

Choice of Law and Interpretive Authority in Investor-State Arbitration

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This article rejoins one of the core debates in investor-state arbitration, over the extent to which arbitrators may refer to sources of international law beyond the investment treaty that governs the dispute. This issue may appear esoteric, but the political backlash to investment treaty arbitration is largely fueled by uncertainty over the content of the substantive rules that bind states in their relations with foreign investors. Such uncertainty affords arbitrators room to indulge what is alleged to be a pro-investor bias. It may chill regulatory initiatives, even if in the end most states' actions are vindicated. The problem at the heart of investment arbitration is, therefore, a legal one, so there may be a legal response to the political backlash. This article argues that arbitrators are obligated by the choice of law clauses contained in most investment treaties to consider all potentially relevant sources of international law. Arbitrators are akin to agents of the states that enter into investment treaties, and are bound by choice of law provisions in those treaties. Since most of these refer simply to the text of the treaty and "international law", tribunals not only may but must refer to international law beyond the treaty. Putting choice of law at the centre of determinations of tribunals' interpretive authority refocuses arbitrators' attention on states, which are, after all, the parties to the arbitration agreements that empower investor-state tribunals. It gives proper weight to the economic objectives of international investment law, but also provides arbitrators with an appropriate basis on which to account for the public interest, via international law doctrines of environmental protection, indigenous rights, and the like. Finally, it could help stave off a continued backlash to investor-state arbitration, which would harm the global investment climate and the global rule of law.

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I. Introduction: Reconceiving the “Backlash” to Investment Arbitration

Arbitration of investment treaty disputes is in the news a lot these days, and usually because someone new is denouncing it. Most prominently, the proposed *Trans-Pacific Partnership* (“TPP”) and *Trans-Atlantic Trade and Investment Partnership* (“TTIP”) are probably now dead letters, attacked most bitterly in the places that pioneered – and historically benefitted the most from – investment treaty arbitration: the USA and Western Europe. Recent political events, especially the Brexit vote and the election of Donald Trump to the US presidency, indicate that new investment treaties are less likely to be ratified, especially if incorporated into multilateral trade conventions.

It is therefore all the more important that the existing system of investor-state dispute settlement (ISDS) be made to work better for its purported beneficiaries: the people of the states that engage in it.¹ Investment treaty arbitration, along with other means for peaceful

1. Cf. Ingo Venzke, “Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication” (2016) 7:3 *Journal of World Investment & Trade* 374 (arguing that “the architects of TTIP as well as the critics of this edifice seem to share a core point – the demand, namely, that the law be spoken in the name of the peoples and citizens” at 380).

resolution of disputes between investors and the states that host their investments, has the potential to stimulate foreign direct investment (FDI) and promote the rule of law. Investment treaty arbitration is not now living up to that potential. However, should states abandon it because of its flaws, they may also miss out on its benefits.

This article advances a new way of thinking about the causes of hostility to arbitration between investors and states, then proposes a new way of thinking about how to improve the quality and consistency of the justice provided by investor-state arbitration without making structural changes to the ISDS system. The backlash to investor-state arbitration is driven by political concerns, but there may be a legal response to it.

One of the core debates about investor-state arbitration concerns the extent to which arbitrators may refer sources of international law outside the text of the investment treaty that governs the dispute. This is essentially a question of interpretation: to what sources may adjudicators refer when clarifying ambiguities and filling gaps in the treaties, statutes, and contracts that govern different aspects of an investor-state dispute, and how should they resolve conflicts between these sources. Some commentators argue that investment arbitration tribunals should decide, to the extent possible, within the text of the governing treaty and the investment contract – “restrictive interpretation”.² Others argue that general international law is relevant both to interpret the relevant treaty and to introduce doctrines not referred to in the treaty, including principles developed in treaties and case law outside the investment context, in particular international

2. This view is perhaps most associated with Charles Brower. See *e.g.* Charles N Brower & Sadie Blanchard, “From ‘Dealing in Virtue’ to ‘Profiting from Injustice’: The Case Against Re-Statification of Investment Dispute Settlement” (2014) 55:45 *Harvard International Law Journal Online*, online: <www.harvardilj.org/wp-content/uploads/2014/01/Brower_Blanchard_to_Publish.pdf>; Charles N Brower & Shashank P Kumar, “Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?” (2014) 30 *ICSID Review* 35; and Charles N Brower & Sadie Blanchard, “What’s in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States” (2014) 52:3 *Columbia Journal of Transnational Law* 689.

trade and human rights law – “extensive interpretation”.³ A third school of thought emphasizes the public law nature of investment disputes, arguing that tribunals determining whether a state has breached its obligations to a foreign investor ought to take a public law approach that emphasizes national rather than international law.⁴ These threads in the academic discourse are connected to more fundamental discussions about the place of investment law within international law, which are in turn related to broader debates over fragmentation and convergence in international law.⁵

Such matters may appear to be esoteric, of concern only to academics and policy wonks. In fact, the theoretical and political debates over investment treaty arbitration are both largely fueled by the same basic concern: uncertainty over the content of the substantive rules that bind states in their relations with foreign investors. The substantive provisions of most of the relevant instruments are incomplete and vaguely worded, and it is hotly contested how arbitrators should fill these gaps and resolve these ambiguities

The gaps and ambiguities create a zone of discretion for arbitrators that many see as too broad – an issue that affects international law generally,

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3. See *e.g.* Pierre-Marie Dupuy et al, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).
 4. See generally Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press 2010); see also Stephan W Schill, “Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach” (2011) 52 *Virginia Journal of International Law* 57 at 68-71, 81; Benedict Kingsbury & Stephan W Schill, “Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality” in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) at 75.
 5. See generally Freya Baetens, ed, *Investment Law Within International Law: Integrationist Perspectives*, (Cambridge: Cambridge University Press, 2013).

but is particularly acute in international investment law.⁶ The breadth of arbitral discretion gives arbitrators space to indulge what is alleged to be a pro-investor bias and permits tribunals to overrule reasonable attempts by states to regulate commerce in the public interest.⁷ The uncertainty that results may chill regulatory initiatives, even if states' actions are vindicated by arbitral awards in the end.⁸ The obscurity of the process (and, secrecy, although less than in the past) add to the sense that some kind of scam is being run.

The problem at the heart of ISDS is therefore a legal one, which means that there may be a legal response to the political backlash. Investor-state tribunals must recognize that their interpretive role in resolving individual disputes implies a more fundamental role as guardians of the coherence of investment law itself.⁹ To play this role properly, tribunals must adopt a coherent interpretive approach. This article argues that, when interpreting investment treaties, arbitrators are not only permitted to consider sources of international law from outside investment treaties, but are in most cases obligated to do by the choice of law provisions in those treaties. Arbitral tribunals are akin to agents of the states that enter into investment treaties, and must follow choice of law provisions in investment treaties. In most cases, the law governing investor-state

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6. Gleider Hernandez, "Interpretive Authority and the International Judiciary" in Andrea Bianchi et al, eds, *Interpretation in International Law* (Oxford: Oxford University Press, 2015) at 167.
 7. Many of these charges are collected in a report published by the Corporate Europe Observatory and the Transnational Institute. See Pia Eberhardt & Cecilia Olivet, "Profiting from Injustice: How law firms, arbitrators, and financiers are fuelling an investment arbitration boom" (November 2012), online: <www.tni.org/files/download/profitfrominjustice.pdf>.
 8. Jürgen Kurtz, "Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law" in Zachary Douglas et al, eds, *The Foundations of International Investment Law* (Oxford: Oxford University Press, 2014) ("[e]ven with an outcome ledger that tilts generally in favour of respondents, the deep variances in the jurisprudence make it almost impossible for states to isolate when and why particular regulatory initiatives might potentially engage investment treaty liability" at 270).
 9. Hernandez, *supra* note 6 at 167-68.

arbitrations is simply the text of the treaty and “international law”,¹⁰ which means that arbitral tribunals not only may but must refer to international law outside the treaty.

This article is premised on the current ISDS system remaining roughly in its current form. Here, I take no position on whether or how the system ought to change structurally. Rather, my aim is to show that a greater attention to the governing law would improve arbitral decision-making without any structural changes – and moreover that the approach I advocate is dictated by the structure of the existing system of investor-state arbitrations. My line of argument is theoretical rather than pragmatic, although I believe that it will also yield practical benefits.

The proposed interpretive approach gives proper weight to the economic objectives of international investment law, but also provides arbitrators with an appropriate legal basis on which to account for the public interest, in the form of international law doctrines of environmental protection, indigenous rights, and the like. It also refocuses arbitrators’ attention on states, which are, after all, the parties to the arbitration agreements that empower investor-state tribunals. Employment of a coherent interpretive approach that pays attention to the choice of law would help improve the quality and consistency of arbitral decision-making and, in turn, promote buy-in from governments and the populations they represent. It would also reaffirm investment law’s place within international law and promote cross-fertilization between investment law and other international legal disciplines.

Part II provides background, explaining how many of the criticisms of investment treaty arbitration are rooted in uncertainty over how the governing law is interpreted and applied. Part III presents the core theoretical argument: that the structure of arbitral authority in international investment law requires arbitrators to consult the choice of law provision in the applicable investment agreement in order to determine not only which laws to apply, but also how to interpret them. Part IV applies those theoretical arguments to describe, in the abstract,

10. See *infra* notes 52-57 and accompanying text (this is something of an oversimplification).

how investment treaty tribunals ought to proceed. Finally, Part V explains the main implications of the proposed approach, making prescriptions about how states may act to shape arbitrators' interpretive authority and how arbitrators ought to interpret IIAs in the majority of cases where the treaty contains an unqualified choice of "international law" as the governing law.

Before proceeding, a brief note on terminology is needed, since authors in this field sometimes use the same terms to refer to different things and different terms to refer to the same things. I will refer to the overall system of resolving disputes between investors and the states in which they invest as "investor-state dispute settlement" (ISDS) and the heterogeneous body of rules relating to the international law obligations of states to foreign investors as international investment law (IIL). As the label for the main legal instruments of that system, I use "international investment agreements" (IIAs), which describes any agreement between states that has the purpose and effect of protecting cross-border investments, whether those agreements are bilateral or multilateral, whether they deal specifically with investment or with trade more generally, and whether they are memorialized in a treaty or in some other form. Finally, to describe the primary means of resolving disputes between investors and states that relate to IIAs, I will use "investor-state arbitration" (ISA), although that term might conceivably also refer to arbitrations between investors and states that do not arise from IIAs.

II. Understanding the "Backlash": Uncertainty over the Governing Law

It is now *de rigueur* to call political hostility to ISA the "backlash" against investment arbitration. It is an appropriate term, since it captures the reactive nature of much criticism of ISA, especially from politicians and civil society. For many years ISA proceeded without opposition, primarily because the general public and even most legislators had no idea it existed. Since the term "backlash" was introduced to the literature

in 2010,¹¹ hostility to ISDS, and in particular to ISA, has only grown.

The components of this backlash are various. Some critics are concerned about state sovereignty, some about environmental or human rights protection, some about inconsistent outcomes, some about democratic accountability, some about transparency, some about bias. But many of the critiques of ISDS derive in part from one common factor: the content of rules that will be applied to determine the merits of investor-state disputes.

