any account of rights-holding in international investment law must address our unease with thinking about States and investors as rights-holders of the same kind.

B. Pacta in Favorem Tertii and the “Right to Regulate”

Investment treaties were created by States, but the jury remains out on whether treaties are for States. In other words, are investment treaties pacta in favorem tertii (treaties concluded in favor of third parties)?7 An important premise of this Note is that investment treaties are instruments of public international law that turn investors into rights-holders purposively and contingently under the theory that juridifying investors’ rights and protecting their pocketbooks will buoy the economic well-being of the host State.8 ISDS was conceived to meet the sovereigntist end of encouraging foreign investment,9 but it could only do so by turning investors into a class of rights-holders.10

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7. See, for example, the position adopted by W. Michael Reisman in the arbitration between Ecuador and the United States. Republic of Ecuador v. United States, Case No. 2012-5, Opinion with Respect to Jurisdiction in the Interstate Arbitration Initiated by Ecuador Against the United States, ¶ 3(a), (Apr. 24, 2012) (arguing that investment treaties are “a species of treaties for the benefit of third parties”) [hereinafter Reisman Ecuador-U.S. Expert Opinion].
8. This instrumentalist characterization sometimes implicitly appears in the reasoning of investment tribunals. See, e.g., Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 23 (Sept. 25, 1983), 23 I.L.M. 351, 369 (1984) (“To protect investments is to protect the general interest of development and of developing countries.”).
10. Traditional international law does not have a well-developed grammar of rights and duties
Investors might therefore be compared to third-party beneficiaries in contract law, who enjoy more narrowly-circumscribed rights than do States parties to investment treaties. Unlike human rights treaties—standard examples of *pacta in favorem tertii*—that “treatify” rights believed to inhere in human beings, foreign investors do not have freestanding entitlements to the rights created by investment treaties. In the event of a conflict, the interests and sovereign prerogatives of States should take precedence over the third-party beneficiary rights created by investment treaties. Doing otherwise would conflate the means of investment law—vesting rights in investors—with its sovereigntist ends. These issues, far from being theoretical abstractions, are deeply implicated in efforts to reform ISDS.

There is no doubt, of course, that a sovereign State has some inalienable right to regulate. The rights of investors are more contingent, an artifact of economic expediency. But as States rush headlong to vindicate their regulatory competence through treaty reform, it becomes important to clarify: exactly what kind of legal entitlement is the right to regulate?

There is a centrifugal bent to these discussions: that is, commentators insist on describing alternative conceptions of the right to regulate. One common move, seen in the public law doctrine of “margin of appreciation,” is to imagine that States have some finite amount of regulatory space, leaving ambiguous how much “space” States are entitled to. Another popular trope is zero-sum balancing between the investors’ rights and the host State’s right to regulate. Proportionality analysis, a source of confusion among tribunals and commentators, invokes a balancing act of this kind.

The concept of regulatory space and the balancing metaphor are not incompatible; they merely capture two different legal relations often subsumed under the right to regulate. If it makes sense at all to describe States’ regulatory competences as rights in the formal sense, such rights inhere in the State’s sovereignty. The legal fiction of a circumscribed right to regulate captures the State’s effort to solve a time-inconsistency problem through credible commitment and costly signaling; in other words, it juridisifies an economic relationship between investors and States by giving it legal form. Indeed, as Part II shows, even tribunals that recognize an expansive version of the legitimate expectations doctrine might gesture at a putative “right to regulate” before promptly restricting it in the name of the investor’s expectations.

when describing legal relations between States and non-State actors. Older debates, which fixated on whether investors were “subjects” of international law, have become obsolete; international lawyers and jurists now agree that corporate investors have a “limited international legal personality.” ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 79 (2006).


C. Towards a Sovereigntist Turn in International Investment Law

Anthea Roberts has observed that arbitral jurisprudence "frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or treaty parties in particular."\(^\text{13}\) For some observers, investment law’s alienation from its sovereigntist origins is reason enough for a course correction.\(^\text{14}\) By contrast, several scholars and seasoned arbitrators have objected that even if international investment law has become preoccupied with investors’ rights and expectations to the perceived exclusion of the concerns of respondent States, on balance, robust investor protections represent an economic boon for host States by increasing the supply of foreign investment and lowering the costs of credible commitment.\(^\text{15}\)

This Note’s normative commitment to dismantling the house of cards so as to reclaim the primacy of States in the architecture of investment law is based on three further considerations that sometimes get lost in debates over the proper role of the State. First, in puzzling at how to effectuate a sovereigntist turn, this Note recognizes the practical reality that, as detailed in Part III, a groundswell of sovereigntist responses to jurisprudential developments in investment law is already under way and that academic efforts would be more productively directed towards addressing how best to channel discontent into tractable reforms aimed at recentralizing State authority. Second, the intuition that robust protections for foreign investors are conducive to increased foreign investment and economic development does not obviously counsel against returning to investment law’s sovereigntist origins. To begin with, empirical studies of the argument that States attract investment by including self-constraining substantive provisions in investment treaties paint a mixed picture.\(^\text{16}\) It is dubious that recalibrating investment treaty commitments will eviscerate foreign investment into any given State, particularly when many other States are undertaking similar reforms. Such economic arguments also often elide political value judgments, which assume that States are in the best place to adjudicate for...

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14. See M. Sornarajah, The International Law on Foreign Investment 110-70 (4th ed. 2017) (arguing that control over foreign investment is a “right that flows from sovereignty” and, therefore, that States have inherent authority to take measures in the public interest notwithstanding investment treaty commitments); Andreas Kulick, Reassertion of Control: An Introduction, in Reassertion of Control over the Investment Treaty Regime (Andreas Kulick ed., 2017) (documenting both the sidelong of public interest issues in comparison to investor rights and growing efforts to correct that disparity); Detlev Vagts, Introduction to The Backlash Against Investment Arbitration: Perceptions and Reality xxxvii-li (Michael Waibel et al. eds., 2010) (describing criticism against investment law’s perceived biases in favor of business interests and capital-exporting States and proposals for potential reform).
themselves; it is not obvious that every State would elect to maximize foreign investment at the expense of being hamstrung in exercising regulatory autonomy or in meeting their public interest objectives. Finally, there is no reason to insist upon a one-size-fits-all approach. States with different political commitments and appetites for foreign investment should have the wherewithal to calibrate (and importantly, to recalibrate) their investment treaties to reflect mutually agreed upon compromises between reserving room for maneuver and signaling credible commitment. The binding joint interpretations described in Part IV are a promising but presently under-utilized way in which States may be able to do so.

II. LEGITIMATE EXPECTATIONS: AN INTERPRETIVE MORASS

Investment treaties are “maddeningly imprecise” and replete with open-textured provisions that can sustain a wide range of understandings. Tribunals reinvent the wheel all the time. The concerns motivating this Note and the “sovereigntist fix” it develops are not particular to the legitimate expectations doctrine. Yet the excesses of the doctrine provide arguably the most important case study in arbitral jurisprudence. This is because it has become de rigueur for tribunals to inquire into whether the actions of host States might have frustrated the legitimate expectations of investors when adjudicating the host State’s compliance with obligations to accord FET, which is litigated in the overwhelming majority of investment treaty disputes. Venturing into the thicket of legitimate expectations, one finds that the contours of doctrine reveal themselves to be constraints upon the host State’s sovereignty at the outer limits of the FET obligation.

A. Fair and Equitable Treatment and the Provenance of Legitimate Expectations

1. Fair and Equitable Treatment

There is considerable disagreement over what the simple-seeming obligation to accord “fair and equitable treatment” means. If modern investment law has turned the investor into a rights-holder entitled to some level


of protection at the hands of the host State, FET is the textual wellspring from which many of those rights flow. Andrew Blandford's prehistory of contemporary FET jurisprudence describes a centuries-long gestation through which the bedrock principles of "justice and equity" asserted by Emer de Vattel and other progenitors of public international law developed into early twentieth-century characterizations of the so-called international minimum standard (IMS) of treatment for aliens.21 The 1926 award of the US-Mexican Claims Commission in Neer v. Mexico is the canonical expression of the IMS: "[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

Since the postwar period, treatment standards such as IMS or FET have been ubiquitous in international economic law.22 FET is the most important lens through which to follow the unfolding story of international investment law.24 First, FET is a mainstay of this body of law; almost every investment treaty contains an FET provision.25 It is therefore described as the "most important standard"26 or "grundnorm"27 in the investment treaty system. Second, facially similar FET clauses have been given an enormous range of interpretations.28 These two factors are related: as increasing numbers of tribunals have differently interpreted this ubiquitous clause, the interpretive haze surrounding it has thickened.29 Third, precisely because FET is an elastic, open-textured standard, "it is the most often invoked treaty standard in [ISDS], present in almost every single claim brought by foreign investors against host States."30 Finally, the future of FET jurisprudence is cloaked in uncertainty.

24. See DOLZER & SCHREUER, supra note 18, at 130; SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 294 (2009); UNCTAD, Fair and Equitable Treatment, supra note 20, at 1.
29. Christopher Campbell, House of Cards: The Relevance of Legitimate Expectations Under Fair and Equitable Treatment Provisions in Investment Treaty Law, 30 J. INT'L ARB. 361, 364 (2016) ("[FET] has become the twenty-first century’s version of John Selden’s equity . . . varying according to the size of the Chancellor’s foot.").
Arbitral tribunals “routinely take into account and balance public interests, even in sensitive policy areas once thought to be inarbitrable . . . through dynamic construction of [FET],” which has become “the doctrinal site of recurrent skirmishes in an intensifying war of authority between arbitrators and states.”

### 2. Legitimate Expectations

The legitimate expectations doctrine is a legal transplant with public law origins in English administrative law. In public law, due process considerations justify giving legal force to some subset of private actors’ “legitimate” expectations with respect to governmental conduct, such as ensuring consistent, non-discriminatory application of law or enforcing representations that are made with sufficient specificity to justify reliance. As applied to investment law, the doctrine has now been understood to create protections for foreign investors’ substantive expectations (the right to a particular legal framework’s stability) as well as their procedural expectations (the right to a particular kind of State conduct in legislation or regulation). However, the transplantation of legitimate expectations doctrine into investment law appears to be both thinly rationalized and poorly adapted to the different relationship between States and subjects (investors), as compared to public law.

There are two jurisprudential problems within the legitimate expectations doctrine that must be untangled. The first is that at its outer limits, the doctrine goes too far when tribunals misconstrue “legitimate expectations” to read a make-believe stabilization clause guaranteeing “a stable legal and business environment” into FET provisions. As the remainder of this Section explains, this misunderstanding has been endemic to the legitimate expectations doctrine since its very origins. The second is the problem of interpretive drift, which is taken up in Section II.B. The legitimate expectations doctrine has strayed and frayed over time. The doctrine, as it stands today, is the haphazard result of strategic moves, linguistic ambiguity, misapprehensions about the nature of the

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34. See LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/01, Decision on Liability, ¶¶ 124-25 (Oct. 3, 2006) [hereinafter LG&E Decision] (containing nearly identical language); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005) [hereinafter CMS Gas Award]; see also Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000) [hereinafter Metalclad Award]; Occidental Exploration & Production Co. v. Republic of Ecuador, Final Award, ¶¶ 183-96 (UNCITRAL Arb. Trib. July 1, 2004).
35. By using the term “interpretive drift,” this Note does not suggest that the legitimate expectations doctrine started in one place and ended up in another. Other terms, such as “interpretive dispersion” might capture other aspects of the problem. When interpretations drift away from what was originally intended by States parties, States can more readily pick up on interpretive trends and act to clarify their original intent, as proposed in Part IV. Interpretive dispersion is more challenging to detect and respond to. The legitimate expectations doctrine has been shaped by both kinds of effects.
State in its capacity as a disputant, and the political preferences of particular arbitrators. Even after attempts by several tribunals to rein in interpretive drift, there remain outliers to be washed out.

The legitimate expectations doctrine arguably took root in *Tecmed v. Mexico.* The *Tecmed* award held that FET required "treatment that does not affect the basic expectations that were taken into account by the foreign investor . . . [who] expects the host State to act in a consistent manner . . . ." It rooted this understanding in "the *bona fide* principle recognized in international law," stretching and upending prevailing understandings of good faith by giving legal effect to investors' expectations. In a sharp and succinct critique, the *MTD v. Chile* Annulment Committee questioned *Tecmed's* account of State obligations derived from investors' expectations, suggesting that stepping outside the agreed-upon treaty-based obligations may be grounds for annulment for manifest excess of powers. As James Crawford has written: "[T]he doctrine of legitimate expectations should not be used as a substitute for the actual arrangement, agreed between the parties, or as a supervening and overriding source of the applicable law."*40*

*Tecmed's* attenuated reasoning has been no deterrent to tribunals that have adopted its standard. In his widely-cited separate opinion in *International Thunderbird Gaming Corp. v. United Mexican States,* Thomas Walde traced the "significant growth in the role and scope of the legitimate expectation principle, from . . . a subsidiary interpretative principle . . . [to] a self-standing subcategory and independent basis for a [FET] claim."*41* Wälde acknowledged that tribunals in early cases such as *Metalclad Corp. v. United Mexican States,* *Tecmed,* *Occidental Exploration & Production Co. v. Republic of Ecuador,* and *Waste Management II,* and *MTD* "may not have explained the doctrinal background of the principle, its scope and contours specifically."*44* Indeed, each award's discussion of the legitimate expectations doctrine relies on *Tecmed* without critically evaluating or even reproducing *Tecmed's* move of locating the legitimate expectations doctrine in the general obligation of bona fide state

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36. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) [hereinafter Tecmed Award].
37. Id. ¶ 154.
38. Id. ¶ 153.
39. MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment, ¶ 67 (Mar. 21, 2007) [hereinafter MTD Annulment] ("A tribunal which sought to generate from [investors'] expectations a set of rights different from those contained in or enforceable under the [investment treaty] might well exceed its powers, and if the difference were material might do so manifestly."); see also EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 216-17 (Oct. 8, 2009) [hereinafter EDF Award] (hazarding against overstating the conclusion that "legitimate expectations . . . imply the stability of the legal and business framework.").
42. Metalclad Award, supra note 34; Tecmed Award, supra note 36; Occidental Exploration & Production Co. v. Republic of Ecuador, supra note 34.
43. Waste Management v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004) [hereinafter Waste Management].
44. Wälde Separate Opinion, supra note 41, ¶ 37.
conduct. Nevertheless, less than three years after Tecmed, the seminal Saluka v. Czech Republic award declared in 2006 that “the notion of legitimate expectations . . . [was] the dominant element of [the FET] standard.” Writing that same year, Zachary Douglas observed that “the fierce competition among arbitral tribunals to author a pithy single-paragraph proclamation of what [FET] actually means for posterity has, for the time being, produced a fortuitous winner—the so-called Tecmed standard . . .”

B. Interpretive Drift in Legitimate Expectations Doctrine

Does the legitimate expectations doctrine present serious interpretive problems, or does this Note make much ado about nothing? Taking as given that legal rules should aspire to be clear and concrete, the legitimate expectations doctrine can be problematized because ambiguity runs through to its very core. Whereas most tribunals correctly recognize as “legitimate” only those expectations that rely on specific undertakings by governments that induce detrimental reliance, others interpret general legislation or even statements made to the public or to potential investors as expectation-generating commitments. Understanding how the aperture of the legitimate expectations doctrine has widened to permit this range of interpretations requires tracing the doctrine’s development from its early articulation (in Tecmed and its progeny) to the doctrine as it is understood and applied today.

If the legitimate expectations doctrine was misconceived to begin with, its subsequent evolution has been further marred by interpretive drift. W. Michael Reisman has raised “the concern that no matter how carefully a provision is drafted, the intended meaning of key and recurring terms drifts, over the course of serial arbitrations, away from what was originally intended by the states parties.” Because thousands of investment treaties share “recurring and often identical” language,

45. Saluka Partial Award, supra note 20, ¶ 302.
48. See e.g., Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.78 (Nov. 30, 2012) [hereinafter Electrabel Decision]; Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 264 (May 22, 2007); Sempra Energy Int’l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶¶ 303 (Sept. 28, 2007); CMS Gas Award, supra note 34, ¶ 277 (May 12, 2005); National Grid plc v. Argentine Republic, Award ¶ 176-79 (UNCITRAL Arb. Trib. Nov. 3, 2008); Saluka Partial Award, supra note 20, ¶ 329.
The result is a cumulative process of textual elaboration and 'layering' . . . feeding into an ongoing process of shaping and reshaping treaty terms, sometimes leading to deviation from . . . the states-parties' understanding and expectation of the meaning of those terms. So, though there are psycho-linguistic and even philosophical reasons for all textual drift, international investment agreements are peculiarly vulnerable to it. 50

Alec Stone Sweet and Florian Grisel have explained how such drift explains the trajectory of the legitimate expectations doctrine. Early investment agreements contained "virtually no guidance" on FET interpretation. 51 Unfettered by textual restrictions, claimants pled indirect expropriation and FET on "essentially the same facts." 52 Tribunals relied heavily "on the covering principle of [legitimate expectations] to manage situations wherein an investor has relied on express guarantees given by the state to induce the investment in the first place." 53 A number of authoritative judgments, "[w]ritten by renowned jurists and former judges of major international courts" provided "sophisticated commentary on [legitimate expectations] as a general principle of law." 54 An investor’s legitimate expectations came to "include an entitlement to some minimum level of stability in the regulatory environment, and more if expressly promised by the state to induce the investment in the first place." 55 Stone Sweet and Grisel conclude that "tribunals, in the absence of any express state consent, purposefully read into the FET both the doctrine of ‘legitimate expectations’ and the state’s ‘right to regulate’. Arbitrators did not camouflage their lawmaking." 56

In the subtext of this story is an under-emphasized point: although it is clear that the legitimate expectations doctrine has some basis in general principles of public law recognized in most major legal traditions, its content is subject to contestation and change. 57 Interpretive drift is a consequence of the difficulty associated with laying down concrete, enforceable outer limits to obligations founded upon general principles of law.

The resulting legal uncertainty has a number of practical consequences. Although the legal form of ISDS masks its economic function as a form of credible commitment in investor-State relations, uncertainty regarding the scope of applicable investment treaty obligations can prove costly and undesirable for various participants in ISDS. The most important worry is "regulatory chill"—the possibility that the threat of investment disputes might discourage regulation in the public interest. 58 A similar concern is investment chill attributable to

50. Id. at 4.
51. STONE SWEET & GRISEL, supra note 31, at 192.
52. Id. at 195.
53. Id.
54. Id. at 196.
55. Id. at 197.
56. Id. at 198.
58. There is a small but growing body of literature providing evidence of such regulatory chill. See, e.g., Gus Van Harten & Dayna Nadine Scott, Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada, 7 J. INT’L DISP. SETTLEMENT 92 (2016) (concluding
investors' uncertainty. Although investors are not always natural objects of sympathy, reduced foreign investment due to risk-aversion is injurious to States that might otherwise have been beneficiaries of the foregone investment. Finally, there is also an optical dimension: interpretive drift is problematic because it saps ISDS' already-beleaguered legitimacy.