The problem of inconsistency is most obviously traceable to uncertainty in the governing law, but other critiques can also be characterized in terms of uncertainty. Given that state liability through ISA is voluntary, it is not clear how much ISA could possibly “rob” states of their sovereignty, but it is fair to argue that states have given up more of their sovereignty than they realized when they ratified an IIA. Greater certainty would at least make possible more informed decisions by states on whether to enter into IIAs, how to draft them, whether to make interpretive pronouncements after the entry into force of an IIA, and how to pose arguments to a tribunal once a dispute arises.

Similarly, concerns about the ability of states to regulate in the public interest despite their IIL obligations are really concerns about the content of the governing law. How do the obligations created by IIAs relate to countervailing principles of domestic public law? Are IIL obligations supplemented or limited by substantive obligations created by other areas of international law, in particular human rights law? Finally, how do international law doctrines relating to the force of international obligations, such as the law on state responsibility and doctrines like proportionality and the margin of appreciation, affect states’ obligations under IIL?

Of course, some of the critiques are not about the law being applied, but rather about who applies it. One strain of critique emphasizes the private character of arbitral tribunals, and argues that ISA tribunals in particular are populated by business lawyers who are subjectively biased

11. Michael Waibel et al, eds, *The Backlash Against Investment Arbitration* (Alphen aan den Rijn: Kluwer, 2010).

in favour of investors and who have material incentives to take an expansive attitude toward their own jurisdiction and the obligations of states to investors. Regardless of the accuracy of these charges, much of their force would be reduced if the content of IIL were more certain – the more concrete and precise the applicable rules are, the less room there is for adjudicator bias to affect outcomes.

Uncertainty over the governing law has a variety of causes, many of them not resolvable without altering the nature of international law or the structure of the ISDS system. Perhaps most importantly, IIL is expressed in thousands of different IIAs concluded by different states using different language; unlike other fields of international law, such as the law of the sea or international trade law, IIL has no common treaty or set of treaties that sets out the substantive obligations of states. The closest thing to a canonical treaty is the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*¹² (“*ICSID Convention*”), which deals only with the means by which disputes over IIL are to be resolved, and in any event applies only to a subset of investor-state disputes. But even when one looks beyond the various IIAs, public international law continues to have an inherent indeterminacy greater than any national law, something that no one ISDS tribunal can resolve. Even the status of international law as “law” continues to be contested in some quarters (although much less so than in the past). Relatedly, the youth of IIL as a distinct field of law means that many of its details remain to be worked out, simply because the issues have only arisen recently.

Moreover, the lack of any centralized legislative or judicial authority with the power to pronounce on matters of IIL necessarily slows the progressive development of the law, as is the fact that interpreting IIL is largely left to *ad hoc* arbitral tribunals that recognize neither an adjudicative hierarchy nor any doctrine of binding precedent. Sociologically, one might add that the community of international investment lawyers – and more specifically of ISDS arbitrators, do not share a common professional background or legal culture, and in fact may be divided between two

12. March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*] (also called the “Washington Convention”).

campus of commercial lawyers and public international lawyers. Finally, the parties to ISAs – investors and capital-importing states – are often repeat players who have irreconcilably opposed interests.

But regardless of the causes of legal uncertainty, many of them would be resolved or deprived of their significance by a more consistent approach to the interpretation of the governing legal instruments. Writes Kurtz, “Ultimately ... it is the coherence and integrity of reasoning employed by arbitral tribunals that is of greatest import to states parties (with the highest potential to foster deeper commitment to the system)”.¹³ Unfortunately, ISA tribunals have not met this challenge. “[T]here is a distinct and peculiar ‘moving target’ quality to the hermeneutics of investment arbitration with arbitral tribunals often paying simple lip service to the customary rules on treaty interpretation”.¹⁴

The decisions of ISA tribunals should not and will never be entirely consistent, given the variety of differently-worded IIAs that apply in various ISAs, the different national laws that may apply to some aspects of disputes, and the range of legitimate opinions on legal questions that arise in disparate ISAs. However, the impossibility and undesirability of consistent *outcomes* in ISDS should not make us give up on a consistent *interpretive approach*. In the next section, I argue that ISA tribunals are obligated by the structure of arbitral authority in ISDS to follow such a consistent interpretive approach.

III. The Structure of Arbitral Authority in the Investment Arbitration System

It is a common misconception that ISA tribunals have broad inherent discretion with respect to the governing law, for example to interpret IIAs in a restrictive or extensive manner, and to consider or reject principles of international law developed outside the investment context. In fact, while in a given case the tribunal may have such discretion, whether it does or does not depends on the terms of the choice of law provision in the relevant IIA. In other words, when states conclude an IIA, they

13. Kurtz, *supra* note 8 at 258.

14. *Ibid* at 275.

have the power to determine not only the set of rules that tribunals must apply, but also the way in which tribunals must interpret them.

The legal framework that supports ISA imposes very few constraints on the way arbitrators are to interpret the governing law. Rather, arbitral authority to interpret law, along with any restrictions on the exercise of that authority, comes from agreement that empowers the tribunal. For this reason, regardless of its public international law context, ISA has an inherently contractarian character, an inheritance of the international commercial arbitration models on which ISA jurisdictional and procedural rules are based. In IIL, the agreement that empowers the tribunal is usually contained in the applicable IIA. According to the “triangular” nature of ISA, when states ratify an IIA, they make an “open offer” to arbitrate. This offer may be accepted by any investor from another state party simply by filing a request for arbitration, even if the investor lacks a pre-existing legal relationship with the state.¹⁵ The terms of the offer to arbitrate are specified in the IIA, and initiation of arbitration by the investor constitutes the investor’s acceptance of those terms.

As will be seen, questions about the scope of the tribunal’s powers and duties with respect to the decision on the merits cannot normally be answered by reference to general law, but rather according to the terms of the applicable IIA, and in particular the choice of law provision within it, along with and any other agreements entered into between the host state and the investor.

I will begin by examining the provisions of the treaties that form the framework of the ISDS system, but do not themselves contain arbitration agreements: the *ICSID Convention*¹⁶ and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*¹⁷ (“*New*

15. Julian Davis Mortenson, “Treaty Interpretation in International Investment Law” in Michael Bowman & Dino Krisiotis, eds, *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge: Cambridge University Press, forthcoming 2017) at 2, online: <ssrn.com/abstract=2757690/>.

16. *ICSID Convention*, *supra* note 12.

17. 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) [*New York Convention*].

York Convention"). The former applies to all investor-state arbitrations conducted under the auspices of ICSID,¹⁸ and the latter applies to nearly all investor-state arbitrations conducted *ad hoc* (which are typically governed by the *UNCITRAL Arbitration Rules*) or under the auspices of other international arbitral institutions.¹⁹

The *ICSID Convention* and *New York Convention* do not directly bind arbitrators or arbitants; rather, they are directed at national courts, which may be called upon to rule on the enforceability of arbitration agreements and arbitration awards. By design, the two conventions say next-to-nothing about the actual decisions made by arbitrators. For this reason, and with a few exceptions that will be discussed below, they do not regulate the decisions arbitrators make on the merits of disputes, or even the rules of decision which arbitrators must apply, but only the *way* in which arbitrators reach those decisions.

Under *New York Convention* Article V, which governs the enforcement of arbitral awards, the grounds for refusal of enforcement are generally jurisdictional and procedural. Only two provisions might conceivably be engaged by an inapposite or inaccurate application of the governing law. The first is Article V(2)(b), the public policy exception, which permits non-enforcement of an award only in narrow circumstances where enforcement would violate the fundamental public policy of the state.²⁰ To the author's knowledge, no commercial or investor-state arbitral award has ever been refused enforcement under Article V(2)(b) on the ground that the tribunal misinterpreted the governing law.

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18. See International Center for Settlement of Investment Disputes, "Recognition and Enforcement – Additional Facility Arbitration", online: <[icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-\(AF-Arbitration\).aspx](http://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-(AF-Arbitration).aspx)>. The *New York Convention* also applies to the recognition and enforcement of awards not subject to the *ICSID Convention* that are administered by ICSID under the *ICSID Additional Facility Rules*.
 19. As a general matter, the *New York Convention* applies equally to commercial and investor-state arbitration. Awards that arise from IIAs involving non-parties to the *New York Convention*, such as Taiwan, will not be subject to it.
 20. *New York Convention*, *supra* note 17, art V(2)(b).

The second is Article V(1)(d), which provides that awards may be refused enforcement where the arbitral procedure was not in accordance with the agreement of the parties. In extreme cases where the tribunal blatantly applied a law different from the one chosen by the parties or where the tribunal's reasons display a total lack of legal reasoning, courts have held that the tribunal's actions constituted a procedural defect and refused enforcement on that basis.²¹

To the extent that arbitrators make errors of law or reach a decision other than by application of the governing law, courts will not normally interfere unless those errors were so egregious as to constitute arbitrator misconduct (harming a party's due process rights or other otherwise violating public policy), the award blatantly applies a different law than the law chosen by the parties, or the award so disregards all legal rules that the tribunal can be said to have arrogated to itself amiable composition powers.²² If arbitrators apply the governing law incompetently, or if they pay lip service to the law while actually deciding on some other basis, the award is generally proof from challenge. Under *New York Convention* Article V and most national laws, including those based on the *UNCITRAL Model Law on International Commercial Arbitration*,

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21. Only in a handful of commercial cases subject to the *New York Convention* have awards been annulled or refused enforcement on this basis. The case law is reviewed and discussed in James Hope & Mattias Rosengren, "Arbitrators: a law unto themselves?" (3 December 2013), *Commercial Dispute Resolution*, online: <cdr-news.com/categories/expert-views/4616-arbitrators:-a-law-unto-themselves>.
 22. Cf. Jan H Dalhuisen, "Legal Reasoning and Powers of International Arbitrators" (2014), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2393705/> ("[t]here are minimum standards but they are few and only geared to avoiding clear excess" at 22).

there is no recourse against a legally incorrect award.²³

For arbitrations subject to the *ICSID Convention*, which includes most ISAs, the rules differ but the outcome is the same. The *ICSID Convention* itself imposes only one duty directly upon tribunals relating to how they should decide the merits of the dispute: the requirement in Article 42(2) that tribunals may not bring a finding of *non liquet* on the ground of silence or obscurity in the law. Arguably, this provision imposes an obligation to decide legally, that is, in accordance with legal rules, but it does no more than this. In any event, it says nothing about which rules should be applied or how they should be interpreted. Moreover, Article 42(3) makes clear that the parties may empower the tribunal to decide *ex aequo et bono*, so it is not even compulsory for ICSID tribunals decide according to legal rules.²⁴

Article 42(1) contains the *ICSID Convention's* main rules as to the governing law:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.²⁵

According to the first sentence of Article 42(1), the parties may make a choice of law and, if they do so, the tribunal must apply that law. In other words, the parties have absolute freedom to choose any rules

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23. Courts frequently reaffirm this principle; see *e.g.* *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5. I leave aside whether parties may agree to confer upon courts (of the seat or otherwise) the power to review awards for substantive errors of law. State courts have divided on the validity of so-called heightened judicial review agreements; see, *e.g.* the divergent decisions of the US and German Supreme Courts: *Hall St Assocs v Mattel*, 552 US 576 (2008); BGH III ZB 07/06, 1 March 2007.
 24. See generally Christoph Schreuer, "Decisions Ex Aequo et Bono Under the ICSID Convention" (1996) 11:1 ICSID Review 37. Determination *ex aequo et bono* permits adjudicators the greatest possible latitude to consider justice and fairness without the need to resort to any rules of law; it is quite rare in practice.
 25. *ICSID Convention*, *supra* note 12, art 42(1).

of law and their choice is binding upon the tribunal. If the parties do not make a choice, the second sentence of Article 42(1) provides that the tribunal must apply the law of the respondent state, together with whatever rules of international law are applicable. This default provision does require tribunals to apply the named laws, but it does nothing to guide the tribunal's interpretation of national or international law, beyond specifying that a state's law includes its rules on the conflict of laws. Most importantly for the purposes of this article, it implicitly delegates to tribunals the determination of *which* rules of international law are applicable and places no constraints whatsoever upon that determination.