Philip Morris' challenge of Uruguay's tobacco packaging regulations59—arguably the most publicly prominent and controversial investment dispute in recent years—illustrates both lingering uncertainty about the legitimate expectations doctrine and how that uncertainty might cast a pall over regulation in the public interest.60 In Philip Morris Brands v. Oriental Republic of Uruguay (Philip Morris Uruguay), both parties accepted a notional right to regulate but disputed the “acceptable margin of change.”61 Philip Morris relied on the legitimate expectations doctrine, arguing that Uruguay was required to maintain a stable legal and regulatory framework. Uruguay objected that its anti-tobacco regulations “amounted to a reasonable, good faith exercise of [its] sovereign prerogatives” to protect its citizens' health.62 The tribunal agreed, but without a principled distinction with respect to awards upholding the legitimate expectations doctrine.63 It simply held that the FET obligation did not preclude Uruguay from “enacting novel rules . . . provided these have some rational basis and are not discriminatory. [FET] does not guarantee that nothing should be done by the host State for the first time.”64 Rather than seizing a valuable opportunity to clarify the outer limits of the legitimate expectations doctrine, the Philip Morris Uruguay tribunal sidestepped the question altogether. It therefore remains unclear whether a different tribunal confronted with similar facts has the discretion to conclude that even State actions to protect public health, such as anti-smoking legislation, might frustrate investors' legitimate expectations and give rise to a compensation obligation.

The Vattenfall fiasco in Germany further illustrates how the legitimate expectations doctrine might threaten public interest regulation. In the summer following the Fukushima Daiichi meltdown in 2011, the German Bundestag, citing public safety and environmental concerns, passed legislation to phase out nuclear energy production by 2022. Germany's atomausstieg (nuclear exit) backpedaled upon an earlier decision by Chancellor Angela Merkel's government to delay the termination of the national nuclear energy program.65

59 Philip Morris Brands v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016) [hereinafter Philip Morris Uruguay Award].
61 Philip Morris Uruguay Award, supra note 59, ¶ 346.
62 Id. ¶ 13.
63 Id. ¶ 399.
64 Id. ¶ 430.
65 In 2010, Chancellor Merkel amended the Atomic Energy Act, postponing the termination of phase-out efforts initiated by the Social Democrats and the Greens in 2002.
The Swedish State-owned nuclear energy company Vattenfall pursued both investor-State arbitration and a constitutional challenge on the theory that Germany’s *volte face* had frustrated its legitimate expectations in regulatory stability. Although the international arbitration was ultimately settled, Germany’s Federal Constitutional Court (FCC) found that Germany had violated Vattenfall’s legitimate expectations. The German public reacted with righteous indignation.

While acknowledging the “particular weight” of “public interest grounds” and the “paramount importance” of an accelerated phase-out, the FCC defaulted to the orthodox position that the government had to provide “at least an entitlement to adequate compensation.” According to this kind of argument, States are never prevented from regulating; rather, States are merely obliged to pay compensation when investors’ legitimate expectations are frustrated. This is analogous to the concept of “efficient breach” in contract law and reflects the growing sense that a principle of “efficient noncompliance” is overdue in international law. Adherents gloss over the fact that owing to valuation problems and the enormous discretion that tribunals enjoy at the quantum (damages) stage, awards may “misprice” breaches and grant excessive compensation to investors. More fundamentally, this move illustrates the obfuscation of the general presumption in ISDS that States are entitled to “regulatory flexibility.”

Context also plays an under-appreciated role in the legitimate expectations doctrine. In the memorable words of the WTO Appellate Body, disputes in international economic law touch “human societies as they actually exist in the real world, where people live, work and die.” However, the role and limits of contextual analysis remains unclear. *Duke Energy v. Ecuador*, for example, imposed a two-key burden upon the investor bringing a legitimate expectations claim, requiring both investment-inducing assurances leading to detrimental reliance and an assessment of the “reasonableness” or “legitimacy” of investors’ expectations that takes into account “political, socioeconomic, cultural and

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68. Zielinski, supra note 66.

69. German Federal Constitutional Court, supra note 67, ¶¶ 380-382.


72. See, e.g., Electrabel Decision, supra note 48, ¶ 7.77.

historical conditions prevailing in the host State.  

Claimants are typically sophisticated investors who can and should remain abreast of regulatory patterns in the normal course of business. Normatively and doctrinally, it is well-accepted that the legitimate expectations doctrine should not insure claimants against all contingencies. Tribunals have found the frustration of investors’ expectations not to be actionable where their investments were made under circumstances such as political volatility, economic malaise, changing geopolitical priorities, post bellum reconstruction, or in “a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices.” Led by the arbitrators who delivered the widely-acclaimed Methanex v. United States award, some tribunals have held that claimants do not have a legitimate expectation in the fixity of environmental regulation in light of growing environmentalism and legislative lobbying by interest groups. Yet tribunals are more cautious and, resultantly, more inconsistent when considering context that does not present overwhelming exogenous circumstances or discernible political trends or regulatory schemes. Investors' conduct is another area of uncertainty. Some scholars advocate “assessing the conduct of investors towards the community on behalf of which the State may act.” For the most part, however, tribunals are largely inattentive to investor conduct, entrenching investors’ rights without creating concomitant responsibilities.

To some minds, if context justifies the frustration of legitimate expectations, States are placed in a position of full sovereignty without full responsibility. However, this critique makes sovereignty conditional upon the fulfilment of responsibilities to the international community. This idea rightly has very little purchase within investment law or, for that matter, outside it. A more reasonable position might be that context usefully informs whether an

74. Duke Energy Award, supra note 47, ¶ 340.
75. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶¶ 193-194 (Aug. 27, 2009).
76. Olguin v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, ¶ 65(c) (July 26, 2001).
77. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 335 (Sept. 11, 2007) [hereinafter Parkerings Award].
79. Genin v. Republic of Estonia, ICSID Case No. ARB/99/2, Award, ¶ 348 (June 25, 2001) [hereinafter Genin Award].
80. Methanex Corp. v. United States, Final Award, pt. IV, ch. D, ¶ 9 (NAFTA Ch. 11 Arb. Trib. Aug. 3, 2005) [hereinafter Methanex Final Award]; see also Philip Morris Uruguay Award, supra note 59, ¶ 430 (observing the “progressively more stringent regulation of . . . tobacco products”); Glamis Gold Award, supra note 47, ¶¶ 767, 800 (discussing California’s increased sensitivity to open-pit mining).
83. But see Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 602 (Dec. 8, 2016) (“The protection of [the] universal basic human right [to water] constitutes the framework within [sic] the Claimants had to frame their expectations . . . .”).
expectation is legitimate in the first place; for instance, whether an unreliable representation made by States in dire economic or political straits can create material, investment-inducing reliance.

To trace how these unresolved debates about host States’ regulatory competence and contextual reasoning contribute to interpretive drift, it is instructive to compare a series of recent awards from the ongoing Energy Charter Treaty (ECT) disputes concerning regulatory measures by European governments to wind down support for photovoltaic energy production. 84 Before the ripple effects of the 2007-2008 economic crisis had reached European shores, the Spanish, Italian, and Czech governments had poured billions of euros into their photovoltaic energy sectors. As the European fiscal crisis and the politics of austerity took hold, Spain, which has borne the brunt of this saga thus far, gradually dismantled its feed-in tariff scheme, and imposed grid duties and power generation levies. The Italian and Czech governments followed suit. 85 Foreign investors in the photovoltaic energy sectors of each country promptly challenged these measures as violations of the FET obligation imposed by Article 10(1) of the ECT. 86

These disputes illustrate the play in the joints of the legitimate expectations doctrine. 87 At least four merits awards, each starting with the premise that investors do not have a “right to regulatory stability,” and that “[t]he state has a right to regulate,” 88 have arrived at different results. In Charanne v. Spain, 89 Isolux v. Spain, 90 and Blusun v. Italy 91 (the first two in split decisions, the last unanimously), tribunals found that there was no legitimate expectations violation. The Eiser v. Spain 92 tribunal, by contrast, unanimously held that the investor’s legitimate expectations had been frustrated.

The Charanne tribunal held that Article 10(1) ECT protected investors’ “legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest.” 93 Focusing on the

85. Id. at 435 n.6.
86. Id. at 435.
88. Eiser Infrastructure Ltd. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 362 (May 4, 2017) [hereinafter Eiser Award]; see also Blusun S.A. v. Italian Republic, ICSID Case No. ARB/14/3, Award, ¶ 319 (Dec. 27, 2016) [hereinafter Blusun Award].
89. Charanne B.V. v. Kingdom of Spain, Case No. V 062/2012, Final Award (SCC Jan. 21, 2016) [hereinafter Charanne Award].
90. Isolux Netherlands, B.V. v. Kingdom of Spain, Case No. V2013/153, Final Award (SCC July 17, 2016) [hereinafter Isolux Final Award].
91. Blusun Award, supra note 88.
92. Eiser Award, supra note 88.
93. Charanne Award, supra note 89, ¶ 514 (unofficial translation provided by Mena Chambers).
foreseeability of regulatory changes, however, it determined that neither the "specific rules" nor the "essential characteristics" of the photovoltaic energy regime had been altered so as to violate Spain's FET obligations. The *Isolux* tribunal also emphasized foreseeability in finding that investors' legitimate expectations had not been frustrated. Emphasizing the due diligence obligations attendant upon prudent investors, the tribunal observed that at the time of the claimant's investment, the Supreme Court of Spain had upheld the government's right to lawfully modify its regulatory framework, and that the government had actually done so several times. Anticipating challenges on whether the measures adopted were narrowly tailored to the policy objective, the tribunal clarified that the requisite reasonability analysis did not require that the adopted measures were the least restrictive ones.

Guido Santiago Tawil's dissenting opinions in *Charanne* and *Isolux* represent the other side of the legitimate expectations debate. Pointing to the government's "regime of promotion and 'encouragement,'" his dissents insist that "the creation of legitimate expectations for an investor is not solely limited to the existence of a 'specific commitment' . . . but can also originate or be based on the legal order in force when the investment is made."

The *Eiser* merits award, which did find a legitimate expectations violation, seized upon this argument. The tribunal also held that notwithstanding the fiscal burdens straining state subsidization of renewable energy, the obligation to ensure FET remained unabated. Furthermore, reasoning from the ECT's object and purpose as a treaty aimed at "creat[ing] stable, equitable . . . and transparent conditions," it held that FET protects investors from a "fundamental" changes to the regulatory framework. Although both *Charanne* and *Eiser* augmented the specific undertaking requirement in the legitimate expectations doctrine with protection against "fundamental" changes, neither tribunal was clear about what the requisite degree of fundamentality looks like. Instead, the *Eiser* tribunal lapsed into circularity, holding that "[w]hat is prohibited however available at https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf.