Awards subject to the *ICSID Convention* are even more broadly enforceable than those subject to the *New York Convention*. Under Article 54, contracting states "shall recognize [awards] rendered pursuant to" the *Convention*, and must enforce "the pecuniary obligations imposed by that award ... as if it were a final judgment of a court in that State".²⁶ The only exception given in the *ICSID Convention* itself is the statement in Article 55 that national laws relating to sovereign immunity are not affected by the *Convention*. States may also refuse to enforce ICSID awards that violate the fundamental public policy of the state, but to the author's knowledge, as with *New York Convention* Article V(2)(b), no ICSID award has been refused enforcement on public policy grounds because the tribunal misinterpreted the law.

ICSID awards are also subject to annulment by a three-member *ad hoc* annulment committee constituted for that specific purpose.²⁷ Annulled awards have no force, so parties unwilling to treat the dispute as ended must request the constitution of a new tribunal.²⁸ The *ICSID Convention* lists only five grounds on which an award may be annulled, of which only two are potentially relevant here: that the tribunal "manifestly exceeded its powers"²⁹ or that the award fails to "state the reasons on which it is based".³⁰ An examination of the way these provisions have

26. *Ibid*, art 54(1).

27. *Ibid*, art 52.

28. *Ibid*, art 52(6).

29. *Ibid*, art 52(1)(b).

30. *Ibid*, art 52(1)(e).

been applied by annulment committees shows that each does little or nothing to restrain tribunals from interpreting the governing law in idiosyncratic or even incorrect ways.

In some early annulment decisions – the so-called “first generation”, comprising *Klöckner v Cameroon* ³¹ and *Amco v Indonesia* ³² – the annulment committees closely scrutinized the tribunals’ interpretation of the governing law and application of that law to the facts of the dispute, reasoning that a failure to accurately apply the governing law can constitute either (or both) an excess of powers or a failure to state reasons.³³ However, both annulment committees were heavily criticized for these decisions.³⁴ The modern annulment decisions, and the overwhelming weight of commentary, hold that tribunals only manifestly exceed their powers related to application of the governing law if they fail to apply the chosen law altogether or blatantly apply a different law.³⁵ If a tribunal defectively or incompetently applies the chosen law, the award is proof from annulment. Similarly, the modern position is that a tribunal has failed to give reasons only where the annulment committee is unable to follow the tribunal’s reasoning or see how it relates to the issues before

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31. *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais II* (1985), ICSID Case No ARB/81/2, 2 ICSID Reports 95 [*Klöckner I*].
 32. *Amco Asia Co and others v Republic of Indonesia* (1986), ICSID Case No ARB/81/1, 1 ICSID Reports 509 [*Amco I*].
 33. See Christoph Schreuer, “Three Generations of ICSID Annulment Proceedings” in Emanuel Gaillard & Yas Banifatemi, eds, *Annulment of ICSID Awards*, IAI International Arbitration Series No 1 (New York: Juris, 2004) at 17.
 34. Vladimír Balaš, “Review of Awards” in Peter Muchlinski et al, eds, *Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 1148-49.
 35. See e.g. *Malaysian Historical Salvors Sdn BHD v Malaysia* (2007) ICSID Case No ARB/05/10. The decision of the annulment committee criticizes the award’s failure to examine the express terms of the IIA as applicable law, and instead to decide on the basis of default rules in the *ICSID Convention*. The annulment committee held that such failure constituted a manifest excess of powers requiring annulment under the *ICSID Convention*. *Ibid* at para 80.

the tribunal.³⁶ Whether the reasons given by the tribunal are correct, adequate, or convincing is irrelevant.³⁷

In sum, there are only two obligations related to application of the governing law that are directly imposed upon ISA tribunals by positive law: that arbitrators may not refuse to apply the law on the grounds that it is silent or obscure, and that arbitrators must give some reasons for their decision. Neither mandates that the tribunal interpret the law in any particular way. Even if one were to follow the now-discredited first generation of annulment decisions and find that a failure to *accurately* apply the governing law can constitute a manifest excess of powers, the powers referred to are those granted by the arbitration agreement. We must therefore look to the arbitration agreement to find any constraints on the tribunal's power to apply the law.

What is meant by the arbitration agreement in this context is the provision in the relevant IIA that expresses a contracting state's consent to arbitrate, if an investor from another contracting state initiates arbitration. The term "parties" is not defined in the *ICSID Convention*, but it is clear from the context that the term refers to the parties to the dispute (*i.e.* the host state and the investor), rather than the parties to the IIA (*i.e.* the two or more states that ratified it).³⁸ Throughout the *ICSID Convention*, states involved in ISAs are referred to as "Contracting

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36. The "second generation" of annulment decisions emphasized this point. See *e.g.* *Maritime International Nominees Establishment v Republic of Guinea* (1988), ICSID Case No ARB/84/4, *Klöckner I*, *supra* note 31 and *Amco I*, *supra* note 32.
37. The "third generation" of annulment decisions repeatedly affirmed this point. See *e.g.* *Wena Hotels Ltd v Arab Republic of Egypt* (2002), ICSID Case No ARB/98/4; *Empresas Lucchetti SA and Lucchetti of Peru SA v The Republic of Peru* (2007), ICSID Case No ARB/03/4; and *CMS Gas Transmission Co v The Republic of Argentina* (2007), ICSID Case No ARB/01/8.
38. See International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ICSID Convention, Regulations and Rules, Doc No ICSID/15/Rev. 1 (2003), at paras 28-30, online: <icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf>.

States”, whereas “parties” always refers to the parties to the dispute, rather than the parties to the IIA.

It may therefore seem that investors, as parties to a dispute, have the power to shape the governing law. Indeed they may, but only if the host state agrees. A host state’s offer to arbitrate, as expressed in the dispute resolution provisions of the IIA, is a conditional offer – conditional on the investor’s acceptance of the terms of the IIA’s arbitration agreement. Nothing prevents a state and investor from making a subsequent agreement as to the choice of law; Article 42 of the *ICSID Convention* does not require that the parties make a choice of law at any particular time or in any particular form in order for that choice to bind the tribunal. However, unless the host state and the investor agree to law other than one stated in the IIA, the choice of law in the IIA binds the tribunal. In practice, although other laws (in particular domestic laws of the respondent states) are frequently applied to other aspects of an investor-state dispute, the content of the obligations created by the IIA is almost invariably determined according to the law specified in the choice of law provision of the IIA, if there is one.

The contractarian structure of arbitral authority in ISA thus renders fatuous arguments about whether investment arbitrators are agents of the parties or trustees of the treaty regime. International relations theory classically distinguishes between third party adjudicators who are agents of contracting states versus those who are trustees of the underlying regime.³⁹ The distinction is not binary; agent and trustee are opposing ends of a spectrum.⁴⁰ Where a particular adjudicative body sits within that spectrum depends primarily on the “zone of discretion” delegated to the adjudicative body by states parties to the treaty empowering the

39. Kurtz, *supra* note 8 at 267 (citing Karen Alter, “Agent or Trustee: International Courts in their Political Context” (2008) 14:1 *European Journal of International Relations* 331 and Jean-Jacques Laffont & David Martimort, *The Theory of Incentives: The Principal – Agent Model* (Princeton: Princeton University Press, 2001)).

40. Anthea Roberts, “Power and Persuasion in Investment Treaty Arbitration: the Dual Role of States” (2010) 104 *American Journal of International Law* 179 at 187 [Roberts, “Power and Persuasion”].

tribunal.⁴¹ The breadth of the zone of discretion is determined by the sum of competences explicitly delegated to an adjudicator minus the sum of control instruments available for use by principals to curb their operations.⁴² Tribunals acting within a large zone of discretion act in a “permissive strategic environment as trustees of the values that inhere in the treaties that constituted them” and can “shape or control the evolution of the [treaty] regime”.⁴³ Tribunals acting as agents, by contrast, must “align their adjudicatory activities far more closely with the immediate preferences” of their principals.⁴⁴

To determine where ISA tribunals sit along that spectrum, one must examine the structural features of the system, in particular the “systems of control” within ISA.⁴⁵ Arbitral jurisdiction is limited to the specific set of disputes described in the arbitration provisions of IIAs. Arbitrators have no life tenure and are appointed ad hoc for each dispute; they are therefore vulnerable to retaliation for their decisions. Arbitral awards may be overturned, albeit on narrow grounds, and more generally may be overridden by the renegotiation of IIAs. States therefore possess a number of control powers that constrain the authority of investment arbitrators, suggesting that states parties expect arbitrators to exercise their authority closely in line with the states parties’ objectives.⁴⁶

Indeed, the only important aspect of ISA tribunals consistent with a

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41. Alec Stone Sweet & Thomas L Brunell, “Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union and the World Trade Organization” (2013) 1 *Journal of Law and Courts* 61 at 65.
42. *Ibid*; For an alternative formulation, see Roberts, “Power and Persuasion, *supra* note 40 at 185 (the scope of adjudicators’ zone of discretion is defined by “the interpretive powers explicitly or implicitly delegated to them minus the formal and informal powers retained by treaty parties to influence their interpretations, including through dialogue” at 185).
43. Kurtz, *supra* note 8 at 267.
44. *Ibid* at 268.
45. See generally W Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Durham, North Carolina: Duke University Press, 1992).
46. Kurtz, *supra* note 8 at 268-69.

trustee type of role (beyond the simple fact that they may issue decisions that are binding on states) is the degree of interpretive authority that is typically delegated to arbitrators. Writes Roberts, investment treaties involve:

a low level of precision, because the commitments themselves are broad and vague (*e.g.* the promise to treat investors fairly and equitably). Although imprecision is normally associated with state discretion, when it is coupled with a high degree of obligation and delegation, the opposite is true: the body charged with interpreting and applying the standard is afforded wide discretion.⁴⁷

The net result is a significant shift of interpretive power from the treaty parties to ISA tribunals. The vague, standard-like substantive obligations contained in IIAs represent a greater degree of delegation to adjudicators than would be entailed by more precise, rule-like normative prescriptions.⁴⁸

Nevertheless, while such delegation may be broad in a given arbitration, it is entirely contingent upon the language of the particular IIA, whose substantive provisions may be vague or precise. Either way, the tribunal's authority is entirely circumscribed. Unlike many matters relating to ISDS therefore, it is unarguable that arbitrators can only ever be agents of the states parties to the IIA. Given the radical decentralization of the ISDS system,⁴⁹ there is not even a treaty regime for them to be trustees of in the way that, for example the European Court of Human Rights is charged with developing, maintaining and, furthering the goals of the *European Convention on Human Rights*. Beyond treaty regimes, ISA tribunals have no inherent obligation to "international law", "civil society", or any other such abstraction. They have only the power and duty to resolve the individual disputes for which they are constituted by interpreting and applying the law chosen by the parties, in the manner and according to the procedures that the parties direct.

This is not to say that arbitrators are *merely* agents of the states

47. Roberts, "Power and Persuasion", *supra* note 40 at 190 [citations omitted].

48. Kenneth W Abbott et al, "The Concept of Legalization" (2000) 54:3 International Organization 401 at 413.

49. Mortenson, *supra* note 15 at 11.

party to the IIA and nothing else. At minimum, a tribunal's authority "derives from both the general grant of power by the treaty parties and the specific invocation of that grant by an investor of one treaty party (as claimant) against another treaty party (as respondent)".⁵⁰ This is the "signal innovation" of modern IIAs, and their defining feature – that they provide a direct remedy for individual investors against states, without any intermediation.⁵¹ More concretely, the investor also has a role in appointing the members of the tribunal, which means that states "play a lesser role in determining the appointment and reappointment of investment arbitrators compared to most international judges".⁵²

However, the investor normally plays no role in shaping the tribunal's interpretive authority. Writes Roberts, "Investment tribunals cannot be viewed only as agents of the disputing parties because the disputing parties' rights and the investment tribunal's powers are defined and delimited by the treaty's grant of power".⁵³ Accordingly, in exercising their power to interpret and apply the governing law – to decide the merits of disputes – ISA tribunals should act as if they were agents of the states parties alone.

IV. Interpretation of the Governing Law in Investment Treaty Arbitrations

ISA tribunals derive neither their power to apply the law nor their duties associated with the exercise of that power from the general law. Within the set of public international law dispute resolution institutions, those that are arbitral in character must be sharply distinguished from those that derive their authority in other ways, in particular the "standing" courts such as the ICJ and the World Trade Organization Appellate Body. No treaty regime empowers arbitral tribunals; even IIAs only provide for the establishment of tribunals if and when an investor makes a claim against

50. Roberts, "Power and Persuasion", *supra* note 40 at 182.

51. Mortenson, *supra* note 15 at 2.

52. Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2013) 107:1 American Journal of International Law 45 at 61 [Roberts, "Clash of Paradigms"].

53. *Ibid.*

an individual state. Except to the extent that positive law imposes non-derogable duties upon the tribunal (such as a duty to declare conflicts of interest, not to take bribes, or, more prosaically, to provide reasons for their decision), tribunals owe only those duties that the parties impose and owe performance of those duties only to the parties.

The structure of interpretive authority in ISA has not been fundamentally altered by its transposition from the international commercial arbitration context to public international law disputes and “triangular” ISA. There is an arbitration agreement (the dispute resolution provisions of the IIA); there are parties to that arbitration agreement (the states that enacted the IIA); there are chosen procedures (the *ICSID Convention* and *Rules*, the *New York Convention* and *UNCITRAL Rules*, or whatever other combination the parties select); finally, there is a choice of the rules of law according to which the tribunal must decide the merits of the dispute: the choice of law provision in the IIA, potentially modified by other agreements between the host state and the investor. If there is no choice of law, this should be taken as an implied choice of the default law, such as that mandated by the second sentence of Article 42(1) of the *ICSID Convention*, or alternatively as a delegation to the tribunal of the power to choose the applicable law. One way or another, there will be an identifiable set of rules of law that the tribunal must apply, save only the rare circumstance where the parties have chosen *ex aequo et bono* determination.

To make these generalities more concrete, consider the question of whether tribunals have a duty to decide consistently with prior tribunals. The *Saipem* tribunal thought so; it found that it had a “duty to seek to contribute to the harmonious development of investment law”.⁵⁴ On the other hand, the *Romak* tribunal held that, “Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission

54. *Saipem SpA v The People's Republic of Bangladesh* (2009), ICSID Case No ARB/05/07, at para 90 [*Saipem*].

to ensure the coherence or development of ‘arbitral jurisprudence’.⁵⁵ The point here is not so much that *Saipem* was wrongly decided and *Romak* was correct on the point that motivated these observations: how tribunals should treat precedents.⁵⁶ Rather, the point is that the *Saipem* tribunal was asking the wrong question – how should tribunals conceive of their role? – while the *Romak* tribunal was asking the right one – what role have the parties assigned to the tribunal?

Therefore, nearly all questions of the applicable law – how it is chosen, how its content is ascertained, and how it is applied to the facts – are at heart matters of interpretation. The tribunal should determine the intentions of the parties as expressed in the relevant agreements and, where those agreements do not provide a clear answer, should act according to the parties’ presumed intentions. Applying rules beyond those the parties agreed to or in a manner not agreed to by the parties constitutes an excess of authority, which, if “manifest”, constitutes grounds for annulment of the tribunal’s award.

What laws do current IIAs call for? Most contain no choice of

55. *Romak SA (Switzerland) v The Republic of Uzbekistan* (2009), UNCITRAL PCA Case No AA280 at para 171 [*Romak*]; see also *AES Corporation v The Argentine Republic* (2005), ICSID Case No ARB/02/17 (concluding that “[e]ach tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem” at paras 30-31).

56. The status of precedents in ISA is outside the scope of this article, but it is worth mentioning that citation of precedent is consistent with the structural argument advanced in this article. However, precedents are relevant not because tribunals have some obligation to decide consistently with each other or to advance the development of ILL. Rather, “judicial decisions” constitute a source of international law under the Statute of the International Court of Justice (albeit as “subsidiary means”) for determining the content of international law. Therefore, even under a narrow, orthodox definition of the sources of international law, precedents are still within the scope of the law chosen by the choice of law provisions of most IIAs.

law provision whatsoever.⁵⁷ For ICSID arbitrations, that leads to the application of the residual rule of Article 42(1), which calls for the host state's law and the applicable rules of international law. For non-ICSID arbitrations, this generally means that the parties to the dispute may agree to the governing law or, failing such agreement, the tribunal chooses.⁵⁸

Among the IIAs that contain choice of law provisions, the wording varies. However, the choice of law provisions fall into six categories.⁵⁹ The most common type of clause calls for the application of four sources of legal rules: the IIA itself, the municipal law of the host state, the provisions of any investment agreement or contract relating to the investment, and applicable principles of international law. The second type of choice of law clause is similar in that it lists various sources of law, but it provides the tribunal should "take [these sources] into account", as opposed to applying them, and may also provide that the list of sources is non-exhaustive. The third type calls for application of the IIA itself and international law. The fourth type is found in Indian BIT practice, and calls for application of the treaty text alone.⁶⁰ The fifth type, which appears only in more recent treaties and goes into more detail as to the relevant sources of law, specifies different laws to apply to different matters. For example, it might specify that the IIA text and international law apply

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57. Christoph Schreuer, "Jurisdiction and Applicable Law in Investment Treaty Arbitration" (2014) 1:1 McGill Journal of Dispute Resolution 1 at 12.
 58. See *UNCITRAL Arbitration Rules* GA Res 68/109, UNCITRAL, 2013, UN Doc A/68/462 art 35(1) (most non-ICSID ISAs are conducted under the *UNCITRAL Rules*, which determine the applicable law in this manner).
 59. Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer, 2009) at 78. See generally Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford: Oxford University Press, 2013).
 60. *Ibid* at 80 (It also provides that arbitrations may be submitted only to ad hoc arbitration under the *UNCITRAL Rules*, and not to ICSID, presumably to avoid Article 42(1), second sentence, *ICSID Convention*, which provides a backup choice of law that includes reference to international law).

to claims relating to breaches of treaty obligations, but that claims relating to investment authorizations are governed by the law specified in the authorization or, failing that, a combination of the law of the host state, the IIA text, and international law.⁶¹ Finally, the sixth category of choice of law provisions may contain similar language to any of the previous types, but then adds that an interpretation of an IIA provision made jointly by the contracting states is binding on a tribunal.⁶² These provisions vary between IIAs as to matters like the time limit for issuance of a joint interpretation and whether the tribunal must, if so requested by a state party, ask for a joint interpretation.

The apparent variety between IIAs does not, in the end, make much of a difference. “The only significant difference between the various rules on applicable law in treaties lies in the absence of a reference to host state law in some of them. The narrower clauses refer only to the treaty itself and to applicable rules of international law”.⁶³ More generally, the default rule under Article 42(1) of the *ICSID Convention* captures most if not all elements contained in the more elaborate choice of law provisions in some IIAs. What all of these categories, except the last one, have in common is that they do not make any attempt to guide the tribunal’s ascertainment or application of the chosen law; all they do is make an exclusive or non-exclusive list of the laws tribunals must consider.

The only exception to this pattern is the choice of law provisions that call for joint interpretations of the IIA by the states party to it. These do have the potential to significantly affect outcomes; however, as will be discussed below, states have the power to shape treaty interpretation

61. See *e.g. Dominican Republic-Central America-United States Free Trade Agreement*, 5 August 2004, 32 ILM (entered into force 1 March 2006).

62. See *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*] (*NAFTA* Chapter 11 is probably the most prominent example. Article 1131(2) provides that tribunals are bound by interpretations of the *NAFTA* Free Trade Commission, a joint body composed of representatives of the three *NAFTA* contracting states: Canada, the USA, and Mexico).

63. Schreuer, *supra* note 57 at 12-13.

through subsequent agreements and subsequent practice, regardless of whether the treaty contains a specific provision calling for binding joint interpretations.⁶⁴ Except for clauses relating to joint interpretations, IIAs typically give no guidance as to how the applicable law ought to be interpreted, nor does the default choice of law provision in the *ICSID Convention*. I call choice of law clauses of this standard kind “unqualified” choices of national or international law.⁶⁵

How should tribunals proceed when faced with an unqualified choice of national or international law? Such a choice of law provision leaves unspecified a number of issues relating to interpretation of that law, such as how its rules are to be ascertained, whether reference may be made to other laws or to general principles, and how conflicts are to be resolved between these different sources of rules of law (*i.e.* which norms take precedence in case of conflicts).

Since the choice of law clause constitutes an agreement of the parties to the arbitration agreement, these questions should themselves be answered by reference to a set of interpretive principles. Unfortunately, in most cases involving unqualified choices of law, neither the text of the IIA nor any of the other means of interpretation prescribed by Articles 31-32 of the *Vienna Convention on the Law of Treaties*⁶⁶ (“*VCLT*”) (such as an examination of the IIA’s *travaux*) sheds any light. The tribunal’s only safe option is to presume that, unless the parties carve out some area of the law or qualify the choice of law in some other way, choice of a legal system means a choice of *all* of that legal system’s substantive rules.