94. *Id.*, ¶ 505-33.

95. *Isolux* Final Award, *supra* note 90, ¶ 818. One explanation for the overlapping reasoning was the significant similarity in composition of the tribunals. The party-appointed arbitrators in both *Isolux* and *Charanne* were Guido Santiago Tawil (claimant's appointment) and Claus von Wobeser (respondent's appointment).


97. *Isolux* Final Award, *supra* note 90, ¶¶ 793-95.

98. *Id.* ¶ 788.


101. *Id.* ¶¶ 363, 374.
is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power." A prohibition against unfair or inequitable regulatory treatment in assessing FET breaches provides only an unhelpful tautology.

The only merits award to date concerning Italy’s regulatory changes, \textit{Blusun}, found no legitimate expectations violation but held that regulatory changes could not be “disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of [investors] who may have committed substantial resources on the basis of the earlier regime.”

In early 2015, amidst the \textit{Blusun} dispute, the Italian government notified its withdrawal from the ECT, citing budgetary costs.

Italy’s withdrawal from the ECT provides a hinge to the second half of this Note, which focuses on a range of responses to the interpretive techniques discussed in Part II. The focus thus far has been on how different interpretive modalities have left the legitimate expectations doctrine unsettled. Indeed, recent awards are rife with examples of the durability of the doctrine and lingering ambiguities within it. In tandem with, or perhaps as a result of, the elasticity of the concept of legitimate expectations, claims by investors alleging the frustration of legitimate expectations are increasingly being brought against States with sterling rule of law traditions, straining the patience of some of the most influential participants in the ISDS regime (including the United States). The backlash against ISDS has thus been mainstreamed, and efforts towards reform are now under way.

\section*{III. INCOMPLETE SOLUTIONS: BETWEEN USURPATION AND INEFFECTUALITY}

This Part examines juridical and quasi-legislative responses to the legitimate expectations doctrine that have been attempted to reduce the scope for arbitral overreach. Juridical responses may be understood as a form of arbitral self-discipline. Much as the concept of legitimate expectations was transplanted from domestic public law, Section III.A documents countervailing moves by arbitrators to draw upon public law standards of review that demarcate the host State’s room for maneuver in taking actions that might frustrate a foreign investor’s settled expectations. This self-corrective response has been accompanied by a parallel development that is the subject of Section III.B: many States have begun to redraft the architecture of ISDS to restrict textual elasticity in investment treaties and, thus, the space afforded to arbitrators by treaty interpretation rules. In describing the shortcomings of both approaches, this Part

\begin{itemize}
\item 103. Id. ¶ 387.
\item 104. \textit{Blusun} Award, \textit{supra} note 88, ¶ 319(5).
\item 106. Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 546-75 (Apr. 4, 2016) [hereinafter Crystallex Award] (observing that legitimate expectations are “now considered part of the FET standard” and “firmly rooted in arbitral practice”); Windstream Energy LLC v. Government of Canada, Case No. 2013-22, Award, ¶¶ 347-82 (Perm. Ct. Arb. Sept. 27, 2016) (avoiding the language of the legitimate expectations doctrine but drawing heavily upon similar arguments to find a breach of NAFTA Article 1105).
\end{itemize}
seeks to constructively set the stage for the joint interpretations proposed in Part IV.

A. Juridical Responses: The Possibility of Arbtiral Self-Restraint?

The judicialization of international investment law brings both promise and peril. Some believe that the law-making role of international adjudicators constitutes "the primary mechanism for the progressive construction of international law today." If the legitimate expectations doctrine is in need of a course-correction, could it be led by arbitrators themselves? Illustratively, tribunals have already reined in the doctrine's excesses in one respect by clarifying that legitimate expectations must be objectively determinable and not "solely the [investor's] subjective expectations." Rather, legitimate expectations must "be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest."

Although all international law obligations restrict sovereignty, what is distinctive about ISDS is its hybrid nature. For some, the operative question is how to balance the rights of claimant-investors against the privileges, immunities, and prerogatives of respondent-States. Such a balancing act raises the question of how much deference the State should be afforded. This Section is devoted to understanding the most important proposals for arbitral self-discipline: public law standards of review, including reasonableness, margin of appreciation, and proportionality. It concludes, however, that a course correction through arbitral interventions alone is improbable.

I. Public Law Standards of Review: Reasonableness, Margin of Appreciation, and Proportionality

Reasonableness resembles rational basis review in U.S. constitutional law and arbitrary and capricious review in U.S. administrative law. A measure is reasonable if it bears a reasonable relationship to some rational objective. Reasonableness is highly congenial to host State discretion. With a handful of

109. EDF Award, supra note 39, ¶ 219.
111. See, e.g., Walde Separate Opinion, supra note 44, ¶ 2.
113. See, e.g., Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award ¶ 254 (Sept. 5, 2008) [hereinafter Continental Casualty Award]; Saluka Partial Award, supra note 20, ¶ 460.
exceptions, finding that a measure is reasonable does not preclude an FET breach—that is, reasonableness is a necessary but not sufficient condition.

The margin of appreciation standard, famously associated with the jurisprudence of the European Court of Human Rights (ECHR) and now found in numerous areas of international law, is premised on the principle of subsidiarity. It affords States “room for manoeuvre” in fulfilling their obligations. However, investment tribunals seldom rely upon a margin of appreciation; some have even disclaimed that their mandates preclude a “wide margin of appreciation.”

The Strasbourg court has routinely found that governments are owed a “wide” margin of appreciation without further specifying the width of the margin. Similarly, within investment law, even tribunals that have recognized the “high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders” very rarely address how much deference is owed. Tribunals sometimes further complicate matters by inflecting their margin of appreciation analysis with context-specific considerations. Gesturing to a margin in general terms is therefore neither outcome-determinative nor does it preclude the finding that the investor’s legitimate expectations have been violated.

Scholars and arbitrators disagree about the appropriateness of a margin of appreciation. Arguments about the analytical fit of the standard of review given

114. See, e.g., AES Summit Generation Ltd. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶ 7.6.9 (Sept. 23, 2010); Electrabel Decision, supra note 48, ¶¶ 8.34-35; Genin Award, supra note 79, ¶¶ 363-365; LG&E Decision, supra note 34, ¶¶ 245-258; Parkerings Award, supra note 77, ¶ 332; Philip Morris Uruguay Award, supra note 59, ¶¶ 398-399; Frontier Petroleum Serv. Ltd. v. Czech Republic, Final Award, ¶ 527 (Perm. Ct. Arb. Nov. 12, 2010); Saluka Partial Award, supra note 20, at ¶¶ 272-273.

115. See, e.g., Metalclad Award, supra note 34, ¶¶ 90-100; Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 318-319 (Jan. 17, 2007); Lemire Decision, supra note 47, ¶¶ 298-309.


122. Glamis Gold Award, supra note 47, ¶ 617 (rejecting deference).

123. Continental Casualty Award, supra note 30, ¶ 181 (Argentina’s economic state of necessity); Philip Morris Uruguay Award, supra note 59, ¶¶ 398-399 (public health). See generally Chemtura Corp. v. Government of Canada, Award, ¶ 123 (NAFTA Ch. 11 Arb. Trib. Aug. 2, 2010) (describing margin of appreciation as “an assessment that must be conducted in concreto”).

124. Crystallex Award, supra note 106, ¶¶ 546-575; S.D. Myers Partial Award, supra note 121, ¶ 263, 322.
the tribunal’s function in ISDS must be kept separate from arguments about the outcomes of margin of appreciation reasoning. The political theory of deference turns on the fact that governments have the knowledge, capacity, and legitimacy to make laws and regulations, but arbitrators do not. William Burke-White and Andreas von Staden have argued that both the hybrid role of the State in ISDS and the legitimacy imperative justify the use of a margin of appreciation standard. Others disagree, arguing that the conditions for invoking the margin of appreciation in public law—jurisprudential consistency, formal precedents, and consistent adjudicators—do not obtain in investment law. Even if tribunals could disambiguate the width of the margin of appreciation, there is a case to be made against doing so: spelling out exactly how much regulatory “space” the host State may lay claim to might induce moral hazard.

Proportionality analysis is widely applied in constitutional courts, administrative law tribunals, international dispute resolution bodies, and human rights tribunals. Proportionality analysis, which is more an analytical method than a standard of review, is done in three steps: (1) rational relatedness between the means and the ends pursued by the government measure, (2) necessity, understood as a least-restrictive means inquiry, and (3) proportionality stricto sensu, balancing between benefits to the host State and harms to the investor. Stone Sweet and his collaborators, among others, have championed ISDS as “proportionality’s next frontier.”

In practice, however, tribunals often seem to invoke proportionality to justify balancing between the host States’ regulatory competence and investors’ expectations. As with the margin of appreciation, proportionality stricto sensu assessments of this kind do not establish limiting principles that constrain the discretion of tribunals. Meanwhile, in overemphasizing this last step of the...
proportionality analysis, such balancing tests disguise the operation of the more restrictive step in the proportionality triad: necessity, which, as applied, resembles strict scrutiny. Tribunals typically employ a least restrictive means (LRM) test, looking to whether the investor’s rights are restricted only to the extent necessary for the government to accomplish its policy objectives. Some tribunals take a deferential approach to LRM analysis, acknowledging their limits as a substitute for the regulatory sophistication of the government. Others are significantly less deferential, finding regulatory measures to be FET violations if alternative measures are available. LRM analysis has rightly been criticized because it authorizes adjudicators to undertake a searching review of policy alternatives available to governments.

2. Whither Public Law Standards of Review?

The standards of review described above are each undermined by the very indeterminacy that they seek to cure. In choosing a standard of review, a tribunal may not actually select the level of deference to be accorded to the State’s regulatory function; instead, it may simply offer an analytical gloss disguising a judgment that reconciles sovereignty and international obligations. Channeling the work of interpretation into standards of review that might not meaningfully constrain tribunal decision-making might counterproductively legitimize the very discretion that juridical responses set out to cure.

The prospects for a juridical fix are further cast into doubt by the decentralized, ad hoc nature of ISDS and disagreements about the role of stare decisis or jurisprudence constante. A number of tribunals have championed relying on precedent “as a matter of comparison and . . . of inspiration,” as well as the development of law through system-conscious approaches. After all, “tribunals implement broadly phrased international standards set out in very similar terms” and define “standards of good governance and of the rule of law.” Andrea Bjorklund describes how “the entire arbitral community . . . will

131. See, e.g., Pope & Talbot, Inc. v. Government of Canada, Award on Merits of Phase 2, ¶ 123, 128, 155 (NAFTA Ch. 11 Arb. Trib. Apr. 10, 2001) [hereinafter Pope & Talbot Phase 2 Award].
132. See, e.g., S.D. Myers Partial Award, supra note 121, ¶ 266.
135. AES Corp. v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, ¶¶ 30-32 (Apr. 26, 2005).
help to establish a hierarchy of cases, and the scope and meaning of the law itself."

Others believe tribunals should hew to case-specific approaches and aim to ensure the award’s recognition, enforcement, and legitimacy. In his 2012 Freshfields Lecture, Reisman argued that uneasy compromises such as “a modicum of awareness of the system as a whole” or “greater contextual awareness” are so indeterminate as to defeat the ability of participants to “agree on their existence and operation.” Such indeterminacy has critical implications: it means that a juridical fix might not “stick.” Disputes in ISDS will always be case-specific to some degree, and tribunals could choose to exercise largely untrammeled discretion even in areas where jurisprudence appears to have crystallized.

The haphazard, undisciplined way in which arbitral jurisprudence develops exacerbates another problem. Douglas points out that “[t]he submissions of counsel often stop short of providing any real analysis of the context for the truncated quotations from awards.” Tribunals may thus inadvertently initiate jurisprudential developments that abstract away from their context-specific origins.

Whether more robust adherence to precedent will regularize interpretive practices in ISDS remains to be seen. The precedential authority of the Salini test for defining protected investments and, closer to home, the outsized prominence the Tecmed standard in early legitimate expectations doctrine, are promising in this regard. The recent push for transparency in ISDS might also help pave the way for increased attentiveness to other tribunals’ reasoning. For the time being, however, standards of review are not poised to provide dependable, durable course-corrections in arbitral jurisprudence, putting the possibility of this juridical fix to bed.

B. Quasi-Legislative Responses: Backlash and Investment Treaty Reform

Although international law lacks legislators as such, States have long relied on quasi-legislative interventions such as treaty renegotiations to manage their delegation of authority to arbitral tribunals. What is special about the present reform moment is the volume and variety of changes taking place. The reform

NEW YORK CONVENTION 5, 44 (Albert Jan van den Berg ed., 2009).
142. See Yannaca-Small, supra note 30, at 386-87.
143. See UNCTAD 2017 Report, supra note 6; see also UNCTAD, INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT (2015), https://unctad.org/en/PublicationsLibrary
moment is an expression of the will of States to preserve their authority in an investment regime that was designed in their names. Although the legitimate expectations doctrine is merely one pathology, responses to it provide a typology for reform efforts more generally.

1. "Exit," or the Revocation of Treaty Obligations

Some States have not taken kindly to finding themselves on the proverbial stand. At the extremes, States have backed away from their ISDS commitments altogether. Outright "exit" has taken several forms: terminations or withdrawals from investment agreements,\textsuperscript{145} denouncements of the ICSID Convention,\textsuperscript{146} and policies of excluding ISDS clauses in newly-negotiated trade and investment treaties.\textsuperscript{147} A less dramatic half-step towards exit is to eliminate FET clauses without replacing them with close substitutes.\textsuperscript{148}

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\textsuperscript{144} See José E. Alvarez, Why Are We "Re-Calibrating" Our Investment Treaties?, 4 WORLD ARB. & MEDIATION REV. 143 (2010); Suzanne A. Spears, The Quest for Policy Space in a New Generation of International Investment Agreements, 13 J. INT'L ECON. L. 1037 (2010).

\textsuperscript{145} Consider, for example, treaty terminations by Ecuador, Venezuela, South Africa, Czech Republic, India, Indonesia, Italy, and Argentina. See Malcolm Langford, Daniel Behn & Ole Kristian Fauschald, Backlash and State Strategies in International Investment Law, in THE CHANGING PRACTICES OF INTERNATIONAL LAW 70 (Tanja Aalberts & Thomas Gammeltoft-Hansen eds., 2018); see also Ioana Knoll-Tudor, The Fair and Equitable Treatment Standard and Human Rights Norms, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 310, 317 n.23 (P.M. Dupuy et al. eds., 2009) (suggesting that states are considering BIT terminations "as a consequence of the different arbitral proceedings they have been involved in"). Merely facing investment claims, rather than adverse awards, might suffice; consider the example above of Italy's withdrawal from the ECT. Gaetano Iorio Fiorelli, Italy Withdraws from Energy Charter Treaty, GLOBAL ARB. NEWS (May 6, 2015), https://globalarbitrationnews.com/italy-withdraws-from-energy-charter-treaty-20150507.


\textsuperscript{147} Brazil's investment agreements since 2015 have not contained ISDS provisions. Australia also pursued this approach briefly but has reverted to including ISDS provisions. Intra-MERCOSUR Protocol for the Cooperation and the Facilitation of Investment, Apr. 7, 2017, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5548/download.

Exit remains a marginal possibility: withdrawals from ISDS are rare, and the reasons why some States have pursued this path are not easily generalizable. Moreover, several States that have considered exiting the ISDS regime have thus far remained within it,¹⁴⁹ often while renegotiating their commitment to the regime in measured ways. What is more useful to describe, then, are ways in which States are responding through “voice” rather than through “exit,”¹⁵⁰ which allows them to continue benefitting from participation in the regime while asserting their primacy anew.

2. “Treatifying” the Right to Regulate

Efforts to “treatify” the right to regulate locate part of the blame for interpretive drift in the treaty provisions that arbitrators must interpret and apply. Investment treaties provide the applicable law in disputes between investors and States. Because the host State’s rights are rarely made explicit, tribunals are left to adduce the scope of those rights anew in each dispute. The resulting interpretive dispersal has drawn the ire of States and their citizens, who may react with hostility towards the ISDS regime when regulation in the public interest comes under arbitral scrutiny.¹⁵¹

In light of increasing public discontentment with ISDS,¹⁵² States have begun to pay attention to treaty language and how it can be used to alter the substantive balance of rights between investors and themselves. In contrast to the template-like provisions that were commonplace in the early history of ISDS, States have (1) reduced the discretion available to arbitrators through alternative treatment standards; (2) increased precision and interpretive guidelines, such as language explicitly constraining which expectations might be deemed “legitimate;” (3) included “right to regulate” and general exceptions clauses; and (4) included hierarchically-ordered goals in treaty preambles.¹⁵³

To avoid mischaracterizing as reform what might merely be an explosion in the number and complexity of investment treaties and disputes, there must be evidence of discontentment with the status quo and directionality in treaty-making practices (for example, a concern with reining in interpretive

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¹⁴⁹. See, e.g., Emmanuel Gaillard & Yas Banifatemi, The Denunciation of the ICSID Convention, 237 N.Y. L.J. 122 (June 26, 2007) (commenting upon Nicaragua and Cuba’s proclamation of their intention to withdraw).


¹⁵². See, for example, the public outcry in reaction to the Vattenfall arbitration and both Philip Morris disputes.

¹⁵³. Stone Sweet and Grisel note that BITs increasingly contain interpretive guidelines but that the rate of growth of new investment treaties containing interpretive guidelines on indirect expropriation is much slower than the rate of growth of new investment treaties altogether. STONE SWEET & GRISEL, supra note 31, at 212.
dispersion\textsuperscript{154} or a nexus to unsatisfactorily reasoned awards\textsuperscript{155}). Recent reforms—and public justifications offered for them—reflect a reversion towards statism in ISDS. ISDS reforms capture a collective response by States against arbitral jurisprudence enabled by old-generation treaties that did not pin down the shared intent of States parties. The reform moment, then, is ISDS’s coming of age.

\textit{a. Alternative Treatment Standards}

One response to the indeterminacy of FET provisions is to shift the weight to another treatment standard. Evolving treaty practice has followed two approaches in doing so. The first is to link the FET explicitly to another treatment standard such as the customary international minimum standard of treatment.\textsuperscript{156} The second kind of substitution replaces the FET with an alternative treatment provision.\textsuperscript{157} Justifying the latter kind of substitution in India’s 2015 Model BIT, the Indian Law Commission cited extensively to scholarly criticism—backed by examples from early legitimate expectations doctrine—of the FET as “wide, tenuous and imprecise.”\textsuperscript{158} It concluded, “The absence of the FET provision will safeguard India’s right to regulate by minimising the possibilities of unexpected restrictions on its regulatory power that broad interpretations of an undefined FET may bring.”\textsuperscript{159} India’s BIT reform was thus attentive to the distribution of interpretive authority between States parties and arbitral tribunals.

\textit{b. Increased Precision}

Many FET provisions have been made more precise through (1)

\begin{itemize}
\item \textsuperscript{154} See generally Franck, supra note 19. Attentiveness to reasoning appears to increase when tribunals are inconsistent regarding similar treaty provisions and similar facts: the diametrically opposed decisions in \textit{Lauder v. Czech Republic} and \textit{CME v. Czech Republic} present a good case study of inconsistency and the crisis of legitimacy that follows. William Burke-White, \textit{The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System}, in \textit{The Backlash Against Investment Arbitration}, supra note 14, at 425-26.

\item \textsuperscript{155} Consider, for example, the hostile reaction of the Argentine legislature to the \textit{CMS Gas} Annulment Committee’s \textit{obiter dicta} regarding legally flawed reasoning in the \textit{CMS Gas} award. See William Burke-White, \textit{The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System}, 3 ASIAN J. WTO & INT’L HEALTH LAW & POLICY 199, 227-28 (2008).