With respect to national laws applied by ISA tribunals (for example, to determine whether the host state violated the terms of an investment authorization or investment contract governed by national law) this means applying *all* of the various sources of law recognized as valid within

64. See *infra* notes 78-92 and accompanying text.

65. One sees the same thing in contract drafting practice, where most choice of law clauses simply name the law of some state without qualification. See Joshua Karton, “The Arbitral Role in Contractual Interpretation” (2015) 6:1 *Journal of International Dispute Settlement* 1 at 27-30.

66. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 arts 31-32 (entered into force 27 January 1980) [*VCLT*].

the chosen national legal system – not just relevant code provisions, but also to all relevant statutes and regulations, along with case law and customs recognized as authoritative within the named legal system.⁶⁷ Since all state laws exist within a normative hierarchy that national courts would unhesitatingly apply (although they may disagree on the outcomes in individual cases), ISA tribunals should also take into account the relationship between the various national rules of law, including constitutional norms that might invalidate some other rule of law.⁶⁸ As a corollary, for matters governed by national law, the chosen national law should be applied to the exclusion of any other national or transnational laws; when parties select a single state's law, they presumably intend that no other national laws should be applied.

With respect to international law, it means roughly the same thing: ISA tribunals should apply international law as a whole, not just rules developed in the investment context, and recognize supervening principles of public international law, such as *ius cogens* or rules of international human rights law, that may have priority over the investment treaty.

In all this, it is the intentions of the state parties to the investment treaty that matter, rather than the intentions of the parties to the dispute (*i.e.* the investor and the host state). Investment arbitrators are agents of

67. This specification is made in some IIAs; see US, Office of the United States Trade Representative, *2012 US Model Bilateral Investment Treaty* (2012), online: <ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (defines national law as “the law that a domestic court or tribunal of proper jurisdiction would apply in the same case” at 34, n 22. Without further specification, this must be taken to mean that the tribunal should situate itself in the position of a domestic court, consulting whatever sources of law are authoritative in that state in whatever hierarchy would be observed within that state) [*US Model BIT*].

68. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, ILC 2001 A/56/10, art 3 (this is qualified by the principle that states may not plead conformity with their own municipal laws to excuse a violations of their international law obligations; “the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”, art 3).

the treaty parties, not the disputing parties.

This rather bald statement will be instinctively rejected by many in the ISA community, who see the system of investment treaties as designed in large part to protect the legitimate expectations of investors. Therefore, two immediate qualifications are required. First, I do not mean to say that the legitimate expectations of investors are never relevant. They may matter greatly in a variety of circumstances, especially for issues that turn on the investment contract that the investor signed. In addition, the fact that some act of the host state was contrary to previous representations by the state to the investor – representations that gave rise to legitimate expectations by the investor that the state would follow through on those representations – may mean that the action constituted a treaty breach, specifically the fair and equitable treatment standard contained in most IIAs.⁶⁹ Recent treaty practice adopts this vision of legitimate expectations. For example, the *Canada-European Union Comprehensive Economic and Trade Agreement* (“CETA”) provides:

When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.⁷⁰

But the expectations of the investor cannot be applied to shape the meaning of treaty obligations themselves: the choice of law in the IIA constitutes a condition of the host state’s standing offer to arbitrate, and investors accept that offer when they launch an arbitration under the IIA.

The second qualification is that the power of the state parties to the

69. A consistent line of case law, especially under *NAFTA* Chapter 11, embraces this point of view. See *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* (2009), UNCITRAL PCA Case No 2009-04 at para 589; *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada* (2012) ICSID Case No ARB(AF)/07/4 at para 152; *Glamis Gold Ltd v United States of America* (2009), UNCITRAL Arbitration Rules at para 22; *Waste Management Inc v United Mexican States* (2004), ICSID Case No ARB(AF)/00/3, at paras 98-99.

70. 30 October 2016, art 8.10(4) (not yet entered into force) [*CETA*].

IIA to shape the tribunal's interpretation and application of the IIA does not imply a requirement to interpret IIAs in a manner favourable to the host state in any given dispute. States enact IIAs in order to create a fair and predictable climate for foreign investments, with the ultimate (and sometimes directly expressed) goal of increasing FDI flows. In order to achieve those objectives, IIAs grant rights directly to investors, rights would be largely meaningless if states did not delegate to neutral and independent arbitral tribunals the power to enforce those rights.⁷¹ Accordingly, some state conduct harmful to investors, even if conducted for a legitimate regulatory purpose, can and should be held to violate state obligations under the IIA and to give rise to an obligation to pay compensatory damages.

These qualifications aside, the contractarian structure of arbitral authority in ISA means that states effectively control the interpretive process. They are, to use the memorable phrase of Methymaki and Tzanakopoulos, "masters of puppets".⁷²

V. Implications of the Proposed Approach

In this Part, I explain how the abstract points made in Part III apply to the interpretation of IIAs by arbitral tribunals. The most direct consequence of my focus on choice of law is that states have the ultimate power not only to choose the governing substantive rules of law, but also to direct their interpretation. This Part first describes how states can make use of that power to bind ISA tribunals to interpret IIAs in particular ways. Next, it explains how tribunals should interpret IIAs under the commonly-employed choice of law provisions that currently exist in IIAs.

71. Roberts, "Power and Persuasion", *supra* note 40 at 183.

72. Eleni Methymaki & Antonios Tzanakopoulos, "Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation" (2016) Oxford Legal Studies Research Paper No 10/2016 at 1-2, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2740127>.

A. States in the Driver's Seat

In the last few years, a number of states have pursued a number of strategies in an effort to “reassert control” over ISAs.⁷³ Some have “exited” the ISDS system by withdrawing from the *ICSID Convention* or from individual treaties they view as problematic, or by not renewing investment treaties when they expire.⁷⁴ More often, states have attempted to renegotiate the terms of existing treaties or draft new terms for treaties going forward. Leaving aside treaty terms that would change the structure of the ISDS system,⁷⁵ states have generally adopted one of two strategies: defining substantive obligations more narrowly and precisely than in past IIAs, and carving out specific exceptions to state liability in areas such as taxation, financial services, public health and the environment, and culture.⁷⁶ Taken together, these strategies suggest that states in general desire greater detail in investment treaties, with the aim of constraining arbitral discretion and promoting greater certainty.⁷⁷

Despite some notable diplomatic successes, such as the conclusion of *CETA*, these efforts have been somewhat underwhelming. Some redrafting attempts fail on their own terms to introduce greater precision

73. See Andreas Kulik, ed, *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, forthcoming 2017).

74. Roberts, “Power and Persuasion”, *supra* note 40 at 191.

75. See European Commission, “Fact Sheet on Investment Provisions in the EU-Canada free trade agreement (CETA)” (February 2016), online: <trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> (such as the EU’s proposal for a permanent investment court, which has been incorporated into the recently-concluded *CETA*).

76. Mitchell Moranis, “Between power and procedure: the changing balance of investment treaty protections” (2015) 32:1 *Arbitration International* 81 at 83.

77. *Ibid* at 101.

and predictability.⁷⁸ But no matter how detailed and specific treaty language becomes, it can never resolve all questions as to the content of obligations arising under the treaty. There are two reasons for this, first, all treaty language, no matter how apparently clear, must be interpreted. As former President of the ICJ, Dame Rosalyn Higgins put it:

Reference to the ‘correct legal view’ or ‘rules’ can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law.⁷⁹

Second, not all potential areas of dispute can possibly be predicted at the time an IIA is negotiated or renegotiated. There will always be unforeseen gaps.

In other words, attempting to eliminate interpretive uncertainty *ex ante* by drafting more specific treaties is ultimately a doomed enterprise, based on a misunderstanding of how law works. Treaty text is never:

... reducible to a fixed, immutable expression of the rule ... the engagement of actors with a legal text is historically contingent: it is structured by the frame in which it is situated, and it is measured against rules contained within that frame, not to mention the past practices of other actors or disputants.⁸⁰

As Schwebel writes of the EU’s attempts to reassert control by redrafting treaty provisions with greater precision:

There is ... a troubling message throughout the EU’s [proposals] ... the notion that international law is simply a set of rules to be applied by judges mechanically. Under this view, the more the [treaty] text clarifies what the law is, the less doubt will exist, the more rigorous and consistent the analysis of

78. Federico Ortino, “Refining the Content and Role of Investment ‘Rules’ and ‘Standards’: A New Approach to International Investment Treaty Making” (2013) 28 ICSID Rev 152 at 158; but see Moranis, *ibid* (arguing that “States are beginning to fill the gaps in treaties, providing greater detail and setting clear limits to their obligations and investors’ rights” at 83).

79. Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994) at 5.

80. Hernandez, *supra* note 6 at 171 citing Ingo Venzke, *How Interpretation Makes International Law: Between Normative Twists and Semantic Authority* (Oxford: Oxford University Press, 2012) at 49.

TTIP awards will be.⁸¹

This view is at best misguided and at worst wilfully obtuse. As Schwebel concludes, “[t]he fact is that applying rules always involves a certain degree of choice”.⁸²

A potentially more fruitful approach, adopted by some states but still significantly underused, is to promulgate interpretations of treaties *ex post*.⁸³ As discussed above, some IIAs expressly provide that the states parties may jointly issue interpretations of a treaty that are binding upon tribunals. But even where no such provision exists, first principles dictate that states, acting together, are masters of the treaties they make:

ultimately the power of authoritative interpretation of a norm ... rests with the organ which promulgated the norm and which has the power to revoke it. In the context of a treaty, the organ that has this power is the peculiar organ formed by *all* the states parties to it.⁸⁴

When states agree on an authentic interpretation of the treaty, it has both retroactive and prospective effect: “[w]e are in the realm of the lawmaker *restricting the range of possible meanings of a norm once and for all*, by selecting one of them to control indefinitely, rather than selecting one among them to apply to a specific case”.⁸⁵ Thus, the only legal effect of an IIA provision regulating joint interpretations is potentially to limit the scope of states’ power to issue joint interpretations, for example by imposing temporal limits or by requiring that the joint interpretations

81. Stephen M Schwebel, “The Outlook for the Continued Vitality, or Lack Thereof, of Investor-State Arbitration” (2016) 32:1 *Arbitration International* 1 at 7.

82. *Ibid* at 8.

83. Roberts, “Power and Persuasion”, *supra* note 40 at 179.

84. Methymaki, *supra* note 72 at 5 citing *Question of Jaworzina (Polish-Czechoslovakian Frontier)* (Advisory Opinion) [1923] PCIJ Ser B No 8, 37: (“the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it” at 5) [emphasis in original].

85. *Ibid* at 5 [emphasis in original].

take a particular form or be arrived at through a particular process.⁸⁶

This conclusion is confirmed by customary international law principles of interpretation, as recognized by tribunals going back more than a century. In 1911, the US-Mexico International Boundary Commission in *The Chamizal Case*⁸⁷ found that joint interpretations were not only binding on the tribunal, but indeed also on the parties to the treaty. The Commission found it:

impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary.⁸⁸

The binding force of subsequent agreements and subsequent practice of the parties is also codified in the *VCLT*, which expresses customary principles of interpretation. Article 31(1) requires that treaties be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in light of its object and purpose”.⁸⁹ At a minimum, joint interpretations of a treaty by the states party to it form part of that context, and are therefore relevant to all matters of interpretation. But in addition, paragraph 3 of Article 31 provides expressly that, together with the treaty’s context, interpreters must also take into account:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law

86. See *NAFTA*, *supra* note 62 (Chapter 11, art 1131(2) provides that interpretations of the *NAFTA* Free Trade Commissions are binding upon tribunals, and art 1132, which provides that disputing parties may require tribunals to request from the Free Trade Commission interpretations on the scope of a reservation or exception set out in one of the annexes to Chapter 11).