\item \textsuperscript{159} Id. at 16.
\end{itemize}
definitional provisions that carefully restrict the scope of the FET obligation or (2) closed lists that enumerate "the rights that are within the scope of the fair and equitable treatment obligation." Both kinds of precision represent a marked departure from old-generation investment treaties, which, for the most part, merely implore States to provide FET without further qualification. These moves also serve a number of goals, including enclosure, norm compliance, foreseeability, and reduction of the discretion of arbitral tribunals.

A special case of using textual precision to correct for open-endedness are provisions that disambiguate what expectations are "legitimate" enough. Treaties are increasingly clarifying that government actions or omissions that frustrate investors' expectations do not automatically constitute treaty violations. These treaties prescribe proportionality-type assessments or require a showing of investment-inducing representations that investors can be shown to have reasonably relied upon.

The temptations of precision must be tempered by a note of caution. Calling a treaty provision more precise is an evaluative act, not an inert description—it is an insistence that from an investor's perspective, a precise provision does what it purports to do. Revisions to ensure "linguistic precision" are "easier said than done," particularly because the provisions at issue continue to use evaluative qualifiers (such as "manifestly arbitrary," "excessive," or "necessary").

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160. See, e.g., ASEAN Comprehensive Investment Agreement art. 11, Feb. 26, 2009, ASEAN Legal Instruments No. 30 [hereinafter ACIA]; see also Korea–Australia Free Trade Agreement art. 11.5, S. Kor.-Aus., Apr. 8, 2014, ATS 43.


162. See, e.g., 2008 German Model Bilateral Investment Treaty, art. 2.2; 2006 French Model Bilateral Investment Treaty, art. 3; 2004 Dutch Model Bilateral Investment Treaty, art. 3.

163. See, e.g., TPP arts. 9.6.4-9.6.5.


165. CETA art. 8.10(4), supra note 156; EU-Singapore FTA art 9.4(2), n. 155; TPP, Annex 9-B, art. 3(a)(ii), n.36.

166. CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY 30 (2016).
A right to regulate clause textually asserts the State’s regulatory competence and clarifies that its obligations under the treaty should not be taken to limit that competence.169 Right to regulate clauses often specifically mark out regulation for particular purposes such as public health, labor rights, or environmental protection.170 Their inclusion in new-generation treaties signifies not only a reassertion of statism but also the reconfiguration of investment treaties to better accommodate regulation in the public interest.

General exceptions provisions, often modeled after the GATT’s general exceptions clause, are circumscribed exceptions to obligations imposed by other parts of the investment treaty upon the host State.171 General exceptions clauses are also becoming increasingly prevalent in investment treaties.172 Presumably in response to the Philip Morris disputes, recent investment treaties have begun including carve-outs for tobacco regulation.173 Although general exceptions provisions provide a clearer textual hook than an ambiguous right to regulate, they may prove counterproductive if they are narrowly interpreted, creating the “unintended consequence of limiting the range of legitimate objectives available to the state (expression unius est exclusion alterius),” which might result in a “limitation, rather than a widening, of policy space,” further constraining the government’s ability to regulate.174 If investment tribunals are already authorized “to balance investor interests with an unlimited list of legitimate government concerns—a list far broader than the exceptions in GATT Article XX,”175 this would represent a needless restriction of the government’s ability to regulate in the public interest.


172. See HENCKELS, supra note 168, at 81; Spears, supra note 144, at 1043-44.

173. See, e.g., TPP art. 29.5; 2016 Singapore-Australia FTA art. 22; see also Sergio Puig & Gregory Shaffer, A Breakthrough with the TPP: The Tobacco Carve-Out, 16 YALE J. HEALTH POL’Y L. & ETHICS 327 (2016).


d. Rewriting Treaty Preambles

According to the general rule of treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT), a treaty's preamble forms part of the "context" for the "ordinary meaning to be given to [its] terms."176 Unfortunately, as written, investment treaty preambles open the door to over-expansive interpretations.177

Many preambles take a kitchen-sink approach, listing numerous potentially conflicting State interests without any kind of ordering. For example, the preamble to the United States-Ecuador BIT illustratively lists goals "including economic cooperation, increased flow of capital, a stable framework for investment, development of respect for internationally-recognized worker rights, and maximum efficiency in the use of economic resources."178 Under several theories of labor economics, respect for internationally-recognized worker rights might potentially restrict the goal of maximum efficiency in the use of economic resources. The preamble offers no guidance for resolving such conflicts.

The hollowness of this approach is clear from preambles in older treaties such as the North American Free Trade Agreement (NAFTA). The NAFTA preamble lists as many possible goals as a trade treaty could possibly have, including commitments to "promote sustainable development" and to "preserve their flexibility to safeguard the public welfare."179 Yet, twenty-three years later, these commitments appear to have imposed no perceptible constraint upon the judgments of NAFTA Chapter 11 tribunals. Rather than externally constraining tribunals, kitchen-sink preambles instead offer tribunals a repository of potential justifications for decisions that likely could have been made in the same way absent such preambles. Inadvertently or otherwise, such provisions smuggle in a source of textual legitimacy for exercises of arbitral discretion.

Although a small number of States have begun to include goals such as sustainable development in their investment treaty preambles,180 or resisted the pull of kitchen-sink preambles by prioritizing the protection of the public interest as the outer limits to the pursuit of economic ends,181 it remains to be seen


177. See, e.g., MTD Annullment, supra note 39, ¶ 113 (holding that preambular language about "creat[ing] favorable conditions for investments" should not be restricted to "prescriptions for passive behavior of the State or avoidance of prejudicial conduct to the investors "but as a "proactive statement" meant to be "conducive to fostering the promotion of foreign investment").


180. See 2004 Canadian Model FIPA, supra note 156, pmbl.; CCIA, supra note 156, pmbl.

whether hierarchically-ordered State priorities in treaty preambles will meaningfully constrain arbitral decision-making. Meanwhile, many preambles set out an objective of establishing and maintaining a "stable framework for investment," which runs the risk of being understood as a codification of the expansive conception of legitimate expectations (i.e., guaranteeing the stability of laws and regulations).  

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Taken together, the juridical and quasi-legislative responses to arbitral innovations, such as the legitimate expectations doctrine, have been mired between usurpation of State authority and ineffectiveness. The putatively self-corrective effort by arbitrators to rein in interpretive drift has been counterproductive. It has imposed no perceptible constraints upon arbitral discretion, while affording tribunals the appearance of being guided by methodical application of public law standards of review. Meanwhile, quasi-legislative reforms by States terminating old-generation investment agreements and renegotiating or signing treaties with innovative provisions represent an incomplete sovereigntist response at best, and an ineffectual one at worst. "Treatifying" the right to regulate is a halfway house in the recentralization of State authority in international investment law. It allows States an additional pass at shaping the terms of their self-constraint without reserving the authority to dynamically interpret their treaty obligations over time.

IV. A SOVEREIGNTIST FIX: JOINT INTERPRETATIONS AS INTERNATIONAL LAWMaking

A. Legal Framework: ISDS as Contingent Delegation

If tribunals cannot be depended upon to restrain their own interpretations, States may seek to reclaim their primacy by rethinking their delegation of decisional authority to arbitral tribunals. After all, delegation of interpretive authority to arbitral tribunals is contingent and restricted in scope, rather than permanent and general. Scrutiny of this delegation has intensified into an opportunity for reform.  

Exit by some States has cast a shadow upon the future of ISDS, but States are not consigned to submitting themselves wholly to the interpretive vicissitudes of arbitral tribunals or to walking away from foreign investment by exiting the ISDS system. Instead, as the architects of ISDS, States can recapture law-making and interpretive authority over their investment treaties. Describing this reclamation as backlash against the ISDS regime unhelpfully focuses attention on the spur for change rather than on the reforms themselves.

The sharing of interpretive authority between tribunals and States through joint interpretations between States parties is a tried-and-tested, but still seldom

used,\textsuperscript{184} way for States to rein in interpretive dispersal. The general law of treaty interpretation requires that "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" be "taken into account."\textsuperscript{185} Bruno Simma has championed such subsequent agreements and practice, arguing that "if there exists—and this is a matter of fact—subsequent practice or a subsequent agreement, there is, \textit{lege artis}, simply no way to get around it. This is it, because the intention of the parties to the treaty will always prevail."\textsuperscript{186}

Joint interpretations must be distinguished from subsequent agreements, which treaty interpreters must "take into account" under Article 31(3) of VCLT. Joint interpretations put investors on notice that States may collectively adopt binding joint interpretations, leading to optimal decision-making and risk-pricing by foreign investors while maintaining the continuing interpretive authority of States parties. They strengthen permissive provisions in the VCLT—allowing treaty interpreters to look to subsequent agreements—into mandatory State-imposed constraints upon arbitral tribunals. Drawing upon the success of joint interpretations in clarifying the scope of the FET obligation under NAFTA and other examples, this Note concludes that this approach promises the most potent check upon legitimate expectations doctrine.

The foreseeable problem with States taking back the reins is that it dilutes the credible commitment that they make to investors by signing investment agreements. The time-inconsistency problem arises when, after making investment-inducing commitments, States are subsequently tempted to walk back their commitments to investors who are locked in. The appropriate role of "voice" for States that wish to maintain credible commitments to investors is to only exercise their "voice" to clarify rather than to change the investment treaty obligations. As Todd Weiler points out, "it is the treaty that is the subject of interpretation, not the ongoing volition of the parties thereto."\textsuperscript{187}

\textbf{B. Joint Interpretations in Practice}

Joint interpretations return States to a place of primacy in treaty interpretation by enabling a response to tribunals that misconstrue the shared intent of States parties. They also facilitate a learning effect in international investment law, in which treaty counterparties may agree to respond

\begin{footnotesize}
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\item \textsuperscript{184} See Roberts, \textit{supra} note 13, at 216-17; UNCTAD, \textit{Interpretation of IIAs: What States Can Do}, IIA ISSUE NOTE 3 (2011).
\item \textsuperscript{185} VCLT, \textit{supra} note 176, art. 31(3).
\item \textsuperscript{187} Todd Weiler, \textit{The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context} 32 (2013).
\end{itemize}
\end{footnotesize}
preemptively to forestall undesirable interpretations of similar clauses in other treaties. For example, after Maffezini and Siemens, two cases in which the most-favored nation (MFN) treatment obligation was read expansively to afford investors access to ISDS provisions found in other investment agreements, a number of States leapt to action.\textsuperscript{188} Panama and Argentina, for instance, established an “interpretive declaration” through diplomatic notes and interpreted the MFN clause in the BIT between them not to include dispute resolution clauses.\textsuperscript{189}

The canonical example of a joint interpretation in international investment law remains the NAFTA Free Trade Commission’s (FTC) Interpretive Note of 2001, which sought to disambiguate the FET clause in NAFTA’s Article 1105.\textsuperscript{190} In the first Chapter 11 dispute to reach the merits phase, the tribunal held that “[t]he only conceivable relevant substantive principle of Article 1105 is that a NAFTA investor should not be dealt with in a manner that contravenes international law.”\textsuperscript{191} The S.D. Myers tribunal concurred that a breach of Article 1105 required treatment “in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”\textsuperscript{192} It held that such a determination “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”\textsuperscript{193} Notwithstanding this asserted deference, a majority of the S.D. Myers tribunal concluded without further explanation that “breach of Article 1102,” NAFTA’s national treatment provision, “essentially establishes a breach of Article 1105 as well.”\textsuperscript{194} In Pope & Talbot, the tribunal likened Article 1105 to FET clauses in BITs and concluded that the FET obligation was additive to the IMS.\textsuperscript{195} Going further still, the Metalclad tribunal found that Mexico breached Article 1105 by failing to provide a “transparent and predictable framework.”\textsuperscript{196} These holdings illustrate how attempted judicial (interpretive) resolution of the scope of NAFTA’s Article 1105 by the Azinian v. United Mexican States and S.D. Myers tribunals was unsuccessful and led to interpretive dispersion rather than correcting for it. A quasi-legislative fix, such as a formal renegotiation of NAFTA, would have required the States parties to muster considerable political

\textsuperscript{188.} Simma, supra note 186, at 46. \textit{See also} Draft of the Central America-Dominican Republic-United States Free Trade Agreement art. 10.4, n.1, Jan. 28, 2004, http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf (clarifying that the “understanding and intent that [DR-CAFTA’s MFN] clause . . . could not reasonably lead to a conclusion similar to that of the Maffezini case”).

\textsuperscript{189.} \textit{See} Daimler Fin. Servs. AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶ 272 (Aug. 22, 2012).

\textsuperscript{190.} North American Free Trade Agreement Comm’n, Notes of Interpretation of Certain Chapter Eleven Provisions (July 31, 2001) [hereinafter NAFTA Free Trade Commission], http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_c.asp

\textsuperscript{191.} Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, ¶ 92 (Nov. 1, 1999).

\textsuperscript{192.} S.D. Myers Partial Award, supra note 121, ¶ 263.

\textsuperscript{193.} \textit{Id.}

\textsuperscript{194.} \textit{Id.} ¶ 266.

\textsuperscript{195.} Pope & Talbot Phase 2 Award, supra note 131, ¶ 110.

\textsuperscript{196.} Metalclad Award, supra note 34, ¶ 100.
capital and would have threatened disruptions to other parts of the carefully negotiated instrument.

The FTC therefore turned to binding joint interpretations to fill this lacuna and resolve the doctrinal ambiguity surrounding the FET provision in NAFTA. The FTC acted pursuant to authority conferred upon it by NAFTA's Article 1131(2), which authorized it to issue interpretations that "shall be binding" upon tribunals in Chapter 11 investment disputes. The relevant part of the FTC's Interpretive Note simply read:

Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. . . . The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.197

Although it is questionable in light of the holdings that prompted the Interpretive Note whether arbitrators on NAFTA Chapter 11 tribunals uniformly agreed with the FTC's interpretation of Article 1105, most tribunals quickly accepted it as binding.198 Some tribunals relied upon Article 31(3)(a) of the VCLT and customary international law establishing the importance of subsequent agreements for treaty interpretation.199 However, as explained further below, subsequent agreements do not have binding legal force. While the rules of treaty interpretation require that tribunals consider subsequent agreements, tribunals with anti-sovereigntist inclinations may subsequently choose to disregard the State's attempt at clarifying the intended meaning of disputed investment treaty provisions. More importantly, NAFTA itself made joint interpretations by the FTC binding. As the Methanex tribunal explained:

The purport of Article 1131(2) is clear beyond peradventure . . . . Even assuming that the FTC interpretation was a far-reaching substantive change . . . Methanex cites no authority for its argument that far-reaching changes in a treaty must be accomplished only by formal amendment rather than by some form of agreement between all of the parties.200

Seeking to preempt controversy over whether the FTC Interpretive Note was an amendment rather an interpretation, the Methanex tribunal noted that, under international law, treaties can "provide for their amendment by agreement without requiring a re-ratification."201 Nevertheless, the Pope & Talbot tribunal regarded the FTC Interpretive Note as an unlawful treaty amendment not in conformance with the requirements for treaty amendment, and stuck to the idea that FET is a self-standing right that is additive upon IMS, dismissing the

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197. NAFTA Free Trade Commission, supra note 190.
198. See, e.g., Grand River Award, supra note 47, ¶ 175; Glamis Gold Award, supra note 47, ¶ 599; Methanex Final Award, supra note 80, pt. IV, ch. D, ¶ 20; ADF Award, supra note 20, ¶ 177; Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶ 121 (Oct. 11, 2002) [hereinafter Mondev Award].
199. See, e.g., Methanex Final Award, supra note 80, pt. II, ch. H, ¶ 23.
201. Id. pt. IV, ch. C, ¶ 21 (citing VCLT art. 39).
equivalence between Article 1105 and the IMS.\textsuperscript{202} The \textit{Merrill & Ring} tribunal was similarly inclined to understand the Interpretive Note as "closer to an amendment of the treaty, than a strict interpretation."\textsuperscript{203} Notwithstanding these holdouts, the widespread acceptance of the FTC's Interpretive Note as binding illustrates the unrealized potential of joint agreements.

Once tribunals had agreed that Article 1105 prescribes the customary IMS, the debate swiftly turned to what the IMS entailed. As it turned out, equating FET to the IMS did not settle the controversy or add a great deal of specificity. The \textit{El Paso} tribunal observed that the IMS is "as little defined as the BIT's FET standard."\textsuperscript{204} In particular, tribunals disagreed about the evolution of IMS.\textsuperscript{205} \textit{Mondev} held that Article 1105 incorporated customary international law (CIL) as of the time NAFTA came into force in 1994.\textsuperscript{206} \textit{ADF}, meanwhile, subscribed to the evolutionary view that CIL was "constantly in the process of development."\textsuperscript{207} These shifting terms of interpretive drift around Article 1105 suggest that, left to their devices, tribunals will stumble upon—or even seek out—further ambiguity in investment agreements. Because treaties are meant to give effect to the intent of parties, there must be a continuing role for States in the balance of interpretive authority. Who interprets is at least as important as what specific treaty provision is being interpreted.

Highlighted by the example of the FTC's Interpretive Note are two distinctions between different kinds of agreements by which States reserve and exercise joint interpretive authority. The first is whether potential investors, as third-party beneficiaries, are put on prior notice of binding joint interpretive authority retained by States. Without such notice, States could, of course, make subsequent agreements, but such agreements must merely be "taken into account" under the VCLT. Reisman argues that

\begin{quote}
where the States-parties decide \textit{ex ante} to reserve to themselves the power to change the rights they are creating for the benefit of third parties, they put the universe of potential third party beneficiaries on express notice that the States-parties have retained this power and have not done so as a matter of State-State arbitration and adjudication.\textsuperscript{208}
\end{quote}

NAFTA Article 1131(2), which gave the FTC its authority to promulgate its binding interpretive note in 2001, is a standard example of putting third-party beneficiaries on requisite notice that parties have the authority to issue binding interpretations—a constraint that is additive upon the rules of treaty interpretation. The general rule on treaty interpretation, as laid out in the VCLT,

\begin{itemize}
\item 202. Pope & Talbot Phase 2 Award, \textit{supra} note 131, ¶ 108-18.
\item 203. Merrill & Ring Forestry L.P. v. Government of Canada, ICSID Case No. UNCT/07/1, Award, ¶ 192 (Mar. 31, 2010).
\item 204. El Paso Award, \textit{supra} note 108, ¶ 335.
\item 205. \textit{Compare} Waste Management, \textit{supra} note 43; \textit{ADF} Award, \textit{supra} note 20; \textit{Mondev} Award, \textit{supra} note 198; S.D. Myers Partial Award, \textit{supra} note 121; and Glamis Gold Award, \textit{supra} note 47. Only \textit{Glamis Gold} implied that the \textit{Neer} standard still applies. That decision has been criticized by Judge Schwebel. Stephen Schwebel, \textit{Is Neer Far from Fair and Equitable?}, 27 \textit{ARB. INT'L} 555 (2011).
\item 206. \textit{Mondev} Award, \textit{supra} note 198, ¶ 91.
\item 207. \textit{ADF} Award, \textit{supra} note 20, ¶ 179.
\item 208. Reisman Ecuador-U.S. Expert Opinion, \textit{supra} note 7, ¶ 29.
\end{itemize}
does not put such third-party beneficiaries on sufficient notice that subsequent agreements by States will inform the interpretation of the relevant treaty provision; the VCLT merely suggests the possibility that it could. This feature affords tribunals the discretion to reject non-binding interpretations.