87. (1911), XI RIAA 309.

88. *Ibid* at 328.

89. *VCLT*, *supra* note 66, art 31(1) [emphasis added].

applicable in the relations between the parties.⁹⁰

The distinction in paragraph 3 between subsequent agreements and subsequent practice makes no difference in terms of their legal effects, but only in terms of the necessary evidence; a subsequent agreement under subparagraph (a) constitutes “an *ipso facto* authentic interpretation”, while a party relying on subsequent practice under subparagraph (b) must show that the practice of the states parties substantiates a particular common understanding.⁹¹ If the states that are party to an IIA promulgate any kind of document setting out their understanding of the meaning of treaty terms, such document would qualify as both subsequent agreement and subsequent practice. Either way, writes Villiger, “the parties’ authentic interpretation of the treaty terms is not only particularly reliable, it is also endowed with binding force”.⁹² Here, I refer to subsequent agreements and subsequent practice that have the purpose and effect of specifying the meanings of treaty provisions collectively as “joint interpretations”.

Under the *VCLT*, states’ powers to issue joint interpretations are effectively unlimited. In the investment arbitration context, it has been argued that the direct rights that are vested in investors by IIAs may impose limits on the absolutely binding character of joint interpretations.⁹³ Investors may rely to their detriment on meanings of the applicable IIA as they are understood at the time the investment is made. In addition, a tension arises between states’ dual roles, as parties to the IIA and as respondents in individual arbitrations. Roberts explains:

Viewing investment treaty arbitration solely through a public international law, state-to-state prism is unsatisfactory because investment treaties create

90. *Ibid.*

91. First Report of Special Rapporteur Georg Nolte, *Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, ILC, 65th Sess, UN Doc A/CN.4/660 (2013) at para 70; see also Rahim Moloo, “When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation” (2013) 31:1 *Berkeley Journal of International Law* 39 at 58 (describing subsequent agreements and subsequent practice as existing along a single evidentiary continuum).

92. Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff, 2009) at 429.

93. See Roberts, “Power and Persuasion”, *supra* note 40 at 207-15.

reciprocal rights and duties for the treaty parties *and* rights for nonstate actors (investors). To increase confidence in and enforcement of those rights, states have delegated the power to resolve investor-state disputes to arbitral tribunals. If the treaty parties could agree at any time on a binding interpretation of the treaty, they could use that authority to undermine not only investors' expectations but also tribunals' dispute resolution powers.⁹⁴

For this reason, Roberts and others argue that states' power to issue joint interpretations of IIAs may be limited on two broad bases: reasonableness and timing. With respect to reasonableness, if a joint interpretation selects one of a set of reasonable interpretations of a disputed treaty provision, that is indisputably within the states parties' power, but adoption of an unreasonable or unexpected interpretation may constitute a *de facto* amendment of the treaty, which would be unfair to the investor to apply retroactively. With respect to timing, changing the terms of the treaty after an investment is made may involve harm to investors who have detrimentally relied on the treaty; fixing the treaty's terms after a claim is filed may harm not only the investor, but also the integrity of the arbitral process.⁹⁵ For this reason, Roberts concludes that "the persuasiveness of treaty party interpretations should be understood as a function of their timing and reasonableness".⁹⁶

I reject limits based on reasonableness. States do indeed delegate to tribunals the power to interpret treaties, but that delegation is limited by subsequent agreements and subsequent practice. Writes Crawford:

In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the states parties to them ... That is not what international law says. International law says that the parties to a treaty own the treaty and can interpret it. One might say within reason, but one might not question their application of reason as they see fit.⁹⁷

The contractarian structure of authority in ISA means that investment arbitrators are, if anything, *more* bound by joint interpretations than

94. *Ibid* at 183 [emphasis in original].

95. *Ibid* at 212.

96. *Ibid*.

97. James Crawford, "A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties" in Georg Nolte, ed, *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013) 29 at 31.

adjudicators applying other kinds of treaties. A joint interpretation may be objectively unreasonable, but it is not within the power of ISA tribunals to declare it to be so.

In addition, there should not be any temporal limit on states' power to issue interpretations of treaties, unless a limit is imposed by the IIA itself or a legal stabilization clause in an investment agreement or other contract between the respondent state and the investor. Absent such a provision, investors have no legitimate expectation that the legal environment of their investment will remain stable for the entire life of that investment. Some recently-enacted treaties make this principle explicit. For example, *CETA* provides that, “[f]or greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits, does not amount to a breach of an obligation...”.⁹⁸ In other words, states may regulate without fear that the mere fact that their regulations reduce foreign investors’ profits will lead to a finding that they have breached the treaty. Therefore, *a fortiori* states must be able to enter into subsequent agreements or establish subsequent practice in order to clarify or change the meaning of treaty obligations, even if this restricts the range of possible interpretations tribunals may adopt.⁹⁹

More importantly for present purposes, the choice of law provisions in IIAs or in the *ICSID Convention* state only that tribunals shall or may apply certain laws; they do nothing to fix the content of those laws in place. Accordingly, arbitrators are bound to apply the law as it stands at the time they render their decision. This arguably raises due process concerns, especially where states issue joint interpretations after a dispute arises. However, nothing about a change in the underlying law constitutes a procedural violation that might justify annulment of an award or refusal of enforcement. On the contrary – a tribunal’s failure to apply the governing law as authoritatively interpreted by the states party to the treaty would constitute an excess of powers. In addition, as the

98. *CETA*, *supra* note 70, art 8.9(2).

99. Methymaki, *supra* note 72 at 19.

investor's home state has an opportunity to protect its investor by arguing that a subsequent agreement or practice alleged by the respondent states constitutes an impermissible moving of the goalposts. If it decides not to do so, that "must mean something".¹⁰⁰ It is therefore unfortunate that ISA tribunals tend toward "a certain reluctance ... to embrace wholeheartedly ... the unquestionable vesting with binding force of joint interpretations by the states parties of their own treaties".¹⁰¹

The correct approach is demonstrated by a recent decision of the High Court of Singapore annulling an investor-state award in favour of a Macanese investor under the *PRC-Laos BIT* on the basis of excess of jurisdiction ("*Sanum Investments*").¹⁰² The basis of the annulment was an exchange of letters between China and Laos, which reflected the common position of China and Laos that the *BIT* did not extend to Macau. The court held that the letters constituted a subsequent agreement of the states parties under Article 31(3)(a) *VCLT*, establishing conclusively that the Macanese investor could not take advantage of the *BIT*.¹⁰³

It made no difference that exchange of letters came after the tribunal had issued its decision upholding its jurisdiction; the Singaporean court dismissed the investor's due process concerns, reasoning that "parties relying on the provisions of BITs" should be aware of the potential impact of Article 31(3)(a). The letters reflected the "common understanding" of the parties rather than a retroactive amendment of the *PRC-Laos BIT*.¹⁰⁴ The *Sanum Investments* decision reflects the conception, advanced in this article, that while investors are third-party beneficiaries of IIAs and derive certain direct rights from them, investors have no claim to interpretive power over them.

These two avenues – redrafting of substantive IIA provisions and promulgation of binding interpretations after ratification of the IIA – have been employed by states and explored in the literature. The contractarian

100. *Ibid* at 20.

101. *Ibid* at 15.

102. *Government of the Lao Peoples' Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 [*Sanum Investments*].

103. *Ibid* at paras 69-70.

104. *Ibid* at paras 76-77.

theory advanced here points the way to a third strategy that, thus far, has been largely overlooked: states may shape the application of the governing law by adding content to the choice of law provisions in IIAs. For example, if states want arbitrators to follow or not to follow precedents, they can so provide in their treaties. The *US Model BIT* provides that “An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case”.¹⁰⁵ This provision is modeled on Article 59 of the *ICJ Statute*, which has in no way prevented the ICJ from regularly treating its prior judgments as persuasive. Indeed, a *de facto* system of precedent has already existed in ISA for some time.¹⁰⁶ Thus, if tribunals are to be restrained from considering prior case law, the *Model BIT* should be redrafted accordingly; conversely, if the states party to the IIA want tribunals to take prior decisions into account, the clause can so state.

Similarly, if the states party to an IIA want to restrict the tribunal to certain international law doctrines and not others, it is within their power to do so. But even most recently-drafted treaties, including those promulgated by states intent on restricting arbitrators’ zone of discretion, do not take advantage of this opportunity. For example, Article 8.31(1) of *CETA* provides:

When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.¹⁰⁷

Such a provision is effectively meaningless – a missed opportunity. The

105. *US Model BIT*, *supra* note 67, art 34(4).

106. See *e.g.* Eric De Brabandere, “Arbitral Decisions as a Source of International Investment Law” in Tarcisio Gazzini & Eric De Brabandere, eds, *International Investment Law: The Sources of Rights and Obligations* (Leiden: Martinus Nijhoff, 2012) at 245; Lucy Reed, “The *De Facto* Precedent Regime in Investment Arbitration: A Case for Proactive Case Management” (2010) 25:1 ICSID Rev 95; Andrea Bjorklund, “Investment Treaty Arbitral Decisions as Jurisprudence Constante” in Colin Picker et al, eds, *International Economic Law: The State and Future of the Discipline* (London: Bloomsbury, 2008) at 265.

107. *CETA*, *supra* note 70, art 8.31(1).

VCLT already applies (as treaty law and as an expression of customary international law) to the interpretation of all IIAs except the small minority that do not take the form of treaties. Stating that tribunals should apply “other rules and principles of international law applicable between the Parties” does nothing to constrain arbitrators’ authority to determine which rules and principles are applicable.¹⁰⁸ Despite all its verbiage, it is no different from a simple choice of “international law”.

States easily provide that particular treaties or areas of international law outside of the IIA text do or do not apply. They could contract out of the interpretive rules in the *VCLT*. They could even provide that interpretations other than those of the states parties are binding. For example, the choice of law provision in the IIA could declare opinions of the International Law Commission are binding. Such a provision could be accompanied by treaty language to the effect that failure to abide by reports of the ILC would constitute manifest excess of the tribunal’s powers, so that awards could be annulled or refused enforcement. (Note that I am not arguing that this would necessarily be a good idea, only that it would be effective.)

The upshot is not that any particular interpretive approach is optimal, or even that any one approach can be considered optimal for all combinations of states parties. It is simply to encourage treaty drafters to be more creative and more assertive in shaping the interpretive authority of arbitrators beyond simply making unqualified choices of whole legal systems. Given the contractarian structure of interpretive authority in ISA, arbitrators would be bound by more specific choice of law provisions.