Another relevant distinction is whether joint interpretations are established ex ante (by necessity, in general terms) or ex post (in light of a particular dispute). Although the Panama-Argentina joint interpretation and the FTC’s Interpretive Note were both ex ante joint interpretations made in general terms, States may also rely on subsequent agreements to signal their shared intentions to tribunals when an ongoing dispute implicates a textual ambiguity. Admittedly, joint interpretations are likely to be regarded as more legitimate when they are not established pursuant to an ongoing dispute. Some scholars have therefore recommended against giving retrospective effect to joint interpretations so as to preserve the stability of expectations.\textsuperscript{209} Indeed, the potential for abuse when States may tip the interpretive scales in their own favor or in favor of a national who is a current disputant is the reason why unilateral declarations by States are not given the same effect under the VCLT.

Joint interpretations have a natural check against this: both States parties must establish a shared intentionality before a joint interpretation is considered to have been rendered. The \textit{Aguas del Tunari} case offers an illustrative example: in that dispute, both the Dutch and Bolivian governments independently expressed the opinion that the BIT between their two countries did not apply to the dispute. The tribunal nevertheless objected that the “coincidence of several statements does not make them a joint statement” or a “subsequent agreement.”\textsuperscript{210} The tribunal emphasized the absence of “intent that these statements be regarded as an agreement.”\textsuperscript{211} The fact that at least one State party must sign on to a joint interpretation that might be prejudicial to its own nationals in an ongoing dispute should help legitimate ex post joint interpretations. For example, in \textit{CME}, dissatisfied with a partial award, the Dutch and Czech governments engaged in consultations and published agreed-upon minutes, recording their subsequent agreement regarding the interpretation of the Czech-Dutch BIT. Helpfully, the BIT provided for the option to engage in bilateral consultations “on any matter concerning the interpretation and application of the Agreement.”\textsuperscript{212} The tribunal then relied upon the agreed minutes in deliberations for the final award.\textsuperscript{213}

Binding joint interpretation provisions are increasingly common in “new-

\textsuperscript{209} See, e.g., Roberts, supra note 13, at 216-17.
\textsuperscript{210} \textit{Aguas del Tunari}, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, ¶ 251 (Oct. 21, 2005).
\textsuperscript{211} Id.
\textsuperscript{212} Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, Neth.-Czech, art. 9, Apr. 29, 1991, \url{https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/968/download}.
\textsuperscript{213} See \textit{CME} Czech Republic B.V. v. Czech Republic, Final Award (UNCITRAL, 14 March 2003), ¶¶ 87-93.
generation” investment treaties.214 U.S. investment treaty practice has incorporated the following clause: “A joint decision of the Parties, each acting through its representative designating for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”215 Other States are also increasingly concluding new-generation investment agreements explicitly allowing for binding joint interpretations.216 In tandem with its program of terminating BITs in 2016, India invited its remaining twenty-five investment treaty counterparts to conclude Joint Interpretative Declarations (JIDs).217 The European Union and Canada issued a Joint Interpretative Instrument on CETA, which includes a right to regulate provision, an extensive list of “legitimate public policy objectives” in the preamble, and a commitment to “review regularly the content of the obligation to provide fair and equitable treatment, to ensure that it reflects their intentions... and that it will not be interpreted in a broader manner than they intended.”218

C. The Co-Construction of Meaning in International Investment Law

If the law of treaty interpretation has always allowed for joint interpretations, why are States dusting off the option now? One answer lies in the growing pattern of powerful, formerly capital-exporting States wearing dual hats as both capital-importers and capital-exporters. Their old impulse for determinate, rigidly-interpreted investment treaties that favored their investor-claimant nationals has given way to a self-protective awareness that they may find themselves respondents in investment disputes. As disputes become more numerous, States are also becoming keenly aware of their roles as repeat players. Secondly, the epistemic community of international lawyers and adjudicators are taking fresh stock of the role of subsequent agreements. In 2008, the


International Law Commission launched an effort to understand “treaties over time,” and, in 2013, it changed the topic’s framing to focus more squarely on “subsequent agreements and subsequent practice in relation to interpretation of treaties.” Finally, the FTC’s Interpretive Note and other examples illustrate a tried-and-tested form that allows durable reform by recapturing an interpretive role for States, as opposed to static textual approaches by which States get another pass at reworking their treaty commitments without reserving lasting interpretive authority for themselves.

This historical gloss helps to explain the conundrum of timing: as developed countries—which have now had their turns in the respondent’s hot seat—turn to reform, the stickiness of old-generation investment treaties is beginning to give way to momentum for reform. It also brings the political economy of the reform moment to the fore. This paper has described ISDS reform largely as a response to an interpretive problem in investment law that is captured by the unsettled nature of the legitimate expectations doctrine.

There is, of course, another explanation: traditionally capital-exporting developed States are also increasingly recipients of foreign investment and, consequently, the targets of investment claims. Because these States have the diplomatic wherewithal and systemic importance to play an agenda-setting role in the international investment regime, their new positions as potential respondents has galvanized reform. Both explanations are highly compatible: as the formerly capital-exporting architects of old-generation investment instruments face liability as a result of interpretive uncertainty, they are using their clout to manage interpretive authority and reasserting the newly salient primacy of States, in whose names the investment regime exists.

The rise of joint interpretations and subsequent agreements speaks to the resurgence of the State in investment law. As the ADF tribunal observed, “[W]e have the Parties themselves—all the Parties—speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision . . . is possible.” The ADF tribunal gave a second reason that is endemic to the decentralized nature of ISDS: subsequent agreements are not only “a mechanism for correcting what the Parties themselves become convinced are interpretative errors but also for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain.”

Joint interpretations established through subsequent agreements and practice invite understandable suspicion. The “golden rule” of treaty interpretation in the Vienna Convention has always drawn veneration and suspicion in equal measure. Simma has argued that “one can make

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220. ADF Award, supra note 20, ¶ 177.

221. Id.

interpretation arrive where one’s preconceptions (Vorverstaendnis) of where the treaty ought to prescribe want it to arrive, and then garnish the result with that wonderful formula you find in art 31(1).” 223 Mahnoush Arsanjani and Reisman have also argued that, in interpreting treaties for the benefit of third parties, where stability of (third-party) expectation is a cardinal value, “the quest for the ‘shared’ subjectivities of the many states that are involved in any place other than the text of the agreement is a pursuit of the ignis fatuus.” 224 Reisman has explained elsewhere that “[i]n treaties made to provide benefits to third parties and, especially, to induce them to adjust their actions in reliance on the effective provision of those benefits, the stability of those expectations is also critical to the fulfillment of the objects and purposes of the treaties concerned.” 225

The understandable concern with returning interpretive authority to States is that in the world of investment law, which is concerned with the time-inconsistency problem created by immobile capital investments, uncertainty breeds uncertainty. However, this concern is not sensitive either to the hurdles that keep states from forming binding joint interpretations recklessly or to the behavioral consequences of arbitrators and investors being put on notice of binding interpretive authority ex ante. As the Aguas del Tunari example illustrates, the threshold to finding that subsequent agreements and practice have risen to the level of a binding joint interpretation is—and should be—high enough as to create a presumption in favor of existing interpretations unless States clearly evince agreement to the contrary. Although it remains within the discretion of tribunals to consider subsequent agreements and practice regardless of notice or form, States are much more likely to be able to both reassert control (through binding joint interpretations) and maintain legitimacy (by putting investors on notice) if they explicitly allow for joint interpretive authority in their investment treaties, even if it might make credible commitment costlier ex ante.

The lurking presence of States’ binding interpretive authority is also likely to have a disciplining effect on arbitrators contemplating expansive interpretations of treaty provisions and to be priced in by investors making foreign investment decisions, regardless of whether States eventually end up choosing to exercise that authority. If and when States do promulgate binding joint interpretations, there is an unequivocal information-disclosing effect to tribunals and investors that can be factored into the repeat game that participants in the ISDS regime play. In these ways, binding joint interpretations—perhaps in tandem with the juridical and quasi-legislative approaches discussed in Part III—facilitate the dialectic relationships that States, foreign investors, and the epistemic community of arbitrators should share in the co-construction of meaning in international investment law.

223. Simma, supra note 186, at 46.
International investment law is being reconstituted. Through rose-tinted glasses, ISDS apologists see a “complex adaptive system” in the midst of experimentation, building gradually towards the regime’s unrealized potential.\textsuperscript{226} For others, this moment of reform threatens to introduce “new uncertainties into the law”\textsuperscript{227} of investment arbitration and “[w]iping the slate clean seems to be the only possible way forward.”\textsuperscript{228}

But uncertainty is endemic to the law, and the law of international investment is no different.\textsuperscript{229} This Note deconstructs the myth that investment treaties are \textit{pacta in favorem tertii}; rather, they are public international law’s solution to economic problems of time-inconsistency and credible commitment. International investment law is finally homeward bound, but its return to its sovereignist roots is encumbered by role differentiation between creators (States parties) and authoritative interpreters (arbitral tribunals). This Note has sought to temper expectations about how much may be achieved by juridical self-restraint or treaty reform alone while making a cautiously optimistic case for binding joint interpretations to reclaim interpretive authority for the very States in whose name the regime exists. After all, “[t]he most important thing . . . is \textit{who} interprets, not \textit{what} is interpreted.”\textsuperscript{230} Doctrines like legitimate expectations fill gaps when tribunals must guess about the scope of the State’s credible commitment. Joint interpretations would keep tribunals from having to puzzle at what States meant to say. States could—and very well should—simply tell us.

\begin{footnotesize}
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\item \textsuperscript{227} M. Sornarajah, \textit{Resistance and Change in the International Law on Foreign Investment} 401 (2015).
\item \textsuperscript{228} Id. at 408.
\item \textsuperscript{229} Stanimir A. Alexandrov, \textit{On the Perceived Inconsistency in Investor-State Jurisprudence}, \textit{in The Evolving International Investment Regime: Expectations, Realities, Options} 60 (José Alvarez et al. eds., 2007).
\item \textsuperscript{230} Douglas, \textit{supra} note 46, at 38.
\end{itemize}
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