B. In Most Cases, International Investment Agreements Should be Interpreted Extensively

The previous section considered the ways in which states might act to take advantage of the contractarian structure of arbitral authority in ISA. But renegotiating treaties takes a great deal of time, and in the current

108. See Schwebel, *supra* note 81 at 8-9 (arguing that, by contrast, the *CETA* text is probably overzealous in its attempts to restrain tribunals’ interpretations of national laws and regulations).

political climate there may be little support for new multilateral or bilateral IIAs. Even if the political will existed and the collective action problems could be overcome, the transaction costs involved in renegotiating the thousands of extant treaties would be prohibitive.¹⁰⁹ Even issuance of joint interpretations requires agreement between states with potentially opposed interests, as well as timely coordination between the states.

In the meantime, arbitrations continue to be commenced and tribunals must resolve them. To do so, they will have to interpret the IIAs that now exist. The contractarian structure of interpretive authority in ISA indicates that, in doing so, they should be guided by the choice of law provisions in those IIAs. As discussed above, most IIAs make, in effect, an unqualified choice of “international law” as the governing law. How should a tribunal interpret an IIA subject to such an unqualified choice of international law? This section sets out some brief rules of thumb as to how tribunals should proceed in this, the most common choice of law scenario under existing IIAs.

I argue that an unqualified choice of international law implies three more specific choices, all of which reflect the presumptive intention of the states party to the IIA as to how the IIA should be interpreted. First, (and least controversial) it constitutes a choice of international law rules of interpretation, as expressed in the *VCLT*. Second, it constitutes a choice of *all* international law, including customary and treaty law from outside the IIA and outside the IIL context – at a minimum, all of the sources of law envisaged by Article 38 of the *ICJ Statute*. Third, it constitutes a choice of *only* international law – which means, for example, that tribunals have no power to conduct a comparative public law analysis to determine the meaning of treaty obligations.¹¹⁰ Regardless of whether a comparative public law analysis would increase the real or perceived legitimacy of ISA, it is outside the arbitral remit.

In what follows, I will discuss these three points in more detail. In the process, I will show how an unqualified choice of international law

109. Roberts, “Power and Persuasion”, *supra* note 40 at 192.

110. As urged by commentators such as Kingsbury & Schill, *supra* note 4; see Roberts, “Power and Persuasion”, *ibid*; see also note 4, *supra*, and accompanying text.

as the governing law mandates an extensive approach to interpretation – one that draws on sources of international law beyond the treaty text and that gives voice to the object and purpose of the treaty.

It is undisputed that international law rules of interpretation as expressed in Articles 31-32 of the *VCLT* apply to the interpretation of IIAs,¹¹¹ although tribunals are inconsistent in how they apply those rules and may pay mere lip service to the *VCLT*.¹¹² What remains more contested is the role of international law beyond the *VCLT* in interpreting IIAs and filling gaps within them. This is the question of restrictive versus extensive interpretation, which lies at the heart of interpretive disputes in many areas of international law adjudication: whether treaties such as IIAs should be interpreted restrictively, according to the literal meaning of their text and in isolation from broader international law except where necessary to fill gaps, or extensively, with broad reference to the treaties' object and purpose and to international law more generally.

Given the incomplete nature of most IIAs, including the recently-negotiated ones, some resort to international law beyond the IIA is unavoidable and uncontroversial. A good example is the customary international law rules on attribution described by the International Law Commission in its *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*.¹¹³ These are frequently

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111. J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford: Oxford University Press, 2012) at 24-30.
112. *Ibid* at 157-64 (observing that, while declaring that they would apply the *VCLT*, tribunals often rely instead on fairness, policy implications, practical consequences, efficiency, or reasonableness); see also Mahnoosh H Arsanjani and W Michael Reisman, "Interpreting Treaties for the Benefit of Third Parties: the 'Salvors Doctrine' and the use of Legislative History in Investment Treaties" (2010) 104:4 *American Journal of International Law* 597 at 599; Thomas Wälde, "Interpreting Investment Treaties: Experiences and Examples" in Christina Binder et al, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2014) (observing that "[i]t is difficult to find a tribunal which formally and properly applied the Vienna Rules step by step" at 746).
113. ILC, 54th Sess, UN Doc A/56/10 (2001) arts 4-5.

cited by ISA tribunals and, to my knowledge, no commentator has criticized tribunals for citing them.

But beyond such “easy cases”, debate continues. Ongoing disagreement as to restrictive versus extensive interpretation may be justified with respect to permanent international judicial bodies, but given the contractarian structure of interpretive authority in ISA, an unqualified choice of international law in an IIA mandates an extensive approach to interpretation of the IIA. International law from outside the applicable IIA should be applied not only to shed light on the meaning of the IIA – to resolve disagreements as to the meaning of the text – but also as a source of obligations of the parties to the arbitration beyond those created by the IIA. This may appear, at first glance, to be a pro-investor position, since only states, not investors, have obligations under IIAs and, more generally in international law, non-state entities enjoy rights more than they incur obligations. However, international law principles may also limit states’ obligations or provide excuses for breaches of treaty obligations.

One’s attitude toward the interpretation and application of international law is inextricable from one’s attitude toward the independence of international law in relation to its main subject: states. If international law is always and entirely a product of state consent, and merely determines the reciprocal rights and duties of states that belong to an international community without limiting their sovereignty,¹¹⁴ then the interpretation and application of international law should be limited to what is explicitly mentioned in the text of treaties and in written instruments in general. If, on the other hand, international law is an autonomous legal system that requires the consent of its subject to exist and determine its rules and principles, but that may have an impact beyond the express consent of states, then its interpretation and application might extend beyond the explicit words of written

114. See e.g. James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1963) at 1 (this may be described as the “classical view”); Lassa Francis Lawrence Oppenheim, *International Law: A Treatise*, vol I (Peace) (New York: Longman, Green, 1912) at 366-67.

instruments and the clearly-defined customary law of state practice.¹¹⁵

The *VCLT* crystalizes the understanding that treaties should be interpreted based on “their context and in the light of its object and purpose”.¹¹⁶ It also recognizes that treaties, like other legal instruments, are not self-executing, nor are can they ever be entirely autonomous; they must therefore be interpreted within their broader legal context, including preambles, annexes, and agreements relating to treaties, as well as instruments connected to them and accepted by the parties.¹¹⁷ Finally, the *VCLT* requires that, in addition to the treaty’s context, subsequent agreements between the parties, or practice regarding the treaty’s interpretation and “relevant rules of international law applicable in the relations between the parties” must also be taken into consideration.¹¹⁸

This is not to say that the *VCLT* is entirely contextualist in its approach; to the contrary, the first rule of *VCLT* Article 31 is that treaties should be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty”. At the same time, though, Article 31 does not impose pure textualism.¹¹⁹ The ordinary meaning of the treaty terms must be considered in their context and in light of their object and purpose. In this way, the *VCLT* adopts an approach that sits between pure textualism and pure contextualism. Most importantly for present purposes, the *VCLT* directs adjudicators to consider more than just the immediate context of the treaty – the circumstances surrounding its conclusion, including its drafting history – and to take into account

115. See Antonio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Leiden: Martinus Nijhoff, 2010) at 429-49. On developments in treaty interpretation generally, see Richard K Gardiner, *Treaty Interpretation* (New York: Oxford University Press, 2008) and Gerald Fitzmaurice, Olufemi Elias & Panos Merkouris, eds, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Boston: Martinus Nijhoff Publishers, 2010).

116. *VCLT*, *supra* note 66, art 31(1).

117. *Ibid*, art 31(2).

118. *Ibid*, arts 31(3)(a)-(c).

119. See *e.g.* Julian Davis Mortenson, “The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?” (2013) 107:4 *American Journal of International Law* 780.

the treaty's broader political and legal context, including conduct of the states parties not directly related to the treaty, as well as the full scope of international law rules applicable between the states parties.

Some argue that the *VCLT* mandates a two-stage interpretive process similar to the process of contractual interpretation in many common law jurisdictions; in the first stage, only the ordinary meaning of the words is to be considered; if, and only if, that meaning is vague or ambiguous or leads to results that contradict other provisions of the treaty may the adjudicator proceed to the second stage of interpretation, in which it may consider the treaty's object and purpose.¹²⁰ There is some support for this position in the *travaux* of the International Law Commission at the time of the drafting of the *VCLT*, as some ILC members emphasized "the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation".¹²¹

However, applying this line of argument to the *VCLT* itself shows that it does not call for such strict textualism. Article 31(1) of the *VCLT* states simply that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It says nothing about distinct stages of interpretation, nor does it limit the object and purpose of the treaty to a subsidiary or supplementary role. Rather, the ordinary meaning of the treaty text should be considered together with ("in light of") the treaty's object and purpose. The fact that other interpretive aids are expressly relegated to a subsidiary status¹²² shows that the treaty's context and its object and purpose should not be left to a second stage of interpretation.

120. See e.g. Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer, 2007) at 203.

121. *Draft Articles on the Law of Treaties with Commentaries*, ILC, 18th Sess., UN Doc A/CN.4/191 (1966) 187 at 218 [*Draft Articles on Treaties*].

122. *VCLT*, *supra* note 66 (specifically, "the preparatory work of the treaty and the circumstances of its conclusion", art 32).

Indeed, the International Law Commission itself pointed out that “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose should be the first element to be mentioned”.¹²³ Consequently, preference must be given to the ordinary meaning, which “is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose”.¹²⁴ Article 31(1) does not foreclose consideration of the treaty’s object and purpose in the first instance; all it forecloses is “an investigation *ab initio* into the intentions of the parties”.¹²⁵ The *VCLT* therefore prescribes a method of interpretation that takes into account, together with the ordinary meaning of the text, the purpose of a treaty as a whole, including its preamble, and the area being interpreted (international law in general or its specific subdivisions), including its evolution through time (“emergent purpose”). These contextual materials will be particularly useful to adjudicators when they are called upon to fill gaps and apply treaties to circumstances not considered at the time of the treaty’s conclusion.

An example of this approach in action can be seen in the jurisprudence of international human rights courts. The object and purpose of human rights treaties is, generally speaking, the effective protection of individuals. Accordingly, the Inter-American Court of Human Rights (“IACtHR”) and the European Court of Human Rights (“ECtHR”) have both developed their jurisprudence by going beyond the mere grammatical interpretation of their respective treaties and seeking interpretations that advance such effective protection.

In *Loizidou v Turkey*,¹²⁶ the ECtHR affirmed that “the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective”.¹²⁷ It added that a restrictive approach to the interpretation of the *European*

123. *Draft Articles on Treaties*, *supra* note 121 at 220.

124. *Ibid* at 221.

125. *Ibid*.

126. (1995), 20 ECHR (Ser A) 99.

127. *Ibid* at para 72.

Convention on Human Rights would “seriously weaken” the role of the ECtHR and would “diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)”.¹²⁸ The corollary position that the *Convention on Human Rights* is a “living instrument” that requires dynamic interpretation to ensure that it continues to achieve its object and purpose, first expressed in *Tyler v the United Kingdom*,¹²⁹ is continually reaffirmed by the ECtHR.¹³⁰

Arguably influenced by the ECtHR,¹³¹ the IACtHR has gone even further in crystalizing and extending the notion that human rights treaties must be interpreted to be effective in protecting individuals. Invoking what it called the “*pro homine* principle”,¹³² the IACtHR has, for example, held that States cannot damage an individual’s “life plan” without breaching their international law obligations;¹³³ that indigenous communities have special rights to their lands;¹³⁴ that the Court may take into consideration indigenous legal traditions;¹³⁵ and that international law prohibits forced disappearances.¹³⁶

All of these judgements advanced the protection of human rights beyond the initial set of rights spelled out by the *Inter-American Convention on Human Rights*. The IACtHR, in its jurisprudence interpreting treaties *pro homine*, has made reference to other treaties, and to principles codified or developed in the context of international humanitarian law,

128. *Ibid* at para 75.

129. (1978), 21 ECHR (Ser A) 612 (the *Convention* “is a living instrument which ... must be interpreted in the light of present-day conditions” at para 31).

130. See *e.g. Rantsev v Cyprus and Russia*, No 25965/04, [2010] I ECHR 1, at paras 273-75.

131. Magnus Killander, “Interpreting Regional Human Rights Treaties” (2010) 7:13 SUR – International Journal of Human Rights 145.

132. Sometimes called the *pro personae* principle.

133. *Loayza Tamayo Case (Peru)* (1998), Inter-Am Ct HR (Ser C) No 42 at paras 144-54.

134. *The Mayagna (Sumo) Awas Tingni Community Case (Nicaragua)* (2001), Inter-Am Ct HR (Ser C) No 79.

135. *Aloeboetoe et al Case (Suriname)* (1993), Inter-Am Ct HR (Ser C) No 11.

136. *Villagrán-Morales et al Case (Guatemala)* (1999), Inter-Am Ct HR (Ser C) No 63.

international environmental law, international investment law, and the international law of economic, social and cultural rights.¹³⁷ The IACtHR has held that international human rights law is a part of public international law, but is *lex specialis* in cases that come before the Court; that is, international human rights law prevails over conflicting principles of general public international law, but only when its provisions are *more favourable* to the rights bearers in a specific case.¹³⁸

ISA tribunals should take a page from the international human rights courts (although not necessarily from international human rights law). The primary lesson is that an IIA which makes an unqualified choice of international law cannot be interpreted according to the text of the treaty alone; instead, tribunals must interpret and apply it in such a way as to preserve its effectiveness, including by drawing on doctrines that do not appear in the treaty and may have been developed in different contexts. Thus far, many tribunals have been tentative in their treatment of international law beyond the investment context, restricting themselves to citing the *VCLT*, the ILC's *Draft Articles on State Responsibility*, and a small handful of famous judgments like the *Barcelona Traction*¹³⁹ ruling on nationality and *locus standi* or the *Chorzów Factory* formula for compensation.¹⁴⁰

Such hesitation is unwarranted. Interpretation in international law is a necessarily subjective process, bound up as it is with uncertainty as to the sources of international law. But the IIA's choice of law provision points the way. As Kelsen put it, "the work of interpretation is one of discovering the intention of the parties not only by reference to rules of interpretation, but to rules of international law bearing upon the subject-

137. See Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21:3 *European Journal of International Law* 585 at 603.

138. *Ibid* [emphasis in original].

139. *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1964] ICJ Rep 6.

140. *Factory At Chorzów Case (Germany v Poland)* (1928), PCIJ (Ser A) No 17.

matter of the disputed contractual stipulation”.¹⁴¹ If states call for a treaty to apply something as so open-ended as “international law” *simpliciter*, they thereby acquiesce, at minimum, to the arbitrators’ determination of the sources of that law.¹⁴² ISA tribunals should therefore take a wide view as to the scope of applicable norms in any given investment arbitration. In doing so, arbitrators will “give prudent effect to the truest expression of state intent in sacrificing sovereignty vis-à-vis foreign investments (thereby potentially fostering greater state commitment to the system)”.¹⁴³

None of this is to suggest that all international law is always relevant, or that the treaty text is subordinate to general international law. The IIA remains *lex specialis*. Just like a contract in private law, it constitutes a derogation from all conflicting rules of general international law except non-derogable *ius cogens*. As an example of such derogations, Kurtz cites the customary rules on diplomatic protection,¹⁴⁴ which entitles states to bring actions against other states for injuries caused to their nationals by internationally wrongful acts,¹⁴⁵ these principles are excluded by

141. Hans Kelsen, *Pure Theory of Law* (2d English ed) (Berkeley: University of California Press, 1970) at 355.

142. This point may also be shown by a counter-example, the phrase in many IIAs negotiated by the United States that the fair and equitable treatment standard be defined according to the customary international law standard for minimum treatment of aliens. See *e.g.* the final negotiated text of the *Trans-Pacific Partnership Agreement*, 4 February 2016 (not yet in force), online: <ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [*Trans-Pacific Partnership Agreement 2016*]. Article 9.6(2) states that, “for greater certainty”, the obligation of states to provide to covered investments fair and equitable treatment and full protection and security “prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. 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 that standard, and do not create additional substantive rights.

143. Kurtz, *supra* note 8 at 281.

144. *Trans-Pacific Partnership Agreement 2016*, *supra* note 142 at 283-84.

145. *Draft Articles on Diplomatic Protection with Commentaries* ILC, 58th Sess, UN Doc A/61/10 (2006) art 1; see also *Ahmadou Sadio Diallo (Guinea v Congo)*, Preliminary Objections, [2007] ICJ Rep 582, at para 39.

the *ICSID Convention*, which prohibits the extension of diplomatic protection to individuals who have brought direct claims against other states under IIAs subject to the *ICSID Convention*, “unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute”.¹⁴⁶

However, to the extent that the treaty is silent, or is vague or ambiguous (all of which are common in the existing IIAs), tribunals should consider the full sweep of international law to fill the gap or clarify the vagueness or ambiguity. In this exercise, tribunals should not limit themselves to doctrines specific to IIL or even to international economic law. IIL norms should only take precedence over other international law norms to the extent that the IIL norm is more favourable to the object and purpose of the IIA. Thus, tribunals’ authority to pluck principles from other areas of international law is not unlimited. They may venture outside the treaty text, but must remain inside the treaty’s legal and political framework.

In this light, it is important to remember that the object and purpose of IIAs, and of investment arbitration in particular, are to ensure fair, predictable, and non-discriminatory treatment of foreign investments, no more and no less.¹⁴⁷ It has been argued that, since investors gain direct rights as subjects of IIAs, just like individuals gain direct rights as subjects

146. *Ibid*, art 27(1).

147. As the *Suez/Vivendi* tribunal put it, “a recognized goal of international investment law is to establish a predictable, stable legal framework for investments”. *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (2015), Case No ARB/03/19 at para 189 (International Centre for Settlement of Investment Disputes).

of human rights treaties, the purpose of IIAs is to protect investor rights.¹⁴⁸ Indeed, especially in the earlier years of ISA, some tribunals “seemed not solely to simply assume that IIAs were concluded exclusively to protect investors, but also to make this assumption their ultimate guide to the interpretation of the agreement, establishing the peculiar presumption *in dubio pro investore*”.¹⁴⁹

However, the analogy to human rights is misplaced. These tribunals confused the promotion of *investment* with the promotion of *investors*. The purpose of IIAs is not to protect the profit margins of investors, although of course the promotion of investment is an intended and welcome consequence. Rather:

from a teleological point of view, investment treaties were initially concluded in order to induce FDI flows to states with developmental needs.... This differs a lot from the very idea at the heart of human rights or other individual-centered

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148. See generally Martins Paparinskis, “Analogies and Other Regimes of International Law” in Zachary Douglas et al, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014) at 79-85. See also Martins Paparinskis, “Investment Treaty Arbitration and the (New) Law of State Responsibility” (2013) 24 *European Journal of International Law* 617 at 617; Anastasios Gourgourinis, “Investors’ Rights *Qua* Human Rights? Revisiting the ‘Direct’/‘Derivative’ Rights Debate” in Malgosia Fitzmaurice and Panos Merkouris, eds, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Leiden: Martinus Nijhoff, 2013) at 147; Francisco Gonzáles de Cossio, “Investment Protection Rights: Substantive or Procedural?” (2010) 25 *ICSID Review* 107. The issue has been taken up in some arbitrations, with mixed outcomes; see e.g. *Wintershall Aktiengesellschaft v Argentina* (2008), ICSID Case No ARB/04/14, at para 110; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico* (2007), ICSID Case No ARB(AF)/04/05, at paras 161-80; *ADF Group Inc v USA* (2003), ICSID Case No ARB(AF)/00/1, at para 152; *Corn Products International, Inc v United Mexican States* (2008), ICSID Case No ARB(AF)/04/1, at paras 167-179; and *Cargill Inc v Mexico* (2009), ICSID Case No ARB(AF)/05/2, at paras 403-28.
149. Methymaki, *supra* note 72 at 3 (this is intended to be analogous to the *pro homine* principle adopted by human rights courts); see above, notes 122-27 and accompanying text for clarification.

regimes (eg, the law of consular relations), namely the protection of individuals because of considerations of humanity and due process.¹⁵⁰

Equally, the object and purpose of IIAs is not to insulate states from liability, although of course states can and should draft IIAs to preserve their ability to regulate in the public interest. The reason states enter into investment treaties is analogous to the reason states enforce contracts within their borders: to ensure the predictable and fair enforcement of legal obligations, with the expectation that a private market will flourish as a result. Therefore, in interpreting and applying IIAs, tribunals should adopt the interpretation that most fosters a fair, predictable, and non-discriminatory (not necessarily profitable) regulatory environment for foreign investment.

VI. Conclusion

I have argued in this article that the interpretive authority of investment arbitrators is constrained primarily by the choice of law provisions in the IIAs that they interpret. The contractarian structure of arbitral authority in ISA means that arbitrators must not only apply the chosen laws as opposed to other laws, but must also interpret the chosen laws in the *ways* intended by the states parties to the IIA. I offered some rules of thumb for determining the states parties' presumed intention in (the majority of) cases where they have provided no guidance beyond naming "international law" as the law governing the dispute. I also offered something of a roadmap, drawing from the same theoretical principles about the structure of arbitral authority, for states to more effectively guide the discretion of arbitrators.

The main benefit of the proposed approach is greater certainty and consistency, assuming tribunals were to follow it – not consistency in the sense of absolute uniformity, which is impossible and probably undesirable, but a consistency of approach that is most likely to conform to the intentions of states when they issue regulations that may affect investors covered by the state's international law obligations.

More broadly, the proposed approach would also help to rationalize

150. Methymaki, *ibid* at 16.

the interests of states and investors. On the one hand, investors do have legitimate expectations from investment treaties and the dispute resolution systems created by them, expectations on which they should be able to rely with some degree of certainty. On the other hand, ultimate control remains with states, as it should: they are the ones issuing a standing offer to arbitrate, and are entitled to set the terms of that offer. They can restrict or expand the range of available rules of decision in the arbitration agreement, or simply define it more precisely. They may issue joint interpretations of treaty terms that are binding on tribunals, even after disputes arise. To the extent that such actions would narrow the range of claims that investors may make, or reduce the damages recoverable for breaches, they would still benefit investors to the extent that they would create greater certainty. Widespread renunciation of IIAs fueled by political backlash, or even just a drastic narrowing of states' obligations under IIAs, may be even more harmful to the global investment climate and the global rule of law.